



**T9
MASTERED®**
Training for Title IX Professionals



Update on Investigating Misgendering and Other Gender Identity Complaints

Course Material
July 18, 2023

Presented by T9 Mastered LLC
a venture of Van Dermyden Makus Law Corporation



T9 Mastered Webinar: Update on Investigating Misgendering and Other Gender Identity Complaints

Course Material

July 18, 2023

T9 Mastered LLC
2520 Venture Oaks Way, Suite 450
Sacramento, CA 95833
916.779.2402
info@t9mastered.com
www.t9mastered.com

All materials are copyright 2023 by T9 Mastered LLC, unless otherwise specified. All rights reserved.

T9 Mastered LLC provides the materials in this manual for informational purposes only and not for the purpose of providing legal advice.



TABLE OF CONTENTS

1.	Biography of Presenter	3
2.	PowerPoint Notes	4
3.	Resource List	11
4.	List of Terms	13
5.	“Misgendering,” Chan Tov Mamarah, <i>California Law Review</i> , Vol. 109, No. 6, Dec 2021	20
6.	“Kiel School Board closes Title IX investigation over wrong pronouns that prompted threats of violence,” Madeline Fox, Wisconsin Public Radio, June 3, 2022	65
7.	“What’s in a Word: Enby,” Alex Kapitan, <i>Radical Copyeditor</i> , August 6, 2018	69
8.	British Columbia Human Rights Tribunal Decision in <i>Nelson v. Goodberry Restaurant Group Ltd. dba Buono Osteria and others</i> , 2021, BCHRT 137, September 29, 2021	74
9.	U.S. District Court Opinion in <i>Megan Milo v. Cybercore Technologies LLC, et al.</i> , Case 1:18-cv-03145-SAG, January 13, 2020	116
10.	U.S. Court of Appeals Opinion in <i>Nicholas K. Meriwether v. Francesca Hartop, et al.</i> , Case no. 20-3289, March 26, 2021	132

Biography

Nora Rohman has been an investigator at Public Interest Investigations, Inc., since 2013. Her cases have focused on campus investigations involving sexual misconduct allegations; workplace investigations into complaints of harassment, discrimination, and/or retaliation; and mitigation investigations for death penalty matters, both at the trial and appellate levels.

An engaging lecturer and trainer, Nora has been part of the faculty of T9 Mastered since 2017. She has also given presentations to numerous groups on conducting effective investigations. These presentations have included the annual conference of the Association of Workplace Investigators (AWI) in 2015 and 2018, and an annual training for the Title IX and Equity investigators for the California State University (CSU) system in 2019. Nora also serves on the AWI Diversity Committee.

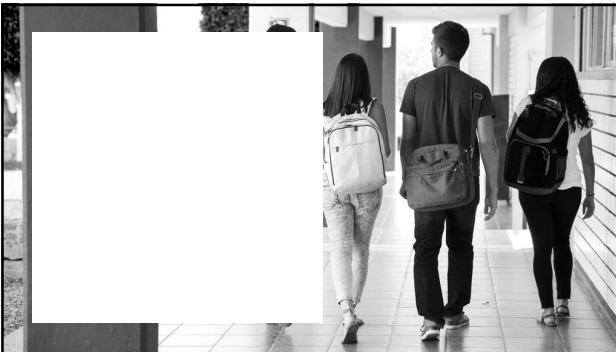


Nora also has specialized knowledge in the area of sexual assault prevention education. She completed an internship at Peace Over Violence, working on interpersonal violence prevention education, and trained as a Peer Counselor at Concordia University's 2110 Center for Gender Advocacy, including violence prevention and sex education. She also has extensive experience with education and activism in the LGBTQ community.

Nora frequently participates in workshops, conferences, and training programs to stay current on legal developments. She completed the Investigations Training Institute for AWI and has regularly attended the annual Capital Case Defense Seminar, held by California Attorneys for Criminal Justice. She has also received training on conducting interviews using trauma-informed approaches.

Nora earned her bachelor's degree in Interdisciplinary Gender Studies from Concordia University in Montreal. Following this, she pursued a master's degree in Gender Studies at New York University.





Learning Objectives

- Reviewing of gender identity concepts & terminology
- Explore dimensions of pronouns, and techniques for report writing.
- Techniques for a trauma-informed approach, and becoming "pronoun proficient"
- Define and explore misgendering concepts and terminology.
- Investigations: Explore concepts relating to intent, policy issues, and key considerations for the investigation.



Review of Gender Identity Terms & Concepts



- Sex
- Gender Identity
- Gender Dysphoria
- Trans/Transgender
- Cisgender
- Transphobia and stigma
- Gender Non-Conforming (GNC)
- Non-Binary
- Agender
- Intersex

Offensive Terms to Avoid



Pronouns

Subjective	Objective	Possessive	Reflexive	Example
She	Her	Hers	Herself	The challah is hers. She created the recipe herself. This loaf is for her.
They	Them	Theirs	Themselves	The babka is theirs. They created the recipe themselves. This one is for them.
He	Him	His	Himself	The kugel is his. He created the recipe himself. This batch is for him.
Ze ("Zee")	Zir ("Zeer")	Zirs	Zirself	The matza balls are zirs. Ze created the recipe zirself. This bowl is for zir.
Ze	Hir ("Here")	Hirs	Hirself	The hamantaschen are hirs. Ze created the recipe hirself. This one is for hir.

...and more!!

- It / It's / Itself
- Rolling Pronouns
- Report Writing – when in doubt use names

Source – The Jewish Education Project - <https://educator.jewishedproject.org/>



Gender Transition

Gender Transition can be some combination of these, all, or none. There is no one way to transition.

- **Medical Transition**
 - No singular "transgender" surgery
 - Can include a variety of treatments and interventions, or none.
- **Social Transition**
 - Coming out to family, friends, and co-workers
 - New name and/or pronouns
- **Institutional Transition**
 - Changing name and/or sex on ID documents
 - Notifying H.R.



Misgender

(verb - misgendered; misgendering; misgenderers)

The assignment of a gender with which a party does not identify, through the misuse of gendered pronouns, titles, names, and honorifics



Honorific / Dishonorific

- **Honorific** - a title or word implying or expressing high status, politeness, or respect.
 - Mr. Mrs. Ms. Captain. Coach. Professor, Reverend (to a member of the clergy), and Your Honor (to a judge).
 - Non-binary honorific – Mx.
 - Bidirectional
- **Dishonorific** - The communication of disrespect and subordinate status through the manipulation of terms of classification, reference, and address.
 - Black man referred to as 'boy'
 - Woman called 'sweetheart' at workplace
 - Referring to a gay man as "Ms."
 - Refusal to properly pronounce a person's ethnic name
 - Using incorrect pronouns or name for a trans person



Three Forms of Misgendering

1. Mistitling / Mispronouncing / Mislabeled

Mistitling – To "mistitle" a gender minority is to refer to them with a gender-specific title or honorific at odds with their gender.

Mispronouncing - the use of pronouns at odds with the person's gender

Mislabeled - used as a catch-all to refer to the use of gendered designations or categorizing language that does not fall into one of the previous buckets.



Three Forms of Misgendering

2. Ungendering / Unpronouncing

Ungender - A form of misgendering that incorrectly describes people who have clear gendered self-descriptions using 'neuter' or non-gendered language, in contexts in which gendered language is used to describe other people.

- Example: Danica Roem (Virginia's first transgender elected official)
- Related term - **Degender**

Unpronouncing - The deliberate omission of pronoun usage for gender minorities while using them for cisgender people.

- Example: using she/her pronouns when discussing a cis-person but referring to a trans person by name alone.
- Example: using gender-neutral pronouns for a transman who uses binary pronouns (i.e., she/her or he/him) as a means of avoiding the gender-appropriate language.



Three Forms of Misgendering

3. Deadnaming

Deadname (noun) - The name that a transgender person was given at birth and no longer uses upon transitioning

Deadnaming (transitive verb) - (deadname; deadnaming) To speak of or address (someone) by their deadname.



Using a person's chosen name shows an understanding of their humanity, and a respect for their innate dignity.

Deadnaming qualifies as a form of misgendering because we *understand* most names as inherently gendered.



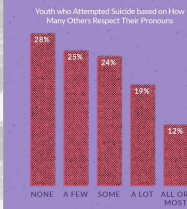
Trauma Informed Effects of Misgendering

- **The effects of misgendering can include:**
 - An increase in anxiety, depression, and stress
 - **Gender dysphoria** and negative body image
 - Social isolation from friends and family
 - Higher risks of life-threatening behaviors and suicide attempts
- **Trauma** & the cumulative effect of misgendering and transphobia
- **Gender Euphoria** & Resilience
 - Using gender-appropriate pronouns and names positively impacts well-being.



Respecting a person's pronouns and chosen name is suicide prevention.

IN THE TREVOR PROJECT'S SURVEY OF 40,000+ LGBTQ YOUTH:



Trans & nonbinary youth who reported having their pronouns respected by all or most of the people in their lives **attempted suicide at half the rate** of those whose pronouns weren't respected.



Trauma Informed Handling Misgendering Mistakes & Improving

Mistakes can happen

Acknowledge, Apologize, Restate, Move on (AARM)

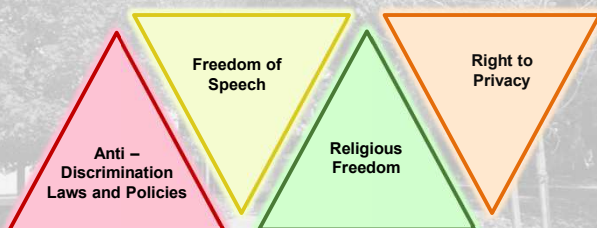
Pronoun Proficiency is a Practice

- Breathe, and take a beat
- Find a Friend
- Practice plant
- www.minus18.org.au/pronouns/

they
really
love
burgers



Misgendering & Gender Identity: Broader legal issues



Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)

Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 Wm. & Mary L. Rev. 513 (2004)



Intent: Types of Misgendering

1 Negligent Misgendering

- Unintentional, a failure to take the proper care
- Assumptions based on appearances
- Cannot know someone's gender by looking

2 Accidental Misgendering

- Inadvertent or unconscious
- Automatic, no failure of care.

3 Intentional Misgendering

- Not automatic, a deliberate choice
- The speaker fully aware the person's gender, pronouns.

4 Self-Misgendering

- Often the result of habit
- Can be due to safety concerns.

Chan Tov McNamara, "Misgendering," California Law Review, Article December 2021 Volume 109 No. 6



Investigating Misgendering Hypothetical

Complainant: Jake Finnegan
Respondent: Professor Tessa Ellis



Investigating Misgendering Key Considerations


- Timeline is crucial
- Think broadly about potential witnesses
- Consider Respondent's awareness (of gender identity pronouns, chosen name, etc.)
- Regarding "reasonableness," and "objectively offensive" – consider social framework evidence
- Understand that the regularity of gendered language means it may be difficult for Complainant to specify or isolate specific incidents
- Eye on the Policy - clarify policy questions at the outset, and throughout the investigation.



Investigating Misgendering

Examples of Key Questions

- Did Respondent know Complainant is trans or non-conforming?
- Did the Respondent know the chosen pronouns / name of the Complainant?
- Did the Respondent know the Complainant prior to their transition (use of different name/pronouns), or not?
- Was Complainant 'out' as trans/gender non-conforming to other teachers / students / coworkers?
- Were others similarly situated to Respondent able to use pronouns correctly?
- How many incidents of misgendering?
- How long did the conduct continue?
- Were there attempts made on part of Complainant to intervene / correct? How many?
- Did deadnaming occur? How did Respondent learn the deadname of Complainant?
- Were there any Non-verbal actions (eye rolling, limp wrist, etc.)?



“

We have to remain visible...I don't need their permission to exist; I exist in spite of them. I want you to train and teach and love on and create families within my community and gender non-conforming people, so that we can understand that we have a culture, we have a history, we have a reason to be here. We have a purpose.

Miss Major Griffin-Gracy



(Images L to R from top: Madiri Lopez, Laverne Cox, Sylvia Rivera, Trish Salah, Leslie Feinberg, Miss Major Griffin-Gracy, Dean Spade, Alex Vaid, Menon, Estelle Asmodelle, Julia Serrano, MJ Rodriguez)

Mx. Nora Rohman
(they/she)

Public Interest Investigations, Inc.
-nrohman@piila.com

Resource List

Videos and Links:

Lamda Legal – Know your Rights in the Workplace

<http://www.lambdalegal.org/know-your-rights/workplace>

Gender Spectrum – Understanding Gender

www.genderspectrum.com

The Trevor Project – Trans* and Gender Identity

<http://www.thetrevorproject.org/pages/trans-gender-identity>

Sylvia Rivera Law Project

<http://srlp.org>

Trans 101 – Sylvia Rivera Law Project

<https://srlp.org/resources/trans-101/>

Rutgers Center for Social Justice and LGBT Communities

<http://socialjustice.rutgers.edu/trans-ru/trans-101/>

Interact: Advocates for Intersex Youth

<https://interactadvocates.org/>

Beyond Gender: Indigenous Perspectives, Fa'afafine and Fa'afatama

<https://nhm.org/stories/beyond-gender-indigenous-perspectives-faafafine-and-faafatama>

Books:

C. Riley Snorton. 2018. **Black on Both Sides: A Racial History of Trans Identity.** University of Minnesota Press

Susan Stryker, 2017. **Transgender History: The Roots of Today's Revolution, second edition.** Seal Press

Yolanda Martínez-San Miguel and Sarah Tobias. 2017. **Trans Studies: The Challenge to Hetero/Homo Normativities.** Rutgers University Press

Julia Serrano. 2016. **Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity – Second Edition.** Seal Press

Copyright 2023 by Nora Rohman, Public Interest Investigations. All rights reserved.

Kate Bornstein. 2016. **Gender Outlaw: On Men, Women and the Rest of Us.** Vintage; Revised, Updated edition

Ed. Laura Erickson-Schroth. 2014. **Trans Bodies, Trans Selves: A Resource for the Transgender Community 1st Edition.** Oxford University Press

Ivan E. Coyote and Rae Spoon. 2014. **Gender Failure.** Arsenal Pulp Press; Second Printing edition

Steven Williams, Susan Stryker, Aren Z. Aizura 2013. **The Transgender Studies Reader 1&2.** Routledge

Thea Hillman. 2008. **Intersex: For Lack of a Better Word.** Manic D Press

Deborah Carlin, Jennifer DiGrazia. 2004. **Queer Cultures.** Pearson/Prentice Hall.

Joan Nestle, Clare Howell, Riki Anne Wilchins. 2002. **GenderQueer: Voices from Beyond the Sexual Binary.** Alyson Books

Articles:

Sylvia Rivera Law Project. Marksamer, Jody and Vade, Dylan. 2015. **Trans 101.**

Lambda Legal. 2015. **Transgender Rights Toolkit: A legal guide for trans people and their advocates.**

Lambda Legal. 2015. **Frequently Asked Questions: Equality Act.**

Grant, Jaime M., Ph.D., Mottet, Lisa A., J.D., Tanis, Justin, D.Min., Harrison, Jack, Herman, Jody L. Ph.D., Keisling, Mara. 2001. **Injustice at Every Turn: A report of the National Transgender Discrimination Survey. (Pgs. 50 – 72)** National Gay and Lesbian Taskforce.

Blackless, Melanie, Anthony Charuvastra, Amanda Derryck, Anne Fausto-Sterling, Karl Lauzanne, and Ellen Lee. 2000. **How sexually dimorphic are we? Review and synthesis.** American Journal of Human Biology 12:151-166.

For more resources or questions, please e-mail the presenter.

We will be happy to help in whatever way we are able.

List compiled by Nora Rohman, 2017. Updated July 2023.

Copyright 2023 by Nora Rohman, Public Interest Investigations. All rights reserved.

LIST OF TERMS

Agender: Not having a gender or a “lack of” a gender. Agender people see themselves as neither a man nor a woman, or both. They're gender-neutral and often are described as “genderfree” or “genderless.”

Ally: Someone who advocates for and supports members of a community other than their own. Ideally, someone who listens openly. An ally is receptive to learning about experiences that are different from their own.

Asexual / Ace: A term used to describe someone who does not experience sexual attraction toward individuals of any gender. Asexuality is a sexual orientation, and is different from celibacy, in that celibacy is the choice to refrain from engaging in sexual behaviors and does not comment on one's sexual attractions. An asexual individual may choose to engage in sexual behaviors for various reasons even while not experiencing sexual attraction. Related terms: “Gray-A,” “gray-asexual,” “gray-sexual” are terms used to describe individuals who feel as though their sexuality falls somewhere on the spectrum between asexuality and sexuality. “Demisexual” individuals are those who do not experience primary sexual attraction but may experience secondary sexual attraction after a close emotional connection has already formed.

Bisexuality: (Also “Bi”) A person who has romantic attraction, sexual attraction, or sexual behavior toward both men and women, or romantic or sexual attraction to people of any sex or gender identity.

Biphobia: The irrational fear and intolerance of people who are bisexual.

BDSM: Engaging in consensual relationships, sexual, romantic, etc. that contain a component of domination, submission, or otherwise non-normative sexual acts, as defined by the participants in that relationship.

Bottom Surgery: Gender Confirming Surgery (GCS) below the waist, which sometimes involves genitalia.

Brotherboys and Sistergirls (also referred to as Sister-girls and Brother-boys): Terms used to describe trans and gender diverse people in some Aboriginal or Torres Strait Islander communities. ‘Sistergirl’ and ‘Brotherboy’ are sovereign terms coined by the First Nations people of the Australian continent.

Chosen Family / Family of Choice: People that an individual considers significant in their life. It may include none, all, or some members of their family of origin. In addition, it may include individuals such as significant others, domestic partners, friends, and coworkers. This term came about due to the rejection that many LGBTQ people face from their families of origin, or birth families.

Cisgender: A person who *conforms* to gender/sex based expectations of society. A person who is not trans or non-binary, who does not endeavor to transition or question

Copyright 2023 by Nora Rohman, Public Interest Investigations, Inc. All rights reserved.

their gender identity. If assigned female at birth, a cisgender person is someone who continues to identify as female, and does not question their sex or gender, or deviate from gender norms. “Cis” is a prefix that means ‘stable,’ which is different from the prefix “Trans,” which implies movement.

Coming out: To recognize one's sexual orientation, gender identity, or gender expression, and to share it with oneself and with others.

Crossdresser: – Someone who dresses in clothing generally identified with the opposite gender/sex. Often, crossdressers are heterosexual males who derive pleasure from dressing in “women’s” clothing. Someone who identifies as a cross-dresser may have no desire to transition, and can be completely content with the sex they were assigned at birth. This term has generally replaced “transvestite,” which is now considered by some to be outdated and offensive.

Domestic Partner: One who lives with their beloved and/or is at least emotionally and financially connected in a supportive manner with another. Another word for spouse, lover, significant other, etc.

Drag: The act of dressing in gendered clothing and adopting gendered behaviors as part of a performance, most often clothing and behaviors typically not associated with your gender identity. *Drag Queens* perform femininity theatrically. *Drag Kings* perform masculinity theatrically. Drag may be performed as a political comment on gender, as parody, or simply as entertainment. Drag performance does not indicate sexual orientation or gender identity.

Gender: A socially constructed system of classification that ascribes qualities of masculinity and femininity to people. Gender characteristics can change over time and are different between cultures. [For example, “boys only like to play with trucks and not dolls.”] (See “*Gender Identity*” and “*Gender Expression*” for more on gender.)

Gender Binary: The idea or belief that there are only two genders, male and female.

Gender Conformity: When your gender identity, gender expression and sex “match” according to social norms. (See “*Gender Identity*” and “*Gender Expression*” and “*Gender Roles*” for more on gender.)

Gender Confirmation Surgery (GCS) / Gender Affirming Surgery – A term used by some medical professionals to refer to a group of surgical options that alter a person’s sex and/or gendered characteristics. In most states, one or multiple surgeries are required to achieve legal recognition of gender variance and transition. Some trans people undergo multiple surgical interventions to affirm their gender, some do not. [Note: GCS was previously referred to as “Sexual Reassignment Surgery (SRS),” which is now commonly considered to be a problematic and outdated term.]

Gender Diverse/Gender Divergent: A person who does not conform to gender-based expectations of society (e.g. transgender, transsexual, intersex, genderqueer, cross-

Copyright 2023 by Nora Rohman, Public Interest Investigations, Inc. All rights reserved.

dresser, etc.) Preferable to "gender variant" because it does not imply a standard normativity, or supposed "neutral" starting point.

Gender Dysphoria: The formal diagnosis used by psychologists and physicians to describe people who experience significant dysphoria (discontent, discomfort) with the sex they were assigned at birth, and the gendered associations with their assigned sex. In the past iterations of the DSM (the American Psychiatric Association's Diagnostics and Statistics Manual) this was referred to as "Gender Identity Disorder."

Gender Expression: An individual's external characteristics and behaviors such as appearance, dress, mannerisms, speech patterns, and social interactions that are perceived as masculine or feminine. Gender expression does not necessarily correlate with a person's sex, gender identity, or orientation.

Gender Fluid: A person whose gender identification and presentation shifts, whether within or outside of societal, gender-based expectations.

Gender Identity: A person's internal, deeply-felt sense of being male, female, neither, something other, or in-between. Some people have complex identities that may even be fluid and change over time.

Gender-Neutral/Gender-Inclusive: Inclusive language to describe *relationships* (i.e., using "spouse" and "partner" instead of "husband/boyfriend" or "wife/girlfriend"), *spaces* (gender-neutral/inclusive restrooms for use by all), *pronouns* ("they" and "ze" are gender-neutral/inclusive pronouns), and *objects*.

Gender non-conforming, (GNC): A person who has gender characteristics and/or behaviors that do not conform to traditional or societal expectations.

Genderqueer: A person whose gender identity is neither man nor woman, is between or beyond genders, or is some combination of genders. This identity is usually related to, or in reaction to, the social construction of gender, gender stereotypes, and the gender binary system. Some genderqueer people identify as trans or transgender, while others do not.

Gender Roles: Societal norms regarding how males and females should behave, expecting people to have personality characteristics and/or act a certain way based on their biological sex. (For example, "Women should care for children, and men should go to work" are examples of normative gender roles.)

Heterosexuality/Heterosexual (Straight): Sexual, emotional, and/or romantic attraction to a sex other than your own. Commonly thought of as "attraction to the opposite sex." Usually a technical term, has some clinical connotations. "Straight" can be interchangeable, and is more commonly used.

Heterosexual Privilege: Benefits derived automatically by being (or being perceived as) heterosexual that are denied to gays, lesbians, bisexuals, queers, and all other non-heterosexual sexual orientations.

Copyright 2023 by Nora Rohman, Public Interest Investigations, Inc. All rights reserved.

Heteronormative/Heteronormativity: The attitude or belief (can be conscious or unconscious) that heterosexuality is the only “normal” and “natural” expression of sexuality. (For example, “Women should marry men, not women” is a heteronormative belief.)

Homophobia: The irrational fear and intolerance of people who are homosexual. Homophobia also encapsulates the assumption or belief that heterosexuality is superior. (This can also be applied to oneself, or of homosexual feelings within one's self. See “Internalized Oppression.”)

Homosexuality/Homosexual (Gay) - A person primarily emotionally, physically, and/or sexually attracted to members of the same sex. Usually a technical term, has some clinical and pathological connotations. “Gay” can be interchangeable, and is more commonly and colloquially used.

Identity Sphere – (as opposed to gender binary) The idea that gender identities and expressions do not fit on a linear scale, but rather on a sphere that allows room for all expression without weighting any one expression as better than another. This is a less common term, and more frequently used in an academic context.

In the Closet – Refers to a homosexual, bisexual, trans-person, or intersex person who will not or cannot disclose their sex, sexuality, sexual orientation or gender identity to their friends, family, co-workers, or society. There are varying degrees of being “in the closet.” For example, a person can be out in their social life, but in the closet at work, or with their family. Also known as on the “Downlow” or ‘D/L.’

Institutional Oppression – Arrangements of a society used to benefit one group at the expense of another through language, media, education, religion, economics, etc.

Internalized Oppression – The process by which a member of an oppressed group comes to accept and live out the inaccurate stereotypes applied to the oppressed group. (For example, “Internalized homophobia.”)

Intersex - A term describing a person whose sex a doctor has a difficult time categorizing as either male or female. A person whose combination of chromosomes, gonads, hormones, internal sex organs, and/or genitals differs from one of the two expected patterns. An umbrella term for a variety of physical conditions resulting in a reproductive, hormonal, sexual anatomy, and/or chromosomal makeup that does not fit the typical definitions of female or male. Intersex conditions can occur as frequently as 1 in 100 people.

Lesbian – Term used to describe female-identified people attracted romantically, erotically, and/or emotionally to other female-identified people.

LGBTQI – A common abbreviation for lesbian, gay, bisexual, transgender, queer and intersexed community.

Non Binary – A term for someone who has any gender that does not fall neatly into the category of male or female. A person who is outside of the gender binary. Some Non Binary people also identify as transgender, while some do not. (See also: Genderqueer, gender binary, Gender Non-Conforming)

Outing – Disclosure of the sexual orientation, gender identity, or intersex status of oneself or another. Outing or “being outed” can be consensual or non-consensual. (For example, “Hi, I’m a trans man” is an example of consensual outing, while “Did you hear that James is transgender?” is an example of non-consensual “outing.”)

Packing (wearing a ‘packer’) – Wearing an item underneath clothing below the waist. Reasons for packing may include: the validation or confirmation of one’s gender identity; and/or sexual interaction. A packer might include a silicone phallus, socks, or a strap-on, among other things.

Pansexual – A person who is sexually attracted to all or many gender expressions.

Partner - Another word for spouse, lover, significant other, etc. This term is gender neutral, in contrast to terms like boyfriend/girlfriend, wife/husband, which are gender specific.

Passing – Describes a person's ability to be accepted as their preferred gender/sex or race/ethnic identity, or to be seen as heterosexual or cisgender. Sometimes people ‘pass’ in ways they are uncomfortable with, or in ways that do not align with their self-identity.

Polyamory – Refers to having honest, usually non-possessive, loving and/or sexual relationships with multiple partners. Can include many different formulations of relationships.

Queer – **1.** An umbrella term that embraces a variety of sexual preferences, orientations, and gender identities. **2.** A word that was formerly used only as a slur, but that has been semantically overturned by members of the slandered group. Queers have reclaimed the term, and some now use it as a term of defiant pride. “Queer” is an example of a word undergoing this process. For decades “queer” was used solely as a derogatory adjective for gays and lesbians, but in the 1980s the term began to be used by gay and lesbian activists as a term of self-identification. Eventually, it came to be used as an umbrella term that can include gay men, lesbians, bisexuals, and transgendered people. Nevertheless, a sizable percentage of people to whom this term might apply still hold “queer” to be a hateful insult, and its use by heterosexuals is often considered offensive. **3.** A term which describes a set of political beliefs that are anti-assimilationist and resistant to heteronormativity.

They/Them - Alternate pronouns that are gender neutral and used by some gender non-conforming people.

Top Surgery – Gender affirming surgery above the waist, can include breast augmentation, bilateral mastectomy, or chest reconstruction. (See “GCS surgery.”)

Trans - An abbreviation that is used to refer to a gender non-conforming and/or transgender person. This term is often used as an umbrella term, to refer to the gender non-conforming community as a whole, as in “the trans community,” or “trans people.”

Transgender: A term used to describe people whose gender identity and/or gender expression is different from the sex they were assigned at birth. (The trans community, trans people, transgender individual, trans folk, etc.)

Transition – This term is primarily used to refer to the process a trans or gender non-confirming person undergoes when changing their bodily appearance either to be more congruent with the gender/sex they feel themselves to be. It is a process that enables a person to be in harmony with their preferred gender expression. It can include medical, social, and institutional changes. [Note: A person does not need to engage in any aspect of transition in order to be trans, and there are many socioeconomic barriers to accessing the medical and institutional aspects of transition.]

Transsexual: A person who identifies internally as a gender/sex other than the one to which they were assigned at birth. Transsexual people sometimes wish to transform their bodies to match their inner sense of their gender/sex. Some view this term as overly medical and pathologizing, and there is a general cultural shift happening in North America, shifting to using “Transgender.”

Transphobia – The irrational fear of those who are gender non-conforming and/or the inability to deal with gender ambiguity.

Trans man / Trans guy— A man who describes himself in a way that affirms his history and experience as a trans person.

Transmasculine – A term used to describe transgender people who were assigned female at birth, but identify with masculinity to a greater extent than with femininity. This includes: Trans men. Butch people, Multigender people whose strongest gender expression is a masculine one.

Trans woman / Trans girl - A woman who describes herself in a way that affirms her history and experience as a trans person.

Transfeminine - A term used to describe transgender people who were assigned male at birth, but identify with femininity to a greater extent than with masculinity. This can include: Trans women, femme people, and multiple genders of people whose strongest gender expression is a feminine one.

Two-Spirit – A term exclusively used by Native and Indigenous persons who have attributes of two genders, and sometimes have distinct gender and social roles in their tribes.

Copyright 2023 by Nora Rohman, Public Interest Investigations, Inc. All rights reserved.

Sex: A term used to denote whether an individual is male or female, as determined by a physician or other medical professional at the time of birth. This designation is often made solely based upon an examination of an infant's genitals. This can also be referred to as a person's "assigned sex" or "sex at birth." It is a medical term designating a certain combination of gonads, chromosomes, external gender organs, secondary sex characteristics and hormonal balances. This category does not recognize the existence of intersex bodies and individuals.

Sexuality – A person's exploration of sexual acts, sexual orientation, sexual pleasure, and desire.

Sexual orientation: A person's emotional and sexual attraction to other people based on the gender of the other person. Examples include lesbian, gay, heterosexual, bisexual, queer.

Sistergirls and Brotherboys (also referred to as Sister-girls and Brother-boys): Terms used to describe trans and gender diverse people in some Aboriginal or Torres Strait Islander communities. 'Sistergirl' and 'Brotherboy' are sovereign terms coined by the First Nations people of the Australian continent.

Stealth – This term refers to when a person chooses to be private about their gender history. (Also referred to as 'going stealth' or 'living in stealth mode'.)

Ze / Hir – Alternate pronouns that are gender neutral and preferred by some gender non-conforming or genderqueer persons. Pronounced /zee/ and /here/, they replace "he"/"she" and "his"/"hers" respectively.

Sources:

Merriam-Webster Dictionary - <https://www.merriam-webster.com/dictionary>

LGBT Resource Center at UC Riverside - Eli R. Green (eli@trans-academics.org) and Eric N. Peterson 2003-2004

UC Berkley Gender Equity Resource Center - LGBT@uclink.berkeley.edu

UNC-Chapel Hill LGBTQ Center

Sylvia Rivera Law Project - <http://srlp.org>

What is Asexuality? <http://www.whatisasexuality.com/intro/>

Bisexual Resource Center <https://biresource.org/resources/youth/what-is-bisexuality/>

Beyond Gender: Indigenous Perspectives, Fa'afafine and Fa'afatama
<https://nhm.org/stories/beyond-gender-indigenous-perspectives-faafafine-and-faafatama>

"Brotherboys And Sistergirls: We Need To Decolonize Our Attitude Towards Gender In This Country" by Hayden Moon

Copyright 2023 by Nora Rohman, Public Interest Investigations, Inc. All rights reserved.



ARTICLE · DEC 2021 · VOLUME 109 · NO. 6

Misgendering

Chan Tov McNamara



Pronouns are en vogue. Not long ago, introductions were limited to exchanges of names. Today, however, they are increasingly enhanced with a recitation of the speaker's appropriate gendered forms of address: he/him/his, she/her/hers, they/them/theirs, or neopronouns like zie/zir/zirs, xe/xem/xirs, or sie/hir/hirs. This development—like every other dimension of progress for LGBTQ+ people—has been met with fierce resistance. In particular, four prominent objections have surfaced (1) that calls for pronoun respect are a fraught demand for “special rights” from a vocal queer minority; (2) that, semantically, gendered pronouns, honorifics, and titles cannot constitute offensive speech; (3) that these gendered labels are “just words,” and any consequences of their misuse are trivial and legally incognizable; and (4) that sanctions against misgendering violate the First Amendment by both unconstitutionally compelling and restricting speech.

This Article explains why these arguments fail without exception. It counters the first two arguments by placing misgendering in its historical context. By recovering the history of subtle verbal practices meant to express social inferiority, exclusion, and caste, this Article demonstrates that misgendering is simply the latest link in a concatenation of disparaging modes of reference and address. From addressing Black persons by only their first names, to the intentional omission of women's professional titles, and to the deliberate butchering of the ethnically-marked names of minorities, these verbal slights have long been used to symbolize the subordination of societally disfavored groups.

Next, this Article takes on the third argument by articulating the injuries of misgendering to the legal academy, the judiciary, and, ultimately, the law. Until now, legal scholarship has largely overlooked misgendering as a pernicious socio-linguistic practice. To fill this gap, this Article identifies and examines the injuries of misgendering by looking to the stories of those who experience it. Drawing on a range of sources, it presents a layered account of the harms caused by the misattribution of gender. Finally, this Article rejects the fourth objection for failing as a matter of First Amendment doctrine. Anti-misgendering regulations do not unconstitutionally restrict free speech because they narrowly target harassing workplace conduct and because the government has a compelling interest in protecting gender minorities from discrimination. At the same time, anti-misgendering regulations do not unconstitutionally compel speech because they neither force a speaker to express an ideological message, nor do they alter or interfere with a speaker's primary message.

All told, this Article makes at least four contributions. First, contextually, it places misgendering in its historical milieu—along a continuum of verbal practices designed and deployed to harm the socially subordinated. Second, descriptively, it offers a sustained meditation on misgendering's injuries to gender minorities' autonomy, dignity, privacy, and self-identity by consulting original interviews, collected accounts, medical literature, and social science research. Even while making the latter two contributions, this Article makes a third, corrective one, as well: It takes up the necessary work of challenging and dispelling mistaken narratives on the wrongfulness and harmfulness of gender misattributions and replaces them with ones that center the lived realities of gender-diverse persons. Fourth, prescriptively, this Article concretely illustrates how the law must adapt to, respond to, and recognize the discriminatory harms of misgendering.

Misgendering

Prologue

Introduction

I. Milieu

- A. Dishonorifics: Expressions of Social Inferiority
- B. Black Persons' Experiences with Dishonorifics
- C. Women's Experiences with Dishonorifics
- D. Other Racial and Ethnic Minorities' Experiences with Dishonorifics
- E. Sexual Minorities' Experiences with Dishonorifics
- F. Gender Minorities' Experiences with Dishonorifics
 - 1. Mistitling, Mispronouncing, and Other Mislabeling
 - 2. Ungendering and Unpronouncing
 - 3. Deadnaming
- G. Discrediting Arguments About Special Rights, Slurs, and Slurring
 - 1. Why the Special Rights Objection Fails
 - 2. Why the Semantic Determinism Objection Fails

II. Meaning

- A. An Introductory Typology of Intent
 - 1. Negligent Misgendering
 - 2. Accidental Misgendering
 - 3. Intentional Misgendering
 - 4. Self-Misgendering
- B. Why the Trivialization Objection Fails
 - 1. Disrespect and Disregard
 - 2. Embarrassment and Humiliation
 - 3. Social Subordination
 - 4. Deprivation of Privacy and Safety

5. Dehumanization
6. Gender Policing
7. Epistemic Injustice
8. Diminution of Autonomy
9. Gender Sadism
10. Measurable Psychological and Physiological Injuries

III. Misgendering and the Law

A. Speech Law: Why the Unconstitutional Speech Regulation Objection Fails

1. Free Speech
2. Compelled Speech

B. Religious Freedom Law

1. Religious Discrimination
2. Religious Accommodations
3. Religious Refusals

C. Family Law

D. Elder Law

E. Wills and Testamentary Law

F. Misgendering in Specific Contexts: The Law of the Workplace, Schools, Hospitals, and Prisons

1. Employment Discrimination Law
2. Education Law
3. Healthcare Law
4. Prisoner Law

G. The Legal Profession

1. Rules of Attorney Professional Responsibility
2. Rules of Judicial Conduct
3. Legal Services

Prologue

Imagine the following scenarios:

- A middle-aged Black man is walking home after work. He senses he is being followed. Turning around, he sees two young White police officers trailing him in a patrol car. He quickens his pace. The car does as well. Pulling alongside the man, one officer calls out: “Where are you going, boy?”^[1] [1] See *King v. Ci*
- A physician enters her examination room and meets a male patient for the first time. She begins to introduce herself as “Dr. Brown,” but the patient cuts her off and interjects, “Hi Lisa, so nice to meet you.” Throughout their fifteen-minute-long checkup, the patient continues to address Dr. Brown by her first name, along with other informalities like “sweetheart” and “darling.”^[2] [2] See *Sagun v.*
- An accountant’s coworkers refuse to properly pronounce his name, “Mamdouh.” When he corrects them, they respond by either mockingly emphasizing its Middle Eastern pronunciation or continuing to intentionally botch it. Others are even less generous, referring to him with racist generics, like “Mohammed,” “Osama,” or “Bin Laden.” Frustrated, he reports his coworkers’ harassment to his supervisor who, instead of reprimanding them, suggests he adopt a nickname that is “easier to pronounce.”^[3] [3] See *Baig v. In*
- A student stays back after the first day of class to speak with her professor. As her classmates leave, the student explains she is transgender and requests that the professor refer to her using female titles and pronouns. The professor refuses to oblige. For the remainder of the semester, the professor uses only male pronouns and titles whenever he addresses her.^[4] [4] Cf. *Meriwethe*

At their core, the injuries in each vignette are kin. In all four, the forms of reference and address—honorifics, professional titles, names, and pronouns—were used in a manner that was equivalently belittling, dehumanizing, and humiliating. But, despite the similarities made obvious through this juxtaposition, contemporary conversations about the use of pronouns and gendered language remain largely ahistorical and acontextual. Detached from earlier examples of the use of terms of reference and address as tools to subjugate and degrade, the ways in which subtler forms of verbal discrimination are reincarnated, repurposed, and ultimately reinforced are kept concealed.

Today, the vast majority of Americans can easily see the indignity imposed by referring to a Black man as “boy.” And yet, they remain oblivious to the harm of referring to a transgender girl or a nonbinary person as the same. Reintroducing historical context, therefore, is promising. Framed with such perspective, opposition to misgendering can be understood, not as demands for new “special rights” or “radical grammatical modifications,” but as a link in an ongoing fight against verbal violence inflicted upon minority social groups. That is the guiding insight of this Article.

Introduction

The rights of gender minorities^[5] have sharply come into focus. In rapid succession, the spread of bathroom bills,^[6] the rolling back of trans-protective Title VII and IX positions,^[7] the Trump Administration’s ban on transgender military service,^[8] and most recently, the *Bostock v. Clayton County* holding,^[9] have bombarded the societal consciousness. In their wake, now so more than ever, Americans have begun to acknowledge and address the second-class citizenship imposed upon persons who are transgender, genderqueer, gender nonbinary, agender, and otherwise gender diverse.

Legal scholarship has also begun to take notice of the inequalities faced by gender minorities. Commentators have documented prejudice against transgender venire members,^[10] the routine use of trans-panic defenses,

[6] E.g., Catherine
[5] Like any group
[7] See Chan-Tov
[8] See Comment
[9] 140 S. Ct. 1731

[11] Cynthia Lee &
[10] See generally

Misgendering

For all this, however, perhaps the most common manifestation of discrimination against gender minorities has been all but ignored. Misgendering, the assignment of a gender with which a party does not identify through the misuse of gendered pronouns, titles, names, and honorifics, has been given scant consideration in legal literature.

This oversight is puzzling. For one thing, gendered terms of reference and address are quite commonplace in everyday life. In casual conversation, it is not unusual to use names and pronouns interchangeably.^[14] For instance, we might say, “I like Sam’s new shirt,” or “I like *his/her/their* new shirt.” Neither is it particularly uncommon to introduce another person using gendered titles. For instance, we might present someone as *Mrs.*, *Ms.*, *Mr.*, or *Mx.*^[15] *Smith*.

[14] See Dean Spade

[15] Pronounced “

The scarcity of writing is also curious since misgendering has played a sizable role in the culture war surrounding the social equality of gender minorities.^[16] On the one hand, the increased awareness of gender-diverse identities has launched a movement for the use of genderappropriate language^[17] that has spread across campuses and workplaces and entered the national conversation. On the other hand, many critics have decried gender-appropriate language as “political correctness run amok”^[18] among many other less courteous critiques.^[19] Adding more fuel is the ever-growing list of persons facing employment consequences for misgendering others.^[20] Yet, despite the brewing conflict over gendered language, these developments have gone largely unnoticed in print.

[17] I use the term

[16] Chan Tov Mc

[19] See Joanna W

[18] Andy Sher, *Te*

[20] See Teacher F

The gap is not inconsequential. Theoretically, the lack of an understanding of what misgendering is, or even a cogent definition of the term in legal scholarship, has allowed misunderstandings and agrant inaccuracies to remain unchecked. What little commentary exists has been predominantly antagonistic, suggesting that being required to acknowledge or respect others’ gender (or lack thereof) is coercive, unnecessary,^[21] or perhaps even unconstitutional.^[22] Others raise even more apocalyptic warnings, alleging that efforts to curtail abusive misgendering will result in the criminalization of even accidental slips.^[23]

[22] Volokh, *supra*

[21] Ryan T. Ander

[23] Elliot Kaufman

There are also practical stakes. The lack of a conceptual baseline has proven costly for discrimination claims premised on misgendering. Because such litigation remains relatively new and unguided,^[24] courts have struggled to comprehend the wrongfulness of gender misattributions. Consequently, gender minorities’ legal claims have suffered. Judges in such cases either fail to recognize the extent of the injuries, or worse, declare them insignificant.^[25] At other times, judges themselves are the perpetrators. In recent cases, courts have not only intentionally misgendered the parties before them, they have also referred to gender-diverse litigants as “it,” “whichever,” or “he/she.”^[26] Clearly, without the basic definition or framework to interpret misgendering, similar unfortunate mistakes—not to say deliberate disparagements—will only continue.

[24] Meg Elison, *Jt*

[25] See, e.g., *Jud*

[26] *Gibson v. Coll*

This Article enters the conversation to offer the necessary clarity. My primary goal is to attend to the threshold matter of what misgendering is, does, and means. I do this by shining new light on the practice through three interrelated projects: (1) introducing historical context; (2) looking to the firsthand accounts of gender minorities; and (3) examining the interplay of law and misgendering. I undertake these projects in three corresponding steps.

First, I seek to dismantle the increasingly dominant framing of the movement for genderappropriate language as a demand for new “special rights” by situating misgendering in historical context. In that respect, Part I of this Article will show that misgendering is a modern reincarnation of a distinctive form of verbal violence I call *dishonorifics*.^[27] Summarily, the label refers to the practice of manipulating terms of reference and address in order to otherize, degrade, and subjugate.

[27] By no means

As the vignettes that opened this Article demonstrate, these expressions can be used to communicate respect and equality, or the lack thereof. From addressing Black people by only their first names, to refusing to acknowledge women’s professional titles, or intentionally mispronouncing ethnically marked names,^[28] terms of reference and address have historically been deployed as symbols of exclusion, dehumanization, and caste. This Part will establish that misgendering is simply a reincarnation. Thus, criticisms painting gender misattributions as novel demands for special rights are ultimately incorrect for failing to notice the longer line

[28] For salient ex

Misgendering

repurposed to demean.

Second, I respond to characterizations of misgendering as “trivial.” Because harms tend to mean less to those who do not bear them, Part II looks to the experiences of gender minorities to explicate the injuries of gender misclassifications. Their rich accounts of misgendering force us to rethink the argument that misgendering is harmless. By appealing to testimony from original interviews of genderdiverse individuals, medical and social science literature, and case law, this Part presents evidence of what gender minorities have long attested: Misgendering has measurable psychological and physiological effects. In prioritizing the voices of genderdiverse persons, the narratives collected in this Part fully expose the extent of misgendering’s harms to gender minorities’ dignity, privacy, safety, and autonomy.

Third, I examine misgendering’s potential place in the law to push back against arguments that legal interventions against misgendering violate the First Amendment and that misgendering is or should be, legally incomprehensible. With the caveat that Part III adopts a speculative register, its goal is to take the law in new directions. The Part begins by specifically addressing whether laws aimed at preventing misgendering are constitutional under the First Amendment. It finds they likely are.

Widening its scope, the remainder of Part III considers how the law must respond to the harms of misgendering across a swath of legal subjects: From First Amendment religious freedom jurisprudence, to employment discrimination law, and to family law. The injuries identified in Part II have far-reaching implications for the law and legal practice. Thus, this Article concludes by sketching how the law should respond to the harms identified by the phenomenological account of misgendering described in Part II.

I. Milieu

This Part uses historical context to respond to two criticisms directed at the movement for genderappropriate language. The first criticism frames the call for gender-appropriate language as a call for “special rights.”^[29] Critics argue that gendered language has traditionally been tied to “biological sex” and that only a closed class of pronouns have existed. A corollary argument is that, historically, gender-neutral language was only rarely used, and neopronouns^[30] (i.e., pronouns like zie/zir/zirs, etc.) did not exist. For language to adapt to accommodate gender minorities and increasing societal awareness of gender diversity then, suggests some “special right” for transgender, genderqueer, nonbinary, and other gender-diverse citizens.^[31]

[29] E.g., Bader, *supra* note 1, at 100.

[30] I borrow the term from *supra* note 1, at 100.

[31] Heritage Foundation, *supra* note 1, at 100.

This depiction is not new. The critique is recycled during every flashpoint on the journey towards equal citizenship for minority groups^[32] and deployed against queer equality in particular.^[33] Since the idea underpinning this account ties gender-appropriate language to “special rights,” I will call this the *special rights objection*.

[33] Samuel A. Markey, *supra* note 1, at 100.

[32] See Nan D. Hunter, *supra* note 1, at 100.

The second line of criticism is more original to the context of misgendering. It argues that misgendering is less condemnable than known derogatory slurs.^[34] The rationale is that slurs are more offensive, in part, because they “exist in the vernacular for a specific reason: to be derogatory.”^[35] At bottom, the argument is one of semantic stability: that it is the original meaning of words that dictates their offensiveness. By that logic, words whose initial meanings are not offensive—say, for example, pronouns, honorifics, and titles—cannot be offensive as applied. For ease of reference, I will call this argument the *semantic determinism objection*.

[35] *Id.*

[34] Josh Blackman, *supra* note 1, at 100.

This Part will show that neither objection is persuasive. With respect to how societally marginalized groups are addressed, the history presented here demonstrates that calls for language changes are not unique to gender minorities. Just as importantly, in the past, language has proven to be remarkably dynamic, able to quickly accommodate cultural shifts and updated understandings of minority groups. Nothing, therefore, is particularly “special” about existing calls for gender-appropriate language.

Next, context demonstrates that the critique premised on semantics is flawed for ignoring how people actually use language in social life. By looking to the lessons of history, this Part will show that many other benign

—are separate from *sturring*, the speech act of using language to convey group disrespect

A. Dishonorifics: Expressions of Social Inferiority

Lacking the elaborate honor terms or respect vocabularies of more complex systems of language,^[36] the English language relies on the use of terms of reference and address—language used to classify, designate, or identify in the contexts of spoken and written communication^[37]—to convey respect or formality.^[38] For example, referring to someone by the titles Doctor, Captain, Judge, or Senator, or addressing them as Your Honor, Sir, or Madam, can express compliment, deference, or elevation.

[36] In which they
[38] Adam Jawors
[37] Terms of refer

Conversely, expressions used to communicate disrespect, disfavor, or inferiority are ordinarily considered to occur through stand-alone epithets. But the primary purpose of epithets is to demean, not to address or refer. So, while these expressions may contrast honorifics and titles functionally,^[39] they fail to be diametric opposites of honorifics and titles from a conceptual view.^[40]

[40] By this, I mean
[39] Which is to sa

Hence the question: What expressions do? A true dishonorific,^[41] and the ones I am interested in here, must involve the communication of disrespect and subordinate status through the manipulation of terms of classification, reference, and address.^[42] In other words, they must include the practice of using terms of reference and address to convey the social inferiority of the referenced person or addressee

[41] Here, I appropr
[42] See Joyce O.

Sociolinguistics provides the answer. Honorifics are bidirectional:^[43] Where used, titles and formal names express favored social status or positions; where withheld, their absence expresses the opposite.^[44] Beyond that, several factors might further signal the social positioning of speakers. As the second illustration opening this Article suggested, the patient's dismissal of Dr. Brown's title and his use of belittling informalities, the nonconsensual dismissal of titles can also express a lack of respect. Similarly, nonreciprocity in the use of these terms indicates deference from one direction or party, but the lack of it in the other.^[45] Finally, and perhaps most importantly, history matters.^[46] For instance, a child may address their teacher as "Ms. Daly," while the teacher addresses the child as "Alex," without any implicature of either party's social status. Yet, contrast that example with this Article's first illustration—that of the officers addressing a Black man as a "boy." There, using boy as an address form infantilized and disrespected our hypothetical protagonist.^[47] Further, the language also called to bear the history of White dismissal of Black names and titles. Taken together, then, honorifics and their converse, dishonorifics, act as markers that signal social status.^[48]

[44] See Camila D.
[43] No Name, *sup*.
374–75.
[46] See Sally McC
[45] Penelope Eck
[47] Eckert & McCi
supra note 45
[48] Penelope Eck

With the understanding that honorifics are bidirectional and historically defined, the following sections document the social use of dishonorifics to communicate social inferiority across a range of identity categories. As we will see, in an almost unbroken chain from history to present, forms of reference and address have always operated to subjugate societally disfavored minority groups

B. Black Persons' Experiences with Dishonorifics

Historically, anti-Black caste regimes like Chattel Slavery and Jim Crow Segregation were harmful in both symbol and substance.^[49] Said differently, these systems were detrimental not only due to the physical brutality of racial violence and the material inequality of segregated facilities for Black people but equally, in the ever-present emblems of White supremacy. The latter existed as physical representations, such as Confederate iconography and spectacle terror lynching as well as an infinite number of more minor social practices. To name a few, Black persons were expected to raise or remove their hats for Whites,^[50] leave sidewalks,^[51] and never look Whites in the eye,^[52] among numerous other humiliating rituals.^[53]

[49] See Kimberlé
[51] Loewen, *supra*
206.
[50] See Stetson K
[52] Ruth Thompson
[53] See Thad Sitt

All the while, language played a role in Black people's social degradation. To take the most obvious examples, language was present in signs that designated facilities "Whites Only" or announced, "No Dogs, No Negroes." But, it was equally present in the manipulation of deference and respect granted to Black people through spoken and written forms of address.

[55] Cathleene He

Misgendering

that enslaved Black persons were deprived.^[54] Then, when the Civil War's outcome threatened to throw White supremacy into question, the urgency of preserving the Black community's designation as inferior increased.^[56] Accordingly, for White persons, withholding titles and honorifics were crucial expressions; they testified that Black people were "excluded from not only the [W]hite man's society but also from the ordinary symbols of respect."^[57]

[54] Throughout

[57] Gunnar Myrdal

It bears underscoring the exigency, bordering sheer fanaticism, with which White persons communicated Black persons' social denigration by withholding titles. When titles were unavoidable, say, for Black persons who were in professional positions, White persons used other inapplicable honorifics such as professor, doctor, or reverend—and, on occasion, even employed the French titles "messieurs and mademoiselles"^[58]—all in an effort to avoid granting Black persons the respect associated with "Mr.," "Mrs.," or "Miss."^[59] White children who dared to, or unknowingly, referred to Black persons with courtesy titles were sharply reprimanded.^[60] White persons were so averse to even the appearance of respect for Black persons that if letters addressed to Black residents included titles, postal workers were wont to redact them.^[61]

[59] Charles S. Johnson

[58] Stephan Ther

[60] Mattias Småns

The everyday assaults on Black dignity even extended to the legal system.^[62] In *Hamilton v. Alabama*, when Mary Hamilton was arrested for refusing to answer a White prosecutor who would not use her title the National Association for the Advance of Color People's petition for certiorari captured the impact of these types of dishonorifics: "Petitioner's reaction to being called 'Mary' in a court-room where, if [W]hite, she would have been called 'Miss Hamilton,' was not thin-skinned sensitivity"; rather it was "one of the most distinct indicia of the racial caste system."^[63]

[62] Johnson, *supra*

[63] Petition for a

Read together, these illustrations show that the impact of dishonorifics on the Black psyche cannot be rightly described as trivial. These were viscerally offensive devaluations.^[64] Indeed, as sociologist Charles S. Johnson observed, Black citizens found these verbal offenses to be among the most dehumanizing: "[T]he promptness with which instances of failure to use titles of respect are mentioned whenever the question of racial discrimination is raised, suggests that this offense to personal self-esteem might be considered more acute than the fact of segregation itself."^[65]

[64] bell hooks, *Ain't I a Woman?*[65] Johnson, *supra* 279.

Naming practices have also been used to inflict verbal violence on Black people. Practices of *renaming*—by which I mean the process through which the enslaved were systematically stripped of their identities through the replacement of their names, and *un-naming*—by which I mean the practice of devaluing Black persons by episodically replacing their names with a generic or diminutive, are potent examples.

Consider, first, the renaming of enslaved persons. Upon shipment and purchase, the renaming of enslaved persons served as an acculturation mechanism.^[66] Then, should an enslaved person be sold or gifted they could again face having their names replaced. Advertisements for runaways featured previous names, referring to "Tom, alias Tom Scipio"^[67] or "Sarah alias Nope alias Moll," indicating White enslavers' imposition of new names upon each sale.^[68]

[68] Robert K. Fitts

[66] Peter Kolchin,

[67] Richard A. Bai

Renaming served many functions. Most obviously, it expressed the enslaver's authority and the enslaved's lack of it. The power to name was reserved to White persons, and Black persons were denied the simple dignity of being able to name themselves.^[69] At the same time, because names are intimately connected to identity, renaming was also meant as an act of violence, in that it sought to destroy the identity of the enslaved.^[70] Finally, given the significance normally associated with naming, we might read the frivolity of the names selected by enslavers as further testimony of the enslaved's devalued status.^[71] In total, the dishonorific of renaming was transformative; it was central to the process by which Africans were stripped of their humanity and recast as property.^[72]

[71] It was not unh

[69] See Dwight N

[70] Simon Gikand

[72] Trevor Burnard

Un-naming, similarly, was rooted in enslavement. Given the mass-scale of human property consumed in the process, recognizing enslaved persons' individuality was impossible. Therefore, perhaps to demonstrate the enslaved's fungibility, rather than use names, enslavers often addressed enslaved persons with a range of generics: "boy" or "girl" and "uncle" or "auntie" for the elderly.^[73] Following emancipation, un-naming practices continued. Variants like "George" and "Jack" for men were common.^[74] For women, "Auntie," a holdover from enslavement, continued to be popular.^[75] Mirroring these spoken modes of disrespect, written

[74] Renaming Bla

[75] Henry H. Mitc

[73] See E. Frankli

Un-naming practices sought to devalue Black people and maintain the symbolic superiority of White persons. By addressing Black persons with generics, White persons effectively said that Black referents were so inferior that they did not warrant differentiation.^[77] Plainly, the practices were meant to demonstrate “the individual spoken to w[as] not worthy of the distinction of a name of [their] own.”^[78] Further, the distinct un-naming of Black adults with the dishonoric addresses “boy” or “girl,” was specifically expressive. Those dishonorics communicated that Black persons were symbolically locked out of adulthood. Thus, in this way as well, the infantilizing language signaled Black adults’ subordinate status *vis-à-vis* White persons.^[79]

[78] Margaret L. H.

[77] Thernstrom & *supra* note 61,

[79] See Ned E. Fe

C. Women’s Experiences with Dishonorifics

[81] See Pauli Mur

Historically, as in many ways still today, society classified and treated women as inferior to men. Notions of women’s “natural or necessary or divinely ordained” position,^[80] in addition to the accepted view of men’s roles as providers,^[81] worked in tandem to shore up men’s dominance and undercut women’s ability to participate in civic life.

[80] Barbara A. Bro

Linguistic inequality also formed part of women’s social subjugation. Among its more obvious forms, rampant androcentrism and the use of the generic masculine signaled men as the baseline and women as the derivative.^[82] The existence of numerous sexually derogatory words for women—and their noticeable absence for men—also signaled women’s all-pervading sexual objectification.^[83] So, too, forms of address and reference used for women formed part of this linguistic chauvinism.^[84]

[83] Frank & Anshu

[84] Anne Pauwels

[82] See Anna Livi

The ways in which women’s titles were regulated readily shows how dishonorifics have functioned as expressions of women’s subordinated status in society. Towards the end of the Twentieth century, feminists began emphasizing the linguistic inequalities inherent in women’s titles.^[85] The predominant honorifics “Miss” and “Mrs.,” they contended, perpetuated women’s subordination in at least two ways. First, and most prominently, these titles explicitly denoted women’s marital status.^[86] “Mr.,” by contrast, granted men a level of anonymity. Second, men’s titles were unchanging, while women’s fluctuated—again, depending on their relationships with men.

[85] Janet M. Fulle

[86] No Name, *supra* note 84

[88] Bruce J. Schu

[89] Gibbon, *supra* note 84

In response, women promoted the title “Ms.”^[87] The title was to be “adopted as a standard form of address by women who want to be recognized as individuals, rather than being identified by their relationship.”^[88] Not surprisingly, the introduction was met with resistance and, in response, counter-protest.^[89] When the *New York Times* refused to adopt the title for more than a decade, women demonstrated outside the newspaper’s headquarters, carrying placards reading “Miss, If She Chooses; Mrs., If She Chooses; Ms., If She Chooses,” and “Ms. Now!”^[90]

[87] Margaret Gibb

[90] David W. Dunl

The legal sphere matched societal hesitancy towards adopting the title “Ms.” In the 1973 case, *Alllyn v. Allison*, two women challenged the California Elections Code section that required women’s registration “be preceded in all cases by the designation Miss or Mrs.,” alleging the condition was an unconstitutional denial of women’s equal protection, on the argument that there was no comparable requirement for men.^[91] The California Court of Appeal rejected the notion, finding the requirement reasonable in order to prevent voter fraud.^[92] Moreover, the court concluded any harm was *de minimis*. Writing for the majority, Justice Compton surmised “[a]ssuming that compliance with [the law] . . . results in the disclosure of marital status, such compliance is not onerous or burdensome. A woman is not disadvantaged in any way by such disclosure.”^[93]

[92] *Id.* at 79–80.

[91] *Alllyn v. Allison*, 77, 78 (Cal. Ct. App. 1973).

[95] Dunlap, *supra* note 94

[93] Enid Nemy, *M*

Despite *Alllyn*’s holding, the injuries of these dishonoric practices were not trivial.^[94] For one, as said before, women’s titles defined them in relation to others, and specifically, men.^[95] This not only told a woman her individual identity and accomplishments were less important than her intimate choices^[96] but was also especially insulting, in that no similar standard was applied to men. The nature of these titles also disparately diminished women’s right to privacy. Because marital status was inherently bound up in women’s titles, a woman who wanted to conceal her marital status was prevented from doing so.^[97] Finally, for women who wished to use the title “Ms.” to affirmatively communicate a specific identity,^[98] the law at issue in *Alllyn* also infringed on women’s ability to express that message.^[99]

[94] See generally

[98] See Alette Oli

[99] See Margaret

[97] Naming the U

Misgendering

names, while using titles for men, remains a common linguistic slight on the former. Across a swath of contexts, and particularly in the judicial system,^[100] studies find that women are significantly less likely to be addressed by professional title than are men.^[101]

[100] E.g., Kimberly

Like titles, naming practices have long served as symbols of women's social control. Most obviously, patronymic naming restricted women's right to choose their names.^[102] Here, again, a woman's relationship to men was determinative: when born, women received their father's last name, which later might change upon marriage and, subsequently, could change again upon re-marriage or the initial marriage's dissolution.^[103]

[102] No Name, *supra* 364.

[103] Brown et al., *supra* note 27, at 25

Law solidified this nominal sex inequality. Though common law traditionally observed a right to choose one's own name or change it, women were routinely denied the right.^[104] Laws required married women to assume, and in some instances keep, their husbands' names.^[105] Alongside this, in areas such as voting, paying taxes, applying for passports, or seeking a driver's license, women who asserted their right to use a pre-marital name faced several disadvantages.^[106]

[104] Deborah J. Ar

[106] Anthony, *supra* 199–200.

[108] Federal Judge

[109] Federal Judge

[107] Esther Suarez

Even where laws did not directly cause women's nominal domination, the law's coercive force was used to buttress it. In 1988, District Court Judge Hubert Teitelbaum threatened attorney Barbara Wolvovitz with imprisonment for refusing to be addressed by her husband's last name in court.^[107] The judge demanded: "From here on, in this courtroom you will use Mrs. Lobel. That's your name."^[108] When Wolvovitz objected, Teitelbaum allegedly replied, "What if I call you sweetie?"^[109]

[111] Fischer, *supra* 479.

Judge Teitelbaum's last remark reveals yet another sexist dishonoric: addressing women with names of endearment (e.g., sweetie, baby, darling, etc.), or generics like "the girl" or "my girl," particularly in professional settings.^[110] Principally, these forms of address verbally impose unwanted familiarity.^[111] As one commentator remarked, "Terms of endearments are words used by close friends, families, and lovers, or so one would think, but they are also used on women by perfect strangers."^[112]

[112] Hill, *supra* not

[110] Ann Bartow, S

Taking all this together, we can readily see that sexist naming practices were not harmless. Primarily, they unevenly extinguish women's names and identities in favor of men's.^[113] By elevating the man's name at the expense of the woman's, the laws labeled women subordinate to their husbands and reified women's diminished status in society.^[114] The automatic imposition of husband's names, or requirement of spousal approval for name changes,^[115] also infringed on women's rights to freedom of speech,^[116] interest in maintaining a consistent identity,^[117] and personal liberty.^[118] In the same vein, the practice of addressing women with terms of endearment was a symbolic devaluation. When used by a man, these dishonorics served as a "unilateral declaration . . . that he need not trouble about the formalities expected between non-intimates."^[119]

[115] Beth D. Coher

[113] Robin Lako, *id.*

[116] See Spencer, at 683–85.

[114] See Michael C

[117] See Marija M

[118] Anthony, *supra* 200.

[119] Deborah Cam

D. Other Racial and Ethnic Minorities' Experiences with Dishonorifics

Many of the dishonorics discussed have also been used against other racial and ethnic minorities—to wit, the withholding of titles.^[120] Others have been more uniquely deployed. The intentional mispronunciation of names, for example, has served as a vehicle for othering and excluding persons with ethnically-marked Eastern European, Hispanic, Asian, and Middle-Eastern names.^[121] "Deliberate mispronunciation of foreign names," sociolinguist John Lipski points out, often "stems from a general desire to degrade, belittle, or ridicule members of minority ethnic groups."^[122] Indeed, a look to employment discrimination case law provides a snapshot of how frequently nominal mispronunciation has been used to verbally harass minority employees.^[123]

[120] See Sheri Lyn

[121] Mary Bucholtz

[122] John M. Lipsk

[123] See, e.g., Tlen

[125] El-Hakem v. B

Anglicizing ethnic names or replacing them with ones the speaker finds easier to pronounce are other forms of dishonorics that trivialize the non-dominant background and social meanings of names and the named.^[124] Take *El-Hakem v. BJJ Inc.*, a Ninth Circuit employment discrimination case involving a White employer's insistence on calling an Arabic employee, Mamdouh El-Hakem, by the Westernized "Manny."^[125] Or, cases

[124] *Fuentes v. Per* 759, 767 (3d C

Dishonori cs may additionally take the form of replacing the ethnically-marked name with the name of another person of the same or similar ethnic background. Of course, this can be accidental—though still harmful and offensive—such as the confusion of two persons of the same racial or ethnic group.^[128] But, surprisingly often, it is intentional. Case law is replete with examples of Asian employees being addressed as “Samurai Jack,” “Bruce Lee,” or “Jackie Chan,”^[129] and Muslim, Middle Eastern, and Sikh persons being harassed with names such as “Al-Qaeda,” “Osama,” and “bin Laden.”^[130] Here, though these words are not ethnic slurs—at least as the term is used in common parlance—their use is nevertheless wounding. In essence, they are racist generics. Insofar as these dishonori cs are designed and deployed to send the message that the target is a de-individualized, inter-changeable member of their racial and ethnic group, they are harmful for that reason as well.

[130] See Sahar F. /
[128] See Rachel H.
[129] Ryerson v. Be

E. Sexual Minorities’ Experiences with Dishonorifics

Dishonori cs have served as a tool to demean lesbian women and gay men. For a start, the misapplication of gendered titles is an easy verbal barb to emphasize the apparent gender nonconformity of sexual minorities. For instance, to disparagingly refer to a gay man by the title Ms. or Mrs. is to emphasize his femininity and failure to conform with gender stereotypes.^[131] The same is true for queer women. Courts have found that referring to queer women by masculine titles is a common form of targeted lesbophobic workplace harassment.^[132]

[131] Cf. Stephanie
[132] See, e.g., Doe
[134] Kerry Eleveld,
[135] Choi also test

Withholding professional or earned titles is another dishonori c used to belittle sexual minorities. In *United States v. Choi*, an assistant U.S. attorney (AUSA), Angela George, repeatedly omitted military titles when referring to gay men who were wrongfully dismissed from the armed forces under Don’t Ask, Don’t Tell (DADT).^[133] *Choi* arose out of the November 2010 arrests of thirteen former servicemen for “failure to obey a lawful order” while protesting against DADT.^[134] As the protesters were being taken into custody, the arresting officer publicly removed the rank insignia from their uniforms, a sign of disrespect in itself.^[135] Then, at trial, George did verbally what the arresting officer did physically. George repeatedly refused to address testifying witnesses by their earned ranks, instead referring to the witnesses by “Mr.”^[136] The third instance prompted the following exchange:

[133] U.S. v. Choi, 8
[136] Transcript of E

Ms. George: So, on March 17th, I believe Mr. Pietrangelo testified that you –
Mr. Feldman: Captain Pietrangelo, please.
The Court: Please, call everybody by their name.
...
Ms. George: But it was shortly before March 18, 2010, that you and Mr. Pietrangelo –
Mr. Feldman: Captain Pietrangelo, please.
The Court: All right. They’ve been established. Ms. George, do you—please explain something to me: Do you have an objection to referring to these gentlemen as the rank they achieved in the United States army?
Ms. George: They’re not in the military, Your Honor. Yes, I do.
The Court: I appreciate that. But I would like to think after I retire, people still will call me Judge. So, the title that one captures at one point in his life usually follows him. I call retired judges Judge all the time and so do you. What’s the difference?
Ms. George: Is the Court ordering me to refer to him as –
The Court: I would appreciate it if you would.^[137]

[137] Id. at 69–70.

Despite the court’s instruction, AUSA George continued to mistitle the gay and lesbian veterans both at trial and in other exchanges.^[138] While the reasoning for AUSA George’s refusal is ultimately unknown, her targeted prosecution of DADT protestors, in addition to how other government actors easily used the discharged veterans’ ranks, strongly suggests the dishonori cs were rooted in homophobic animus.^[139]

[138] Overall, it is cl
[139] Plaintiffs’ Tamm

Last, like titles, naming practices are used to verbally slight sexual minorities.^[140] In *Walker v. City of Holyoke*, several coworkers repeatedly referred to Tammy Walker, a Black lesbian police sergeant, by the Black male

[140] See, e.g., Daw

Misgendering

marked to the invidious stereotype that lesbian women aspire to be men, specifically expressing that as Walker herself was Black, she desired to be a Black man.

F. Gender Minorities' Experiences with Dishonorifics

Generally, the dishonorifics weaponized against gender minorities are a form of *misgendering*. As I use the term here, misgendering refers to both the imposition of terms, honorifics, names, or pronouns at odds with a referent's gender, as well as the failure to use terms, honorifics, names, and pronouns in line with a referent's gender.^[143]

[143] See Sonny Ng

Typically, misgendering consists of a formative verbal assignments of a gender with which a party does not identify, through misapplied terms, honorifics, and pronouns.^[144] For instance, to misgender a trans person may involve assigning a gender at odds with their own, while to misgender an agender or nonbinary person might involve the assignment of any gender at all. Additionally, misgendering can consist of deliberate omissions of gendered terms, honorifics, classifications, and pronouns. For instance, consistently referring to gender minorities by name instead of pronouns, while freely using pronouns for cisgender persons, qualifies as misgendering. Finally, though misgendering sometimes involves gendered titles and pronouns, it can also involve persons' names.^[145]

[144] See Y. Gavriel

[145] See Nordmark, 143, at 130.

As we will see, the three forms of misgendering detailed below—the formative, the omissive, and the name-related—mirror the same dishonorifics weaponized against other minority groups.

1. Mistitling, Mispronouncing, and Other Mislabeled

To "mistitle" a gender minority is to refer to them with a gender-specific title or honorific at odds with their gender. Most obviously, this includes titles like "Mr." "Ms." "Mrs." or "Ma'am" "Sir." However, gendered titles as I describe them here extend further. It would be mistitling to use the term "Gentlewoman" or "Congresswoman" to refer to a transgender elected official who identifies as a man. The use of any such gendered title to refer to a person who identifies as neither male nor female would, too, be mistitling.

Next, the use of pronouns at odds with the target's gender is "mispronouncing."^[146] To refer to a trans man as "she" or "her" is to mispronoun him, and to refer to someone who is agender or nonbinary with gender-specific pronouns such as "he" or "she"—when the person uses gender neutral pronouns—is to mispronoun them. Particularly offensive, mispronouncing includes referring to any gender-diverse person with the pronoun "it," a pronoun usually reserved for inanimate objects.^[147]

[146] Matthew Bruc

[147] See Talia Mae

Finally, the term "mislabeled" may be used as a catch-all to refer to the use of gendered designations or categorizing language that does not fall into one of the previous buckets. For example, to address a trans man as a "girl" or "chick," or to address an agender or nonbinary person in that way or as a "bro" or "dude," is a misattribution of gender. Similarly, to refer to someone's significant other as their "husband" or "wife" or "boyfriend" or "girlfriend," where the partner does not identify with the gendered label, would constitute mislabeling.

Mistitling, mispronouncing, and mislabeling are offensive for many of the same reasons emphasized in earlier examples. The imposition of gendered terms with which gender minorities do not identify is insulting in the very same way that the renaming of Black persons or ethnic minorities is the speaker rejects the referent's identity and imposes the speaker's own. As critically, we might also view the rejection of gender-appropriate language as analogous to the discriminatory control of women's titles; both are autonomy-encroaching expressions.

2. Ungendering and Unpronouncing

To "ungender" a gender minority involves the asymmetrical use of gendered titles, terms, or pronouns for cisgender people but not for gender-diverse ones.^[148] It may also involve the deliberate use of gender-neutral

[148] See Ansara &

Misgendering

changing officials' titles from "Gentleman" and "Gentlewoman" to the gender-neutral "Delegate," an apparent attempt to avoid acknowledging Roem's womanhood.^[149]

[149] Antonio Olivio

"Unpronouncing" refers to the deliberate omission of pronoun usage for gender minorities while using them for cisfolk.^[150] Say, using she/her or he/him pronouns when discussing a cis person, but referring to a trans or nonbinary person by name alone.^[151] Likewise, unpronouncing may involve the use of gender-neutral pronouns for gender minorities who use binary pronouns (i.e., she/her or he/him) as a means of avoiding the gender-appropriate language.^[152] Say, referring to a trans woman or trans man by they/them pronouns.

[150] Robin Dembre

[152] Julia Serano, I

Whereas other forms of misgendering, like mistitling, are offensive for affirmatively communicating a rejection of the referent's gender, ungendering and unpronouncing are offensive for failing to acknowledge the referent's gender. To better understand this point, recall the earlier discussion of the dishonoric omissions of Black persons' and other ethnic minorities' honorifics and of women's professional titles. Speakers' conscious avoidance of gendered terms or pronouns for gender minorities is derogatory under the same logic. In this vein of dishonoric omissions, acknowledgment and respect are discriminatorily withheld from one minority group and offered to others.

3. Deadnaming

[155] Other comme

As we have seen from earlier examples, names and the power to name are incredibly important. This is especially true for gender minorities. Often, the process of choosing a name more closely in line with one's gender identity is the first step in transitioning or acknowledging a gender-expansive identity.^[153]

[153] Adryan Corcic

"Deadnaming," the term for the use of a person's name assigned at birth or previous name, is another example of a dishonoric used to harm gender minorities.^[154] And, because most names are inherently gendered, deadnaming also qualifies as a form of misgendering.^[155]

[154] See Lucas Wa

Why is deadnaming insulting? Persons normally have no issue with referring to cisgender persons with names that differ from their legal names. Think, for example, of Jamie Foxx, Lady Gaga, or Whoopi Goldberg, or Senators Mitt Romney or Ted Cruz.^[156] When the willingness to refer to others by the names they have chosen for themselves does not extend to gender minorities, it must be understood as an offensive practice meant to deny these minorities' legitimacy.^[157] Notice the similarity between deadnaming and previous dishonoric omissions, such as the unname and renaming of Black persons and the anglicization and replacement of ethnically marked names. In all these examples, the speakers' power to unilaterally name and rename dismisses the referents' identities and acts as an expression of social domination.

[156] GLAAD Media

[157] Antonio Toma

G. Discrediting Arguments About Special Rights, Slurs, and Slurring

The lessons of history shed necessary light on the current debate over gender-appropriate language. With the context introduced above, we can now return to a more informed vantage point to scrutinize the two criticisms outlined at the beginning of this Part: the (1) special rights objection; and (2) the semantic determinism objection.

1. Why the Special Rights Objection Fails

Once again, the special rights critique proposes that, since gendered language has traditionally corresponded to the referent's gender assigned at birth, to use language in a way that accommodates and acknowledges the identities of gender minorities is to advocate for a special right or some other form of special treatment. Yet, the history of dishonoric omissions reveals at least three flaws in this criticism.

To begin, no "special" rights are actually involved in promoting the use of gender-appropriate language. Wanting to be addressed respectfully or appropriately isn't unique to gender-diverse persons. Rather, it is a larger matter of human dignity and a principle that is generally respected.^[158] Somewhat ironically, it is the omission of and deviation from the standard use of honorifics, names, and titles that persons prefer which are

[158] See Geo Nui

Misgendering

Second, calls for gender-appropriate language are not particularly different from the advocacy engaged by other minority groups. As we have seen, demands for changes in the ways members of marginalized groups have been referred to and addressed have played a role in many movements for civil rights and social equality. Gender minorities requesting language that acknowledges them as they know themselves to be rather than as who society tells them they are, is therefore simply a modern retelling of earlier advocacy

The reaction isn't new either. Not long ago, male commentators branded women pursuing non-sexist language as "Ms-guided," "linguistic lunatics," throwing "libspeak tantrums," and "'women's lib redhats' with 'the nutty pronouns.'"^[159] And, lest we forget, White resistance to racial labels adopted by Black people as unnecessary "political correctness," and White dismissal of calls for the capitalization of racial group designations, are not in the distant past.^[160]

[159] Wendy Martyn

[160] Political Corre

To put a finer point on it: past is prologue. Thus framed, a trans man's assertion that he is a man and should be addressed as such should be read in parallel with a Black man's Civil Rights Era mantra that, like his White counterparts, he too was a man and should be treated that way.^[161] Both are calls for recognition of the speakers' innate dignity and equality. Likewise, a trans woman's request to be addressed as a woman is not very different from a cisgender woman's advocating for the title "Ms."—both women are calling to be addressed based on their autonomy and understanding of self rather than external factors, i.e., her gender assigned at birth for the former, and her marital status for the latter. Lastly, just as the anglicization and replacement of ethnically marked names with ones that are easier to pronounce harmfully prioritize the speaker's ease at the expense of the referent's identity, so too does the replacement of gender-expansive persons' neo- and gender neutral-pronouns with binary or traditional ones that the speaker finds easier to remember and understand.

[161] Here, I am ref

The third and most obvious reply is that the argument that calls for language to change and adapt to accommodate new understandings of gender are special fails because it misses how language changes. Calls for recognition of innate dignity and equality transform language, revealing its dynamism. History demonstrates the starkness with which dishonors strike the modern ear. Because Black people, women, and other marginalized groups have pointed out the harms of the dishonors wielded against them, it is no longer widely acceptable to use many of the dishonors explored here. Thus, again, critics' characterization of gender-appropriate language as "special" is misapplied.

2. Why the Semantic Determinism Objection Fails

Reexamined in context, the idea that language's original definition ultimately dictates its offensiveness also suffers from several flaws. This argument would find that language that exists in the collective vocabulary as derogatory is somehow qualitatively distinct from, and more offensive than, its "neutral" (semantically, that is) contemporaries.

[164] Brief for Respo

That logic cannot be right. As an initial point, this reasoning completely ignores the number of ways slurs can be used in non-offensive, benign, or reclaimed ways.^[162] It was only a few years ago that the Supreme Court considered Simon Tam's purported reclamation of anti-Asian slurs in striking down the disparagement clause of the Lanham Act in *Matal v. Tam*.^[163] As Tam rightly argued in his petition for certiorari, minority groups have long re-appropriated what were originally "insults" and transformed them into "badges of pride."^[164]

[162] See Adam D.

[163] *Matal v. Tam*, 137 S. Ct. 1751 (2017).

More importantly, though, the critique ignores the opposite of the prior example: benign words can be used offensively.^[165] Above all else, by tracing the history of dishonors, this Part has shown that terms that exist in the vernacular for reasons other than derogation can be used and misused to demean

[165] See, e.g., Mar

For example, compare the term "boy" as applied to an adult Black man with an anti-Black epithet of your choosing. If, as the semantic determinism objection would have us believe, original meaning controls, then, juxtaposed against an actual anti-Black racial epithet, the epithet should, categorically, be considered more pejorative.

Misgendering

where a white supervisor only refers to Black male workers as “boys” but uses names and titles for white workers with a scenario where a Black rapper uses the n-word in song lyrics. Undoubtedly, the former should be considered the more offensive of the two. Clearly, the context and history of the term “boy” are such that there are times when using the language would be equally if not more offensive than using the slur.^[166]

[169] See generally

[166] Historical use

Considered altogether, the semantic determinism objection misses the most critical point.^[167] The social and historical contexts of language transform and inform its meaning and therefore its offensiveness. This context is precisely the difference between *slurs*—terms which, to use the objection’s language, “exist in the vernacular”^[168] to derogate social groups—and *slurring*—a species of speech act which involves the derogation of social groups.^[169]

[167] More broadly,

[168] Blackman, *supra*

Applied to misgendering, the critique’s reasoning cannot hold. As with the other dishonifics we have examined, while gendered pronouns, honorifics, names, and labels are not by themselves derogatory, they are when applied as such. For the reasons outlined above, misgendering calls to bear a social and historical context that portrays gender minorities as inferior to their cisgender counterparts. In so doing, the otherwise inoffensive language acts as a slur against gender minorities.

On balance, neither the special rights nor the semantic determinism objections can withstand scrutiny. Viewed alongside previous examples of dishonific language levied against Black people, women, and ethnic and sexual minorities, the laxity of both accounts becomes readily apparent. Nothing, after all, is sufficiently “special” about the movement for gender-appropriate language such that the special rights objection can succeed. Nor does the original meaning of a pronoun or other gendered language render it inoffensive or non-derogatory as applied. The countless examples of dishonifics, across a swath of identities, has shown that is far from the case.

II. Meaning

[171] Brief Amicus C

[172] The Pronomin

When faced with the notion that misgendering is harmful, skeptics have put forward a number of replies. More than anything else, commentators usually sidestep the charge, choosing to ignore the harms altogether. Another common rejoinder is to question the seriousness of gender misclassifications. The use of gendered language, some argue, is a “simple social courtesy”^[170] or an acknowledgment of “biological or physiological” facts.^[171] On those views, to misgender another person is at worst an insignificant “oversight,” or even a truth-telling—neither of which can be considered disrespectful or harmful.^[172] Others take the offensive; alternatively claiming gender-diverse persons overexaggerate the injuries of gender misattributions, if there are any at all.^[173] Because these accounts claim the consequences of misgendering are insignificant, collectively, I will call this brand of push-back the *trivialization objection*.

[170] Michael Book

[175] Allyn v. Allison, 77, 78 (Cal. Ct. 1977)

[173] Scott Shackelford

The objection is unsurprising. Generally, harms tend to mean quite little to those who do not experience them.^[174] With respect to dishonifics in particular, trivialization has always been the standard retort. Recall how the *Allyn v. Allison* court concluded California’s sexist title-restrictive laws were “a discrimination so trivial.”^[175] Or how, despite extensive Black testimony to the contrary, Alabama’s reply brief in *Hamilton v. Alabama* argued it would be an “imposition upon [the] Court to request that it concern itself with an attempt to enforce[sic] social amenities and rules of etiquette.”^[176]

[174] Studies comp

[176] Brief for Resp

This Part responds to the trivialization of misgendering by centering the voices of those who have the highest stakes in the conversation. Drawing on gender minorities’ firsthand accounts, the questions answered by this Part are these: What is the social meaning of misgendering? That is, what is expressed or symbolized when a person misattributes the gender of another? What does the intentional deployment of gendered pronouns, honorifics, and labels say to and about gender-diverse folk? And, more directly, as seen from the perspectives of gender minorities, what is truly and fundamentally troubling about having one’s gender misattributed?

Misgendering

self-imposed. Then, the Part looks to social science, psychology, interviews, and collected narratives of gender minorities' experiences with misgendering to demonstrate that misgendering is qualitatively harmful language that infringes on the social equality, autonomy, dignity, and privacy of transgender, genderqueer, and gender nonbinary persons.

A. An Introductory Typology of Intent

Before turning to the typology, a brief clarification is in order. My purpose in differentiating between types of misgendering is not to suggest that some are not offensive. Rather, the principal point is that intent often informs the nature of action. Therefore, the takeaway is that though any misgendering of another person might be considered offensive, intentionally using the wrong language, and accidentally or negligently doing so, are both morally and experientially distinct.

[179] To be clear, in

1. Negligent Misgendering

Most unintended misgendering can be thought of as negligent.^[177] In other words, the label applies to misattributions of gender that occur due to a failure to take the proper care. To see this, imagine that you are introduced to someone for the first time who, in your view, appears male. You may assign a gender to the person by referring to them as “Sir” or “Mr.” only to realize they are not a man. In this situation, the failure of care was the decision to make an assumption based on appearances,^[178] rather than to inquire about the person’s appropriate form of address.^[179] The more prudent approach would be to ask the individual their pronouns and designations.

[177] Lauren Simps

[178] We can think
[182] In perhaps the

Understandably, this idea might strike most readers as novel. The reason for this is that, until fairly recently, American society has conflated gender, appearance, and anatomy.^[180] This confusion, Sonny Nordmarken points out, “reflects epistemic assumptions about how gender *can be known*—holding that social actors are able to determine others’ gender identities (and appropriate gender pronouns) based on their own sensory perceptions of others’ bodies.”^[181] Yet, if mistaken, assumptions based on another’s appearance can have devastating consequences, even for cisgender persons.^[182] The better path forward, therefore, is to ask everyone their appropriate forms of address rather than to assume

[180] Nordmarken, :
at 131.

[181] Sonny Nordm

2. Accidental Misgendering

Truly inadvertent or unconscious gender misclassifications qualify as accidental misgendering.^[183] The label refers to a limited category where, by force of habit, a speaker uses the wrong pronoun, label, title, or name.^[184] Accidental misgendering differs from negligent misgendering in that the latter is preventable; the negligent misgenderer has time to reflect, and that means that they can and should ask persons how they would like to be addressed. By contrast, because accidental misgendering is automatic and therefore largely uncontrollable, there is no failure of care on the part of the person who accidentally misgenders another

[183] Simpson & De
note 177, at 10

[184] Here, philoso

Take an example of a long-term friend or colleague who comes out as a gender minority. For obvious reasons, the process of transitioning or publicly acknowledging one’s gender requires adjustment from persons who knew them before the transition or acknowledgment.^[185] For longstanding friends or family members to unthinkingly slip by addressing a gender minority by their deadname or previous pronouns particularly early in the transition or shortly after the acknowledgment, would be inadvertent.^[186] The point here is not that accidental misgendering is not harmful. Instead, it is that truly accidental misattributions are less morally culpable, given the automaticity of the actor’s behavior.^[187]

[185] See Laura Erik

[186] Baker A. Roge

[187] See Gilbert Ry

3. Intentional Misgendering

Intentional misgendering involves the conscious refusal to use the correct gendered language or designations. By “intentional,” I mean actions that are not automatic or unthinkingly done; the label applies to scenarios where a speaker knows and is fully aware of the referent’s gender-appropriate language and deliberately chooses not to use it or chooses to use language at odds with it

Misgendering

language when talking to and about *B*. (In this case, say, with she/her/hers pronouns and Mrs./Ms./Miss titles). Imagine, further, that *A* learns that *B* was assigned male at birth. Thereafter, *A* refers to *B* exclusively with he/him/his pronouns and the title “Mr.” In this scenario, given that *A* previously used *B*’s correct pronouns and titles to no apparent detriment and only made a conscious choice to misgender *B* after discovering she was transgender, *A*’s misgendering is obviously deliberate.

Persons offer many reasons for why they intentionally misgender gender minorities.^[189] Speakers may claim to be trying to express that they do not acknowledge the target’s gender.^[190] On this view, some feminists deliberately misgender transgender women in order to reject trans women’s membership in the category of “women.”^[191] Alternatively, speakers may claim to be trying to express a larger political point about the binary nature of gender or deny the possibility of transition or gender-expansive identities: for instance, in rejecting musician Sam Smith’s use of they/them/theirs pronouns, conservative journalist Douglas Murray rationalized his misgendering of Smith with the argument that he did not “think there is any such thing as non-binary.”^[192] Or, speakers may even just be trying to be cruel.^[193] Regardless of the specific motive, because the speech was deliberate, we can conclude that it is more morally culpable than accidental or negligent misgendering.^[194]

[193] Issac Michael
[189] Sebastian Cor
[191] See, e.g., Jani
[192] See BBC Radi
[194] This principle,

4. Self-Misgendering

Distinct from the other forms of misgendering, gender minorities, and particularly those whose genders are recently acknowledged or still in the process of formation, may misgender themselves.^[195] There are several explanations for why this happens. As with accidental misgendering, self-misgendering might be the result of habit. Interestingly as well, gender minorities speaking a second language have been found to unintentionally misgender themselves in that language.^[196]

[195] Laura Nelson,
[196] See generally

A more typical reason is that self-misgendering is a product of necessity or safety.^[197] Given that the majority of persons a gender minority must interact with on a daily basis subscribe to a binary conception of gender or are openly transphobic, self-censoring one’s gender pronouns and other language can be a tool to avoid backlash or attack. Research has indeed found that gender minorities often decline to ask their employers to use their correct pronouns in an effort to avoid more severe discrimination.^[198] Along similar lines, in the context of litigation, gender minorities frequently report self-misgendering in an effort to appeal to decision-makers who would otherwise not understand or would be resistant to the gender minority’s identity.^[199]

[197] Lauren Freem
[198] Sandy E. Jam
[199] See Elizabeth

B. Why the Trivialization Objection Fails

Some critics have claimed that the consequences of misgendering are insignificant. They analogize the consequences to the minor offense some cisgender people feel when their gender is misattributed say a short-haired woman is mistaken for a man, a man with a higher-pitched voice is misaddressed on the telephone, or parents’ reaction when their baby’s gender is misidentified by a stranger.^[200]

[200] Tellingly, soci

But there’s more to it than that. Though cisgender people might be uncomfortable or even irritated by being misgendered, the experience is qualitatively different for gender minorities.^[201] In the sections that follow, I mine the gender minorities’ narratives to develop a layered account that captures exactly how and why misgendering is harmful. Beyond the trivialities and potential discomfort experienced by cisgender people, misgendering, especially when done intentionally, inflicts a range of injuries on gender minorities’ self-identity, dignity, autonomy, privacy, and mental and physical health.^[202]

[201] Sam Dylan Fir
[204] Compare Ben
[202] Naturally, the

1. Disrespect and Disregard

Foremost, misgendering is disrespectful.^[203] Of course, accounts of what disrespect is and is not vary.^[204] So, for the purposes of this argument, a disrespectful action is one that (1) ignores, fails to account for, or dismisses an affected individual’s feelings; or (2) fails to reflect on its harms. Both definitions are applicable to misgendering.

[206] David P. Gautl
[203] Kate Light, Ge

Misgendering

respect involves deference to others.^[206] When someone we respect tells us they find our actions or words harmful, we typically stop doing or saying the relevant action or speech to the extent we are capable. At the very least, we make efforts not to do or say the harmful actions or remarks around that person.^[207] To do otherwise would be disrespectful.

[207] C.f. Richard B.

For a concrete example, recall Judge Teitelbaum's insistence on addressing Barbara Wolvovitz by her husband's last name and the title Mrs. The judge's continued use of that form of address, despite Ms. Wolvovitz's objections, was disrespectful because it involved treating her as if her feelings, opinions, and personhood were unimportant. In that instance, the judge's continued misaddressing notwithstanding Wolvovitz's uneasiness was a communiqué expressing: "Your wishes or offense don't matter to me," "I don't care about how you feel," or, "I see I make you uncomfortable, but my desire to continue is more important than that." Whatever the message, it was one of disparaging dismissal: a disrespectful prioritizing of the speaker's own desire over the addressee's.^[208]

[208] See Stephen I.

Viewed in this way, misgendering can be considered disrespectful because it involves referring to someone in a manner that they have made known they find offensive or harmful. Just as before, it is the elevation of the speakers' desire to use offensive language and the concomitant dismissal of the targets' feelings that is disrespectful.

Second, deliberate misgendering fails to account for the harms of the language.^[209] Language, like actions, can be disrespectful when we ought to know that another person will find them dismissive. To grasp this account, consider the following scenario: imagine you are invited to a friend's house for a home-cooked dinner. Imagine, further, that your friend has spent all day laboriously preparing this meal. We can agree that for you to fail to show up simply because you weren't in the mood and worse, without an excuse or apology, would be disrespectful. Doing so would fail to recognize the harm of your actions, and it would devalue the time and effort that your friend put into preparing the meal.^[210]

[209] This view of re

[210] See Leslie Gr

Along the same lines, to intentionally use language that gender minorities experience as harmful, without reflection on the harm it causes, is disrespectful. To be clear, gender minorities spend time, effort, and financial resources on coming to terms with their gender. It is no small feat to take the step of going against the societal status quo and identifying outside of the cis majority.^[211] The costs may include the effort required to have name or gender marker changes, major life alterations, and transition-related care, not to mention the potential loss of personal relationships and the incurred burdens of discrimination. From that perspective, it is disrespectful to wantonly dismiss the efforts gender minorities make by choosing to use language at odds with their gender.^[212]

[211] Vanessa Sher

[214] Gün R. Semin

[212] See Laura A. .

2. Embarrassment and Humiliation

Misgendering can cause embarrassment and humiliation. Though related, the two concepts are distinct. As a threshold matter, embarrassment typically occurs in less consequential settings and it is frequently unintentional and temporary.^[213] Embarrassment may arise where one commits an awkward act or social faux pas.^[214] On this definition, misgendering may be considered embarrassing where it occurs accidentally in that it (1) is a violation of the social rule of mutual respect and not offending others; and (2) misgendering places the onus on the gender minority to (often awkwardly) correct the speaker.^[215]

[217] Nussbaum, su
at 205.

[213] Martha C. Nus

[215] Interview with

Social situations may also be considered embarrassing when they involve the sudden onset of social scrutiny.^[216] Consider instances when we are praised or receive an unexpected compliment; we might feel exposed because the focus is placed on us.^[217] In this sense as well, misgendering may be considered embarrassing. Frequently, the misuse of the incorrect pronoun, honorific, or label, or an elaborate apology for doing so thereafter, turns unwarranted focus on the target, along with unwelcome scrutiny or evaluations of their gender or gender expression.^[218]

[216] The Oxford C

[220] Walter J. Torre

[218] See Kay Marti

Humiliation, by contrast, is more likely deliberate. Further, unlike embarrassment, humiliation involves elements of power and powerlessness: It is the victim's inability to stop or control the humiliator's actions—the

[223] See Grace La

Misgendering.

remedy for the injustice suffered.”^[219] Humiliation is also qualitatively different from embarrassment in that it involves a loss of social status or the rejection of a self-presentation or social identity.^[220] In this way, as a rejection of gender minorities’ claim to their gender, particularly when repeated and deliberate, misgendering can serve to humiliate its target.^[221]

[219] PHIL LEDSK, *LO*

[221] See Ezra Isher

This is especially true when intentional misgendering occurs publicly.^[222] In fact, this is often the perpetrator’s desired effect.^[223] Take the events of conservative provocateur Milo Yiannopoulos’s 2016 speech at the University of Wisconsin, Milwaukee.^[224] Projecting a transgender UW student’s name and photograph on screen, Yiannopoulos began the following targeted, degrading, tirade:

[222] See Ra aele f

I’ll tell you one UW-Milwaukee student that does not need to man up. Have any of you come into contact with this person? This quote unquote nonbinary trans woman forced his[sic] way into the women’s locker rooms this year. . . . He [sic] got into the women’s room the way liberals always operate, using the government and the courts to weasel their way where they don’t belong. In this case he [sic] made a Title IX complaint. . . . I’ve known some passing transnics[sic], which is to say transgender people who pass as the gender they would like to be considered.

[pointing towards the projection of the student]

The way you know he’s [sic] failing is I’d almost still bang him [sic].

[crowd laughs]

It’s [sic] really just a man in a dress, isn’t it [sic].^[225]

[225] MILO, *MILO at*

The intention to humiliate is obvious. The effort required to organize the projection, in addition to the consistent misgendering, the use of “it,” transphobic epithets, and sexually crude comments, all point towards a conscious desire to intentionally harass.

[227] For a cogent c

3. Social Subordination

[229] See Ordinary,

Misgendering expresses that gender minorities are less valuable than their cisgender counterparts. When actions communicate the lessened importance of one person or a group *vis-à-vis* another, we should think of the actions as communicating the target’s symbolic subordination.^[226] One of the most common ways individuals or groups are symbolically subordinated is through the denial of the symbols of social equality.^[227]

[226] The concept c

To my mind, terms of reference and address—pronouns, honorifics, titles, names, and the like—are *ordinary signs* of social equality.^[228] By “ordinary” I mean that they are widely used, commonplace, and generally thought of as inconsequential.^[229] We might think of withholding these terms as expressing the target’s lessened worth: doing so says, in effect, that the person the speaker is referring to or addressing does not deserve the due regard that is typically given to all other citizens. The connotation is that the target is in a lower pole of the social hierarchy and is the speaker’s social inferior.^[230]

[228] Michael Walzer

[230] See Yousef T.

Here, social context is key.^[231] Largely, it is the prism of context that illuminates whether any deprivation of social equality is symbolically subordinating. In the case of members of groups that are or have been widely discriminated against, the absence of these ordinary signs of social equality takes on an even greater significance. To see this, consider that addressing professionals with titles like “Doctor,” “Judge,” “Sergeant,” and “Officer” is ordinary. Yet, to specifically fail or refuse to use these terms with a Black person would be considered symbolically subordinating because the history of discrimination against Black people provides context for this action. Remember that, for centuries, withholding the ordinary signs of social equality—through a failure to use titles or by addressing Black persons by only their first names—was an integral part of the social practices that symbolized Black persons’ purported inferiority. Thus, it is the deviation from ordinary treatment, against a backdrop of historical and ongoing social discrimination, that makes the conduct both meaningful and condemnable.^[232]

[231] See Deborah

[232] For a synthesis

Misgendering

societal transphobia, to refuse to use a gender minority's preferred name or to deadname them is a deviation from the ordinary that takes on a new significance because of the social context of transphobic discrimination.^[233] Normally, using persons' preferred names—whatever they want to be called—is accepted. Certainly, we would have no issue with referring to a person by their preferred moniker “Bob,” when in actuality their legal name is Robert. Likewise, at their request, we would happily refer to a colleague by their pre-marital name, even though they've officially adopted their partner's surname after marriage. Like using preferred names, we ordinarily accept using pronouns that are in line with the gender of the people we refer to. It just so happens that most people we discuss or address are cisgender. To fail to do so when the referent is a gender minority, therefore, is to deviate from the ordinary in a way that must be understood as a deprivation of that person's right to social equality.

[233] This is why or

[235] Cf. Karsten Mi

The deprivation of social equality has further consequences. Because gender misattributions signify that the target is of less social standing than the speaker, and perhaps, has less social standing than cisgender persons as a collective, it makes the target vulnerable to all the corollary mistreatment associated with being branded as inferior.^[234] From a wider view, then, we must understand misgendering to act as a license—or even invitation—to mistreat, and discriminate against gender minorities.^[235]

[238] See Powell v.

[239] See Gonzalez

[240] See Kathelee

4. Deprivation of Privacy and Safety

Misgendering deprives gender minorities of privacy and threatens their safety. Among other things, the right to privacy includes the right to control intimate information.^[236] Expressed differently, aspects of our personal lives are private, precisely because we choose not to share them, or alternatively, to share them with only a select few.^[237] Gender undoubtedly falls within the realm of intimate information.^[238] As with pregnancy, sexual orientation, and the disclosure of HIV status, “there are few areas which more closely intimate facts of a personal nature” than one's own sense of gender.^[239] It follows that, with information of this sort, individuals should have the right to decide when, how, whether, and with whom they share it.^[240]

[236] Julie C. Innes

[242]

[243] See Gapin, su

Misgendering, especially in public settings, undercuts the control of intimate information. Where misgendering outs the target—that is, non-consensually or forcibly reveals current gender or gender assigned at birth^[241]—it deprives gender minorities of the right to choose when/if to reveal this information.^[242] Accordingly, for gender minorities living “stealth,” misgendering harms their privacy by exposing their intimate information.^[243]

[245] Id.

[241] See Citron, su at 1884.

Whether inadvertent or deliberate, outing through misgendering harms the privacy of gender minorities. Consider these illustrations. In *Meriwether v. Trustees of Shawnee State University*, a Shawnee State student chose to limit knowledge of her transgender status by only divulging it to close friends and, when necessary, university administrators.^[244] Her professor's incessant misgendering in class by “refus[ing] to use female honorifics and pronouns” when referring to her “‘out[ed]’ her to her classmates.”^[245] Author and journalist Meredith Talusan tells of a time when, after showing her ID containing her gender assigned at birth, a bartender maliciously asked her date: “So you want to buy him a beer?”^[246] And, Os Keyes has documented how, in a fairly casual scenario, a store clerk revealed their deadname and gender assigned at birth to a colleague who only knew them post-transition.^[247] In all these instances, the misgendering violated the individuals' privacy and the non-consensual revelations interfered with their relationships, depriving each party of the ability to choose when, and if, to reveal their transgender status or name given at birth.

[244] Meriwether v.

[246] Meredith Talu:

[247] Os Keyes, (Mi:

Closely related to misgendering's deprivation of gender minorities' privacy is its threat to their safety and security. When gender minorities are misgendered, there is the possibility that they will be exposed to actual physical violence. As discussed above, incorrect pronouns or honorifics can nonconsensually reveal someone's gender minority status to third parties. If these third parties are transphobic, this exposure can lead to a violent reaction.^[248]

[248] Eve, *Say My A*

5. Dehumanization

[252] Sophie Oliver,

Misgendering is dehumanizing. It deprives gender minorities of their “full humanness,” exposes them to “the cruelty and suffering that accompany” such status,^[249] and objectifies them—a specific form of

[249] Nick Haslam,

[254] James C. Jarr.

Misgendering

To start, misgendering is dehumanizing in that it not only denies gender minorities rights, *qua* persons, to assert their identity^[251] but also otherizes them. By denying them markers of social equality, misgendering marks gender minorities as being outside the community of respected moral equals^[252]

[251] Mari Mikkola,

Occasionally, it goes further. Misgendering is also dehumanizing where it involves metaphorically likening gender minorities to the nonhuman.^[253] Specifically, the pronoun “it” is not used to describe other human beings; instead, it may be applied to the inanimate.^[254] To apply the pronoun to another person is to portray them as less-than humans.

[253] See David Liv

In being dehumanizing, misgendering is a precursor to and justification for injustices towards gender minorities; dehumanization, as we know, is often the lubricant for social oppression. On August 7, 1995, Tyra Hunter, a Black transgender woman, was involved in a car accident.^[255] By the time Emergency Medical Service (EMS) workers arrived, bystanders had removed Hunter and another passenger from the car and laid them on the ground. As the attending EMS technician cut Hunter’s pants and saw her genitals, he recoiled, exclaiming slurs in front of bystanders.” He immediately stopped treating Hunter, leaving her bleeding unattended for up to five minutes.^[256] For several minutes thereafter, Emergency Medical Technicians (EMTs) stood by and “laughed and joked” about Hunter’s being trans, while bystanders begged them to render aid^[257] When Hunter was finally taken to the hospital an hour later, she died from blood loss.

[255] Scott Bowles,

[256] Id.; Sarah D. F

[257] Bowles, *supra*

By referring to Hunter as “it,” the EMT rendered her nonhuman, such that his duty to provide care—both as a condition of his employment and his moral duty as a fellow person—was extinguished. Said another way, by describing Hunter as nonhuman, the EMT made plain that, at least to him, she was less valuable, and the urgency of caring for her diminished or extinguished completely. More pointedly: one has no duty to care for the life of the inanimate, simply because the inanimate does not have a life.^[258]

[258] See Richard J

From another angle, misgendering involves objectification, a distinct form of dehumanization that involves the denial of persons’ humanities by treating them as instrumentalities or things.^[259] This may take many different forms, but two are particularly applicable to the phenomenon of misgendering

[259] See Lina Pap

For one, objectification may result from a denial of subjectivity. This occurs when we treat another person’s subjective experiences or feelings as irrelevant.^[260] When a woman is objectified through obscene catcalls or street harassment, for example, her harasser denies her subjectivity. Which is to say, her objectifier does not recognize the woman’s feelings or her experience. From another view, the harasser may know the comments are unwelcome, but chooses to disempower the victim by making them anyway. The crude comments often involve an unwelcomed imposition; the harasser could have thought whatever he did, but he made the conscious choice to impose his feelings upon the victim by expressing his thoughts.^[261]

[260] Martha C. Nus

[261] Langton, *supra* 228.

Like the harasser who catcalls notwithstanding the target’s fear and disgust, persons who intentionally misgender ignore gender minorities’ subjectivity. As we have seen, gendered misclassifications are experienced as traumatic. To ignore this is to deny the referent or addressee’s subjectivity. As one trans woman expressed, “When someone calls you ‘sir’ in spite of your gender presentation, it is a hostile act . . . It is as though they are saying, ‘Yes, I see that you ‘think’ you’re a woman . . . but it is *more important* to me to express my distaste for transgender people and my indignation at having to serve or look at you”^[262]

[262] Brief of Amici

For two, objectification may take place through a reduction to body,^[263] which is defined as “the treat[ment] [of a person] as identified with [their] body, or body parts.”^[264] When a woman is treated as if she is a sex object—that is, when she is evaluated by her appearance or body, rather than as a fully autonomous person and moral equal—she has been objectified. Put more plainly, persons are more than their bodies and their individual body parts. The objectifying wrong, therefore, is the act of treating another as if their body parts are representative of their personhood.^[265]

[263] Rae Langton, .

[265] Barbara L. Fre

Misgendering qualifies as an objectifying reduction to body.^[266] It objectifies its victims by ignoring their full humanity (their personality, expression, inner life, sense of being, and choices), in view of their genitals: As one person remarked, “If someone misgenders me I feel like I’ve been forced to be naked and that people are

[266] See Alexis Sh

Misgendering

objectify him. By the same token, to refer to a nonbinary person with male pronouns because of their sex organs is to reduce them to their body in an objectifying way. In either instance, the act of misgendering removes the human characteristics of the victim (i.e., his/their gender, constructed life, choices, identity, and personhood), and focuses solely on his/their body.

6. Gender Policing

Intentional misgendering is a technology of *gender policing*. That is to say, it is meant to reinforce a binary, discrete, stable notion of gender, and to punish and censor those who challenge it. Social hierarchies are not self-built, self-sustaining, self-enforcing, nor self-defending. To the contrary, they rely on persons with vested interests to protect them from precarity, and their stability demands constant vigilance. The socially powerful understand this and employ various interventions to neutralize threats to the castes necessary for these hierarchies to continue. Dishonors are among such hierarchy-protective interventions. Essentially, they are verbal barbs designed to reinforce social castes by reminding the societally disfavored of their place.

So understood, historically, the White man who called an educated Black man “boy,”^[268] and the man who refused to address a woman by her preferred title or insisted on referring to her by her husband's last name, had similar aims. In the former, the speaker was deliberately humiliating a person whose existence threatened the principles of Black inferiority necessary to sustain Jim Crow White supremacy. In similar fashion, the latter speaker sought to neutralize a threat to patriarchy.

[268] Recall the urg

I want to suggest misgendering operates similarly. Today, many cisgender persons are heavily invested in the conception of binary, biologically-determined and stable gender categories and gender roles.^[269] For many, gender, gender conformity, and gender immutability are valuable. Recognizing new understandings of gender, particularly those disaggregated from genitalia, and acknowledging gender-transgressive persons, threaten the value some cisgender people find in these concepts.^[270]

[269] See Davina C

[270] See Karen L. F

Not surprisingly, the threat is unwelcomed. It is, as Murray S. Davis poses: “[A]nything that undermines confidence in the scheme of classification on which people base their lives sickens them as though the very ground on which they stood precipitously dropped away.”^[271] Naturally, the reaction to this psychic disequilibrium is negative, if not violent. Those confronted, those “for whom gender forms a cornerstone of their view of the world,” viciously “defend[] the status quo of the existing gender system.”^[272] Thus, the gender destabilizing individual must be disciplined, either by being made to fit into standard categories through rearticulation and rationalization, or made invisible through obfuscation.^[273]

[271] Murray S. Dav

[272] Kate Bornstein

[273] See John M. S

All this to say that misgendering is, often explicitly, a declaration that gender is biologically determinable rather than socially constructed, and binary rather than expansive.^[274] Intentional misgendering, therefore, must be seen as the explicit refusal to recognize these order-destabilizing ways of being, and it must be seen as an effort by cisgender persons to protect that in which they have an interest.^[275] It must be understood as a defense of that in which some cisgender persons find value, at the expense of limiting the freedom and liberty of gender minorities. For these reasons, trivializing intentional misgendering as “just words” is also harmful, in that it ignores the practice is a deliberate effort to break the spirits and silence those who have escaped from the societal conventions.

[274] Jessica King,

[275] See Sean Ara

[278] Id.

7. Epistemic Injustice

Misgendering produces two interconnected harms related to distortions in knowledge creation. Combined, these contribute to *epistemic injustice*. Miranda Fricker's work sorts epistemic injustice into two categories: *testimonial injustice* and *hermeneutical injustice*.^[276] This Subsection documents how misgendering contributes to both.

[280] Id. at 17.

[276] Miranda Frick

Fricker finds testimonial injustice “occurs when prejudice causes a hearer to give a devalued level of credibility to a speaker's word.”^[277] Put another way, it is the harm present when a speaker's words are granted less credibility, simply on account of her identity.^[278] As Fricker puts it, negative stereotypes about the speaker's

[277] Id. at 1.

[282] See Deborah

Misgendering

so doing, the speaker is harmed in her “capacity as a knower.”^[280]

Pause, for a moment, to consider the role of invidious group stereotypes in the process of reducing the speaker’s credibility. As Fricker points out, “Many of the stereotypes of historically powerless groups . . . involve an association with some attribute inversely related to competence or sincerity or both over-emotionality, illogicity, inferior intelligence, evolutionary inferiority, incontinence, lack of ‘breeding’, lack of moral fibre, being on the make, etc.”^[281] Thus understood, testimonial injustice might most obviously occur in situations involving identities societally associated with less credibility, examples include women,^[282] racial minorities,^[283] and persons who are both.^[284]

[281] Id. at 32.

To reinforce the concept, it will help to briefly assess an example of testimonial injustice in the context of sexual violence. In the typical *he-said-she-said* situation, necessarily, there must be a weighing of accounts.^[285] Very often, the imputed diminished credibility of women manifests in the problematic standard questioning—“What was she wearing?” “What was she doing?” “Did she somehow cause it?” “Did she adequately resist?”—and the absence of similar interrogation of the man. This privileging of men’s accounts over women’s, despite the fact that the overwhelming majority of sexual violence is unreported and false accusations are few,^[286] relies on stereotypical assumptions of women’s veracity. It is testimonial injustice that explains the credibility deficit and widespread-yet-unwarranted skepticism of women’s allegations of sexual violence.

[285] Incredible Wo
note 282, at 3

[286] See Nat’l Sex
[290] As a result, illustra

The second form of epistemic injustice Fricker identifies, *hermeneutical injustice*, refers to “the injustice of having some significant area of one’s social experience obscured from collective understanding owing to persistent and wide-ranging hermeneutical marginalization.”^[287] That occurs when an idea or event is rendered unintelligible by the wider society because the person who experiences it does not contribute to the collective socio-epistemic structures that create shared social meaning.^[288] In other words, hermeneutical resources are the tools we use for understanding the world, such as the language, propositions, and concepts through which we interpret.^[289] When identity discrimination is the reason society lacks the necessary tools for us to understand phenomena around us, that is a hermeneutical injustice.^[290]

[287] Fricker, *supra*

[289] Epistemic Op
note 284, at 2

[293] See Tracey M.

Again, an illustration will prove helpful. We might take the example of Fourth Amendment cases involving Black people. All too commonly, when evaluating police officers’ conduct, White judges interpret officers’ actions through their own lived experience—rather than the Black defendants’.^[291] In doing so, the victims’ very real, very racialized, experience is ignored or even rendered unimaginable. There are at least two non-nefarious reasons for this. Because the experience of racially targeted police behavior is (1) not shared by everyone in society, and so White judges cannot relate to it, and (2) has not yet been added to the collective hermeneutical resource, and therefore White judges cannot understand it. Simply, there is a hermeneutical chasm between White judges’ and Black defendants’ lived experience. Viewed thus, it is hermeneutical injustice that accounts for the late Justice Scalia’s derisive biblical admonition that only “the wicked flee when no man pursueth,”^[292]—in discussing *Hodari D.*’s choice to run from the police—ignoring completely rational reasons why Black persons would avoid the police.^[293]

[291] See Roseann

[292] *California v. H*

Misgendering involves and contributes to both forms of epistemic injustice. In the first place, it implicates testimonial injustice. As scholars have already previously described, societal narratives paint transgender persons as inauthentic and deceptive.^[294] Many of these narratives carry over for other gender-expansive individuals. For instance, in litigation involving access to public facilities, persons advocating anti-gender minority positions have repeatedly made the argument that nonbinary and gender fluid identities are deceptive claims made to wrongfully gain access to bathrooms (often, allegedly, for improper purposes).^[295]

[294] Talia Mae Bett

[295] E.g., *Adams v.*

In practice, frequently, misattributions of gender involve the deliberate exploitation of false notions of gender minorities’ diminished credibility. At its core, to intentionally misgender is to accuse another person of lying (about their gender). In short, it is a claim that the misgenderer has some form of epistemic authority over the referent’s body and consciousness that exceeds that of the misgendered.^[296] Thus, the dismissal of persons’ appropriate forms of address implicitly relies on the stereotypes of gender minorities as deceptive and feeds narratives of gender minorities’ diminished authenticity.

[296] See MJ Eckh

Misgendering

Gorcenski for malicious prosecution when she served as a witness against him for charges related to his conduct at the rally. Throughout the malicious prosecution suit, Cantwell's attorney misgendered Gorcenski with male pronouns and honorifics and deadnamed her. In response to Gorcenski's motion to recaption the case to reflect her current name, Cantwell's attorney, filed a motion including the following:

Despite his *[sic]* best efforts to the contrary, Gorcenski is not in fact a female human being having been born with and retaining the XY chromosome. . . . Gorcenski's presenting himself *[sic]* as female is untruthful, mendacious, and deceptive. He *[sic]* is free to suffer the consequences of his *[sic]* decision, but has no right to force others to condone his *[sic]* lie. He *[sic]* further has no right to ask a court of law to condone his *[sic]* lie, nor to ask that court to force others to condone it. The United States District Court exists to determine the truth, not to condone falsehoods nor encourage or force others to do so. A United States District Court Judge is not a "transmagistrate;" the magistrate judge is not a "transjudge" any more than counsel for Plaintiff is "transthin," "transyoung, or trans-not-balding." Convicted criminals are not "translawful." Cars with rolled back odometers are not "transmileage;" and perjury is not "transtruth,["] except to used car salesmen and perjurers *[sic]*. This motion should not be transdenied, but rather granted.^[297]

[300] Interview with

[297] Motion for Enl

Here, the attorney's vastly inappropriate responsive motion makes the testimonial injustice obvious. The motion misgenders Gorcenski and, at the same time, offers the justification that to address Gorcenski appropriately is to "lie" or "condone falsehoods." Gorcenski's first-person authority, that is, her rightful claim of being an expert on herself, is wrongfully ignored.^[298] This is Woodward stating, quite explicitly, that his account of Gorcenski's gender and name are more credible than her own. How could this be? Indisputably, it is Gorcenski, more so than Woodward—or anyone else for that matter—who has the most knowledge of her gender.^[299] Thus, Woodward's misgendering constitutes testimonial injustice since Gorcenski's account of herself was inappropriately undervalued because of her gender.^[300]

[298] See Talia Mae

[299] See Mathew

Misgendering also involves hermeneutical injustice because it is both the result of, and furthers, gender minorities' restricted contribution to the collective structures that create shared social meaning.^[301] On a most basic level, misgendering is the result of gender minorities' exclusion from the resources with which we interpret our lives. Hermeneutical marginalization is precisely why some cisgender people cannot understand or appreciate gender minorities' descriptions of their gender.^[302] Being silenced is why, rather than viewing a trans woman as a woman, some cisfolk see her "experience through a framework that positions her as a man living as a woman," which "is to simply fail to adequately represent her experience at all."^[303]

[301] See Stephanie

[302] See Quinn Mc

[303] Talia Mae Bet

But also, misgendering furthers gender minorities' hermeneutical disadvantage. To willfully mislabel someone is to deny them the opportunity to express and develop their own terms.^[304] This view of hermeneutical injustice seems particularly applicable to the resistance to neopronouns. Imagine Alejandra, who is nonbinary, uses ze/zir/zirs pronouns. For another person, Johnathan, to dismiss these pronouns as "made up," and to insist on addressing Alejandra by she/her/hers pronouns, is for Johnathan to contribute Alejandra's continued hermeneutical marginalization. Johnathan has refused to recognize the validity of the conceptual tools Alejandra uses to make sense of zir reality.^[305] And, by refusing to engage with or use neopronouns, Johnathan is (willfully) stymying the process of the acceptance, use, and proliferation of neopronouns, and in so doing, limits nonbinary persons' ability to contribute to our collective hermeneutical resource.^[306]

[304] Kapusta, *supra* 504–05.

[305] See Freeman

[306] See Guro Parr

The consequences of exclusion from shared social meaning also extend beyond persons who are deliberately misgendered. Imagine another person, Xena, is prevented from knowing and understanding zir true gender and the associated pronouns because Johnathan and people like him prevented the adoption of Alejandra's neopronouns. Thus, Xena is also disadvantaged; Xena never received access to the understanding and shared vocabulary and meaning necessary to articulate zir experiences.^[307]

[307] See Cull, *supra*

In sum, misgendering is harmful for producing epistemic injustice along two axes. It causes testimonial injustice because it feeds on and contributes to narratives about gender minorities' diminished credibility and because it wrongfully discredits gender minorities' accounts of their gender. At the same time, it causes hermeneutical injustice by furthering the exclusion of gender minorities from the structures that create shared social meaning.

[309] Joseph Raz, *T* Freedom 369

[310] See Lal Zimm

Misgendering

Misgendering infringes and curtails the autonomy of gender minorities. To speak of autonomy is to state both that a person has the capacity to make their own decisions and that they live under conditions that allow their life to remain their own as well.^[308] In the simplest terms, the autonomous person is the “author of [their] own life.”^[309]

[312] In present w

[308] Benjamin Eide

One dimension of this self-determination is one’s gender and gender expression.^[310] We must come to understand that living openly in a manner consistent with one’s gender (including through the use of pronouns and gendered language) is an assertion of autonomy. These are radical decisions of self-authorship and self-definition: these are actions by gender minorities intentionally chosen to shape and define their lives, as opposed to accepting the definitions imposed upon them by others.^[311] In short, they are expressions of gender autonomy.^[312]

[311] See Robin De

Seen in this light, misgendering can be understood to infringe gender autonomy in both direct and indirect ways. Directly, both negligent and intentional misgendering ignore the autonomous choices gender minorities have made regarding how to live their lives.^[313] Negligent misgendering normally relies on stereotypes that link appearance and gender; because someone appears male, the speaker assumes they use male pronouns. But this judgment fails to properly weigh the evidence of the person’s self-authoring choices.^[314] In that split-second decision, the speaker fails to pay attention to the person that the subject has made themself

[313] Davis & McCr

See Mia Fisch

[314] See Eidelson,

Intentional misgendering similarly impairs autonomy. Deliberate misattributions of gender, as we have seen, are a concentrated effort to impose an incorrect definition.^[315] They aim, primarily, at “frustrat[ing] an individual’s success in externalizing their self-identity, making it more difficult for them to come to occupy the social position associated with that identity.”^[316] Intentional misgendering therefore rejects, and is intended to reject, the gender minority’s agency in deciding how they live their lives.^[317] On this reasoning too, we must understand that misgendering restricts autonomy.

[315] See Joli St. Pe

[316] Dembro & Si
supra note 31

Indirectly, misgendering is an oppressive external condition that may stymie individual autonomy. To appreciate this, note again that autonomy requires more than the capacity to make one’s own decisions. It also requires the necessary external conditions to make these self-defining choices. Severely oppressive or constraining social conditions, therefore, operate to limit the capacity for autonomy.^[318]

[318] E.g., Paul Ben

Exposure to a constant barrage of external messages deeming one inferior erodes internal trust and self-worth and, consequently, decreases the likelihood of autonomous expression.^[319] Self-trust and self-respect are integral conditions for expressions of autonomy; one cannot make or implement self-authoring decisions without trusting oneself.^[320]

[319] Trudy Govier,

[320] *Id.*; Thomas N

Understood thusly, we can see how the consistent misclassifications of gender minorities function to diminish their self-respect and autonomy.^[321] Talia Mae Bettcher reminds us, “To be regarded as ‘really a man’ at every turn can undermine a trans women’s sense of worth as an agent attempting to set forth her conception of what it is to live her life on her own terms, as a woman.”^[322] By eroding gender minorities’ self-respect and self-worth, therefore, misgendering can also indirectly abridge autonomy.

[321] Stephanie Ka

[322] Bettcher, *supr*
124.

9. Gender Sadism

Intentional misgendering often involves misgenderers deriving pleasure, satiation, or feelings of superiority. There is a word for such fulfillment gained from the pain of others; that word is “sadism.” As it relates here, gender sadism is the enjoyment, pleasure, satisfaction, or feeling of superiority derived from denying the social equality of gender minorities through deliberately misgendering them.

To better see how sadism is bound up in deliberate misgendering it will be helpful to consider sadism’s relationship to dishonors more broadly. Return to the earlier explication of the inequality that Jim Crow laws imposed on Black people. In addition to material inequality, Jim Crow used social practices, including dishonors, to create racial inequality. Tellingly, no one would suggest that White persons’ use of dishonors conferred any tangible benefit. Put more roughly, White persons gained nothing tangible from

Still, there must have been something to gain. Otherwise, we might assume these practices would not have existed. When these social and symbolic forms of violence are included alongside overt racial violence and terror, the benefit, I think, must be psychic.^[323] Which is to say, there must have been some psychological gratification gained from verbally inflicting pain upon, being cruel to, disrespecting, antagonizing, frustrating, or otherwise inconveniencing Black people—no matter how trivial or spectacular the pain, suffering, cruelty, disrespect, antagonism, or frustration.^[324]

[323]

For support for

[324]

Cf. The Derric

The point holds when we reflect on women's experiences. By taking a fresh look at examples of men deliberately misaddressing women, we can easily see elements of sadism. A male employee who steadfastly refuses to address his female colleague with her professional title gains nothing tangible. His job performance and role remain the same, and he is no better at his job for having disrespected his colleague. The conclusion is that this misogynistic disrespect is, I think, sadistic.^[325] The same is true of the person who intentionally mispronounces the ethnically-marked name of another or the person who uses male pronouns or names when referring to a lesbian woman.

[325]

Cf. Tiffany D. F

Against this, there is ample reason to believe that, today, there are persons who find sadistic satiation in being verbally cruel towards gender minorities.^[326] To be sure, the conclusion that intentional misgendering involves sadism may strike some as an overreach. Assuredly, however, it is not. Think of the media's misgendering of Chelsea Manning, when she initially announced she was trans in 2013.^[327] In one broadcast, Fox News went as far as to play Aerosmith's song "Dude (Looks Like a Lady)," while juxtaposing photographs of Manning pre-transition in military uniform and post-transition.^[328] Clearly, the entire segment was meant to be a cinematic production with Manning as the punchline. In other media outlets, commentators joked Manning would get "'good practice' being a female in prison."^[329] Again, the punchline being Manning's harm. Obviously, none of this was necessary. So why do it? Why go to such lengths to debase and be deliberately cruel?

[326]

As jarring as t

[327]

For extensive

[328]

Fischer, *supra* 44.

[333]

It's Ma'am, Kn

[329]

Jase Peoples,

To further see this point, consider a 2019 viral video of Tiffany Moore reacting angrily about being misgendered.^[330] In the video, Moore can be seen yelling and cursing at a store employee. In a follow up interview, Moore relayed she lost her composure after the cashier repeatedly called her "Sir" "ve or six times."^[331] Public reactions to the video cut to the heart of the perverse enjoyment I have described. Social media users shared the clip with comments and captions such as "What happens when you 'misgender' someone . . ." "Macho Ma'am Tranny Savage," "He-Ma'am," "That was quite a testosterone fueled rage!" among others.^[332] The ordeal went on to launch a stream of internet memes similarly mocking Moore.^[333]

[330]

Kai Porter, *Tra*

[331]

Id.

[332]

Alex Bollinger

[336]

See Paulo Fre

These examples, along with the host of other jokes, comedic material, and memes making light of misgendering,^[334] indicate a market for enjoyment derived from witnessing gender minorities' obvious distress: a libidinal economy of persons producing, trading in, profiting from, and consuming some psychic value found in the terror, discomfort, and pain gender minorities feel when they are misgendered.

[334]

See, e.g., Amr

Involvement in gender sadism is not unharmed. In addition to the direct burdens gender-diverse persons must bear as the targets of misgendering, there are real affective, psychological, moral, and spiritual costs borne by those engaged in gender sadism. Indeed, studies find participation in sadistic acts ultimately causes perpetrators emotional pain and increased negative affect.^[335] This is not surprising. Involvement in any form of oppression injures both the oppressed and the oppressing.^[336] Just as participation in anti-Black racial sadism harms Whites, participation in misogyny harms men, and homophobia harms heterosexuals, so too does the involvement in gender sadism injure cisgender persons.^[337] For this reason, as well—the affective, psychological, moral, and spiritual injuries borne by persons who derive enjoyment, pleasure, satisfaction, or feeling of superiority through verbally humiliating gender-diverse persons—misgendering is harmful.

[335]

See David S. C

[337]

See, e.g., Deri

10. Measurable Psychological and Physiological Injuries

Given the other harms listed above, unsurprisingly, misgendering imposes a host of psychological and physiological injuries. Studies find that the use of the incorrect pronoun, name, or gendered title are

Misgendering

”

This causes both instantaneous and accumulating harm. In the moment, misgendering induces anxiety. When they are misgendered, gender minorities report mentally calculating whether the misattribution was done intentionally or accidentally. They must further question whether to correct the speaker or not, whether the speaker’s misattribution has placed them in danger, and what the speaker’s misspeaking says about their gender presentation.^[339] Then, even when the episode is over, gender minorities replay and reanalyze misgendering language, causing further harm.

[339] See St. Patrick

The additive effects of these episodes are worse. Considered cumulatively, microaggressions have severe effects on targets’ mental and physical health. In the long term, gender minorities experience misgendering as extremely stigmatizing and psychologically and emotionally distressing.^[340] Gender misclassifications are also associated with lower self-esteem and increased negative views of self.^[341] The clear psychologically detrimental impact of gender misattributions is underscored by studies finding that, among gender minorities, increased exposure to misgendering is associated with significantly increased feelings of hopelessness, apathy, depressive symptomology, and suicidal ideation.^[342]

[345] E.g., Elizabeth

[346] See, e.g., Lau

[340] E.g., Kevin L. F

[347] E.g., Phan Y. F

[348] E.g., Melinda I

[349] See, e.g., Amy

[342] See, e.g., Nich

[350] See Nikki Kha

Misgendering is further psychologically harmful because it invalidates gender minorities’ identities and triggers emotional harms related to the undermining of their self-perception. Individuals need their private experiences to be validated or otherwise “met with understanding, legitimacy, and acceptance . . .”^[343] On the contrary, invalidation—the process of having internal experiences trivialized or disregarded—is often traumatic and isolating.^[344] Across a swath of contexts, psychologists find the invalidation may lead to and amplify emotional distress,^[345] depression,^[346] and PTSD,^[347] as well as confusion and questioning of one’s internal feelings and sense of self.^[348] Consistent invalidation, therefore, is widely considered a form of emotional and psychological abuse.^[349]

[352] Id. at 113.

[343] Chad E. Shenl

[344] See Ronald C.

[354] E.g., Kerry An

[355] See, e.g., Mari

With respect to identity, invalidation can be particularly harmful. Identity development is a two-part process. First, one internally self-defines, and second, others externally either affirm or deny the self-definitions.^[350] These denials may occur through explicit rejection or denial (“You say you are X but you *are not* X”), assumption and ascription (“You *are* X”), or through imposition (“Even though you claim to be X, you are *actually* Y”).^[351] In turn, where external responses create distance between self and societal understandings, or challenge internal senses of self, individuals experience those responses as hostile and disconcerting.^[352]

[356] See Margaret

[357] See Marisa G.

[358] Cf. A. Finn Enl

[351] Marisa G. Frar

To fully see these harms, consider the case of multiracial individuals whose racial identities may not be readily perceived by others. Frequently, these persons face identity invalidation when others either reject their self-selected identities or impose a racial identity.^[353] A chronic stressor, when multiracial individuals have their racial identity invalidated, they face increased psychological distress and suicidal ideation,^[354] increased feelings of isolation and confusion,^[355] decreased senses of self-esteem and self-perception,^[356] and a sense of threatened identity.^[357] In view of these findings, it is not difficult to see how misgendering inflicts the psychological harms related to identity invalidation.^[358]

[353] Samuel D. Mu

Finally, for gender minorities who experience gender-related dysphoria, a condition of clinically significant distress or discomfort resulting from an incongruence between gender assigned at birth and current gender, misgendering is especially traumatic.^[359] Social transition, a process that typically involves the changing of one’s pronouns, names, and way of dress, has been found to alleviate feelings of anxiety, depression, and suicidality, associated with dysphoria.^[360] For persons experiencing gender dysphoria, rejection of their identity through misgendering further exacerbates feelings of distress, disquietude, and suicidal ideation associated with the condition.^[361] Thus, for some gender minorities at least, using gender-appropriate language is a medical necessity.

[359] Peggy T. Coh

[360] See Gonzalez

[361] Arayasirikul &

* * *

The lived experiences of gender minorities render the trivialization objection moot. While pronouns, titles, and other gendered terms may not mean much to speakers, from the perspectives of gender minority referents, these words are extremely impactful and potentially devastating. Misgendering is disrespectful, humiliates gender minorities, deprives them of privacy, safety, and autonomy, contributes to epistemic injustices, and is a

Misgendering

misattributions are inconsequential.

III. Misgendering and the Law

This final Part reorients towards the contemporary moment. Primarily, it grapples with how lessons learned from history and firsthand accounts of gender misattributions should interplay with the law. The implications of these lessons for the law are, I believe, profound.

Most obviously, these lessons raise questions about the interaction of misgendering and free speech law. Many critics argue legal interventions against misgendering violate the First Amendment. However, the arguments laid out below should give such criticism pause.

There's more. The understanding gained from the experiences of gender minorities touches and informs divergent areas outside of First Amendment speech law, from religious freedom and criminal law, to even the law of incarceration and professional responsibility, among others.^[362] Some examples: Should the law accommodate persons who believe their religious convictions prevent them from using gender minorities' appropriate gendered language? Could the professional responsibility rules sanction members of the bench and bar who willfully disrespect gender-diverse parties through misgendering in their filings and opinions? Consider a custody decision involving a gender-diverse child. In balancing the child's best interest, how must the law weigh one parent who misgenders the child and another who respects the child's identity? Finally, suppose a testamentary instrument misgenders a beneficiary—how should a probate court interpret the document? Is the bequeathed property delivered, or does it lapse?

[362] The examples

In what follows, I consider these and other potential questions and, very provisionally, suggest some answers. The discussion proceeds from the abstract to the specific. From a high level, Sections A–E address misgendering and various aspects of doctrinal law. Narrower in scope, Section F takes on misgendering in some specific contexts and places, examining the laws related to the workplace, schools, hospitals, and prisons. Finally, Section G ends this Part by describing interventions against misgendering within the legal profession.

A. Speech Law: Why the Unconstitutional Speech Regulation Objection Fails

Misgendering raises several thorny First Amendment issues. Specific efforts^[363] to regulate misgendering in the workplace—what others have dubbed “pronoun laws”—raise questions of both the unconstitutional suppression and compulsion of speech.^[364] Roughly, the laws fall into two categories: (1) regulations using misgendering as evidence of a hostile environment, thereby tracking Title VII's interpretation; and (2) regulations effectively requiring the use of gender-appropriate language by punishing the continued refusal to use it.

[363] By this I mean

[364] Thus far, pron

Regulations in Colorado, Washington State, and Washington, D.C. fall into the first category.^[365] For example, the D.C. municipal regulation prohibits “harassment and actions that create a hostile environment based on gender identity or expression,” which include “[d]eliberately misusing an individual's preferred name, form of address, or gender-related pronoun.”^[366]

[365] See Colo. Cor

[366] D.C. Mun. Reg (2006).

By contrast, only the law of New York City belongs to the second group. The New York City Human Rights Law (NYCHRL) “requires employers . . . use the name, pronoun and title . . . with which a person self-identifies, regardless of the individual's sex assigned at birth, anatomy, gender, medical history, appearance or sex indicated on the individual's identification.”^[367]

[367] N.Y.C., N.Y. Ad

While the aims of the laws converge, and the critiques of pronoun law—what I will collectively call the *unconstitutional speech regulation objection*—share a similar pattern, the implicated constitutional issues are distinct. The objection is really two sub-arguments. The first class of pronoun laws in Colorado, Washington

Misgendering

restrictions—laws which target speech based on the ideas or viewpoints expressed—and are therefore subject to strict scrutiny.

The second class of pronoun laws, New York City’s law, prompts the question of whether it is permissible to require persons to use gender-appropriate language. This raises a compelled speech argument that New York City’s law forces persons to express viewpoints that they do not hold or would not otherwise voice

1. Free Speech

[369] *Id.*
[370] *Id.*

Put briefly, the First Amendment prohibits the government from restricting speech or expressive conduct based on disapproval of the ideas expressed. Laws that regulate speech based on its content, therefore, are presumptively unconstitutional and subject to strict scrutiny. Additionally, where speech is targeted, not only for content, but instead for specific views, invalidation is almost inescapable.

In considering whether the first group of pronoun laws are unconstitutional, the preliminary question should be whether the laws target speech. Some critics take the answer as given, but it is not. In *R.A.V. v. City of St. Paul*, the U.S. Supreme Court recognized a “valid basis for according differential treatment to . . . a content-defined subclass of proscribable speech” that “happens to be associated with particular ‘secondary effects’ of the speech.”^[368] This subclass includes “laws directed not against speech but against conduct.”^[369] As the prototypical example of such laws, the Court pointed to Title VII’s prohibition on “sexually derogatory ‘fighting words’” as part of a larger prohibition on sex discrimination.^[370]

[368] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992).

On those facts, there is a plausible argument that because the first group of pronoun laws targets discriminatory and hostile actions in employment, they primarily target workplace harassment. So, while the language of the first class of pronoun laws does specifically refer to types of speech, it is reasonable to view them as not aimed at the speech or the speech’s content, so much as identifying a leading exemplar of harassing conduct against gender minorities.

If we accept, however, that pronoun laws target speech and are outright content-based restrictions, then strict scrutiny applies. But even that does not mean their unconstitutionality is inevitable.^[371] Resembling the language of Title VII’s “hostile environment” jurisprudence, the first set of pronoun laws trigger the same First Amendment issues raised in the application of Title VII to hostile work environments. And many of the same responses as to why Title VII does not unconstitutionally restrict speech apply.

[371] *Luke Boso v. City of St. Paul*, 2019 WL 1111111 (D. Minn. 2019).
[375] See Richard H. Pildes, *Speech, Privacy, and the First Amendment*, 101 Harv. L. Rev. 1215 (1989).

To begin with, the state’s interest in protecting gender minorities is undeniable. As the Supreme Court found in *R.A.V. v. St. Paul*, “ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace,” is undoubtedly compelling.^[372] Underscoring that point, in *Roberts v. United States Jaycees*, the Court likewise reasoned, “removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups” was a compelling government interest, given “the importance, both to the individual and to society.”^[373] Seen in such light, the government’s interest in protecting gender minorities is clearly compelling.

[372] 505 U.S. at 391.
[377] See Lisa B. Bird, *Speech, Privacy, and the First Amendment*, 101 Harv. L. Rev. 1215 (1989).
[373] *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984).

Further, pronoun laws are quite narrowly tailored. Which is to say, they “target[] and eliminate[] no more than the exact source of the ‘evil’ [they] seek[] to remedy.”^[374] The regulations only target one-to-one harassing speech.^[375] By their text, none of the pronoun laws limit employees’ ability to advocate or express their views on gender or gender identity either at work or outside of it. Importantly, under the laws, accidental misgendering is not punishable, and employees are free to espouse any transphobic views unless they (1) are targeted at specific coworkers; and (2) are sufficiently pervasive to create an objectively hostile environment.

[374] *Frisby v. Schultz*, 474 U.S. 485 (1985).
[380] If we think of the workplace as a public forum, the regulations are even more narrowly tailored.

Next, the context of the speech is significant.^[376] The workplace differs vastly from the traditional public forum.^[377] The unavoidability of being exposed to the harmful speech—gender-diverse employees are a captive audience, as they have no alternative to work—makes the regulations even more necessary.

[376] *Frisby*, 487 U.S. at 494.

Misgendering

round, the First Amendment values that typically justify finding content-based regulations unconstitutional are not implicated in this narrow context.^[379] Weighing the factors, it is completely possible, if not likely, that the first set of pronouns laws can withstand strict scrutiny.^[380]

[379] *Id.*
[384] Note, *Two Mo*

2. Compelled Speech

New York City's law raises compelled speech counterarguments. In recent times, it has become *de rigueur* to claim that any antidiscrimination law aimed at protecting the dignity of minorities somehow unconstitutionally compels speech.^[381] Predictably, these arguments have also been raised in relation to pronoun laws with First Amendment absolutists denouncing these regulations as unconstitutional speech compulsions. Condemning New York City's law as "designed to target a broad swathe of conduct and speech" and lofty "codified anti-microaggression prohibitions," one commentator swiftly concluded the law could not survive strict scrutiny—without examining the harms the regulations are designed to prohibit.^[382]

[381] See Terri R. D.

[386] *Wooley v. May*
705, 715 (1977)

[382] See *id.*
Cf. *PruneYard*

I would not be so fast.^[383] As a general matter, compelled speech doctrine is a morass; the result of the analysis, therefore, is significantly cloudier than some commentators would have us believe.^[384] In fact, on careful review, several factors cut against a finding of unconstitutionally compelled speech, particularly because gendered language does not carry the kind of semantic meaning that is constitutionally protected

[388] E.g., *Hurley v.*
[383] *Nor would ma*

For one, it's unclear what exactly is being compelled. Regulations mandating gender-appropriate language are not examples of the government selecting a message and forcing persons to speak. This is not a case of the government saying, for instance, all persons who identify as X should be addressed as Y. Rather, the choice of gendered language lies in the hands of the gender-diverse employee. On those facts, these laws are not the prototypical speech compulsion where the speaker is given a "government-drafted script"^[385] or is forced to serve as a "billboard" for the State's ideological message.^[386] It cannot rightly be said that the government has selected a favored message.^[387]

[385] *NIFLA v. Bece*

More aptly, these laws might be characterized as "accommodations" of others' messages.^[388] Yet, even then, what speech—if any—will actually be compelled is far from clear. Compelled-speech objections mistakenly rely on at least two assumptions: (1) that speakers will ever be in a situation where a gender-diverse person makes their gender-appropriate language known and (2) that the gender-diverse person will select language the speaker finds offensive (i.e., will use neopronouns).

[391] See Seana L.

[392] Larry Alexand

Neither is necessarily true. A gender minority with no preference for pronouns, who does not make their preference known, or who prefers language in line with their gender assigned at birth will not trigger the speaker to speak any particular message. So, if the linchpin of compelled speech is being required to express viewpoints one finds abhorrent, it's not certain that pronoun laws actually require that^[389]

[394] Stern, *supra* n
909.

[395] Relatedly, the

[389] See Leslie Gie

For two, there is no guarantee that the use of another person's pronouns will be misattributed as the speaker's message.^[390] At first glance, it may seem like the use of gendered language will readily be attributed to the speaker; in everyday conversation, one does not usually say things they do not believe in.^[391] But civility, particularly in the workplace, is rarely interpreted as the employee's free choice.^[392] For instance, few believe that every time a store employee asks how we are or if we need assistance, they are actually interested; rather, they are more understandably compelled to ask as a condition of their employment. And, as the Court has pointed out, where the listener expects the speech to be coerced or unwilling questions of misattribution are irrelevant.^[393] Equally critical, the conclusion that gendered language will be misattributed to the speakers overlooks the speakers' ability to distance themselves from the speech in question.^[394] Nothing on the face of any regulation prohibits speakers from disavowing using gender-appropriate language or making their views on gender minorities known at any time.^[395]

[397] Nadia N. Sawi
[390] See Laurent S
[398] See Respondi

[400] See Recent C

[401] See Day, *supra*
[393] See Rumsfeld
70.

For three, the Court has found speech compulsions unconstitutional where laws or policies require the affirmation of an "ideological message."^[396] Admittedly, what constitutes an "ideological message" for compelled speech purposes is unsettled.^[397] Even so, it is highly unlikely gendered language qualifies.^[398]

[396] *Wooley v. May*

[404] There are mai

Misgendering

ideology”^[399] or statements in support of liberal politics.^[400] Melding the two points slightly, one commentator has written, “[c]ompelled use of politically correct pronouns requires a speaker to convey the message of accepting non-binary gender classification.”^[401]

[399] Recent Case,

These characterizations are unconvincing. The contentions would suggest that every time the speaker uses pronouns or gendered titles, they send “ideological messages” about gender, sex, and the immutability of either. That argument is as clearly illogical as it is untrue.^[402] On that logic, every word said expresses some element or support, a promise, or approval. But it does not follow, obviously, that addressing a judge with “Your Honor” conveys any ideological messages about the judge’s honorability.

[406] *Becerra*, 138 S

[407] *Rumsfeld v. F.*

[408] *Boy Scouts of*

[409] See Agency fr

[410] I acknowledg

Rather, if pronouns, honorifics, or gendered terms say anything, it is a message of respect.^[403] But that does not qualify as the endorsement of an ideological viewpoint.^[404] Clearly, we do not view referring to a Black person with honorifics or referring to a woman by her professional title as conveying or endorsing ideological messages about Black people or women. Instead, we see the terms as limited, neutral, and ordinary facets of respectful interaction. Thus, it is difficult to see exactly what ideological message the speaker is forced to “assert” or “endorse” by using gender-appropriate pronouns, honorifics, or terms.

[411] Here, I assum

[403] See Motion to

For four, the Court has found speech compulsions unconstitutional where they “alter[],”^[405] “drown[] out,”^[406] “interfere[] with,”^[407] “impair[],”^[408] or otherwise “distort[]” the speaker’s message.^[409] But gendered language is not semantically disruptive.^[410] By this, I mean that it is not typically used to express or constitute a primary part of what a speaker is trying to say; gendered language is only ancillary or supplementary.^[411] Consequently, its effect on speakers’ principal message is negligible at best. Illustrations will help:

[405] Nat’l Inst. of F.

Example 1:

“Did you see Jerri’s new guitar?”

“Did you see *her/his/their/zir* new guitar?”

Example 2:

“I’m looking for Ms. Avery. Do you know where she is?”

“I’m looking for *Mx.* Avery. Do you know where *he/she/they/ze* are?”

Example 3:

“I believe that gender is sex-linked, immutable, and biologically determined. Therefore, despite whatever Lee says, I do not view *her* as a woman.”

“I believe that gender is sex-linked, immutable, and biologically determined. Therefore, despite whatever Lee says, I do not view *him* as a woman.”

In any of these examples, the gendered language does not form part of the focal message and importantly, changing it does not affect what the speaker seeks to convey. Plainly, in example 1, the core message is about whether the listener has seen Jerri’s guitar; in example 2, the core message is whether the listener knows the location of a third party with the last name *Avery*; and in example 3, the core message is that the speaker views gender as “sex-linked, immutable, and biologically determined,” and as a result does not consider Lee a woman. Nowhere have the speakers’ fundamental messages been altered, drowned out, interfered with, impaired, or otherwise distorted.^[412]

[412] Precisely bec

The examples all make the same point. Functionally, the gendered language is simply the replacement of a noun, name, or other marker word; it only works to identify or refer. “Proper names and pronouns,” sociolinguist Sally McConnell-Ginet rightly emphasizes, “do not standardly have content in the same way as ordinary common nouns do. . . . [R]ather than characterizing, they indicate a person or group.”^[413] This

[413] Sally McConn

Misgendering

argument have failed to acknowledge these points, much less address them.

Given this, it is difficult to reasonably argue that pronoun laws actually alter or distort the content of the speaker's message. Simply, if it is the primary message that matters, the arguments that pronoun laws interfere with the speakers' right to "choose the content of [their] own message" fail.^[414] Again, this factor suggests the conclusion that pronoun laws unconstitutionally compel speech is far from inescapable

[414] Hurley v. Irish-

For example, consider the consequences of crediting this argument. Accepting the argument that pronoun laws are unconstitutional speech compulsions undercuts antidiscrimination law more broadly. To understand the far-reaching repercussions, take a scenario of a homophobic and racist employee, *A*, who views Latinx people and gay people as less valuable than White heterosexual males. While at work, *A* routinely insults a gay coworker, *C*, by calling him "she," "her," and "girlfriend" and using the title "Miss," on the belief that, because of his sexual orientation, *C* is not "a real man"; *A* routinely insults a Latinx coworker, by addressing him by "boy," and by his first name only (while addressing White coworkers with titles), on the belief that, because of his race, *B* is subhuman.

Is a law unconstitutional if it prohibits *A*'s conduct, requiring him to address his coworkers properly or face sanction? If we accept the argument that pronoun laws unconstitutionally compel speech, the answer must be "yes." In this hypothetical, *A* could easily argue that his potential punishment forces him to express opinions he does not believe in. Namely, (1) that gay men are equal to and should be treated the same as their heterosexual counterparts; and (2) that Latinx people are equal to and should be treated the same as White persons. In either instance, *A* is called to behave in ways that his own views—that gay men aren't "real men" and that Latinx people are unequal to White ones—cut against.

Normally, we would rightly brush this objection aside. Whatever *A*'s genuine beliefs, *B* and *C* are still being subjected to a hostile work environment and harassment. And these are just examples related to dishonors. Following the logic of the speech compulsion argument, requiring a misogynist employee to treat or at least speak to female colleagues and customers with the same respect he gives to men would likewise be an unconstitutional speech compulsion. Discrimination law is not so oblivious and ineffective that any assertion of compelled speech causes it to turn a blind eye to *B* and *C*'s—or any harassed person's—unacceptable mistreatment. New York's pronoun laws, as they have so far been written and implemented, go no further than employment discrimination law generally or remedying the harassment captured by the above hypotheticals. For this reason, too, lest we unravel well-established antidiscrimination protections, the compelled speech argument against gender-appropriate language use must fail.

* * *

To summarize, the reasoning of the unconstitutional speech regulation objection leaves much to be desired. The argument that pronoun laws unconstitutionally restrict speech succumbs to the fact that pronoun laws can be viewed as targeting harassing conduct rather than speech and that they can very likely survive strict scrutiny. Among several other deficiencies, the contention that pronouns unconstitutionally compel speech fails for ignoring that gendered language does not comprise part of the constitutionally protected portion of speakers' core messages. In short, like the rest, the unconstitutional speech regulation objection is ultimately untenable.

[417] In one example

Having set this final objection aside, the remaining sections now turn to the task of how misgendering should interact with the law more broadly.

B. Religious Freedom Law

As with other progress for LGBTQ+ persons, misgendering raises thorny issues of how the law should treat religious adherents. Such persons may consider it religious doctrine that gender is immutable.^[415] Or, their religious beliefs may be such that gender misclassifications are not offensive, but rather objective truths that their religious beliefs compel them to acknowledge.^[416] Others may, without much by way of explanation,

[415] See, e.g., *Plain*

[416] See Brief for /

Misgendering

and when confronted, she responded that she was “a good Christian woman” who believed there is “no such thing as misgendering.”^[418]

[418] Complaint at !
[423] Id. at 11; see *a*

In view of such scenarios, this Section considers how the doctrines of religious discrimination accommodation, and religiously-based service refusals should interact with gender misclassification.

1. Religious Discrimination

Is it religious discrimination to terminate an employee whose religious beliefs permit or even oblige them to address or refer to gender minorities with inappropriate language? Litigation involving persons’ refusal to use gender-appropriate language on religious grounds has already begun to take shape.^[419] Since 2016, there have been several high-profile instances of religious observants facing employment actions for refusing to use gender-appropriate language on alleged religious grounds.^[420] In one October 2019 complaint, a high school French teacher, Peter Vlaming, alleged being fired for refusing to use a student’s gender-appropriate pronouns violated his First Amendment free exercise rights.^[421] He claimed that “using male pronouns to refer to a female was against his religious beliefs” that “sex is biologically fixed in each person and cannot be changed regardless of a person’s feelings or desires.”^[422] For Vlaming to use gender-appropriate language would be to “intentionally [i]e,” in violation of his “conscience and religious practice.”^[423]

[419] See Katie Reil

[420] See *id.*; Iliana

[421] Complaint at :

[422] Id. at 10.

Though these claims frame misgendering as subscription to unassailable “sincerely held religious beliefs,” that alone does not provide constitutional cover. Neutral, generally applicable laws are constitutional unless “the object of [the] law is to infringe upon or restrict practices because of their religious motivation” or if the “purpose of [the] law is the suppression of religion or religious conduct.”^[424] Under this rule, burdens to persons of faith notwithstanding, neutral policies requiring all persons to use gender-appropriate language should withstand constitutional challenge. Indeed, on that reasoning, the lower court in *Meriwether v. Trustees of Shawnee State University* rejected a professor’s claim that the university’s non-discrimination policy barring misgendering “tramp[ed]” on his religious convictions.^[425]

[424] Church of the

[425] 2019 U.S. Dist at *70.

[429] *Brennan*, 361

[430] Id. at 504.

More generally, it is fairly obvious that even genuinely held religious views do not excuse discrimination and harassment. For instance, a religious observer, say a teacher, may quite sincerely hold the religiously-derived belief that Black people are inferior to White persons and are divinely ordained to be eternally enslaved beliefs which, though noxious to modern ears, were once widely accepted.^[426] For the religious teacher to express their religiously-derived belief, by openly and repeatedly referring to Black students as “inferior to their White classmates,” we can agree, would be wholly improper, not to say condemnable and impermissible.^[427]

[426] Recall that rel

[427] Cf. *Newman v*

2. Religious Accommodations

A companion question is whether employers must make accommodations for religious observers whose beliefs are fundamentally opposed to the possibility of gender transition or genderexpansive identity. In a January 2019 case, *Brennan v. Deluxe Corporation*, a Christian employee brought a failure to accommodate claim when, as a part of his employment, he was required to complete an ethics compliance course that “was structured to accept only those responses acceptable to Deluxe [, his employer].”^[428] If the employee selected the incorrect answer, the course refused to move forward or allow the employee to skip the question.^[429] One question involved a hypothetical transgender employee, “Alex.”^[430] In Brennan’s view, the answers the ethics course viewed as correct contradicted his faith, and he refused to “answer a question in a way that would make [him] compromise [his] faith in God.”^[431] Then, in an email to human resources, Brennan declared: “If God has created someone as a man, I will use the pronoun ‘him’ to refer to that person, or if God created someone as a woman, I will use the pronoun ‘her’ to refer to that person.”^[432] Subsequently, the company reduced Brennan’s salary by 1% for failing to complete the compliance course. Four months later, Brennan was terminated.

[434] Id. at 499.

[428] *Brennan v. De*

[431] Id.
[436] *Peterson v. H*

[432] Id.

Brennan alleged the company’s actions constituted a failure to accommodate religious beliefs and failure to make reasonable attempts to accommodate.^[433] On review for motion to dismiss, the court upheld the failure

[433] Id. at 498.

Misgendering

The ultimate outcome of *Brennan* is yet unknown, but even the memorandum opinion's conclusion that the failure to accommodate claim should proceed seems misguided. *Brennan* stands squarely against established principles in religious accommodations law. Equal Employment Opportunity Commission (EEOC) directives explicitly state not providing exceptions to employer-mandated training programs that "simply discusses and reinforces" expectations of professional behavior and policies against harassment or discrimination is permissible.^[435] Because employers must ensure all workers understand appropriate workplace conduct, the EEOC states religious exemptions to such programs can be considered an undue hardship for employers.^[436]

[435] EEOC Compli

More directly, what are the appropriate accommodations for employees with such religious beliefs? Some have suggested allowing employees to address others by last name in lieu of pronouns or first names.^[437] In theory, perhaps that is a satisfactory solution. Assuming that the employee refers to all persons by last name, that accommodation seems reasonable. After all, gender-diverse persons will not be singled out for unequal treatment.

[437] See Kluge v. E

Symbolically though, this leveling-down move is probably so transparent as to offend the dignity of gender minorities. It is akin to pool closures by White persons following desegregation in order not to share them with Black people or the termination of male sports teams under Title IX, rather than expending resources for women's teams.^[438] A person who avoids all pronouns and titles expresses an unmistakably stigmatizing message to their gender minority colleagues: *I would rather go to extreme lengths than respect you*. Future cases will certainly have to consider whether that accommodation is truly appropriate.

[440] The *Masterpie*

[438] Admittedly, de

3. Religious Refusals

Following marriage equality, persons of faith—wedding vendors in particular—have increasingly claimed that providing service to sexual minorities is at odds with their religious beliefs. Participation, the argument goes, makes observers complicit in the alleged sinful conduct. There is no reason to doubt that as the movement for gender-appropriate language gains traction, religious exemption arguments will spread to that context as well. If past examples portend, one could imagine similar religious refusal arguments, such as a minister refusing to address a trans woman by her correct pronouns or with the term "bride," or persons who create wedding invitations refusing to make them with nonbinary or neopronouns. In fact, a July 2020 complaint with allegations along those lines has already been filed in the Northern District of Ohio.^[439] Given *Masterpiece Cakeshop's* reticence on the issue, the ultimate outcomes of this and similar cases are unknowable.^[440]

[439] Complaint at :

C. Family Law

Using children's gender-appropriate pronouns and names positively impacts their well-being.^[441] Conversely, children who are misgendered and deadnamed face significantly higher risks of life-threatening behaviors and suicidal attempts.^[442] For these reasons, courts cannot ignore the ill effects of misgendering in determinations related to child welfare. Put simply, gender misattributions must be considered a factor in the evaluation of the most central concern in issues involving youth: the "best interests" of the children involved.^[443]

[441] Stephen T. Ru

[442] Arnold H. Gro

[443] *Boswell v. Bos*

For a start, the possibility of misgendering must be considered in foster care and adoption decisions. Gender-diverse children placed for adoption report routinely facing resistance to their gender-appropriate pronouns and names. Fortunately, several states have recently introduced or adopted regulations specifically prohibiting the misgendering of children in foster care.^[444] Other states should consider this as well.

[444] Assemb. 175, :

Custody determinations present other issues. There are very real possibilities that one parent might support and affirm a gender-diverse child and the other will not. The possibility that a resistant parent may traumatize a gender-diverse child is also very real. In a widely-reported account, one father repeatedly misgendered his child, publicly humiliated her, forcibly shaved her hair, and forced her to wear male clothing, all in resistance to his transgender daughter's gender.^[445] In that and similar scenarios, considering the hosts of ill effects of misgendering, where one parent of a gender-diverse child is intent on resisting the child's gender identity—through misgendering, opposition to social transition, or by enrolling the child in gender identity change efforts—courts should weigh this factor against a custody ruling in their favor.

[445] See First Ame

Misgendering

a rather’s incessant misgendering and deadnaming, in addition to attempts to have his son abandon transitioning, constituted impermissible psychological and emotional abuse under§ 38 of the Canadian Family Law Act.^[446] American courts should take cue.

[450]

S. 3484, 218th A.B. v. C.D., 12 (Can.).

D. Elder Law

The rate of identity abuse experienced by gender-diverse seniors is stark. Surveys find that anywhere between 64.8 and 80 percent of transgender elders have experienced psychological abuse, verbal abuse, or harassment.^[447] Indeed, one of gender-diverse elders’ more critical concerns is the fear that “that they will be misgendered in the event that they become reliant on others for care especially if those care[takers] have not been accepting of their gender identity or are uninformed about such matters”^[448]

[447]

Elizabeth M. E

[448]

Sarah Steadman

[453]

See Karol Kov

Advocates have several interventions to prevent and address the targeted misgendering and misnaming of gender-diverse elders. In particular, California’s SB 219, the “Lesbian, Gay, Bisexual, and Transgender Long-Term Care Facility Bill of Rights,” enacted in 2017, makes it unlawful for long-term care facilities or facility staff to “[w]illfully and repeatedly fail to use a resident’s preferred name or pronouns after being clearly informed of the preferred name or pronouns.”^[449] Similar legislation has been introduced in Maryland, New York, New Jersey, and Washington D.C.^[450] Despite conservative criticism that these regulations would result in healthcare workers being arrested for simple accidental misgendering where challenged thus far, they have withstood constitutional scrutiny.^[451]

[449]

Lesbian, Gay,

[451]

See Tentative

E. Wills and Testamentary Law

All too frequently, gender minorities are misgendered after death. Either by oversight or through the actions of disapproving family members, gender minorities are presented at burial in manners at odds with their gender or have death certificates categorizing them based on gender assigned at birth.^[452] This is unfortunate since it erodes the deceased’s identity and deprives them of a basic right respect after death.^[453]

[452]

Delaney Naur

[459]

Rousseau, *supra* 835.

The law has begun to address posthumous gender misattributions, but further progress is needed.^[454] Currently, the few states with Respect After Death (RAD) laws fail to account for the lived realities of gender minorities, either through document requirements limiting the provisions to individuals who have undertaken medical or legal transition, affirmative planning, or completely omitting nonbinary identities.^[455] To better avoid postmortem misgendering, new laws should prioritize the personal preference of the decedent, as well as firsthand evidence of the decedent’s gender.^[456]

[456]

Spivack, *supra* 154.

[455]

Id. at 94–95.

[456]

Id. at 97–99.

Testamentary law, too, must adjust to acknowledge the harms of misgendering. To see why, suppose a parent executes a will, which leaves certain property to “my son, Ricardo,” and other specific property to “my daughter, Gail.” Now suppose that both children have obtained legal name and gender marker changes and are the openly nonbinary individual, Rhys, and the trans man, Gavin, respectively.^[457] Due to the parent’s misgendering in the instrument, have the children’s rights to the bequeathed property been extinguished?

[462]

Spivack, *supra* 147.

[457]

This vignette is

The answer is surprisingly unclear.^[458] On one hand, probate law compels judges to give effect to all words in a testamentary instrument.^[459] If that is so, then arguably, the original devisees no longer exist, and the lapse provisions apply. On the other hand, courts may consider extrinsic evidence to remedy the ambiguity.^[460] Even then, that approach could cut both ways: external evidence could find that the misgendering of our hypothetical descendants could just as much indicate an intent to leave property to both children regardless of gender, as it could indicate hostility to their transitions and an intention to disinherit them.

[458]

Id. at 835; Car

How should the law account for misgendering in testamentary instruments? Other commentators have suggested two solutions. Altering the Uniform Probate Code to provide a presumption that a decedent intended a gender-diverse beneficiary to receive property regardless of transition or interpreting trans beneficiaries as “after-born children.”^[461] Of course, this situation is also completely avoidable through careful drafting, the use of gender-neutral language, and the clever use of clauses.^[462]

[464]

Gina R. Rosich

[461]

Rousseau, *supra*

Misgendering

Schools, Hospitals, and Prisons

The discussion now moves away from broad constitutional and doctrinal questions and into discrete place-based or context-specific areas of law. The following subsections examine the potential for the law to address misgendering that occurs in the workplace, at school, during healthcare visits, and in prisons.

[468] M. Paz Galupc

[469] Alison Ash Fo

1. Employment Discrimination Law

Workplace harassment via misgendering is frighteningly common.^[463] By one survey account, over 30 percent of trans women and over 60 percent of trans men reported facing misgendering at work.^[464] Importantly, these workplace behaviors far surpass simple accidental slip-ups. One trans man reported his coworker “told [him that he] had no right to request male pronouns . . . and told [him that he] didn’t look like a man and never would.”^[465]

[463] For an encycl

[465] Stephanie M.

Misgendering at work serves “to alienate a transgender employee, reinforcing the notion that she is different than other members of her gender.”^[466] By targeting and isolating gender minority employees, gender misattributions create an unhealthy work environment and negatively impact employee morale and productivity.^[467] It also places an additional mental burden on gender minorities^[468] who must decide whether to correct employers’, coworkers’ and customers’ misuse of their pronouns, or avoid doing so out of fear of employment repercussions.^[469]

[466] Brief for Amic

[467] Mary Retta, W

Given these statistics, employment discrimination law must also account for misgendering. Per *Bostock v. Clayton County*, Title VII applies to gender minorities.^[470] Accordingly, federal employment discrimination law would find sufficiently pervasive workplace misgendering actionable sexual harassment. Thus far, courts confronted with the issue have generally been willing to hold that gender misattributions are evidence of sex discrimination.^[471]

[470] 140 S. Ct. 1731

[474] Clarke, *supra*

[471] E.g., Parker v.

There are complications, however. In evaluating employment discrimination claims premised on gender misattributions, several courts have dismissed gender minorities’ claims after demanding very specific illustrations of the gender misattributions they face at work.^[472] This fundamentally misunderstands a critical feature of misgendering. Though equally as corrosive as other forms of verbal workplace harassment, unlike a racial, religious, or misogynistic slur, the use of gendered language is common in everyday conversation. This regularity means that, though the likelihood of its misuse is high, the prospect that the affected employee will keep log of every instance of misgendering is low. And yet, some courts expect that.

[472] E.g., Milo v. Cy

[477] Cf. Anna I. Bui

Other problems with courts’ ability to find that gender misattributions are evidence of harassment are deeper rooted. Under current law, a plaintiff’s allegation must be sufficiently “severe or pervasive[, so as] to alter the conditions of the victim’s employment and create an abusive working environment” in order to constitute improper harassment for the purposes of supporting an employment discrimination claim.^[473] Consequently, “accidental or isolated remarks” or intermittent verbal conduct are not sufficient.^[474] This overlooks a core point captured by this Article’s earlier exploration of firsthand accounts and medical literature: even a single misattribution of gender can be detrimental. And the standard requires the harassing action to be evaluated from a neutral, objective, and third-party perspective.^[475] This is problematic since, as we have seen, most cisgender persons fail to grasp the harmful effects of misgendering, particularly when it is accidental or negligent.

[473] Harris v. Forkl
U.S. 17, 20 (199

[475] Harris, 510 U.S.

One possible solution is the adoption of a standard that examines gender misattributions from the perspective of the victim,^[476] a “reasonable gender minority” standard.^[477] And, by harnessing social framework evidence and expert testimony, courts will be able to evaluate misgendering in its appropriate social context. Properly contextualized, jurists and jurors will more readily recognize that misgendering—even on a single occasion—inlicts a range of psychic and physiological injuries and should be considered to render a workplace hostile for Title VII purposes.^[478]

[476] This particular

[478] Alternatively, c

[483] See McNamari

2. Education Law

Misgendering

including “pervasive misnaming and misgendering.”^[480] Despite administrators’ assurances that C.T.’s sex and name assigned at birth would be kept confidential, C.T.’s English teacher outed him on the first day of school by calling his female birth name while taking roll. Then, despite complaints to the school administration, staff and students continued to misgender and deadname C.T. This ultimately caused him “embarrassment, grief, and emotional distress.”^[481]

[480] Complaint at 1.
[485] See Liberty Counsel v. Dep’t of Educ., 2021 WL 1111111 (S.D. Cal. 2021).
[481] Id. at 9.
[487] *Tinker v. Des Moines Indep. Cmty. Sch. Bd.*, 418 U.S. 165, 40 S.Ct. 169, 39 L.Ed.2d 212 (1974).

Like its employment counterpart Title VII, Title IX should be read to provide redress to C.T. and other gender-diverse youth who face misgendering in school. The Trump Administration withdrew Obama-era guidance on the applicability of Title IX to transgender students on February 22, 2017. Yet by its own admission, the Trump Department of Education has conceded that misgendering and deadnaming can constitute “harassment . . . based on sex stereotyping.”^[482] Additionally, since Title VII case law guides the interpretation of Title IX, *Bostock* underscores the conclusion that Title IX covers gender identity discrimination.^[483] State- and district-specific civil antidiscrimination laws covering gender identity may also be interpreted to prohibit targeted harassment of gender-diverse students via misgendering.

[482] See Letter from Liberty Counsel to the Trump Department of Education, [https://www.libertycounsel.com/wp-content/uploads/2017/02/Letter-to-DOE-2-22-17.pdf](#).

More difficult questions involve the line between student disagreement on the topic of gender and misgendering. In a 2019 incident, a 6th grader initially faced reprimand for referring to a transgender female classmate as “a boy, and not a girl.”^[484] After intervention from attorneys from Liberty Counsel, an advocacy organization designated an anti-LGBTQ hate group by the Southern Poverty Law Center,^[485] the school ultimately conceded that the student’s statement did not warrant punishment, since it was a “respectful disagreement on the subject of transgender claims.”^[486] Obviously, students do not “shed their constitutional rights to freedom of speech and expression at the schoolhouse gate.”^[487] But where First Amendment protected student speech ends, and harassment and bullying begin, is a difficult line to draw. In the future, school administrators and courts will likely have to grapple with that delineation with respect to misgendering.

[484] Letter from Liberty Counsel to the Southern Poverty Law Center, [https://www.libertycounsel.com/wp-content/uploads/2019/05/Letter-to-SPLC-5-15-19.pdf](#).
[486] Letter from Eric Lipton to the Southern Poverty Law Center, [https://www.libertycounsel.com/wp-content/uploads/2019/05/Letter-to-SPLC-5-15-19.pdf](#).

3. Healthcare Law

Gender minorities universally report facing misgendering in healthcare.^[488] Whether current health care nondiscrimination law can address gender misattributions as sex discrimination, however, is far from clear. By its text, Section 1557 of the Affordable Care Act incorporates by reference the nondiscrimination clauses of Title VI, Title IX, Age Discrimination Act, and Rehabilitation Act. Further, in May 2016, the Obama Administration’s Department of Health and Human Services (HHS) interpreted the nondiscrimination clause to cover a provider’s “persistent and intentional” misgendering.^[489]

[488] Ezra R. Morris et al., *Gender Minorities and Healthcare Discrimination: A Systematic Review*, 10 *J. GEN. INTERN. MED.* 100 (2019).
[489] 81 Fed. Reg. 31,301 (May 18, 2016).

The Trump Administration rejected that interpretation. In guidance released in June 2020, the Trump Administration’s HHS explicitly stated misgendering does not constitute discrimination on the basis of sex for ACA purposes. The guidance specified that covered entities are not impermissibly stereotyping based on sex “if it uses pronouns such as ‘him’” for “biological males,” and “her” for “biological females.”^[490] Further, though Title VII usually informs Title IX interpretation, the HHS announced it “does not believe that Title IX requires . . . covered entities to use a pronoun other than the one consistent with an individual’s sex and does not believe it otherwise appropriate to dictate pronoun use or force covered entities to recognize a conception of sex or gender identity with which they disagree for medical, scientific, religious, and/or philosophical reasons.”^[491] Thus, whether and how *Bostock*, not to mention Obama-era Title IX interpretation finding misgendering could constitute sex discrimination, will interact with the ACA, and therefore, whether misgendering can constitute healthcare discrimination, is yet unknown.

[490] 85 Fed. Reg. 31,301 (June 19, 2020).
[491] Id.

In any event, health privacy law may provide a vehicle to address the misgendering gender minorities face in health care. It is possible that facility misgendering, at least in public spaces, might be treated as a Health Insurance Portability and Accountability Act (HIPAA) violation. Arguably, gender identity information, particularly where linked to a medical condition like gender dysphoria, qualifies as “protected health information” for HIPAA purposes.^[492] A health care practitioner misgendering a patient, or misgendering and then switching to gender-appropriate language, could qualify as an improper revelation under HIPAA. If the comments are made in a waiting room within earshot of others, they could be interpreted as an indication of the patient’s health status and demographic information.

[492] The reasons are not clear.

Misgendering

Misgendering raises issues for gender minorities who are incarcerated including whether incarcerated persons have the right to be addressed with gender-appropriate language by prison officials and staff. By some accounts, the answer is complicated by regulations that limit or restrict inmates' ability to legally change their names or to go by aliases in prison. In *Konitzer v. Frank*, for example, the Wisconsin Resource Center argued against using gender-appropriate language for trans incarcerated people, claiming their policies "prohibited [them] from using false names and titles; they are not allowed to call themselves doctor if they are not a doctor, nor are they allowed to call themselves by nicknames, by their rank in a gang, or by religious titles."^[493]

[497] See *Brown v.*

[493] *Konitzer v. Frank*, 2019 WL 874, 911 (E.D. Wis. 2019).

Courts normally defer to penal policies,^[494] but at least with respect to gender-appropriate language, deference seems misplaced. Preventing incarcerated persons from being addressed appropriately fails to advance penological interests in security or rehabilitation. First, there is little reason to believe that officials will somehow suddenly be unable to track and monitor an inmate because they now refer to him/her/them/zir with a new name and title.^[495] Second, nothing about misgendering can be characterized as rehabilitative.

[494] *Emma Kaufman v. State of Wisconsin*, 2019 WL 874, 911 (E.D. Wis. 2019).

[495] See *Konitzer v. Frank*, 2019 WL 874, 911 (E.D. Wis. 2019).

Because misgendering is a form of verbal and psychological harassment, it may constitute sex discrimination violative of incarcerated persons' Equal Protection rights if it is sufficiently pervasive.^[496] Verbal harassment of incarcerated persons is generally not thought to be unconstitutional^[497] but where incarcerated persons experience severe gender dysphoria, persistent misgendering may implicate the Eighth Amendment's bar against cruel and unusual punishment as psychological abuse.^[498] At the same time, misgendering might be addressable under the Prison Rape Elimination Act (PREA), which defines sexual harassment as "repeated verbal comments or gestures of a sexual nature to an inmate . . . including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing or obscene language or gestures."^[499] Thus, courts' usual deference to prison administrators is not warranted when administrators refuse to use gender-appropriate forms of address.

[496] E.g., *Tay v. DeLoach*, 2019 WL 874, 911 (E.D. Wis. 2019).

[498] See *Monroe v. Board of Prisoners*, 2019 WL 874, 911 (E.D. Wis. 2019).

[499] Prison Rape Elimination Act of 2003, 34 U.S.C. § 20311.

G. The Legal Profession

More and more, lawyers and judges opposed to equality for gender minorities have intentionally woven abusive terms of reference and address into spoken arguments, written court filings, and opinions. Outside the courtroom, there are similar issues related to how lawyers address and treat genderdiverse clients, prospective clients, and colleagues.

This final Section considers legal interventions against misgendering in the legal profession. In particular, it contemplates the applicability of the Professional Conduct Rules and the Rules of Judicial Conduct to written misgendering by attorneys and judges. It then ends with recommendations on how legal service providers can adapt to minimize misgendering.

[503] See Mark Joseph, *Transgender Rights in the Legal Profession*, 100 *Cal. L. Rev.* 1001 (2012).

1. Rules of Attorney Professional Responsibility

With increasing frequency, lawyers advocating anti-trans positions have been wont to use the misattribution of gender as a means to discredit, intimidate, and harass gender minorities. Often, it is quite explicit. In the 2007 trial of a Black trans woman, a prosecutor asked the jury, "How can you trust this person? He tells you *he* is a woman; *he* is clearly a man."^[500] Even more recently, in 2019, defense attorneys tried to convince a jury that an attack on a transgender woman should be viewed as "mutual combat" between two men, rather than an attack on a woman.^[501]

[506] Model Rules of Professional Conduct r. 3.4(e) (Am. Bar Ass'n 2019).

[500] Joey L. Mogul, *Transgender Rights in the Legal Profession*, 100 *Cal. L. Rev.* 1001 (2012).

[501] *Trudy Ring v. Atty. Gen.*, 2019 WL 874, 911 (E.D. Wis. 2019).

These tactics carry over for lawyers' written submissions. Recall Elmer Woodward's disrespectful misgendering and unnecessary diatribe discussed earlier,^[502] or how in 2017, amici submitting briefs in *Grimm v. Gloucester School Board* revised the case caption to misgender the plaintiff, Gavin Grimm.^[503]

[502] See *supra* text accompanying note 497.

[503] *Grimm v. Gloucester School Board*, 2017 WL 874, 911 (E.D. Wis. 2017).

Advocates have no tenable justification for misgendering gender minorities. It is done simply to disrespect, insult, and antagonize.^[504] And yet, alarmingly, this blatant dimension of bias in the legal system has largely remained hidden from judicial and critical scrutiny.

[504] See Chan Tov, *Transgender Rights in the Legal Profession*, 100 *Cal. L. Rev.* 1001 (2012).

Misgendering

any matter that the lawyer does not reasonably believe is relevant”^[507] might be used in instances where advocates seek to inject extraneous prejudice to a trial via misgendering. Next, Rule 4.4, a bar against a lawyer’s use of “means that have no substantial purpose other than to embarrass, delay, or burden,” is applicable to misgendering since misgendering is undoubtedly experienced as embarrassing and burdensome.^[507]

[507] Id. at r. 4.4.

Last, Rule 8.4 defines professional misconduct as “conduct that is prejudicial to the administration of justice” or “conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . gender identity”^[508] Misgendering falls into both categories. It is directly prejudicial to the administration of justice, as it injects extraneous prejudice into trials. It is also indirectly prejudicial because those who witness such hostilities lose confidence in the impartiality of the legal profession. Simultaneously, misgendering is clearly conduct that a lawyer should know is discriminatory. Thus, again, Rule 8.4 would appear to cover such conduct.

[508] Id. at r. 8.4(d).
[511] Id. at 1050.

[513] Id. at 1054.

2. Rules of Judicial Conduct

In their own writing, courts typically defer to individuals’ chosen titles, pronouns, and names. Still, with increasing frequency, members of the judiciary are perpetrators of verbal violence against gender minorities. Two recent Fifth Circuit opinions—*Gibson v. Collier* and *United States v. Varner*—written by judges whose anti-LGBT positions preceded their appointments, so demonstrate.^[509]

[515] See supra Part

[509] consistent “wi

Often enough, judicial misgendering is overtly disrespectful and gratuitously contemptuous. Take *In re Name & Gender Change of R.E.*, an appeal from an Indiana trial court’s refusal to grant a name and gender marker change.^[510] Beyond refusing to use the correct pronouns during hearings, the trial court judge also referred to the plaintiff as “it” and “whichever.”^[511] On another occasion, the judge rejected the plaintiff’s evidence of his “beard and a deep voice” in support of a gender marker change, with the response that “I’ve got an aunt that has a significant amount of facial hair too, that doesn’t make her a male.”^[512] The Indiana Supreme Court rightfully found the trial court’s behavior inappropriate.^[513]

[510] *In re Name &*

[512] Id. at 1049.
Code of Judicial Conduct

[519] See Brief of 8

Perhaps more so than misgendering from members of the bar, verbal indignities from judges are extremely problematic. For a start, disrespectful behavior reflects poorly on the judiciary and undercuts the appearance of impartiality and, in turn, the court’s moral authority.^[514] Additionally, recall that misgendering, particularly from institutional actors, serves important signaling functions.^[515] Hence, judicial misgendering serves as an invitation for others to do the same. The plaintiff who was derisively misgendered in the *Varner* opinion experienced “an increase in verbal and emotional abuse from prison officials and from fellow prisoners who . . . used the majority’s opinion as justification for their mockery.”^[516]

[514] See McNamara 509.

[516] Petition for Re

Against this backdrop, there is ample reason to address judicial misgendering through the Code of Judicial Conduct. Canon 2 of the Model Code of Judicial Conduct stipulates that judges “shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity,” and further, should “require similar conduct of lawyers, court staff, court officials, and others subject to the judge’s direction and control.”^[517] Additionally, Canon 2.3(A) of the Code of Judicial Conduct requires judges “perform the duties of judicial office . . . without bias or prejudice.”^[518] Clearly, refusing to address any party before the court with language in line with their gender should violate the Canon.^[519]

[517] Model Code c

3. Legal Services

[522] Lois Vitti, *App*

Legal services organizations must also adapt. At a collective level, this includes simple steps such as revising intake forms to be more inclusive.^[520] Organizations might focus on the request for preferred or legal names, pronouns, and honorifics and consider making these questions open-ended. Beyond that, organizations could endorse the addition of gender pronouns and preferred forms of address in email signatures and add them to firm and organization webpages, directories, publications, and name tags. Lastly, legal services organizations

[520] Milo Primeaux

Misgendering

At an individual level, lawyers can make efforts to advance gender-appropriate language as well. The simplest are being conscious of language use and avoiding negligent misgendering during conversations or email correspondence. During introductions, individuals might include their pronouns and ask if other persons are comfortable sharing theirs. Another possibility is respectfully intervening when judicial actors, colleagues, or opposing attorneys misgender or ask invasive questions of gender-expansive clients. Flagging clients' pronouns in filings,^[521] and ensuring not to misgender or deadname in case captions may be other steps.^[522]

[521] See, e.g., Clas

Conclusion

As gender diversity has become the subject of considerable interest and scrutiny, resistance to the movement for gender-appropriate language has increased. However, as this Article demonstrated, the prominent objections to gender-appropriate language are patently ahistorical, acontextual, and categorically incorrect on the facts and the law. Expressed more directly, the special rights, semantic determinism, trivialization, and speech regulation objections all fail.

There is a larger point running through this Article that is worth a final underscore: To understand modern-day social discrimination, it is important to look to history. When we do, oftentimes, we will see contemporary forms of discrimination are not new; they are reincarnations. Of course, how caste systems are preserved over time, as applied to specific social identities, is well-known. We can easily see how status regimes subordinating women have evolved, while avoiding erosion; and, most can follow the line of anti-Black racism and White supremacy beginning in enslavement, and tracking Black Codes, Jim Crow, to the War on Drugs and broken windows policing, to the present rise of "E-carceration" and supervised release.

Less examined is how oppression repeats *across* and *between* socially disfavored identities. To be certain, more spectacular examples, like the parallels between Japanese internment and the Trump Muslim Ban, or the similarities of the rise of religious refusals in *Obergefell's* shadow, and the religious defenses of segregation in the Civil Rights Act's wake, are more readily discernable. But, just as importantly, forms of everyday social discrimination—such as the dishonors drawn out here—also replicate. That cannot be allowed to go overlooked.

History, particularly that of prejudice against other identity groups, then, must always inform conversations on modern-day discrimination. Through it, we can uncover and understand hitherto hidden patterns between forms of oppression. The current debate on gender-appropriate language for gender minorities provides a ready arena where historical perspective lays bare misconceptions on the offensiveness of misgendering and, crucially, upends misguided narratives painting this form of verbal violence as nouveau. The critical point, therefore, is to look backward. By doing so, we will see that the dishonors faced by gender-diverse persons today are but the ghosts of ones which came before.

Chan Tov McNamara: Cornell Law School, J.D. 2019. *They/them pronouns. For comments, critiques, and lots of healthy cynicism, my deepest thanks to Sherry F. Colb, Michael C. Dorf, Taylor M. N. Davis, Michaela Fikejzová, Jared D. Ham, Valerie P. Hans, Tyler P. Hepner, Cyril A. Heron, Rashelle James, Sheri Lynn Johnson, Sonia K. Katyal, Yasiman E. Montgomery, Jeremy J. Rachlinski, Indira Rahman, Aziz Rana, Laura S. Underkuffler, Monty Zimmerman, and the participants in the 2020 Cornell Law School faculty summer workshop series. For important conversations on misgendering within the legal system, my thanks to Emily Gorcenski and Jillian T. Weiss. For particularly generous feedback and for sharing his expertise, special thanks to Ezra Ishmael Young. Finally, for masterful editorial work and superb suggestions, my thanks to the staff of the California Law Review. This Article builds upon and rounds out ideas introduced in prior and forthcoming work. See Chan Tov McNamara, *Misgendering as Misconduct*, 68 UCLA L. Rev. Discourse 40 (2020); Chan Tov McNamara, *Some Notes on Courts and Courtesy*, 107 Va. L. Rev. Online (forthcoming 2021).*

Misgendering

More in this Issue

NOTE · DEC 2021 · VOLUME 109 · NO. 6

Education Federalism in Action: English Learner Education Policy

Hannah Feldman

NOTE · DEC 2021 · VOLUME 109 · NO. 6

An Environmental FOIA: Balancing Trade Secrecy with the Public’s Right to Know

Madeeha Dean

SYMPOSIUM · DEC 2021 · VOLUME 109 · NO. 6

The Real Enemies of Democracy

William Baude

SYMPOSIUM · DEC 2021 · VOLUME 109 · NO. 6

Countering the Real Countermajoritarian Difficulty

Franita Tolson

SYMPOSIUM · DEC 2021 · VOLUME 109 · NO. 6

The New Pro-Majoritarian Powers

Nicholas O. Stephanopoulos

SYMPOSIUM · DEC 2021 · VOLUME 109 · NO. 6

The New Countermajoritarian Difficulty

Pamela S. Karlan

ARTICLE · DEC 2021 · VOLUME 109 · NO. 6

Copyright and Disability

Blake E. Reid

ARTICLE · DEC 2021 · VOLUME 109 · NO. 6

The False Promise of Peña-Rodriguez

Daniel S. Harawa

ARTICLE · DEC 2021 · VOLUME 109 · NO. 6

Voting for Welfare

Abhay P. Aneja

Print &
Symposium

Online
&
Podcast

Submit

About

Alumni

Donate &
Subscribe

Apply

Contact

Instagram

Twitter

Search

Misgendering

Misgendering

Misgendering

Misgendering

[288]

WPR [[HTTP://WPR.ORG](http://wpr.org)]



In this Aug. 29, 2013 photo, students walk through the halls during an open house for incoming freshman and transfer students at a high school in Philadelphia. *Matt Slocum/AP Photo*

Kiel School Board closes Title IX investigation over wrong pronouns that prompted threats of violence

'Trans and gender-diverse kids are not being political, they're being politicized,' says UW-Madison professor

By Madeline Fox

Published: Friday, June 3, 2022, 5:00pm

The Kiel School District has closed its Title IX sexual harassment investigation into three eighth grade students who allegedly used the wrong pronouns when addressing another student who uses they/them pronouns.

Kiel's school board released a [statement](#)

[\[http://www.kiel.k12.wi.us/schoolboard/2022/School%20Community%20Letter.pdf\]](http://www.kiel.k12.wi.us/schoolboard/2022/School%20Community%20Letter.pdf) Thursday, saying it "issued clear directives and expectations to all students involved in this matter for the purpose of preventing bullying and harassment and ensuring a safe and supportive learning environment for all of our students."

News of the investigation went public in mid-May, after parents of the three boys hired a conservative law firm to represent their children. After that, the school and several local institutions — the library, city hall, roads and utility companies — as well as district employees' homes, received bomb threats. A California man [was arrested \[https://www.nbc26.com/news/local-news/california-man-accused-of-threatening-kiel-school-staff-arrested\]](https://www.nbc26.com/news/local-news/california-man-accused-of-threatening-kiel-school-staff-arrested) for threatening to kill a school district staff member.

In response to that backlash, [the city canceled its annual Memorial Day parade \[https://www.wpr.org/kiel-school-district-cancels-person-classes-after-threats-surface-related-transgender-rights\]](https://www.wpr.org/kiel-school-district-cancels-person-classes-after-threats-surface-related-transgender-rights), and students will finish their school year virtually.

The statement released after a closed-session meeting on Thursday evening addressed the violent response the district received after news of the investigation became public.

"As we move forward, we want to acknowledge the strain on our administrators and staff who have been criticized for simply carrying out the functions of their job as set out in District policy."

The Kiel Police Department said on Facebook that it is continuing to track down and investigate leads about the threats, and it is working with federal authorities to prepare for any future threats in response to the district's investigation.



Kiel Police Department

June 2, 2022

Dear School Community,

As you know, the Kiel Area School District prohibits all forms of bullying and harassment in accordance with all laws, including Title IX, and will continue to support ALL students regardless of race, color, religion, national origin, ancestry, creed, pregnancy, marital status, parental status, sexual orientation, sex (including transgender status, change of sex or gender identity), or physical, mental, emotional or learning disability ("Protected Classes") in any of its student programs and activities, consistent with Board policy and the law.

Over the last several weeks, our school district and community have been greatly impacted by media attention related to a complaint involving harassment.

One major concern at this point is that threats continue, to not only the schools but the Kiel Community. We have worked hard to find a resolution.

With that said, we are writing to share with you that consistent with our Board policies and procedures, we have issued clear directives and expectations to all students involved in this matter for the purpose of preventing bullying and harassment and ensuring a safe and supportive learning environment for all of our students.

Based on these actions, and pursuant to District policies and procedures, the School District considers this matter closed.

As we move forward, we want to acknowledge the strain on our administrators and staff who have been criticized for simply carrying out the functions of their job as set out in District policy. These are individuals who have dedicated their careers to education and who selflessly put the interests of all students in front of their own each day they come to work in the District. We are disappointed that administration and staff have been targeted in this matter by individuals who are not privy to all of the information and implore our school community to show support and care for each one of them.

Further, we want to thank our local law enforcement and first responders for their efforts and commitment to our community.

Finally, we know many of you sought to understand the situation better and wished the District had provided more information about this matter over the last several weeks. We too would have liked to engage the community in our discussions but were prohibited by state and federal laws related to student confidentiality, and deep concerns for student, staff, and public safety.

Thank you for your continued support as we grow and move forward as a school community with concern for all of our students.

Thank you,

Board of Education
Kiel Area School District

RELEASE FROM THE KASD BOARD OF EDUCATION: Even with the news that the Board of Education has closed its Title IX investigation, our Police Department along with local, state, and federal emergency response partners will continue to be ready to respond to any threats made to our community.

We will also continue to work with DCI and the FBI, to track down the source of the previous threats and continue other investigations related to threats made to school staff members.

102

14

33

The backlash to the Kiel school district's investigation is part of a pattern in [Wisconsin](http://www.wpr.org/were-just-trying-live-trans-youth-families-wisconsin-struggle-contentious-political-environment) [http://www.wpr.org/were-just-trying-live-trans-youth-families-wisconsin-struggle-contentious-political-environment] and around the nation of lawsuits tied to LGBTQ+ students rights. Trans kids have seen efforts to restrict access to puberty blockers, and around the state small but vocal groups of parents have worked to ban books from school libraries that touch on LGBTQ+ themes.

"When even a little bit of support is provided, or attention is provided, that there is such a backlash is a reminder to us of what trans and gender-diverse kids are facing every day in this country," said LB Klein, a University of Wisconsin-Madison professor who specializes in Title IX and LGBTQ+ health. "Folks are acting

out in violence about basic names, pronouns and terms, and that's politicized — trans and gender-diverse kids are not being political, they're being politicized."

The Wisconsin Institute for Law and Liberty, a conservative legal group, issued a letter to the district in support of the three students being investigated in May. The group contends that the school district violated the students' First Amendment right to free speech, and that using pronouns other than the ones a student prefers is not sexual harassment under Title IX.

Title IX guidance issued by the Obama administration in 2016 specifically prohibits discrimination against transgender students — and while that was rescinded during the Trump administration, guidance from the Biden administration in June 2021 [reestablished those protections](https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity) [https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity].

"I think that there's often an idea that the rights of students who are trans and nonbinary end where other people have a problem with the affirmation of those trans or gender-diverse students," said Klein. "I don't think we have these conversations when it's not about trans and gender-diverse kids — I know a lot of people, as a parent, who have kids that go by names other than the names on their government documents, and people don't bat an eye about that."

Wisconsin Public Radio, © Copyright 2022, Board of Regents of the University of Wisconsin System and Wisconsin Educational Communications Board.

❗ Looking for our comments section? Find [more info here](/wpr-ends-web-article-comments) [/wpr-ends-web-article-comments].

What's in a Word: Enby

Posted on August 6, 2018January 21, 2021 by Alex Kapitan



[Full image description \(https://radicalcopyeditor.com/image-description-enby/\)](https://radicalcopyeditor.com/image-description-enby/)

What does it mean?

The word *enby*, alternately spelled *enbie* or *enbee* and pluralized as *enbies* or *enbys*, refers to a non-binary person (someone whose sense of self is not exclusively girl/woman or boy/man).

Where did it come from?

Enby was invented by non-binary people as a shortened form of *non-binary*; it's a phonetic pronunciation of the initialism *NB*, for non-binary. It started gaining traction in late 2013—that's when it was added to Urban Dictionary (<https://www.urbandictionary.com/define.php?term=enby>) and first used on Twitter.

According to genderqueer writer and activist Ana Mardoll, in "Why I Use Enby and Not NB" (<http://www.anamardoll.com/2018/02/storify-why-i-use-enby-and-not-nb.html>), *enby* was an intentional evolution of *NB*, after people of color asked white non-binary folks to not use *NB* to mean *non-binary* because it was already in use to mean *non-Black*:

There is a tendency in social justice spaces for white-defined terms to dominate the discourse. If we continued to use "nb" for ourselves, people would start reading "NBPOC" as nonbinary people of color (who also exist!). "Enby" was created to avoid using NB. It is, in my mind, a successful example of white people agreeing not to appropriate Black language.

In a July 2018 Facebook comment, Jon Clark shared:

For lots of us, it started as code, especially in spaces where binarist identities dominated.

How is it used?

Uses of *enby* include:

- "I'm an enby"
- "Ze is my enbyfriend" (instead of *girlfriend* or *boyfriend*)
- As a stand-in for casual gendered nouns like *guy*, *gal*, *girl*, and *boy*

Some people like it because it removes the negative prefix and allows non-binary people to have an identity term that doesn't depend on describing ourselves by way of what we're not, particularly when our very existence argues that there is in fact no such thing as a gender binary (see Sam Hope (<https://feministchallengingtransphobia.wordpress.com/2017/07/09/why-we-need-to-drop-the-term-binary-trans-person/>) for a great take on this).

It's also useful because it can be used as a noun or an adjective, as opposed to *non-binary*, which is an adjective only.

Should I use this term?

If you're a non-binary person / enby yourself, sure! But *enby* should not be used as a replacement for *non-binary* in formal and/or mainstream writing. For the most part, it's not currently being promoted as an improvement on *non-binary*; rather, it's generally used as a within-community, in-group term, similar to how *TG* was used as an informal and within-community abbreviation of *transgender* for many years, and *ace* is used as a within-community term for *asexual*.

So, when writing/speaking for a general audience, a good general practice is to use *non-binary*, not *enby*. *Enby* is not a word that the average cisgender (non-trans) person knows, and using it puts up a barrier to understanding, because to understand *enby* a reader/listener generally needs to know the word *non-*

binary (itself a relatively recent term), to get that *non-binary* shortens to *NB*, and to follow that *NB* phonetically spelled out is *enby*.

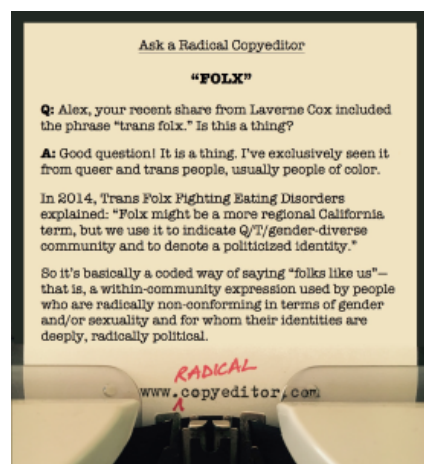
Furthermore, not all non-binary people use and/or like the term *enby*. For example, a lot of people experience it as cutesy or twee, some folks find it inaccessible due to the multiple layers involved, and others simply don't care for abbreviations. So it's good to use care when using *enby*.

For more on what it means to be non-binary and how to write respectfully about non-binary people, check out “[This Is What Gender-Nonbinary People Look Like](https://www.them.us/story/this-is-what-gender-nonbinary-people-look-like) (<https://www.them.us/story/this-is-what-gender-nonbinary-people-look-like>)” by Meredith Talusan, “[8 Common \(But Easily Fixable\) Ways We Erase Non-Binary People from Society](https://everydayfeminism.com/2015/08/common-non-binary-erasure/) (<https://everydayfeminism.com/2015/08/common-non-binary-erasure/>)” by Adrian Ballou, and [Understanding Non-Binary People: A Guide for the Media](http://transmediawatch.org/Documents/non_binary.pdf) (http://transmediawatch.org/Documents/non_binary.pdf) from Trans Media Watch. *Note: this media guide offers problematic advice regarding pronouns. It is always possible to respect a person's pronouns and it is never okay to use the wrong pronouns for a person. See section 2.4 in my [transgender style guide](https://radicalcopyeditor.com/2017/08/31/transgender-style-guide/) (<https://radicalcopyeditor.com/2017/08/31/transgender-style-guide/>) for more on this.

What's your take on *enby*? Comment below! Want to ask a radical copyeditor something? [Contact me](https://radicalcopyeditor.com/contact/) (<https://radicalcopyeditor.com/contact/>)! Was this post helpful to you? Consider [making a donation](https://radicalcopyeditor.com/donate/) (<https://radicalcopyeditor.com/donate/>)!

*Note: Grateful thanks to the folks in the Facebook group Non-Binary Gender Pride for the helpful conversation about *enby* that helped inform this piece.

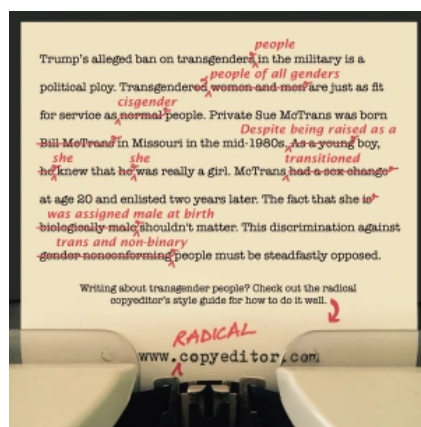
More posts you might like:



(<https://radicalcopyeditor.com/2016/09/12/folx/>)

Ask a Radical Copyeditor:
“Folx”

(<https://radicalcopyeditor.com/2016/09/12/folx/>)



(<https://radicalcopyeditor.com/2017/08/31/transgender-style-guide/>)

The Radical Copyeditor's
Style Guide for Writing
About Transgender People
(<https://radicalcopyeditor.com/trans-style-guide-image-description/>)



(<https://radicalcopyeditor.com/2017/09/05/update-to-transgender-style-guide-they-as-a-personal-pronoun/>)

“They” as a Personal
Pronoun

Tagged
Gender,
What's in
a Word?

(<https://radicalcopyeditor.com/2017/09/05/update-to-transgender-style-guide-they-as-a-personal-pronoun/>).

One thought on “What’s in a Word: Enby”

1. **writersky** says:
August 14, 2018 at 3:51 am
Wow Amazing!

Reply.



Date Issued: September 29, 2021

File: CS-000956

Indexed as: Nelson v. Goodberry Restaurant Group Ltd. dba Buono Osteria and others, 2021
BCHRT 137

IN THE MATTER OF THE *HUMAN RIGHTS CODE*,
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Jessie Nelson

COMPLAINANT

AND:

Goodberry Restaurant Group Ltd. dba Buono Osteria, Michael J. Buono, Ryan Kingsberry, Brian
Gobelle and Nova Melanson

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Devyn Cousineau

Counsel for the Complainant:

Adrienne S. Smith

Counsel for the Respondents:

Michael F. Welsh, QC

Date of Hearing:

July 26 – 28, 2021

I INTRODUCTION

[1] Jessie Nelson is a non-binary, gender fluid, transgender person who uses they/them pronouns. They worked as a server for Buono Osteria, a restaurant run by the respondents Michael Buono and Ryan Kingsberry. The respondent Brian Gobelle was the bar manager. During their employment, Mr. Gobelle persistently referred to Jessie Nelson with she/her pronouns and with gendered nicknames like “sweetheart”, “honey”, and “pinky”. Jessie Nelson asked Mr. Gobelle to stop, and he did not. They asked management to intervene and were told to wait. On their final day of work, Jessie Nelson again tried to speak to Mr. Gobelle about this issue and the discussion grew heated. Four days later, they were fired. Pressed to explain the termination, Mr. Kingsberry told Jessie Nelson that they had simply come on “too strong too fast” and were too “militant”.

[2] Jessie Nelson alleges that Mr. Gobelle’s conduct towards them, and the employer’s response, amounts to discrimination in employment based on their gender identity and expression, in violation of s. 13 of the *Human Rights Code* [**Code**]. I agree.

[3] For the reasons that follow, I find that Buono Osteria, Mr. Gobelle, Mr. Kingsberry, and Mr. Buono discriminated against Jessie Nelson and I order remedies against them. I dismiss the complaint against Nova Melanson.

II ISSUES

[4] In this complaint, Jessie Nelson bears the burden of proving that they were treated adversely in their employment and that their gender identity or expression was a factor in that adverse treatment: *Moore v. BC (Education)*, 2012 SCC 61 at para. 33. There are three issues I must decide:

- a. Did Mr. Gobbelle's conduct towards Jessie Nelson in the workplace amount to discrimination?
- b. Was the employer's response reasonable and appropriate?
- c. Was Jessie Nelson's gender identity and expression a factor in the termination of their employment?

III FACTS

[5] In this section I set out my findings of fact. These findings are based on the testimony of Jessie Nelson and the following witnesses:

- a. **Stacy Coplin** (she/hers): Ms. Coplin was a server who worked with Jessie Nelson. She witnessed a number of the events in this complaint, including the final incident with Mr. Gobbelle and the phone call in which Mr. Kingsberry terminated Jessie Nelson's employment.
- b. **Katie Grill-Donovan** (she/hers): Ms. Grill-Donovan is Jessie Nelson's friend. She witnessed the termination call with Mr. Kingsberry.
- c. **Michael Buono** (he/his): Mr. Buono is a director of Buono Osteria, and its executive chef. He made the decision to terminate Jessie Nelson's employment. He is a named respondent.
- d. **Nova Melanson** (she/hers): At the relevant time, Ms. Melanson was the front of house manager. She was present at an important staff meeting and at the final incident with Mr. Gobbelle. She is a named respondent.
- e. **Brian Gobbelle** (he/his): At the relevant time, Mr. Gobbelle was the bar manager. It was his conflict with Jessie Nelson that led to their termination. He is a named respondent.

[6] The final named respondent, Ryan Kingsberry (he/his), did not testify or appear in this proceeding, though he was represented by counsel for the respondents. Jessie Nelson submits that I should draw an adverse inference from his failure to testify, particularly since he was directly involved in at least two crucial conversations. I do not find it necessary to draw an adverse inference. The effect of Mr. Kingsberry's failure to testify is that Jessie Nelson's evidence about their conversations is uncontested. That evidence supports their allegations.

[7] I am satisfied that all of the witnesses testified truthfully to the best of their ability. At the time of the hearing, the events in question had taken place nearly 2.5 years ago. Memories had understandably faded and, in my view, this explains most of the small differences in the evidence I heard from witnesses to the same events. Other minor differences can be attributed to the witnesses' subjective interpretations and perceptions of the same incident.

[8] There are very few material issues on which the evidence was directly in conflict. On those issues, I have been required to make findings of credibility. In doing so, I apply the well-known principles summarized by Justice Dillon in *Bradshaw v. Stenner*:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides ... The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ...

Bradshaw v. Stenner, 2010 BCSC 1398; aff'd 2012 BCCA 296; leave to appeal refused, [2012] SCCA No. 392 at para. 186 [citations omitted]

[9] As this passage makes clear, the weight I give to a witness' evidence will depend both on their truthfulness as well as their reliability, or accuracy. While related, these two concepts –

credibility and reliability – do not always overlap. A person may testify honestly but their evidence may not be reliable because of their inability to accurately observe, recall, or recount the event: *R. v. H.C.*, 2009 ONCA 56 at para. 42. In that case, the decision maker may not safely rely on their testimony where it conflicts with others’ who are better positioned to give accurate testimony.

[10] The primary dispute in the evidence is between the testimony of Jessie Nelson and Mr. Gobelle. In those areas where their testimony was in conflict, I have preferred Jessie Nelson’s version. They had a clear recollection of events, which had a deep impact on them. They testified in a straightforward manner and their evidence was not shaken in cross-examination. They readily acknowledged when they behaved poorly. On the other hand, by his own admission, Mr. Gobelle’s memory was very poor. He attributes this to a head injury. He often could not remember events or, if he did, his memory was uncertain. Where Mr. Gobelle testified that he could not remember a particular event, I have accepted the evidence of other witnesses about his conduct. That evidence was generally consistent between the witnesses and was also consistent with behaviour I observed from Mr. Gobelle during the hearing. He struggled more than anyone else to use the proper pronouns to describe Jessie Nelson and used a type of bravado to cope with the stress of the moment. In the result, most of my findings in this decision rely on evidence from the other witnesses. I set out the specific basis for my findings of fact on disputed issues below.

A. Background

[11] Buono Osteria is a restaurant in a small town on BC’s Sunshine Coast. Mr. Buono is the director and executive chef. He primarily works in the kitchen. At the relevant time, Mr. Kingsberry was also a director of the restaurant, and its general manager. In that role, he was responsible for hiring, and oversaw the front of house staff. Ms. Melanson was the front of house manager, reporting to Mr. Kingsberry. Mr. Gobelle was the bar manager, also reporting to Mr. Kingsberry.

[12] In 2019, Jessie Nelson was moving from Vancouver to the Sunshine Coast. They had significant experience in the restaurant industry. They reached out to their friend, Ms. Coplin, for help finding a job. At that time, Ms. Coplin was a server at Buono Osteria and enjoyed her work there. She put Jessie Nelson in touch with Mr. Kingsberry and – with Jessie Nelson’s permission – made a point of telling him in advance that Jessie Nelson uses they/them pronouns.

[13] Mr. Kingsberry interviewed and hired Jessie Nelson as a server for the restaurant. Their first shift was May 27, 2019. The first three months of their employment was a probationary period.

[14] When they started, Jessie Nelson talked to Mr. Kingsberry about how important it was to them to be properly gendered in the workplace. At that point, Jessie Nelson had come out as trans relatively recently. They explain that it is a daily struggle to have their pronouns properly recognized:

It’s not easy, it’s not simple. Anytime I am in relationship with any other person, whether that’s getting a coffee or going to the grocery store, I’m almost always misgendered. I’m either referred to as “Ms” or “ma’am” or I’ve had people assume that Jessie is a shorthand for Jessica. It’s a daily conversation I’m in.

Jessie Nelson was happy, then, to have Mr. Kingsberry’s support in speaking to the restaurant staff and ensuring that they were properly gendered in their workplace.

[15] Mr. Buono explains that Jessie Nelson was the first non-binary person to work at the restaurant. It was a new experience for many of the staff and managers, himself included, to use they/them pronouns. They made mistakes – as Jessie Nelson expected, and accepted, that they would. Jessie Nelson perceived that some staff were nervous about making mistakes and kept their distance. Others, including Mr. Kingsberry and Ms. Melanson, were proactive and diligent about using the right pronouns and correcting themselves immediately if they made a mistake. Ms. Coplin witnessed Mr. Kingsberry correct staff who used the wrong pronouns for Jessie Nelson.

[16] Mr. Gobelle was another story. At the beginning of their employment, Jessie Nelson perceived that Mr. Gobelle was distant from them. This was more or less consistent with how he treated many of the staff. However, the relationship degraded relatively quickly.

[17] Mr. Gobelle referred to Jessie Nelson by nicknames. When they started work, they had pink hair and so Mr. Gobelle called them “pinky”. He also referred to them as “sweetheart”, “sweetie”, and “honey”. When he used pronouns, Mr. Gobelle referred to Jessie Nelson as she/her. This was all very hurtful. Jessie Nelson experienced the nicknames as offensive, degrading, and minimizing. Sweetie, sweetheart, and honey are all nicknames traditionally used for women and femme people. They specifically undermined and erased Jessie Nelson’s gender identity. Jessie Nelson explains:

It’s an incredibly dysphoric feeling. I’ve lived my entire life attempting to self-express and figure out who I am and find a place in this world. And I’ve worked very very hard and gone through a lot to get here. And it’s a challenging battle to have on a daily basis, even when people don’t mean it, let alone when somebody is doing it purposely.

[18] Jessie Nelson asked Mr. Gobelle to stop referring to them as she/her and to stop using nicknames. The first time they spoke to Mr. Gobelle, they took a lighthearted approach. Ms. Coplin, who witnessed the exchange, described it as a “simple call in”, along the lines of “hey – I have a name. I’d love if you could use it”. However, the conduct persisted, and Jessie Nelson spoke to Mr. Gobelle at least two more times. They repeated that their name was Jessie and that, at the very least, if he could not use the right pronouns, he could use their name. Mr. Gobelle’s conduct persisted. Jessie Nelson felt that he was deliberately trying to hurt them. For her part, Ms. Coplin could not tell at first whether the nicknames were Mr. Gobelle’s ill-advised attempt at comradery. However, she very quickly saw that his tone was condescending and not friendly. Even Mr. Buono acknowledged that Mr. Gobelle was using nicknames as a way to “get back” at Jessie Nelson in connection with their efforts to make the restaurant a more inclusive place for trans people. I return to this below.

[19] For his part, Mr. Gobelle testified that he may have called Jessie Nelson “pinky” because they had pink hair at the time. He does not recall Jessie Nelson asking him to stop. He does not

recall using other nicknames. For the reasons I have set out above, I prefer Jessie Nelson's evidence about his behaviour towards them, which was corroborated by other witnesses and consistent with Mr. Gobelle's behaviour during the hearing.

[20] Management became aware fairly early on that there was conflict between Mr. Gobelle and Jessie Nelson. Mr. Buono says that he was aware that Jessie Nelson and Mr. Gobelle were "having a hard time getting along". He and Mr. Kingsberry spoke to Mr. Gobelle about his behaviour. They asked Mr. Gobelle to be "as accommodating as possible" towards Jessie Nelson. Mr. Buono recalls that Mr. Gobelle was having a hard time getting used to using gender neutral pronouns and that he said he felt confused by it. Mr. Buono says they told Mr. Gobelle to use the right pronouns and that, if he could not do that, to just use Jessie Nelson's name.

[21] Notwithstanding this conversation, Mr. Gobelle's behaviour did not improve.

B. Staff meeting

[22] On June 13, 2019, Mr. Kingsberry convened a staff meeting. This meeting was a turning point in the relationship between Jessie Nelson and Mr. Gobelle.

[23] Mr. Kingsberry led the meeting with announcements and directions to prepare staff for the busy summer months. Among other things, he asked staff not to alienate guests by asking if they had a reservation. At the end of the meeting, he opened up the conversation to invite ideas from staff.

[24] Ms. Coplin took this opportunity to speak up about some of the offensive language that staff was using in the restaurant. In particular, she had overheard staff using the word "retarded" to describe things they thought were stupid or they did not like. This word is very harmful to people with disabilities and Ms. Coplin asked people to stop using it. She also noted that there had been incidents where staff made inappropriate and harmful jokes about rape. For example, she had heard Mr. Gobelle warn staff before a busy night that they were going to be "raped" or to prepare themselves to be "anally raped without lubricant". These types of comments were deeply upsetting to her and should not be present in any workplace.

[25] Jessie Nelson then took the opportunity to speak up about how staff could make the restaurant a more inclusive place for trans guests by using gender neutral language. They explained: “We don’t know who’s walking in the door. Wouldn’t it be kind of us to not assume anything about them?”. For example, instead of greeting a group of guests with “hi ladies” or “hey guys”, they suggested that staff could use words like “folks” or “friends”, or skip collective pronouns altogether. They used their own experience going to restaurants to highlight the harm that can be caused by misgendering a guest:

I used ... the general example of being in restaurants and being misgendered. Oftentimes it will be me with a group of femme-appearing or female people and a server will come up and say, “hey ladies”, which takes me completely out of that experience. I don’t feel like I’m at the table anymore. I now feel that I have to correct the server, or my friends feel like I do. When the server leaves, it’s not like that moment is over. Now my friends are worried about me and feeling that they have to take care of me. It changes the entire environment, the entire experience. And that’s why people go to restaurants – is to have an experience, to have somebody serve them food and have a higher value night.

[26] The reaction to this suggestion was mixed. Mr. Kingsberry was supportive, as were some other staff. On the other hand, some staff reacted defensively and offered resistance. Ms. Melanson testified that she felt that Jessie Nelson and Ms. Coplin had aggressively taken over the meeting. Both were relatively new to the restaurant, and Ms. Melanson found it “bizarre” that they would take it upon themselves to effectively “run the meeting”. She says, “it was a lot in a short period” and that Jessie Nelson was coming off very “strong”. This is the same type of language that would later be used to explain why their employment was terminated. After the meeting, Ms. Melanson spoke to one of the servers who was particularly upset at the suggestion that she should change the way she greets guests.

[27] Jessie Nelson and Ms. Coplin recall that Mr. Gobelle’s body language during this part of the meeting was angry and annoyed. Jessie Nelson recalls that he abruptly got up and left to open the bar. Mr. Gobelle agrees that he did not appreciate the suggestion to change his behaviour. He testified that he was not about to change how he spoke to guests unless he was

directly ordered to by his manager. From Mr. Buono's perspective, this became the main source of Mr. Gobelle's resentment towards Jessie Nelson.

[28] Indeed, after this meeting, the tension between Jessie Nelson and Mr. Gobelle intensified. He talked to them as little as possible, often ignoring them altogether. He made their job more difficult by being uncooperative or non-communicative about drink orders. For example, when a customer sent back a glass of white wine, Mr. Gobelle refused to taste it or offer Jessie Nelson any suggestions for how to address the customer's complaints. Another time, one of Jessie Nelson's tables ordered a daquiri. When Jessie Nelson went to the bar to pick up the drink, Mr. Gobelle laughed at them, said he did not make daquiris, and walked away without offering any alternatives. Jessie Nelson went back to talk to the table, and when they returned to the bar, Mr. Gobelle had made the daquiri. While this behaviour was not strictly reserved for Jessie Nelson, they did perceive – rightly, in my view – that he had a specific animus towards them.

[29] Ms. Coplin also perceived an increase in tension in her dealings with Mr. Gobelle after the staff meeting. She says that he “blatantly” treated her and Jessie Nelson differently, and was purposely messing up their drinks and not helping them. She complained to Mr. Kingsberry that she could not do her job properly anymore, and that it seemed like Mr. Gobelle was deliberately trying to make it as hard as possible on her. Mr. Kingsberry acknowledged the issue, and told Ms. Coplin that Mr. Gobelle was going through a tough time. He assured her that he would talk to Mr. Gobelle about his behaviour.

[30] Because of the issues they were having with Mr. Gobelle, Jessie Nelson developed concerns that their employment could be negatively impacted because of their gender identity. They expressed this concern to Mr. Kingsberry and asked for feedback about their performance. Mr. Kingsberry reassured them. He told them they were a great server and that he was happy with their performance. Ms. Coplin overheard part of this conversation, as well as one other more casual exchange where Mr. Kingsberry was complimenting Jessie Nelson on their performance and offering words of encouragement.

[31] Jessie Nelson also talked to Mr. Kingsberry about the problems they continued to have with Mr. Gobelle. The timing of this conversation is important. Jessie Nelson says that it was about one week before the final incident leading to their termination, which would be about June 16. The respondents do not dispute this timing, and I accept it as accurate.

[32] Jessie Nelson asked Mr. Kingsberry to talk to Mr. Gobelle again about using their name and pronouns correctly. Mr. Kingsberry assured them that he would talk to Mr. Gobelle but said that it might take a little time. He explained that the restaurant was currently addressing other performance issues with Mr. Gobelle and he did not want to “pile on” to him too much. After their conversation, Jessie Nelson understood that someone from management was going to speak to Mr. Gobelle on their behalf.

[33] However, Mr. Gobelle’s behaviour towards Jessie Nelson continued. They found it increasingly hard to work with him for an entire shift. They felt nervous and stressed about whether Mr. Gobelle would misgender them, interrupt their service, or sabotage their performance.

C. Final incident

[34] The final incident that led to Jessie Nelson’s termination happened on June 23, a Sunday. By this point, Jessie Nelson felt that too much time had passed since their last conversation with Mr. Kingsberry and Mr. Gobelle’s behaviour was not getting any better. Before their shift, they approached Mr. Kingsberry to ask whether he had spoken to Mr. Gobelle. He had not.

[35] This conversation between Mr. Kingsberry and Jessie Nelson is important because the respondents say that Jessie Nelson’s conduct afterward amounted to insubordination in light of what they were told by Mr. Kingsberry. Jessie Nelson denies doing anything that Mr. Kingsberry had told them not to.

[36] Mr. Buono was not present for the conversation but gave evidence about what he understood that Mr. Kingsberry had told Jessie Nelson. He says that Mr. Kingsberry told Jessie

Nelson that he and Mr. Buono intended to meet with them and Mr. Gobelle on Thursday, June 27. By this point, management was aware that Mr. Gobelle's behaviour had not improved, and that Jessie Nelson was reporting that he was not using the correct pronouns to refer to them. Mr. Buono had determined that the next step was for he and Mr. Kingsberry to meet with Mr. Gobelle and Jessie Nelson to "mediate" the dispute between them. He felt it was important to create a space where management could control emotions and give each person the space to "speak freely without judgement". In that environment, he says, management could "evaluate both people's opinions and then hopefully push towards creating a resolution by offering an unbiased opinion."

[37] Mr. Buono says that Mr. Kingsberry told him that Jessie Nelson wanted to talk to Mr. Gobelle themselves. He says that he told Mr. Kingsberry to tell Jessie Nelson not to do that, especially during work hours, and to wait until they could facilitate a proper mediation. He says that he never would have agreed to have Jessie Nelson try to resolve the conflict themselves by talking to Mr. Gobelle alone. He understands that Mr. Kingsberry told Jessie Nelson not to try talking to Mr. Gobelle directly.

[38] Ms. Melanson also testified that Mr. Kingsberry told her that he had told Jessie Nelson not to talk to Mr. Gobelle but instead to wait until they could all sit down for a meeting together.

[39] Mr. Gobelle has a slightly different recollection. He "vaguely" remembered Mr. Kingsberry telling him that he, Mr. Kingsberry, and Jessie Nelson would meet to have a conversation after the shift. He says that he did not really understand what it was about. He did not mention a mediation or a meeting on June 27.

[40] Jessie Nelson recalls their conversation with Mr. Kingsberry differently. They say that Mr. Kingsberry told them that he and Ms. Melanson were going to speak to Mr. Gobelle the next day. However, at that point, Jessie Nelson felt they could not wait any longer for management to deal with the issue. Change was not coming fast enough, and they did not want to work another shift having to deal with Mr. Gobelle's conduct. They asked Mr. Kingsberry if

they could talk to Mr. Gobelle directly. They hoped to connect with Mr. Gobelle on a human level, and felt confident that they could have a respectful conversation. Mr. Kingsberry told them that was fine, but asked that they wait until after work. Jessie Nelson responded that they would rather have the conversation ‘on the clock’ because it was work being imposed on them, as a trans person, to ensure their workplace was safe. Mr. Kingsberry agreed, but asked Jessie Nelson to wait for a lull in the service. Jessie Nelson says that Mr. Kingsberry never proposed or mentioned a mediation, or a conversation between themselves, management, and Mr. Gobelle.

[41] Only Jessie Nelson and Mr. Kingsberry were present for their conversation about how to address Mr. Gobelle’s conduct that day. As I have said, Mr. Kingsberry elected not to testify and so Jessie Nelson’s firsthand evidence about the conversation is undisputed. Mr. Gobelle has no clear or reliable memory of what he was told by Mr. Kingsberry. Mr. Buono and Ms. Melanson’s evidence about this conversation is hearsay, based on what they say Mr. Kingsberry told them about it. Ultimately, I prefer Jessie Nelson’s evidence about what they were told by Mr. Kingsberry. I have already found their evidence to be generally credible and reliable. Further, I find it unlikely that they would deliberately and flagrantly disobey clear management instructions. At this point, they were already concerned about their employment. They had made a point of asking Mr. Kingsberry’s permission to address Mr. Gobelle directly, and – as I will explain – approached Mr. Gobelle directly in front of Mr. Kingsberry and other managers, none of whom intervened to stop them or say that their behaviour was inappropriate. In fact, Mr. Kingsberry affirmed later in the evening that Jessie Nelson could talk to Mr. Gobelle directly.

[42] In sum, I find that Mr. Kingsberry had approved Jessie Nelson’s request to talk to Mr. Gobelle during a lull in service that night. That is what they did.

[43] Jessie Nelson waited for the service to slow down and then approached the bar to talk to Mr. Gobelle. There is some dispute in the evidence about whether they crossed into a prohibited area behind the bar or spoke to Mr. Gobelle from outside the bar area. In my view, nothing turns on this. I simply note that, if Jessie Nelson did go into a prohibited area, no one from management intervened though they were nearby and witnessed it.

[44] Jessie Nelson asked if Mr. Gobelle would mind stepping outside so they could have a chat. He refused and said he was working. Jessie Nelson explained that Mr. Kingsberry had approved the two of them spending a few minutes of work time to have a discussion. Mr. Gobelle repeated that he was working and said they could talk after the shift. Jessie Nelson left it at that.

[45] Mr. Buono and Ms. Melanson both observed this interaction from afar. Ms. Melanson overheard Mr. Gobelle tell Jessie Nelson that he was still working, and they could talk after the shift. She says she knew that the conversation would not end well.

[46] About 20-30 minutes later, Jessie Nelson saw Mr. Kingsberry standing at the bar with Mr. Gobelle. The restaurant was quiet. They decided to approach Mr. Gobelle again, in hopes that Mr. Kingsberry would support the two of them having a conversation. Again, they asked Mr. Gobelle to step outside and talk to them. He ignored them. Mr. Kingsberry told Jessie Nelson that it seemed that Mr. Gobelle would prefer to talk after the shift was over.

[47] Again, Mr. Buono observed this interaction from afar but did nothing to intervene.

[48] At this point, Jessie Nelson felt confused. They had fully expected Mr. Kingsberry to back them up but instead they felt that they were being left to deal with the situation completely on their own. They waited until the end of the shift.

[49] After the restaurant closed, Jessie Nelson approached Mr. Gobelle a third time. He told them he would be going outside for a cigarette soon and they could talk then. It was tense. A few minutes later, Jessie Nelson saw that Mr. Gobelle was smoking outside. They followed him out there.

[50] At this point, it was clear that Mr. Gobelle did not want to talk to Jessie Nelson. They felt scared about having the conversation, which would be a difficult one under the best of circumstances. In this case, they had reason to anticipate that Mr. Gobelle would be resistant to their point of view.

[51] Only Jessie Nelson and Mr. Goble were present to witness this first part of their interaction. Mr. Goble says that Jessie Nelson was obviously angry with him, but he did not know why. He says they were behaving very aggressively. He could not remember much of what they talked about, but says it was possible that they raised the issue of their pronouns, and how to address guests. He says he was not receptive to changing how he addressed guests. He says he tried to go inside when Jessie Nelson put their hands on his chest and said, “you’re not going anywhere”. He brushed past them and went inside.

[52] Jessie Nelson’s evidence about this exchange was different. They say they started the conversation by expressing that they sensed that Mr. Goble did not like them and that they did not understand why. They recall that Mr. Goble laughed and responded, “yeah I don’t fucking like you”. He told them, “you’re trying to police our language and tell me how to speak, and what words to use”. He felt this was unfair and that it went against what his grandfather had fought for in the war. Jessie Nelson understood this to mean that their requests somehow impaired Mr. Goble’s freedoms – a position they found ironic given that freedom and equality was the foundation of their requests of Mr. Goble. Jessie Nelson recalls that Mr. Goble described them as “militant” – a word that would later be used in the explanation for why their employment was terminated.

[53] At least three times during their conversation, Mr. Goble called Jessie Nelson sweetie, sweetheart, or honey. Each time they told him not to. They told him, as they had before: “my name is not pinky or sweetie. If you can’t use my pronouns, at least use my name”. Mr. Goble said that he was not going to change who he was. The people who come to his bar are “ladies and gentlemen”, “boys and girls”. If anyone wants to be called differently, they can tell him and he will respect that. Jessie Nelson tried to explain that this would be a hard conversation for a guest, and it is kinder not to assume a person’s gender and require them to have this conversation when all they really want to do is eat their food.

[54] By the third time they had to ask Mr. Goble to use their name, Jessie Nelson was frustrated. They spoke sternly and with a raised voice: “Brian, that is not my name. My name is Jessie. Call me by my name”.

[55] Jessie Nelson recalls that the conversation ended abruptly. Mr. Gobelle said, “this conversation is over, I’m done” and started to walk by them. Jessie Nelson says that they raised their arms in disbelief and said, “are you serious?”, to which Mr. Gobelle responded: “yeah I’m fucking serious”. Mr. Gobelle brushed past them and back into the restaurant.

[56] On this issue, I again prefer Jessie Nelson’s evidence. They had a clear recollection of the conversation, which was unshaken in cross-examination. They were frank in acknowledging their own conduct, even when it did not cast them in a favourable light. Their evidence about what Mr. Gobelle said was consistent with the evidence of other witnesses about Mr. Gobelle’s resistance to their suggestions about how to be more inclusive of trans guests, as well as his own admitted feelings on the matter. As in other areas, Mr. Gobelle’s memory was vague and at times inconsistent with the probabilities of the case as a whole. In particular, I find it highly improbable that Jessie Nelson would try to physically block Mr. Gobelle in the manner he says they did. While Mr. Gobelle may have perceived their conduct as aggressive or threatening, in my view that is more a function of his own discomfort with conflict and his perception that Jessie Nelson was pushing their ‘agenda’ onto him. In the result, I accept Jessie Nelson’s evidence about what happened in this interaction.

[57] At that time, a number of staff and managers had gathered in the restaurant’s private dining room to drink and socialize after their shift. Ms. Coplin, Ms. Melanson, and Mr. Buono were all there when Mr. Gobelle stormed into the dining room, slamming the sliding door behind him. They all agree he was visibly upset. He came to Mr. Buono, angry and swearing. Mr. Buono describes him as “rambling”. Ms. Coplin recalls that he said words to the effect of, “get her the fuck out of here”, “it’s her or me”, and “I’m gonna fucking quit if she stays”. None of the other witnesses could remember his exact words, but everyone agrees he was angry and swearing. I accept Ms. Coplin’s evidence that Mr. Gobelle expressed that he was angry at Jessie Nelson and referred to them using she/her pronouns. Ms. Coplin was already very alert to the issue of Jessie Nelson being misgendered in the workplace and would have immediately recognized the significance of those exact words being used.

[58] Jessie Nelson was only a few seconds behind Mr. Gobelle. They narrowly missed being hit by the sliding door that Mr. Gobelle had slammed. This was scary. They felt a lot of adrenaline and fear in their body. They were highly emotional.

[59] Mr. Gobelle was swearing. Jessie Nelson recalls him saying words to the effect “I can’t fucking do this anymore, I’m not going to fucking do this – I’m outta here”. Ms. Melanson was trying to get him to stop talking. What happened next is the subject of disagreement between the witnesses.

[60] The entire exchange was very short – about 30 seconds. There is no dispute that Jessie Nelson said something condescending and sarcastic to Mr. Gobelle, which was intended to hurt him. They called Mr. Gobelle “sweetie”, as he had done so many times to them. There is also no dispute that Jessie Nelson touched Mr. Gobelle on his back. But whereas they say this was a gentle touch, the respondents describe it as a violent physical assault.

[61] Jessie Nelson says they put their hand on Mr. Gobelle’s shoulder and said something sarcastic like “must be tough, eh sweetie?”. They admit, “this was not my finest hour”. They were trying to get a jab in and weaponize the same words that Mr. Gobelle had been using against them on him. They deny hitting or striking him, or putting their hand on his neck.

[62] Ms. Coplin recalls that Jessie Nelson said something like “it’s ok, sweetie – I’m leaving so you don’t have to”. She did not see Jessie Nelson touch Mr. Gobelle, and could not confirm whether they did or did not. She was focused on Jessie Nelson and ensuring their safety in that moment.

[63] For his part, Mr. Gobelle says that Jessie Nelson “smacked” him on the back. He could not remember the words they used. He was shocked. He describes it as a “violent encounter” and an assault. This is similar to the evidence of Mr. Buono and Ms. Melanson. Mr. Buono says that, when they entered the room, Jessie Nelson’s eyes were “intense”. He says they slapped Mr. Gobelle on the back and said, condescendingly, “see ya later, sweetie”. He describes it as an “antagonizing blow” that was not friendly. Ms. Melanson says that Jessie Nelson “slapped”

Mr. Gabelle on his back and said, “have a good night sweetie”. She says that the slap was hard enough that she could hear it.

[64] I accept that Jessie Nelson used some force on Mr. Gabelle’s back. In their own words, they were experiencing a rush of adrenaline and “emotional chaos”. They were upset and angry. Along with their words, they intended to find some way to hurt Mr. Gabelle as he had hurt them. The contact was enough to shock Mr. Buono and Ms. Melanson. However, I do not accept that it is fair to characterize this as a violent physical assault. It did not hurt Mr. Gabelle, and he does not claim it did. Rather, he was surprised by it and the touch was unwelcome. It was a parting slap on the back.

[65] Jessie Nelson told Ms. Coplin they were leaving, and the two left together. Once they got to the car, Jessie Nelson broke down and started crying. They describe it “like a panic attack”. They felt incredibly hurt and afraid they would lose their job.

[66] Back at the restaurant, Mr. Buono says that Mr. Gabelle was so angry that he was nearly inconsolable. Other staff were upset and concerned. Mr. Buono reassured everyone that the restaurant would not tolerate Jessie Nelson’s conduct.

D. Decision to terminate

[67] Mr. Buono spoke to Mr. Kingsberry. He felt that Jessie Nelson had been insubordinate in taking it upon themselves to talk to Mr. Gabelle and then going so far as to hit him. Mr. Buono no longer felt that the two of them could be in the same building because of the physical altercation, and that it was his obligation to keep the environment safe by removing Jessie Nelson. In the circumstances, he says that Jessie Nelson was the “obvious aggressor”, having confronted Mr. Gabelle against management’s wishes and then “approaching and striking” him. He felt that he could not create a safe environment if he were to allow Jessie Nelson to return to work. Because Jessie Nelson was still in their probationary period, he decided that the restaurant could exercise its right to terminate them without notice and without explanation. He thought that, by not giving any reason for the termination, they could avoid a perception that the termination was because of the “gender neutral pronoun request”.

[68] At some point, Mr. Buono also spoke to Mr. Gobelle about the incident. He says this was after he had already made the decision to terminate Jessie Nelson's employment. He asked Mr. Gobelle to write a statement about what had happened. The respondents assert litigation privilege over this statement and did not disclose it in these proceedings. In response to my questions, counsel for the respondents said that the statement was dated June 23 – the night of the incident. This would seem to support that Mr. Buono had spoken to Mr. Gobelle before, or around the same time as, he was deciding to terminate Jessie Nelson's employment. I do not make a specific finding about this, or about the merits of the claim of privilege. Ultimately, it is clear that Mr. Buono chose Mr. Gobelle over Jessie Nelson and accepted his version of events without ever asking for, or considering, theirs.

[69] Mr. Buono announced to staff that Jessie Nelson would not be returning. He explained that they had gone against the wishes of management about how to handle a conflict and engaged in a physical altercation. There is no dispute that this announcement happened before Jessie Nelson was informed of their own termination.

[70] Mr. Buono never spoke to Jessie Nelson again. From his perspective, he had seen enough.

E. Termination

[71] After the incident, four days passed. Neither Jessie Nelson nor Ms. Coplin heard anything from the restaurant. They found this strange; they had expected someone to reach out. Jessie Nelson contacted Mr. Kingsberry to ask about their schedule for the following week, and were reassured that it was coming. They asked if they could come by and pick up their tips.

[72] On Thursday, June 27, Jessie Nelson and Ms. Coplin went to the restaurant to pick up their tips. Mr. Kingsberry met them outside, which was very unusual. Ms. Coplin explained that usually she would go in and say hi, chatting with her co-workers. This time, Mr. Kingsberry seemed not to want them in the restaurant. He did not ask Jessie Nelson how they were, or anything about the incident. He told them they were scheduled to work on the following day.

[73] The next day was Friday, June 28. Jessie Nelson understood they would start work around 4 or 4:30. Earlier in the day, they went grocery shopping with Ms. Coplin and Ms. Grill-Donovan. While they were at the store, Jessie Nelson received a call from Mr. Kingsberry. Because Mr. Kingsberry did not testify, the evidence from Jessie Nelson about this conversation is uncontested. It is also corroborated by the evidence of Ms. Coplin and Ms. Grill-Donovan, who overheard most of the conversation on speaker phone.

[74] Mr. Kingsberry explained that he was calling to terminate Jessie Nelson's employment. They were shocked and caught off guard. They immediately asked why. Within a couple of minutes, they got in the car with Ms. Coplin and Ms. Grill-Donovan, and put the call on speaker phone.

[75] The call lasted about 20-30 minutes. Jessie Nelson persisted in trying to get Mr. Kingsberry to explain why they were being fired, especially given his recent positive feedback about their performance. Mr. Kingsberry continuously evaded the question and repeated that they were being terminated without cause, during their probationary period. The witnesses described him as sighing a lot, giving vague answers, and saying things like "I don't know what to tell you". Eventually he told Jessie Nelson that they had just come off "too strong too fast" and were too "militant" – a word that reminded Jessie Nelson of what Mr. Goble had said about them. They challenged Mr. Kingsberry that they were being fired because of their pronouns. Ms. Coplin recalls Mr. Kingsberry telling Jessie Nelson that "part of the problem is making sure you vibe with the team", and that they had made people uncomfortable. He said that his hands were tied, that "the team has spoken", and that Jessie Nelson just was not a "good fit". Ms. Grill-Donovan recalls him saying that it was "too much too fast" and "staff isn't there".

[76] At no point in the conversation did Mr. Kingsberry suggest that Jessie Nelson's termination had anything to do with their final conflict with Mr. Goble or the restaurant's view that they had "assaulted" him. There was also no complaint about their performance.

[77] Based on what Mr. Kingsberry said, Jessie Nelson understood that they were being terminated because of their gender identity. This was devastating. Immediately after the call, Jessie Nelson went home with their two friends and sobbed. Ms. Grill-Donavan had never seen her friend cry like that before. Ms. Coplin called the restaurant and resigned. The impact of these events on Jessie Nelson was significant. I return to this below.

[78] On March 24, 2020, Jessie Nelson filed this complaint of discrimination.

IV ANALYSIS AND DECISION

[79] Jessie Nelson only worked for Buono Osteria for about four weeks. During that time, one of their co-workers persistently referred to them with the wrong pronouns and unwanted, gendered, nicknames. They were fired after their attempt to address this conduct led to a heated encounter. I must decide whether, by their conduct, the respondents violated s. 13 of the *Code*. As I have said, the specific issues are:

- a. Did Mr. Gobelle’s conduct towards Jessie Nelson in the workplace amount to discrimination?
- b. Was the employer’s response reasonable and appropriate?
- c. Was Jessie Nelson’s gender identity and expression a factor in the termination of their employment?

I consider each of these issues in turn.

A. Mr. Gobelle’s conduct

[80] All employees have the right to a workplace free of discrimination. Trans employees are entitled to recognition of, and respect for, their gender identity and expression. This begins with using their names and pronouns correctly. This is not an ‘accommodation’, it is a basic obligation that every person holds towards people in their employment: *BC Human Rights Tribunal v. Schrenk*, 2017 SCC 62 [**Schrenk**].

[81] I am satisfied that Mr. Gobbelle’s conduct towards Jessie Nelson amounted to discrimination. He was told, by his managers and directly by Jessie Nelson, that they are trans, non-binary, and use they/them pronouns. They are not a woman. And yet, he persisted in referring to them with female pronouns and gendered nicknames. This adversely impacted Jessie Nelson in their employment based on their gender identity. I begin with the pronouns.

[82] Like a name, pronouns are a fundamental part of a person’s identity. They are a primary way that people identify each other. Using correct pronouns communicates that we see and respect a person for who they are. Especially for trans, non-binary, or other non-cisgender people, using the correct pronouns validates and affirms they are a person equally deserving of respect and dignity. As Jessie Nelson explained in this hearing, their pronouns are “fundamental to me feeling like I exist”. When people use the right pronouns, they can feel safe and enjoy the moment. When people do not use the right pronouns, that safety is undermined and they are forced to repeat to the world: I exist.

[83] I appreciate, as the respondents point out, that for many people the concept of gender-neutral pronouns is a new one. They are working to undo the “habits of a lifetime” and, despite best intentions, will make mistakes. Unfortunately, this learning is done at the expense of trans and non-binary people, who continue to endure the harm of being misgendered.

[84] Human rights law is concerned not with intentions, but with impacts: *Code*, s. 2; *Schrenk* at para. 88 (per Abella J, concurring). This does not mean, however, that intention is irrelevant. A person’s intention can go a long way towards mitigating or exacerbating the harm caused by misgendering. Where a person is genuinely trying their best, and acknowledges and corrects their mistakes, the harm will be reduced. This is evidenced by Jessie Nelson’s response to mistakes made by Mr. Kingsberry, who proactively took steps to correct himself and make the workplace more inclusive. These mistakes, though they may have been painful, did not lead them to file a human rights complaint. As they explained in this hearing, “I don’t expect perfection around my pronouns; I never have.” On the other hand, where a person is callous or careless about pronouns or – worse – deliberately misgenders a person, the harm will be magnified. This was the case with Mr. Gobbelle.

[85] In cross-examination, Jessie Nelson was asked to agree that Mr. Gobelle was older than other staff and held old-fashioned views that were reflected in how he spoke to them. Jessie Nelson reframed his conduct as follows:

Q: He had a very traditional way of speaking and thinking about things?

A: Ya, again I wouldn't use those terms. Those terms are quite kind. I would say he wasn't traditional or old fashioned, I would say that he was deliberately bigoted. He was deliberately insensitive to the people around him.

Jessie Nelson told Mr. Gobelle that he was hurting them. At that point, it is not a defence to simply say that he is older, or old fashioned, or confused by the request to use gender neutral pronouns. Though he may have struggled to adapt to a "new" way of talking, he was obliged to at least try. Instead, he communicated that Jessie Nelson's wellbeing was not important to him and, in doing so, harmed them in their employment in connection with their gender identity.

[86] I turn now to the nicknames. The nicknames that Mr. Gobelle used to refer to Jessie Nelson, including "sweetie", "sweetheart", and "honey" are well understood gendered terms which are most often used towards women or femme appearing people. While they may be welcome terms of endearment when used to address a close family member or romantic partner, they have no place in a professional setting. When used by a man towards a woman, the effect is infantilizing and patronising, and reinforces gendered hierarchies: *The Sales Associate v. Aurora Biomed Inc. and others (No. 3)*, 2021 BCHRT 5 at para. 116. In Jessie Nelson's case, there was an added layer of harm by the implicit messaging that Mr. Gobelle regarded and treated them as a woman. This undermined, erased, and degraded their gender identity in their place of work. This is discriminatory.

[87] Though the nickname "pinky" may not have the same overtly gendered tone, it was still patronizing and unwelcome. By persisting with this nickname after being told more than once to stop, Mr. Gobelle continued to reassert that he would be the one to define Jessie Nelson in their workplace, regardless of their wishes. This conduct persisted in a context where, by all accounts, Mr. Gobelle was resentful towards Jessie Nelson because of their efforts to make the

restaurant a more inclusive place by pointing out ways in which his behaviour could harm trans people. Even Mr. Buono speculated that the nicknames were Mr. Gobbelle's way of getting back at Jessie Nelson for speaking up about how gendered language affects guests and staff alike. In this context, I am satisfied that this conduct adversely impacted Jessie Nelson and that adverse impact was connected to their gender identity and expression. It was discriminatory.

[88] Mr. Gobbelle's animus towards Jessie Nelson also affected how he worked with them. Although it is undisputed that Mr. Gobbelle had difficulties getting along with other people in the workplace, I have found that he was particularly hostile to Jessie Nelson and Ms. Coplin after their comments about inclusion at the staff meeting. He was unhelpful to them when they had issues with drink orders and refused to communicate in a productive way. The reason for that hostility was laid bare in his final conversation with Jessie Nelson, in which he accused them of "policing" his language and undermining the freedoms his grandfather had fought for in the war. Though this did not relate only to how Mr. Gobbelle was being asked to address Jessie Nelson, I cannot extricate his resentment towards their general feedback from their personal gender identity. Jessie Nelson told him – and others – that it hurts trans people to be casually misgendered in a service setting and spoke from a place of personal experience. Mr. Gobbelle's indifference to Jessie Nelson's lived experience, and open hostility to changing his behaviour, sent a message that the issue was not important to him and neither were they.

[89] In sum, I find that Mr. Gobbelle discriminated against Jessie Nelson in their employment. His use of female pronouns and gendered nicknames demeaned them and undermined their dignity at work. His resentment towards their feedback about inclusion led him to directly undermine their performance by being uncommunicative and uncooperative. All of this was connected directly to Jessie Nelson's gender identity and expression, and constitutes a violation of the *Code*.

B. The employer's response

[90] Jessie Nelson brought their concerns about Mr. Gobbelle's discriminatory conduct to management. There is no dispute that Mr. Kingsberry, Mr. Buono and Ms. Melanson were well

aware of the dispute between the two, and that Jessie Nelson objected to Mr. Gobelle's use of nicknames and female pronouns. As the employer, they were obliged to respond. The Tribunal has summarized the employer's obligations in these circumstances as follows:

... employers have obligations under the *Code* to respond reasonably and appropriately to complaints of discrimination... This includes a duty to investigate. Because the *Code* obliges employers to respond to allegations of discrimination, a failure to do so in a way that is reasonable or appropriate can amount to discrimination.... In particular, an investigation can, on its own, amount to discrimination "regardless of whether the underlying conduct subject to the investigation is found to be discriminatory"... Some factors the Tribunal may consider are whether the employer and persons charged with addressing discrimination have a proper understanding of discrimination, whether the employer treated the allegations seriously and acted "sensitively", and whether the complaint was resolved in a manner that ensured a healthy work environment...

Jamal v. TransLink Security Management and another (No. 2), 2020 BCHRT 146 at para. 106 [citations omitted]; see also discussion in *Denness v. PDK Café and others*, 2020 BCHRT 184 at paras. 200-203 and *Algor v. Alcan and others (No. 2)*, 2006 BCHRT 200 at paras. 185-188.

[91] In my view, the employer's response fell short of what was reasonable and appropriate and sowed the seeds for the altercation that would lead to Jessie Nelson's termination.

[92] First, I acknowledge that the employer had some understanding of discrimination and a stated commitment to creating an inclusive space. This is reflected in their policy on harassment and inclusion, which provides:

We strive to create an inclusive space in Buono. Every staff member has the right to feel safe in our work environment, and free of any unwelcome conduct based on a person's race, sex, or any other status.

It is also reflected in Mr. Kingsberry's support and proactive attempts to ensure that Jessie Nelson was properly gendered at work.

[93] Notwithstanding their high-level commitment to an inclusive workplace, the managers' response to Jessie Nelson's complaints lacked any sense of urgency. This suggests that they did

not appreciate how serious those complaints were. I have a hard time imagining that the restaurant would have responded in the same way to other serious complaints of discrimination.

[94] According to the restaurant's policy, a person who feels they are being harassed is obliged to alert a manager as soon as possible. Jessie Nelson did that, by reporting the behaviour to their manager – Mr. Kingsberry. Mr. Kingsberry, in turn, spoke to Mr. Buono and the two of them led the employer's response.

[95] Mr. Buono spoke to Mr. Gobelle and instructed him to use Jessie Nelson's name and correct pronouns, but that seemed to have no impact on his actual behaviour. When Jessie Nelson raised the issue again, they were told that the issue would have to wait because the employer was addressing other performance concerns with Mr. Gobelle and did not want to "pile on" to him too much. Mr. Buono explains that he felt that Mr. Gobelle deserved a few chances because "this was new". This was not fair to Jessie Nelson and failed to appreciate the impact of them having to attend work each day for a six-hour shift alongside a person who could, at any time, degrade and discriminate against them in their workplace. Whatever Mr. Gobelle's other performance issues may have been, his duty not to discriminate against a co-worker should have taken immediate and urgent precedence.

[1] Above I have found that Mr. Kingsberry did not tell Jessie Nelson that the employer intended to 'mediate' between them and Mr. Gobelle. Accepting for the moment that this was indeed Mr. Buono's intention, and that it was well-meaning, the idea was misguided. This was not a conflict between two employees who simply held different opinions or did not like each other. This was a matter of discrimination. Given that the employer had accepted that Jessie Nelson's complaints were valid, all that remained was to correct Mr. Gobelle's behaviour. This was the employer's responsibility and not Jessie Nelson's. The employer is responsible for ensuring a healthy work environment: *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84 at para. 15.

[2] I appreciate that the period of time in question was relatively short, and this is not a case where the employer was indifferent or took no steps to address the conduct. However, it was not reasonable or appropriate to ask Jessie Nelson to continue to endure discrimination until the employer found an opportune time to talk to Mr. Gobelle. If it truly was necessary to wait, then the employer should have put something in place to protect Jessie Nelson from discrimination during their shifts.

[3] Significantly, the outcome of the employer's approach was not to restore a healthy work environment for Jessie Nelson. To the contrary, it led Jessie Nelson to conclude they would have to address the issue themselves – at the eventual cost of their employment. The decision to terminate Jessie Nelson's employment must be considered as part of the employer's response to their complaints, and bolsters my finding that the employer's response fell short of what is required by the *Code*. I turn to that issue now.

C. Termination

[4] To prove that the termination of their employment violated the *Code*, Jessie Nelson must show that their gender identity and expression was **one** factor in that decision. It does not need to be the only or overriding factor: *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 52.

[5] Mr. Buono says that there were two reasons underlying his decision to terminate Jessie Nelson's employment: their decision to talk directly to Mr. Gobelle on the evening of June 23, which he considered insubordination, and their conduct in insulting Mr. Gobelle and hitting him on the back. Though I have found that Jessie Nelson was not, in fact, insubordinate, I will accept for the purpose of this analysis that Mr. Buono thought they were. The respondents argue that these two reasons constitute a complete and non-discriminatory explanation for the termination. I do not agree.

[6] At the outset I must address the respondents' submissions about the effect of Jessie Nelson being in the probationary period of their employment. From a human rights

perspective, this is irrelevant. Parties cannot contract out of their duties under the *Code*: *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 SCR 145 at p. 158. While an employer may terminate a probationary employee without cause and without notice, they cannot terminate them for any reason connected to the personal characteristics protected under s. 13.

[7] In this case, I have no difficulty concluding Jessie Nelson’s gender identity was a factor – if not **the** factor – in their termination. This conclusion is supported both by the explanation offered by Mr. Buono, as well as what Mr. Kingsberry told Jessie Nelson in their final call.

[8] Accepting Mr. Buono’s explanation for their termination, it is apparent that Jessie Nelson was terminated in connection with their efforts to address discrimination. There is no dispute that their conflict with Mr. Gobelle was based, in part, on his ongoing use of female pronouns and nicknames, and that Jessie Nelson objected to that conduct because it harmed them in connection with their gender identity. The conflict was also related to Jessie Nelson’s feedback at the staff meeting and elsewhere about how people could change their behaviour to be more inclusive towards trans guests – feedback which they overtly connected to their own personal experience. Mr. Buono says that this was Mr. Gobelle’s main problem with Jessie Nelson. Mr. Gobelle felt that it was his right to refer to guests as “guys” or “gals”, and that it was not Jessie Nelson’s place to “police” his language. On one occasion, Mr. Buono says that Jessie Nelson publicly “called out” Mr. Gobelle when he referred to a group of male-appearing guests as “guys”, which was humiliating for him. From his perspective, Mr. Buono perceived that Mr. Gobelle was using inappropriate nicknames as a way to “get back at” Jessie Nelson over this issue.

[9] Where an employee is terminated in the context of a discriminatory work environment, careful attention must be paid to ensure there is no connection between the termination and the discriminatory environment: *Vanderputten v. Seydaco Packaging Corp*, 2012 HRTO 1977 at para. 81, citing *Smith v. Ontario (Human Rights Commission)*, 2005 CanLII 2811 (ON SCDC) at para. 24. In *Vanderputten*, the Human Rights Tribunal of Ontario explained that “[w]here employees are confrontational or aggressive as a result of a discriminatory working

environment, discipline for that aggression is a violation of the *Code*": para. 81. While that may not necessarily be true in every case, it is in this one.

[10] It is painful to endure a discriminatory work environment. In *Naraine*, the Ontario Board of Inquiry quoted expert evidence about the pressures on a person in that position:

A person who must endure a poisoned work environment is constantly in pain, is constantly humiliated ... is always under stress because [they know] that an evaluation is being formed on irrelevant criteria. No matter how good you do the job, you're still going to be perceived in negative terms. So, the immediate effect on the victim is incredible stress, pain, suffering, humiliation, and at the same time the knowledge that a job has to be maintained, because one's own survival and the survival of one's family is dependent on earning a living.

Naraine v. Ford Motor Co. of Canada (No. 4), 1996 CanLII 20056 (Ont. Bd. Inquiry) at para. 90; rev'd on other grounds, 2001 CanLII 21234 (ON CA)

Indeed, this is how Jessie Nelson described their experience. They became fearful that their performance would be judged based on their trans identity and not their merit. This led them to seek, and receive, reassurance from Mr. Kingsberry. At the same time, every shift – especially after the June 13 staff meeting – was a fresh opportunity and occasion for stress, pain, suffering, and humiliation.

[11] Under such conditions, people may react in any number of ways. When a person complains or speaks up about discrimination, there is a well-known propensity to label them as “problematic or difficult to deal with”: *Monsson v. Nacel Properties*, 2006 BCHRT 543 at para. 33. This perpetuates the discrimination. In *Naraine*, the Board of Inquiry cited the following analysis, which applies directly to the circumstances before me:

Discrimination is frequently masked as a "personality" problem ... Oppressors frequently are successful in obscuring the reality of oppression by characterizing complainants as "confrontational." This is the ultimate reversal of "who is doing what to whom." Resisting, fighting back, or showing anger is seen as inappropriate, intimidating and/or immature behaviour.

[This takes] the oppressed's angry response to a discriminatory incident rather than the incident itself, as the starting point of the interaction, thereby constructing the oppressed as culpable and legitimating harsh employer action as a justifiable "response" to the oppressed's "inappropriate" (re)action. Another method is to depoliticize and allegedly equalize the context so that both the dominant and the subordinate are seen as being equally responsible for their "bad tempers." Understanding the politics of inequality which underlie these interactions reveals a different story. It reveals how one party's hostility is about maintaining dominance by stripping the other of their will/dignity, and the other's "temper" is about trying to maintain dignity and assert equality. The expression of anger is a completely appropriate and healthy response to discrimination, which emanates from a sense of self-worth and a demand that others recognize one's humanity: "I am worth more than what your actions dictate, and I refused to be treated with such disregard." From the dominant perspective, however, revealing one's anger and asserting one's equality is seen as a hostile act because it undermines the dominator's sense of self as dominant. **When viewed in context, the acts of "temper" by the dominant and the subordinate parties can be appreciated as being radically different. However, in terms of the development of the principle of insubordination in labour law, they are context-stripped and their analysis reduced to cliché: "two wrongs don't make a right."**

Lynne Pearlman, "Theorizing Lesbian Oppression and the Politics of Outness in the Case of *Waterman v. National Life Assurance: A Beginning in Lesbian Human Rights/Equality Jurisprudence*" (1994) 7:2 C.J.W.L. at 461, 485–86, cited in *Naraine* at para. 92 [emphasis added]

[12] In this case, the employer took Jessie Nelson's conduct on June 23 – rather than Mr. Gobelle's discriminatory conduct – as the "starting point of the interaction". Jessie Nelson was then cast as the angry instigator. The assessment of their conduct was stripped of context, allowing the employer to ignore the inequality between the two sides in the conflict, and its connection to Jessie Nelson's gender identity. Whereas for Jessie Nelson, the issue was their right to a workplace free of discrimination, the issue for Mr. Gobelle was his insistence that he would not change his behaviour to avoid hurting his co-worker. These are not equivalent.

[13] Mr. Buono explained that, from his perspective, Jessie Nelson's use of physical force warranted a much more severe response than Mr. Gobelle's conduct, which was purely verbal.

In his view, anything physical is “much more serious”. In the context of this case, I do not accept that explanation.

[14] To begin, there is some inconsistency between Mr. Buono’s testimony, and the closing submissions made on behalf of the respondents. Mr. Buono testified that he decided to terminate Jessie Nelson before talking to Mr. Gobelle, based on the conduct he had directly witnessed – in particular the slap on Mr. Gobelle’s back in the dining room. However, in their closing submissions the respondents say that they terminated Jessie Nelson’s employment because they had “physically assaulted” Mr. Gobelle twice. The second time refers to Mr. Gobelle’s allegation that they put their hands on his chest when the two of them were talking outside the restaurant. In this decision, I have found that did not occur. If the respondents did in fact rely on this allegation to terminate Jessie Nelson’s employment, it is alarming that they did so without talking to Jessie Nelson to hear their version of events.

[15] Regarding the final incident in the dining room, the respondents overstate the amount of physical force that was involved. I have found that Jessie Nelson slapped Mr. Gobelle on the back. I do not want to minimize this conduct – clearly people should never touch each other without consent, particularly in anger. Jessie Nelson acknowledges this was inappropriate. However, there is no evidence that the contact actually hurt Mr. Gobelle or could fairly be characterized as violent. Its actual impact was to surprise and shock Mr. Gobelle and others who were present.

[16] At the same time, Mr. Buono’s assessment seriously underestimates the power of language and the impact of discrimination. I have set out some of that impact above and return to it below. Suffice to say that it is extremely serious. While he is critical of Jessie Nelson’s “condescending” use of the word “sweetie” and their slap on Mr. Gobelle’s back, Mr. Buono either failed to recognize or to give any consideration to the fact that Mr. Gobelle had, yet again, referred to Jessie Nelson as “her” in his angry rant. This is telling. Though he may have been genuinely committed to an inclusive workplace – and I accept that he was – Mr. Buono failed to identify and understand how that type of conduct was itself extremely harmful. In the specific context of this case, its impact was far greater than a single slap on the back.

[17] In sum to this point, even accepting Mr. Buono's explanation, there is a clear connection between Jessie Nelson's gender identity and their termination. They were terminated because of how they responded to discrimination. They were held to a higher standard of conduct than Mr. Gabelle, and the discriminatory context of the dispute was ignored.

[18] However, I do not think that Mr. Buono's explanation is a complete one. Rather, Mr. Kingsberry's remarks during their final conversation reveal that the employer's issue with Jessie Nelson extended beyond the events of June 23 to a more generalized concern that they were coming on "too strong" on the issue of trans inclusion.

[19] Pressed to explain the termination, Mr. Kingsberry told Jessie Nelson that they had come off "too strong too fast" and too "militant", that "staff wasn't there", that they did not "vibe with the team" and that they were not a "good fit". There is no dispute that the only source of tension between Jessie Nelson and other employees was their use of they/them pronouns – which was new and uncomfortable for some staff – and their suggestions about how to make the restaurant more inclusive of trans people. Mr. Gabelle had accused Jessie Nelson of being too "militant" about gender neutral language. Mr. Buono also admitted during his testimony to feeling uncomfortable about how Jessie Nelson communicated their gender identity to guests. Ms. Melanson felt Jessie Nelson was "aggressive" in their suggestions for gender neutral language. This situation demonstrates the dangers of "fit" or workplace "vibe" when it comes to equality-seeking groups. Jessie Nelson was the first trans, non-binary, employee to work at this restaurant and to insist on equal treatment. They did not "fit in" with employees and managers who felt uncomfortable and challenged to change behaviour they had engaged in for their entire lives. Ultimately, the employer concluded that it would be easier to terminate their employment than to meaningfully address any of these issues. In doing so, they discriminated against Jessie Nelson.

[20] The respondents posit that, during this final conversation, Mr. Kingsberry was "trying to provide some answer without getting into the cause". In the absence of evidence from Mr. Kingsberry, this is pure speculation. Respectfully, it also does not make sense that in order to avoid telling Jessie Nelson they were being terminated for physical assault, Mr. Kingsberry

would opt to tell them they were fired for reasons clearly connected to their gender identity. As in *Benton v. Richmond Plastics Ltd*, 2020 BCHRT 82, this is the type of explanation that “could only make it worse”: para. 57. In any event, even if Mr. Kingsberry did misrepresent the reasons for Jessie Nelson’s termination, that type of misrepresentation still violates the *Code* where, as here, it causes a discriminatory impact: *English v. Sihota*, 2000 BCHRT 19.

[21] The respondents submit that the staff response to Jessie Nelson’s recommendations for a more inclusive environment from guests should be separated from conduct related directly to their gender identity. They argue:

With the proposal by the complainant that gender terms like ‘guys/gals/boys/ladies/gentlemen’ not be used for customers, we submit that the staff does not following this does not amount to an act of discrimination [against] the complainant. The complainant’s personal pronouns not being used is relevant. Use of pronouns for other persons is not. It may be a good and progressive step that leads to less false assumptions but that is a different matter. Again, the timeframe involved was short, and as Melanson said, at least for her, the idea had merit although the way it was presented at the staff meeting irritated staff.

I agree that the issue in this case is not whether or not staff discriminated against customers by using gendered language to greet them. However, the negative response that some staff, and at least one manager, had to Jessie Nelson’s suggestions led the employer to conclude that they were not a good “fit” and were coming on “too strong too fast” and – ultimately – to terminate their employment. This was directly connected to their gender identity.

[22] The respondents argue that this is a case like *Harvey v. Black and Lee*, 2013 BCHRT 49. In *Harvey*, the complainant thought she had been fired for being pregnant. She texted her employer and called him a “lying piece of shit” and a “fucking asshole”. Based on these messages, the employer thought she quit. The Tribunal found that the complainant had misunderstood the situation and that, in fact, her employment was not in jeopardy. Unfortunately, her response to the employer “escalated matters to the point that conciliatory conversation and clarification was obviated”: para. 51.

[23] I disagree that the facts of *Harvey* are similar to the ones before me. Jessie Nelson did not swear or abuse their employer. I have found they were not insubordinate and in fact Mr. Kingsberry gave his permission for them to attempt to talk to Mr. Gobbelle. They approached Mr. Gobbelle in full view of the managers, who did nothing to intervene. They were simply trying to talk to a person who was discriminating against them. The fact that the conversation did not go well was not their fault. By all accounts, Mr. Gobbelle became extremely angry and upset. The employer made no effort to investigate what happened between the two of them, or otherwise determine whether “conciliatory conversation and clarification” was possible.

[24] In the result, I am satisfied that Jessie Nelson’s gender identity was a factor in the termination of their employment and, as such, that their termination violated s. 13 of the *Code*.

[25] Before I consider the appropriate remedy, I must address the issue of which respondents are liable for the discrimination.

D. Complaint against individual respondents

[26] I have found that Jessie Nelson was discriminated against in their employment. Under s. 44(2) of the *Code*, the corporate respondent (Goodberry Restaurant dba Buono Osteria) is liable for the conduct of its employees and directors. It is responsible to fulfill the remedies I order. In these circumstances, the respondents argue that the complaint should be dismissed against the individual respondents. The parties did not make extensive submissions on this issue and so I address it only briefly.

[27] As the Supreme Court of Canada has acknowledged, “the aspirational purposes of the *Code* require that individual perpetrators of discrimination be held accountable for their actions”: *Schrenk* at para. 56. In this decision, I have found that Mr. Gobbelle discriminated against Jessie Nelson by persisting in referring to them with female pronouns and gendered nicknames. He demonstrated his hostility towards their ideas for a more inclusive workplace by being rude and uncooperative. By this behaviour, he violated the *Code* and is directly liable for his conduct.

[28] Likewise, I have found that the employer's response to Jessie Nelson's complaints of discrimination, and ultimate decision to terminate their employment was discriminatory. This was a decision made by Mr. Buono and Mr. Kingsberry for which they are directly responsible.

[29] I reach a different conclusion about Ms. Melanson. There are no direct allegations of discrimination against her. Rather, Jessie Nelson argues that, as the front of house manager, she was aware of the discrimination and obliged to intervene. I am not persuaded that the circumstances of this case warrant a finding against Ms. Melanson as an individual. It is undisputed that Jessie Nelson brought their concerns forward to Mr. Kingsberry, and that it was Mr. Kingsberry and Mr. Buono who took the lead in addressing those concerns and then terminating their employment. Given her role, it was appropriate for Ms. Melanson to defer to them. I am not persuaded that Ms. Melanson did anything that violated the *Code*, and I dismiss the complaint against her as an individual.

V REMEDY

[30] I have found Jessie's Nelson complaint of discrimination justified against the respondents Buono Osteria, Mr. Kingsberry, Mr. Buono, and Mr. Gobbelle. For the purpose of this remedy section, I will refer to these four as the **Respondents**.

[31] I declare that the Respondents' conduct, as set out in this decision, was discrimination contrary to s. 13 of the *Code*. I order them to cease the contravention and refrain from committing the same or similar contraventions: *Code*, s. 37(1)(a) and (b).

[32] In addition to these orders, Jessie Nelson seeks compensation for injury to their dignity, feelings, and self-respect, and orders that the restaurant develop a pronoun policy and implement mandatory training for management and staff about human rights law. I address each of these in turn.

A. Compensation for injury to dignity, feelings, and self-respect

[33] A violation of a person's human rights is a violation of their dignity. That is why s. 37(2)(d)(iii) confers discretion on this Tribunal to award damages to compensate a complainant for injury to their dignity, feelings, and self-respect. The purpose of these awards is compensatory, and not punitive. In exercising this discretion, the Tribunal generally considers three broad factors: the nature of the discrimination, the complainant's social context or vulnerability, and the effect on the complainant: *Torres v. Royalty Kitchenware Ltd.*, 1982 CanLII 4886 (ON HRT); *Gichuru v. Law Society of British Columbia (No. 2)*, 2011 BCHRT 185, upheld in 2014 BCCA 396 at para. 260. The quantum is "highly contextual and fact-specific", and the Tribunal has considerable discretion to award an amount it deems necessary to compensate a person who has been discriminated against: *Gichuru* at para. 256; *University of British Columbia v. Kelly*, 2016 BCCA 271 [*Kelly*] at paras. 59-64. In this case, Jessie Nelson seeks an award of \$30,000.

[34] I begin with the nature of the discrimination. It took place over a relatively short time frame of about four weeks. However, within that period the discrimination was ongoing and escalating. It culminated in the ultimate employment-related consequence: loss of a job. There is no question that is a severe outcome in any circumstance. There are many cases which eloquently describe the significance of a person's employment to their financial and emotional wellbeing. I will only invoke one:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of [their] sense of identity, self-worth and emotional well-being.

Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 SCR 313 at p. 368 (per Dickson CJ)

As Jessie Nelson points out, it is a central purpose of the *Code* to remove impediments to full and free participation in the economic life of the province: s. 3(a). Because of the significance of employment to a person's dignity, cases which involve the termination of employment have

often attracted the top end of this Tribunal’s awards: see e.g. *Senyk v. WFG Agency Network* (No. 2), 2008 BCHRT 376 at paras. 463-470; *Benton* at paras. 67-68.

[35] Next, I consider the social context of the complaint, and Jessie Nelson’s vulnerability. In doing so, I recognize that the Tribunal has traditionally lumped these considerations within the umbrella term of “vulnerability”. The risk of that approach is that it can obscure the underlying causes of the vulnerability, which often lay outside the complainant as an individual and in systemic patterns of inequality and oppression. As the Tribunal recently pointed out, “[v]ulnerability has different aspects, including that which relates to a complainant’s individual situation and that which relates to their membership in a group which society has stereotyped, disadvantaged, or marginalized”: *Client v. Spruce Hill Resort & Spa*, 2021 BCHRT 104 at para. 42. To further the *Code*’s purpose of identifying and eliminating “persistent patterns of inequality”, this Tribunal should be precise about the nature and source of a complainant’s “vulnerability”: *Code*, s. 3(e).

[36] There are several aspects to Jessie Nelson’s vulnerability in this case – all of which arise from social forces and are not endemic to them as a person. First, employees are uniquely vulnerable in the context of their work. They are “a captive audience to those who seek to discriminate against them”: *Schrenk* at para. 44. This is especially so in the restaurant industry, which is often marked by diminished job security, lower wages, and reliance on tips: see eg. Ontario Human Rights Commission, *Not on the menu: Inquiry report on sexualized and gender-based dress codes in Ontario’s restaurants* (March 2017) at p. 2. As the Supreme Court of Canada has observed, “[w]hether a server is harassed by the restaurant owner or the bar manager, by a co-worker, or by a regular and valued patron, the server is ... being harassed in a situation from which there is no escape by simply walking further along the street”: *Schrenk* at para. 44.

[37] Second, Jessie Nelson was vulnerable because of the forces of systemic inequality that continue to oppress, marginalize, and discriminate against transgender people. This context was summarized by the Tribunal in *Oger v. Whatcott* (No. 7), 2019 BCHRT 58 as follows:

And so, despite some gains, transgender people remain among the most marginalized in our society. Their lives are marked by "disadvantage, prejudice, stereotyping, and vulnerability... They are stereotyped as "diseased, confused, monsters and freaks.... Transpeople face barriers to employment and housing, inequitable access to health care and other vital public services, and heightened risks of targeted harassment and violence. The results include social isolation, as well as higher rates of substance use, poor mental health, suicide, and poverty.... For transgender children, anti-trans bullying leads to higher rates of absenteeism and poorer educational outcomes, which then has ripple effects for their health and future prospects... [para. 60, citations omitted]

It is this social context that led the legislature to amend the *Code* in 2016 to confer express protection against discrimination based on "gender identity and expression": *Oger* at para. 63.

[38] Third, Jessie Nelson had just left their home, their job, and their community in Vancouver to move to the Sunshine Coast. They found themselves in a smaller community with fewer opportunities for employment, in which they already felt some trepidation about whether they would be accepted. Jessie Nelson was concerned that their experience with Buono Osteria could diminish their opportunities to work in other local restaurants and/or that it would be replicated in other restaurants where they may eventually work. Fortunately, they found work fairly quickly in a workplace where they felt welcomed and safe. This does not, however, diminish the significance of this factor because, as I will explain, it heightened the impact of the discrimination on Jessie Nelson.

[39] In that regard, I find that the impact of the discrimination on Jessie Nelson was serious. The Respondents sought to point to their resilience in finding work very shortly after as evidence that they were not seriously impacted by these events. I disagree.

[40] In the immediate aftermath of their termination, Jessie Nelson was extremely upset. Ms. Grill-Donavan had never seen her friend like that. In the days that followed, Ms. Grill-Donavan perceived that they were depressed and scared about what the future held for them on the Sunshine Coast. For her part, Ms. Coplin saw an immediate shift in Jessie Nelson's confidence and feeling of safety. She testified:

Immediately, Jessie started to ... alter some of the ways that they showed up in public spaces on the Coast. I think there was a pretty clear sense of not being safe, that there are people in the community that do not uphold human rights and that do not care for all people... Later in the week Jessie was like, 'I don't have a job, I live in the middle of nowhere, I don't have my family around, I don't have my support system to help me'.

And so very quickly there was the understanding that 'I can't just not work'. But then there was this added pressure of going to these restaurants and trying to visually see how diverse their team [was]. Are there going to be people on this team that understand what it's like to not be seen, and to not be witnessed, and not be honoured in their truth?

And so ... all of a sudden it really changed things about where Jessie could apply for jobs. Because there had been a precedent set that the Coast is not safe...

[41] Ultimately, the impact on Jessie Nelson is best described in their own words:

It's hard to put into words. This was one of the first jobs I had where I felt confident enough to disclose who I was. I've gone into many, many situations and beyond employment, this happens in housing, this happens in medical care, this happens all over the place all the time and this was the first time I was like, you know what, I'm going to be fully myself. I deserve that. I'm 32 years old. I've lived long enough pretending, and that's why I disclosed who I was to Ryan prior to taking the job. Now, I don't believe that trans people should have to do that, but I did feel like it would be beneficial. And it was devastating. It's a piece of trauma in a long line of trauma for a trans person living a trans experience.

...

... Ultimately, I was really disappointed. I was scared and sad for myself, but more than that I was really worried about future people. That same summer, prior to this incident happening at Buono, the local crosswalks were painted in rainbow and in the middle of the night somebody had gone and painted them back to white as a protest to queer lives. So that's the environment that I lived in, that I worked in. That was just literally around the corner from my place of employment. So it led me to believe that that was the feeling on the Coast – that a person like me wasn't welcome. And a person like me deserved to be treated as less than.

...

... I am here today in bringing this forward because it is important for me, as a trans person, to have my existence respected. I'm a human being, with a beating heart and a desire to be seen and valued and heard in the world. And I'm also here for every other current and future trans or queer person working in a service or customer-facing setting so that hopefully this doesn't happen anymore. Because it's a lot. It's very draining. And we deserve to live, and have joy, and be respected for who we are.

[42] The parties have provided me with a number of cases in which the Tribunal found discrimination based on sex or gender identity and awarded damages in amounts ranging from \$4,000 to \$22,000. Many of those cases are now dated, and the quantum of damages does not reflect the upward trend in these awards: *Araniva v. RSY Contracting*, 2019 BCHRT 97 at para. 145. In that regard, more recent cases involving discriminatory harassment and/or the termination of a person's employment have attracted damage awards in the range of \$15,000 to \$40,000: see eg. *Benton*; *Araniva*; *Sales Associate*; *Loiselle v. Windward Software Inc. (No. 3)*, 2021 BCHRT 80; *Ban v. MacMillan*, 2021 BCHRT 74.

[43] In all the circumstances, I find that a global award of \$30,000 is appropriate. As the employer, Buono Osteria is liable for this entire amount. Mr. Goble is individually liable for \$10,000. Mr. Kingsberry and Mr. Buono are individually liable for \$20,000. Liability among respondents is joint and several.

B. Order for pronoun policy and mandatory training

[44] Section 37(2)(c)(i) grants the Tribunal discretion to order a respondent to "take steps, specified in the order, to ameliorate the effects of the discriminatory practice". This encompasses orders that require respondents to develop and implement human rights policies: see eg. *Gebresadik v. Black Top Cabs*, 2017 BCHRT 278; *Brar v. BC Veterinary Medical Association and Osborne*, 2015 BCHRT 151 at paras. 1380-1381. Such orders aim to further the *Code's* purposes of identifying and eliminating patterns of inequality and preventing discrimination: *Heintz v. Christian Horizons*, 2010 ONSC 2105 (Ont. Div. Ct.) at para. 276.

[45] In this case, Jessie Nelson seeks orders that the restaurant, Buono Osteria, implement a pronoun policy and mandatory training for all staff and managers about diversity, equity and

inclusion. The restaurant does not resist these orders but asks the Tribunal to be mindful of the resources that may be required to implement extensive training within the context of a small restaurant trying to stay open during a global pandemic.

[46] I agree these orders are appropriate.

[47] I order Buono Osteria to include a statement in its employee policies that affirms every employee's right to be addressed with their correct pronouns. The restaurant can draft its own language, but it could be something like: "**Pronouns** – All team members have the right to be addressed by their own personal pronouns." I also encourage, but do not order, the restaurant to update its policies to use nonbinary, gender neutral language throughout. This would mean, for example, replacing references to men or women with 'people' and replacing his/his/she/hers with they/them.

[48] I also order Buono Osteria to implement mandatory training for all staff and managers about human rights in the workplace. This training should be no less than two hours. I understand that Jessie Nelson has recommended a well-regarded training provider and I encourage the restaurant to avail itself of this option.

VI CONCLUSION

[49] I have found that Buono Osteria, Mr. Buono, Mr. Kingsberry, and Mr. Gobelle discriminated against Jessie Nelson in their employment on the basis of their gender identity and expression, in violation of s. 13 of the *Code*. I make the following orders:

- a. I declare that the Respondents' conduct contravened s. 13 of the *Code*: *Code*, s. 37(2)(b).
- b. I order the Respondents to cease the contraventions and refrain from committing the same or similar contraventions: *Code*, s. 37(2)(a).

- c. I order Buono Osteria and Mr. Goble to pay Jessie Nelson \$10,000 as compensation for injury to their dignity, feelings, and self-respect: *Code*, s. 37(2)(d)(iii).
- d. I order Buono Osteria, Mr. Kingsberry, and Mr. Buono to pay Jessie Nelson \$20,000 as compensation for injury to their dignity, feelings, and self-respect: *Code*, s. 37(2)(d)(iii).
- e. Within three months of this decision, I order Buono Osteria to:
 - i. Add a statement to its employee policies that affirms every employee's right to be addressed with their own personal pronouns.
 - ii. Implement mandatory training, of no less than two hours, for all staff and managers about human rights in the workplace.

Code, s. 37(2)(c)(i)
- f. I order the Respondents to pay Jessie Nelson post-judgement interest on the damage award until paid in full, based on the rates set out in the *Court Order Interest Act*.

[50] I dismiss the complaint against Ms. Melanson.

Devyn Cousineau
Tribunal Member
Human Rights Tribunal

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

MEGAN MILO,

Plaintiff,

v.

**CYBERCORE TECHNOLOGIES,
LLC, *et al.*,**

Defendants.

Civil Case No.: SAG-18-3145

* * * * *

MEMORANDUM OPINION

Plaintiff Megan Milo (“Milo”) filed an Amended Complaint against Defendants Cybercore Technologies, LLC (“CyberCore”) and Northrop Grumman Corporation (“NGC”) (collectively, “Defendants”), alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* (“Title VII”). ECF 47. Milo, a transgender woman, alleges that Defendants subjected her to a hostile work environment (Count One), terminated her employment because of her sex, gender identity, and gender expression (Count Two), and harassed and terminated her to retaliate for her internal complaints about discrimination (Count Three).¹

On September 17, 2019, United States District Judge Richard D. Bennett issued a Memorandum Opinion and Order which, in relevant part, dismissed certain counts of Milo’s original Complaint without prejudice. ECF 41. Subsequently, on October 11, 2019, Milo filed her Amended Complaint. ECF 47. CyberCore and NGC each have filed Motions to Dismiss the

¹ The captions of each of the three counts list Title VII the sole statutory basis for the claims. ECF 47. This Court presumes that the Amended Complaint’s sole reference to Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981(a), refers only to that statute’s expansion of the remedies available to a plaintiff in a Title VII action. *See* ECF 47 ¶ 1.

Amended Complaint, ECF 48 (“CyberCore’s Motion”), 49 (“NGC’s Motion”). This Court has reviewed those Motions, Milo’s Oppositions, ECF 52, 53, and Defendants’ Replies, ECF 56, 57. No hearing is necessary. *See* Local Rule 105.6 (D. Md. 2018). For the reasons set forth below, Defendants’ Motions will be granted in part and denied in part.

I. FACTUAL BACKGROUND²

On or about December 2, 2012, upon approval by NGC, CyberCore hired Milo to be a Senior Software Engineer in a facility in Annapolis Junction, Maryland. ECF 47 ¶¶ 29-30, 33(3)³. Milo’s workplace housed employees of NGC, employees of other subcontractors of NGC, and employees of federal agencies. *Id.* at ¶ 33. Milo was the only CyberCore employee in the office. *Id.* at ¶ 33(3). Her managers were NGC employees.⁴ *Id.* at ¶ 33(4).

In February, 2013, Milo received a promotion to Task Lead. *Id.* at ¶ 31. Milo began living full-time as a female shortly thereafter, on or about March 28, 2013. *Id.* at ¶ 32. Prior to Milo’s gender transition, managers from Defendants and the federal government held a meeting, where they explained to the employees on Milo’s floor that she “would be transitioning to the female sex, that she would use ‘she’ and ‘her’ pronouns, and that she should be treated with dignity and

² The facts are derived from Milo’s Amended Complaint, ECF 47, and are accepted as true for purposes of these Motions. *See Wikimedia Found. v. Nat’l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017) (internal citations omitted). All reasonable inferences to be drawn therefrom are drawn in Milo’s favor.

³ The Amended Complaint contains error in the paragraph numbering, leading to the insertion of paragraphs numbered “3” and “4” between paragraphs 33 and 34. Those paragraphs will be designated herein as “33(3)” and “33(4).”

⁴ The Amended Complaint contains inconsistent allegations regarding the office’s supervisory structure. Although it alleges that “Ms. Milo’s managers were employees of Northrup,” *Id.* ¶33(4), it later describes actions taken by “Ray Wise, a federal government manager with supervisory power over Ms. Milo,” *id.* ¶ 46a, and notes that Wise was “the Office Manager, who worked with the Department of Defense as the government program manager, who had managerial power over” Milo and other office employees. *Id.* ¶ 46g.

respect.” *Id.* at ¶ 43. Milo contends that, despite the meeting, her co-workers did not treat her appropriately. *Id.* at ¶¶ 44-45. Specifically, she alleges the following acts:

- “When she had first discussed transition with Ray Wise, a federal government manager with supervisory power over Ms. Milo, he asked if she would be wearing dresses when she transitioned to living as a female... He indicated dismay at her affirmative indication of choice of gendered attire, based on his bias against someone whom he considered to be male wearing attire that he considered to be female.” *Id.* at ¶¶ 46a-b.
- “Wise and other male managers and co-workers began to misgender Ms. Milo in order to diminish her gender and gender expression.” *Id.* at ¶ 46c.
- “This effort to diminish her gender and gender expression was confirmed for her when, at a meeting, she was told by a male co-worker who worked with and at the direction of Northrop that she wore her heels ‘too high.’” *Id.* at ¶ 46d.
- In April, 2013, “Ms. Anderson, a CyberCore manager, told [Milo] that her skirt was too short and was ‘bothering people.’” When Milo pointed out another female employee with a shorter skirt, Anderson responded, “Well that doesn’t matter. She doesn’t work for me, you do.” *Id.* at ¶ 46e.
- In March, 2013, Theresa Olson, “who worked with and at the direction of Northrop,” told Milo that “she hated transgender people” because her ex-husband was transgender. Milo reported this incident to Anderson in or around June, 2013, but Anderson took no action. *Id.* at ¶¶ 46f, 60.
- In June, 2013, Milo and a male co-worker who worked “with and at the direction of Northrop,” Rob Nelson, engaged in a loud and contentious disagreement “about a work matter.” After the incident, Wise corrected Milo for her loud argument with Nelson, but Nelson was not disciplined. *Id.* at ¶ 46g.
- A manager, Tom Morehead, “who worked with and at the direction of Northrop,” witnessed misgendering by Alex Davis, “who worked with and at the direction of Northrop,” and Anderson. In September, 2013, Morehead told Milo that “she needed to ‘lay low’ because he knew that she was being targeted, and that if she were to complain, she would be in worse trouble.” *Id.* at ¶ 46h.
- Davis then brought a complaint against Milo “to his HR,” complaining that he was “‘walking on eggshells’ around her because she asked to be called by her proper female name and female pronouns.”⁵ *Id.* at ¶ 46i.

⁵ The Amended Complaint does not identify Davis’s employer or HR department. This Court infers that the repeated reference to individuals working “with and at the direction of Northrop” indicates employees of NGC’s various subcontractors, and further understands that Davis brought his complaint to the HR department of the entity employing him.

- On or about October 15, 2013, Anderson, NGC's Human Resources manager, Jeremy Knapp, and the federal government program manager placed Milo on a 30-day probationary period "based on Mr. Davis'[sic] complaint." *Id.* at ¶ 46j.
- During that meeting, when Milo explained that Davis's conduct had been discriminatory, and asked that the misgendering and other poor treatment stop, Knapp responded, "What you think really doesn't matter." *Id.* at ¶ 46k.
- During the probationary period, Milo was subject to a Performance Improvement Plan ("PIP") issued by CyberCore and NGC, which indicated "interaction with coworkers is causing Megan to perform at a subpar level." The PIP instructed Milo that, during probation, she should refrain from complaining in public forums, should treat all customers and coworkers with respect. The PIP further indicated, "Northrop Grumman management recognizes that there are extenuating circumstances, but Megan must extend the same understanding and latitude to her coworkers that she expects for herself. The team is walking on eggshells in fear of creating a perceived slight or offense." *Id.* at ¶ 46l.

In addition to those specific allegations, the Amended Complaint contains a series of general allegations, defined as allegations which do not identify the speaker, or the approximate date, or the statement made:

- Davis "was intentionally discourteous to Ms. Milo, in refusing to use her correct name, title, and pronouns, and in making derogatory comments about her sex." *Id.* at ¶ 49.
- Milo "had to be concerned every day that she was on the job and every morning when she got dressed whether someone would criticize her dress, despite the fact that other women were wearing the same thing." *Id.* at ¶ 55.
- Anderson "scrutinized Ms. Milo's attire every day." *Id.* at ¶ 57.
- Milo "notified Ms. Anderson on many occasions of the constant harassment she was experiencing on the job from people in the employ of Northrop and others onsite." *Id.* at ¶ 61. Despite CyberCore's representation that it would ensure she had a positive workplace environment, it took no actions to protect her "from hostility based on her gender by other workers and managers in the workspace." *Id.* at ¶ 62-63.
- Milo "was subjected to negative events relating to her gender every day, and noted some of the more memorable events in her diary on over 35 dates during April through December 2013, as well as dates in 2014." *Id.* at ¶ 70. The events included "daily misgendering – being called the wrong name or pronouns, people referring to her gender in a negative way on a daily basis, references to sex stereotypes on a daily basis, and efforts by her to avoid harassment on a daily basis." *Id.* ¶ 68.

During the term of her thirty day PIP, Milo ceased her complaints about discriminatory treatment. *Id.* at ¶ 71. After the thirty day period, sometime in late November, 2013, Anderson confirmed that she had spoken to NGC, and that Milo’s probation had ended. *Id.* at ¶ 72.

In February, 2014, Milo “spoke to Mr. Davis again about the misgendering.” *Id.* at ¶ 73. Shortly thereafter, “upon information and belief,” NGC requested Milo’s termination. *Id.* at ¶¶ 74-75. On February 28, 2014, Anderson met with Milo and terminated her. *Id.* at ¶ 76. Anderson told Milo that she could “take a layoff” or “be fired because of her ‘bad attitude.’” *Id.* at ¶ 77. Anderson recommended the layoff, because termination could affect Milo’s future ability to work in the intelligence community. *Id.* at ¶¶ 79-80. Anderson handed Milo a letter from CyberCore indicating that she was being laid off. *Id.* at ¶ 81. No other employees were laid off at the time. *Id.* at ¶ 82. Milo requested to be informed of other CyberCore job openings, but CyberCore told her that they had no openings, and never informed her of further openings. *Id.* at ¶ 95. A person outside of Milo’s protected category was hired to replace her. *Id.* at ¶ 100.

II. LEGAL STANDARD

Under Rule 12(b)(6), a defendant may test the legal sufficiency of a complaint by way of a motion to dismiss. *See In re Birmingham*, 846 F.3d 88, 92 (4th Cir. 2017); *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165-66 (4th Cir. 2016); *McBurney v. Cuccinelli*, 616 F.3d 393, 408 (4th Cir. 2010), *aff’d sub nom.*, *McBurney v. Young*, 569 U.S. 221 (2013); *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). A Rule 12(b)(6) motion constitutes an assertion by a defendant that, even if the facts alleged by a plaintiff are true, the complaint fails as a matter of law “to state a claim upon which relief can be granted.”

Whether a complaint states a claim for relief is assessed by reference to the pleading requirements of Fed. R. Civ. P. 8(a)(2). That rule provides that a complaint must contain a “short

and plain statement of the claim showing that the pleader is entitled to relief.” The purpose of the rule is to provide the defendants with “fair notice” of the claims and the “grounds” for entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

To survive a motion under Fed. R. Civ. P. 12(b)(6), a complaint must contain facts sufficient to “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570; *see Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (citation omitted) (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions’ . . .”); *see also Willner v. Dimon*, 849 F.3d 93, 112 (4th Cir. 2017). However, a plaintiff need not include “detailed factual allegations” in order to satisfy Rule 8(a)(2). *Twombly*, 550 U.S. at 555. Further, federal pleading rules “do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.” *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 135 S. Ct. 346, 346 (2014) (*per curiam*).

Nevertheless, the rule demands more than bald accusations or mere speculation. *Twombly*, 550 U.S. at 555; *see Painter’s Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013). If a complaint provides no more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action,” it is insufficient. *Twombly*, 550 U.S. at 555. Rather, to satisfy the minimal requirements of Rule 8(a)(2), the complaint must set forth “enough factual matter (taken as true) to suggest” a cognizable cause of action, “even if . . . [the] actual proof of those facts is improbable and . . . recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556 (internal quotation marks omitted).

In reviewing a Rule 12(b)(6) motion, a court “must accept as true all of the factual allegations contained in the complaint” and must “draw all reasonable inferences [from those facts] in favor of the plaintiff.” *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440

(4th Cir. 2011) (citations omitted); *see Semenova v. MTA*, 845 F.3d 564, 567 (4th Cir. 2017); *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015); *Kendall v. Balcerzak*, 650 F.3d 515, 522 (4th Cir. 2011), *cert. denied*, 565 U.S. 943 (2011). However, a court is not required to accept legal conclusions drawn from the facts. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986). “A court decides whether [the pleading] standard is met by separating the legal conclusions from the factual allegations, assuming the truth of only the factual allegations, and then determining whether those allegations allow the court to reasonably infer” that the plaintiff is entitled to the legal remedy sought. *A Society Without a Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011), *cert. denied*, 566 U.S. 937 (2012).

III. ANALYSIS

Initially, Milo predicates her claims on discrimination on the basis of sex, in violation of Title VII. As Judge Bennett noted in his September, 2019 opinion, ECF 41 at 11, and as the parties acknowledge, the question of whether Title VII prohibits discrimination on the basis of sexual orientation or gender identity is currently pending before the Supreme Court. On October 8, 2019, the Supreme Court heard oral argument in *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (Apr. 22, 2019) (granting cert as to the question, “Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)?”). To date, no party has sought a formal stay of this case pending the Supreme Court’s ruling. Accordingly, this Court will proceed as to the remaining elements of Milo’s claims, while recognizing that the Supreme Court’s ruling might impact the ultimate viability of her case.

A. Count I – Hostile Work Environment

In Count One, Milo alleges that the Defendants violated Title VII by subjecting her to a hostile work environment, which exists where “the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal quotation marks omitted). To establish a Title VII claim for a hostile work environment, “a plaintiff must show that there is (1) unwelcome conduct; (2) that is based on the plaintiff’s [sex]; (3) which is sufficiently severe or pervasive to alter the plaintiff’s conditions of employment and to create an abusive work environment; and (4) which is imputable to the employer.” *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015) (quoting *Okoli v. City of Balt.*, 648 F.3d 216, 220 (4th Cir. 2011) (alteration and internal quotation marks omitted)). “If the harasser is a supervisor, then the employer may be either strictly or vicariously liable,” depending on whether the harassment culminates in a tangible employment action. *Strothers v. City of Laurel, Maryland*, 895 F.3d 317, 333 (4th Cir. 2018). In contrast, harassment by a co-worker or a third-party, resulting in a hostile work environment, can be imputed to an employer only “if the employer knew or should have known of the harassment and failed ‘to take prompt remedial action reasonably calculated to end the harassment.’” *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 422-23 (4th Cir. 2014) (quoting *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1131 (4th Cir.1995)) (internal quotations omitted).

Assuming, without deciding, that both Cybercore and NGC qualify as Milo’s employers, Plaintiff has failed to plead facts demonstrating sufficiently severe and pervasive work conditions imputable to each Defendant. The Amended Complaint, like the original Complaint, names only one employee of each Defendant company: Anderson for CyberCore and Knapp for NGC. *See*

ECF 47. Of those individuals, only Anderson is identified as Milo’s supervisor.⁶ *Id.* at ¶ 46e, 46j. Milo makes only one specific allegation of harassing conduct by Anderson: her comment about Milo’s short skirt. ECF 47 at ¶ 46e. Milo’s other generic allegations, such as her assertion that Anderson scrutinized her attire every day, ECF 47 at ¶ 57, are not sufficiently specific to form a factual predicate for a claim of hostile work environment. *See Carter v. Ball*, 33 F.3d 450, 461-62 (4th Cir. 1994) (finding testimony that a supervisor generally reprimanded the plaintiff publicly but his co-workers in private was too general to “suffice to establish an actionable claim” of harassment creating a hostile environment); *see also Dangerfield v. Johns Hopkins Bayview Med. Ctr., Inc.*, Civil No. JKB -19-155, 2019 WL 6130947, at *3 (D. Md. Nov. 19, 2019) (stating, with respect to general allegations of consistent “condescending and abusive language and behavior,” “[w]ithout details about the nature of the remarks and behavior at issue, it is impossible for the Court to determine whether the behavior she complains of would be seen as objectively hostile by a ‘reasonable person’”); *Lenoir v. Roll Coater, Inc.*, 841 F. Supp. 1457, 1462 (N.D. Ind. 1992) (finding plaintiff’s allegations of being reprimanded more severely than co-workers, without reference to exact dates, to be insufficient to support a harassment claim), *aff’d*, 13 F.3d 1130 (7th Cir. 1994). Milo does not allege what Anderson’s alleged “scrutiny” of her workplace attire entailed, nor does she link the comments to her gender identity or sex.

Essentially, then, Milo alleges a single affirmative act by Anderson, telling Milo that her skirt was too short for the workplace. As Judge Bennett found, that single comment is insufficient to constitute a hostile work environment. *See* ECF 41 at 13 (“Further, with regard to Cybercore

⁶ Although Milo alleges generally that her supervisors were NGC employees, ECF 47 at ¶ 33(4), she does not name them and does not identify their state of knowledge regarding any harassing behavior. Instead, as noted above, Milo identifies Ray Wise, an employee of the Department of Defense, as the Office Manager. *Id.* at ¶ 46(g). She does not allege that Knapp, the only NGC employee identified in the Amended Complaint, functioned as her supervisor.

specifically, it appears that only one alleged action can be attributed to CyberCore – her supervisor telling her that her skirt was too short. Such a comment is insufficient to support an action under Title VII.”).

The remainder of Milo’s allegations, which do not involve conduct by NGC or CyberCore supervisors, must be considered under the negligence standard applicable to co-worker or third-party harassment. *Freeman*, 750 F.3d at 422–23. Due to the structure of the office in which Milo performed her work, there is an issue with respect to what conduct, by other companies’ employees, might be imputable to NGC or CyberCore. The Amended Complaint identifies three primary harassers: Wise, a federal government employee, Olson, an employee of another subcontractor, and Davis, also an employee of another subcontractor. *E.g.* ECF 47 ¶¶ 83, 59, 49. Milo vaguely asserts that Davis “worked with and at the direction of” NGC, but does not directly state that he was ever employed by NGC. Because none of those individuals are employed by NGC or CyberCore, Milo has to allege that NGC or CyberCore knew or should have known about the harassment, and failed to address the conduct. *Freeman*, 750 F.3d at 422-23. However, Milo makes very limited allegations to establish that she reported the individuals’ specific conduct to NGC or CyberCore. She does allege that she told her supervisor, Anderson, of a single comment made by Olson (regarding her hatred of transgender people as a result of her transgender ex-husband), and that Anderson failed to take remedial action. ECF 47 at ¶¶ 46f, 59-60. That single comment from a non-CyberCore employee, while unquestionably rude, does not meet the “high bar in order to satisfy the severe or pervasive test.” *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008).

Additionally, Milo makes several conclusory allegations about reporting discriminatory behavior to her employers. For example, Milo alleges that, during the meeting in which she was

placed on a PIP, she reported to both Anderson and to Knapp of NGC “that Mr. Davis’s conduct was discriminatory.” ECF 47 at ¶ 46k. However, Milo does not specify exactly what factual allegations she described to CyberCore and NGC. See *id.* (“Ms. Milo explained that Mr. Davis’s conduct was discriminatory and requested as an accommodation that the misgendering and other poor treatment stop.”). Similarly, Milo alleges that she “notified Ms. Anderson on many occasions of the constant harassment she was experiencing.” ECF 47 ¶ 61. Without knowing what specific harassment, if any, Milo not only experienced, but also reported, this Court cannot ascertain whether NGC or CyberCore should have taken action to stop it. See, e.g., *Sonnier v. Diamond Healthcare Corp.*, 114 F. Supp. 3d 349, 357 (E.D. Va. 2015) (“Plaintiff has failed to allege sufficient facts to permit the Court to reasonably infer that Thomas’s actions were sufficiently severe or pervasive”).

The other incidents Milo describes in the Amended Complaint were not, as far as alleged, reported to either NGC or CyberCore. Moreover, some of those incidents are not directly tied to Milo’s gender or gender expression. For example, Milo maintains that the incident in which Wise counseled her, and not Nelson, following their loud verbal disagreement, constituted discriminatory treatment. ECF 47 ¶ 46g. However, Milo specifically alleged that the disagreement in that instance was work-related. *Id.* (calling the dispute a “work matter”). Ultimately, for conduct of a third-party subcontractor or government employee to be imputable to NGC or CyberCore, Milo would have to plead that NGC or CyberCore was aware of specific incidents amounting to harassment, but failed to take remedial action. She makes insufficient such allegations in the Amended Complaint.

In addition to the lack of evidence that NGC or CyberCore was informed of specific incidents of discriminatory treatment, the Amended Complaint, as a whole, provides little insight

into the nature or frequency of the misgendering Milo alleges. Her relevant allegations are as follows:

- Wise and other male managers and co-workers “began to misgender Ms. Milo in order to diminish her gender and gender expression.” *Id.* at ¶ 46c.
- Tom Morehead “was a witness to the misgendering by” Davis and Anderson. *Id.* at ¶ 46h.
- “Mr. Davis was intentionally discourteous to Ms. Milo, in refusing to use her correct name, title and pronouns, and in making derogatory comments about her sex.” *Id.* at 49.
- “Many people did, in fact, begin to consistently use the correct name or pronoun within a matter of weeks. But there were still holdouts, and this continued regularly, several times a week, until the end of her employment almost a year later.” *Id.* at ¶ 69.
- “During the month of February 2014, Ms. Milo spoke to Mr. Davis again about the misgendering.” *Id.* at ¶ 73.

These allegations are lacking in specific details, which are required for this Court to determine the nature and extent of the harassment. For example, who are the “holdouts” and what is the nature of their conduct? Did Davis engage in new misgendering in February, 2014, or did Milo speak to him again about previous conduct?

Milo repeatedly alleges that she maintained a diary in which she detailed, on at least thirty-five dates, specific incidents of discrimination. ECF 47 at ¶ 70. She even makes reference to “physically threatening” conduct, although she includes no allegations whatsoever indicating any physical contact or threat of physical contact. *Id.* at ¶¶ 109, 111. Despite having had an opportunity to amend her complaint, ECF 47, Milo neglected to include specific factual allegations to bring her hostile environment claim, against either CyberCore or NGC, into the “plausible” category. Without knowing the nature of the facts underlying Milo’s claim, an objective factfinder could not determine whether she was subject to a hostile work environment, even when all of her current

allegations are taken as true. Ultimately, Milo has not added any specific allegations, imputable to either NGC or CyberCore, to bolster the allegations that Judge Bennett previously found insufficient to plead a hostile work environment claim . Accordingly, Count I will again be dismissed without prejudice.⁷

B. Count II – Discriminatory Termination

Count II of the Amended Complaint plausibly alleges that the cited basis for Milo’s termination, her “bad attitude,” refers to her complaints about the treatment she had received from her coworkers on the basis of her sex, sex stereotyping, gender, and gender expression. In fact, as alleged, the PIP issued by NGC and CyberCore clearly instructed Milo to refrain from complaining to her coworkers about their treatment of her. ECF 42 at ¶ 46. Taking Plaintiff’s collective allegations as true, as this Court must at this stage of the litigation, Plaintiff was addressing with her coworkers what she believed to be discrimination on the basis of her gender, gender expression, sex, and sex stereotyping. Her termination happened shortly after she directly addressed a co-worker about his alleged misgendering of her. *Id.* at ¶¶ 73-76. Viewing all alleged facts in the light most favorable to Plaintiff, NGC and Cybercore’s decision to terminate her plausibly resulted from her attempts to “stick up for herself” in the face of discriminatory treatment by her coworkers.

In assessing which entity effected the termination, Milo alleges that NGC requested her removal from the worksite. *Id.* at ¶ 75. Again, construing the facts in the light most favorable to

⁷ Although the dismissal without prejudice affords Milo one additional opportunity to replead her claim, the Court will not continue to allow repleading in perpetuity. If Milo files a new amended complaint, she should include all specific facts she believes might support her assertion of a hostile work environment, and should not assume that she has listed a sufficient number of representative samples. *See U.S. ex rel. Nathan v. Takeda Pharm. North America*, 707 F.3d 451, 461 (4th Cir. 2013) (finding no abuse of discretion in refusing to allow an amended complaint “[i]n view of the multiple opportunities Relator has been afforded to correct his pleading deficiencies”).

Milo, she has plausibly stated a claim that NGC had exclusive authority to determine which persons could or could not work at the job site, and exhibited a high degree of control over Milo's employment, thus acting as a joint employer in ordering her termination. *See, e.g., Butler v. Drive Automotive Industries of America, Inc.*, 793 F.3d 404, 414 (4th Cir. 2015) (listing factors to be considered in weighing the element of an entity's control over a plaintiff's employment, including "authority to hire and fire the individual"). Milo has plausibly alleged that NGC had the authority to terminate her, and thus, that CyberCore acted under NGC's direction in doing so. *See* ECF 52 at 19.

Further, although as alleged, NGC made the decision to remove Milo from the work site in question, CyberCore formally employed Milo and issued her paychecks. *See Butler*, 793 F.3d at 414 (listing "possession of and responsibility over the individual's employment records" as a relevant factor). In the Amended Complaint, Milo added an allegation that CyberCore informed her that it had no job openings at the time of her termination. *Id.* at ¶ 95. This Court cannot, at this stage of the litigation, consider CyberCore's contention that it terminated Milo because of her failure to apply for other jobs. *See* ECF 48-1 at 2 ("When Plaintiff refused to apply for any of the available positions, it terminated her employment"). However, the added allegation that CyberCore told Milo it had no job openings bolsters her contention that it relied upon her alleged "bad attitude," which, as noted above, could refer to her efforts to resist discriminatory conduct. Again, drawing all reasonable inferences in favor of Milo, CyberCore had alternatives to termination: it could have insisted that NGC provide its employee with a workplace free of misgendering and other perceived harassment, or could have decided to offer Milo a position outside of NGC's workplace in lieu of termination. As the litigation proceeds, CyberCore may be able to establish that such actions were infeasible due to either a lack of available positions or

Milo's refusal to apply for them; But under the standard governing a motion to dismiss, Milo's amended claim for discriminatory termination is sufficient.

Count III - Retaliation

In Count Three, Milo claims that NGC and CyberCore terminated her employment in retaliation for her protected activity of complaining about the discrimination she had endured. ECF 47 at ¶¶ 144–49. Specifically, she alleges that she “made complaints to Defendants CyberCore and Northrop about her reasonable and good faith belief that she had been subjected to discrimination.” *Id.* at ¶ 144. She also alleges that the reason cited for her termination was her “bad attitude.” *Id.* at ¶ 77.

Had Milo relied exclusively on the temporal proximity between her complaints and her termination, her claim would be less plausible. Milo's her most recent complaints to NGC and CyberCore occurred at the PIP meeting on or about October 15, 2013, *id.* at ¶ 46j, and her termination happened roughly four months later, following her successful completion of the probationary period. *See King v. Rumsfeld*, 328 F.3d 145, 151 n.5 (4th Cir. 2003) (lapse of two months and two weeks between protected activity and adverse action is “sufficiently long so as to weaken significantly the inference of causation”); *Pascual v. Lowe's Home Centers, Inc.*, 193 F. App'x. 229, 233 (4th Cir. 2006) (explaining that a delay of three to four months is too long to establish causal connection by temporal proximity). Here, however, Milo does not rely on the time gap alone. *See Pascual*, 193 F. App'x at 233 (stating temporal proximity is not sufficient to prove causation unless the time between the protected activity and the adverse action is “very close”). CyberCore and NGC's citation to her “bad attitude,” as the reason for termination, suffices to push her allegations over the line of plausibility. When viewed in the light most favorable to

Milo, the allegations could suggest that she was terminated in retaliation for her continued complaints to management and to her co-workers about discrimination.

IV. CONCLUSION

For the reasons set forth above, CyberCore's Motion to Dismiss, ECF 48, and NGC's Motion to Dismiss, ECF 49, will each be granted in part as to Count I, and denied in part as to Counts II and III. Count I will be dismissed without prejudice. A separate implementing Order follows.

Dated: January 13, 2020

/s/
Stephanie A. Gallagher
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NICHOLAS K. MERIWETHER,

Plaintiff-Appellant,

v.

FRANCESCA HARTOP, JOSEPH WATSON, SCOTT WILLIAMS, DAVID FURBEE, SONDRHA HASH, ROBERT HOWARTH, GEORGE WHITE, and WALLACE EDWARDS, Trustees of Shawnee State University, in their official capacities; JEFFREY A. BAUER, ROBERTA MILLIKEN, JENNIFER PAULEY, TENA PIERCE, DOUGLAS SHOEMAKER, and MALONDA JOHNSON, in their official capacities,

Defendants-Appellees,

JANE DOE; SEXUALITY AND GENDER ACCEPTANCE,

Intervenors-Appellees.

No. 20-3289

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 1:18-cv-00753—Susan J. Dlott, District Judge.

Argued: November 19, 2020

Decided and Filed: March 26, 2021

Before: McKEAGUE, THAPAR, and LARSEN, Circuit Judges.

COUNSEL

ARGUED: John J. Bursch, ALLIANCE DEFENDING FREEDOM, Washington, D.C., for Appellant. Paul R. Kerridge, KEATING MUETHING & KLEKAMP PLL, Cincinnati, Ohio, for Shawnee State Appellees. Adam G. Unikowsky, JENNER & BLOCK LLP, Washington, D.C., for Intervenor Appellees. **ON BRIEF:** John J. Bursch, Kristen K. Waggoner, ALLIANCE DEFENDING FREEDOM, Washington, D.C., David A. Cortman, Travis C. Barham,

ALLIANCE DEFENDING FREEDOM, Lawrenceville, Georgia, Thomas W. Kidd, Jr., KIDD & URLING, LLC, West Chester, Ohio, Tyson C. Langhofer, ALLIANCE DEFENDING FREEDOM, Ashburn, Virginia, for Appellant. Paul R. Kerridge, KEATING MUETHING & KLEKAMP PLL, Cincinnati, Ohio, for Shawnee State Appellees. Adam G. Unikowsky, JENNER & BLOCK LLP, Washington, D.C., Jennifer L. Branch, GERHARDSTEIN & BRANCH CO. LPA, Cincinnati, Ohio, Shannon P. Minter, Asaf Orr, Christopher F. Stoll, NATIONAL CENTER FOR LESBIAN RIGHTS, San Francisco, California, for Intervenor Appellees. Deborah A. Ausburn, TAYLOR ENGLISH DUMA LLP, Atlanta, Georgia, Christopher L. Thacker, BILLINGS LAW FIRM, PLLC, Lexington, Kentucky, Gary S. McCaleb, Flagstaff, Arizona, Matthew J. Burkhart, GALLAGHER KAVINSKY & BURKHART LPA, Columbus, Ohio, Jennifer C. Chavez, Washington, D.C., Randall L. Wenger, INDEPENDENCE LAW CENTER, Harrisburg, Pennsylvania, Gerard V. Bradley, UNIVERSITY OF NOTRE DAME, Notre Dame, Indiana, for Amici Curiae.

OPINION

THAPAR, Circuit Judge. Traditionally, American universities have been beacons of intellectual diversity and academic freedom. They have prided themselves on being forums where controversial ideas are discussed and debated. And they have tried not to stifle debate by picking sides. But Shawnee State chose a different route: It punished a professor for his speech on a hotly contested issue. And it did so despite the constitutional protections afforded by the First Amendment. The district court dismissed the professor's free-speech and free-exercise claims. We see things differently and reverse.

I.

The district court decided this case on a motion to dismiss, so we construe the complaint in the light most favorable to the plaintiff. That means we must accept the complaint's factual allegations as true and draw all reasonable inferences in Meriwether's favor. *Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012). Under this standard, we must reverse the district court's dismissal unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Guzman v. U.S. Dep't of Homeland Sec.*, 679 F.3d 425, 429 (6th Cir. 2012)).

A.

Nicholas Meriwether is a philosophy professor at Shawnee State University, a small public college in Portsmouth, Ohio. Shawnee State began awarding bachelor's degrees just thirty years ago. And for twenty-five of those years, Professor Meriwether has been a fixture at the school. He has served in the faculty senate, designed a bachelor's degree program in Philosophy and Religion, led study-abroad trips, and taught countless students in classes ranging from Ethics to the History of Christian Thought. Up until the incident that triggered this lawsuit, Meriwether had a spotless disciplinary record.

Professor Meriwether is also a devout Christian. He strives to live out his faith each day. And, like many people of faith, his religious convictions influence how he thinks about “human nature, marriage, gender, sexuality, morality, politics, and social issues.” R. 34, Pg. ID 1469. Meriwether believes that “God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires.” *Id.* He also believes that he cannot “affirm as true ideas and concepts that are not true.” *Id.* Being faithful to his religion was never a problem at Shawnee State. But in 2016, things changed.

At the start of the school year, Shawnee State emailed the faculty informing them that they had to refer to students by their “preferred pronoun[s].” *Id.* at 1471–72. Meriwether asked university officials for more details about the new pronoun policy, and the officials confirmed that professors would be disciplined if they “refused to use a pronoun that reflects a student's self-asserted gender identity.” *Id.* at 1472. What if a professor had moral or religious objections? That didn't matter: The policy applied “regardless of the professor's convictions or views on the subject.” *Id.*

When Meriwether asked to see the revised policy, university officials pointed him to the school's existing policy prohibiting discrimination “because of . . . gender identity.” R. 34-1, Pg. ID 1509. That policy applies to all of the university's “employees, students, visitors, agents and volunteers”; it applies at both academic and non-academic events; it applies on all university

property (including classrooms, dorms, and athletic fields); and it sometimes applies off campus. R. 34-2, Pg. ID 1511–12.

Meriwether approached the chair of his department, Jennifer Pauley, to discuss his concerns about the newly announced rules. Pauley was derisive and scornful. Knowing that Meriwether had successfully taught courses on Christian thought for decades, she said that Christians are “primarily motivated out of fear” and should be “banned from teaching courses regarding that religion.” R. 34, Pg. ID 1473. In her view, even the “presence of religion in higher education is counterproductive.” *Id.*

Meriwether continued to teach students without incident until January 2018. On the first day of class, Meriwether was using the Socratic method to lead discussion in his course on Political Philosophy. When using that method, he addresses students as “Mr.” or “Ms.” He believes “this formal manner of addressing students helps them view the academic enterprise as a serious, weighty endeavor” and “foster[s] an atmosphere of seriousness and mutual respect.” *Id.* at 1475. He “has found that addressing students in this fashion is an important pedagogical tool in all of his classes, but especially in Political Philosophy where he and [the] students discuss many of the most controversial issues of public concern.” *Id.* In that first class, one of the students Meriwether called on was Doe. According to Meriwether, “no one . . . would have assumed that [Doe] was female” based on Doe’s outward appearances. *Id.* at 1474. Thus, Meriwether responded to a question from Doe by saying, “Yes, sir.” *Id.* This was Meriwether’s first time meeting Doe, and the university had not provided Meriwether with any information about Doe’s sex or gender identity.

After class, Doe approached Meriwether and “demanded” that Meriwether “refer to [Doe] as a woman” and use “feminine titles and pronouns.” *Id.* at 1475. This was the first time that Meriwether learned that Doe identified as a woman. So Meriwether paused before responding because his sincerely held religious beliefs prevented him from communicating messages about gender identity that he believes are false. He explained that he wasn’t sure if he could comply with Doe’s demands. Doe became hostile—circling around Meriwether at first, and then approaching him in a threatening manner: “I guess this means I can call you a cu--.” *Id.* Doe promised that Meriwether would be fired if he did not give in to Doe’s demands.

Meriwether reported the incident to senior university officials, including the Dean of Students and his department chair, Jennifer Pauley. University officials then informed their Title IX office of the incident. Officials from that office met with Doe and escalated Doe's complaint to Roberta Milliken, the Acting Dean of the College of Arts and Sciences.

Dean Milliken went to Meriwether's office the next day. She "advised" that he "eliminate all sex-based references from his expression"—no using "he" or "she," "him" or "her," "Mr." or "Ms.," and so on. *Id.* at 1476–77. Meriwether pointed out that eliminating pronouns altogether was next to impossible, especially when teaching. So he proposed a compromise: He would keep using pronouns to address most students in class but would refer to Doe using only Doe's last name. Dean Milliken accepted this compromise, apparently believing it followed the university's gender-identity policy.

Doe continued to attend and participate in Meriwether's class. But Doe remained dissatisfied and, two weeks into the semester, complained to university officials again. So Dean Milliken paid Meriwether another visit. This time, she said that if Meriwether did not address Doe as a woman, he would be violating the university's policy.

Soon after, Meriwether accidentally referred to Doe using the title "Mr." before immediately correcting himself. Around this time, Doe again complained to the university's Title IX Coordinator and threatened to retain counsel if the university didn't take action. So Dean Milliken once again came to Meriwether's office. She reiterated her earlier demand and threatened disciplinary action if he did not comply.

Trying to find common ground, Meriwether asked whether the university's policy would allow him to use students' preferred pronouns but place a disclaimer in his syllabus "noting that he was doing so under compulsion and setting forth his personal and religious beliefs about gender identity." R. 34, Pg. ID 1478. Dean Milliken rejected this option out of hand. She insisted that putting a disclaimer in the syllabus would itself violate the university's gender-identity policy.

During the rest of the semester, Meriwether called on Doe using Doe's last name, and "Doe displayed no anxiety, fear, or intimidation" while attending class. *Id.* at 1477–79. In fact,

Doe excelled and participated as much or more than any other student in the course. At the end of the semester, Meriwether awarded Doe a “high grade.” *Id.* at 1479. This grade reflected Doe’s “very good work” and “frequent participation in class discussions.” *Id.*

B.

As the semester proceeded, Meriwether continued to search for an accommodation of his personal and religious views that would satisfy the university. But Shawnee State was not willing to compromise. After Dean Milliken’s final meeting with Meriwether, she sent him a formal letter reiterating her demand: Address Doe in the same manner “as other students who identify themselves as female.” R. 34-9, Pg. ID 1702. The letter said that if Meriwether did not comply, “the University may conduct an investigation” and that he could be subject to “informal or formal disciplinary action.” *Id.*

Then, just a few days later—and without waiting for a response from Meriwether—Milliken announced that she was “initiating a formal investigation.” R. 34-10, Pg. ID 1703. She claimed that she was doing so because she received “another complaint from a student in [Meriwether’s] class.” *Id.* The complaint was again from Doe. When Meriwether again asked whether an accommodation might be possible given his sincerely held beliefs, Milliken shot him down. She said he had just two options: (1) stop using *all* sex-based pronouns in referring to students (a practical impossibility that would also alter the pedagogical environment in his classroom), or (2) refer to Doe as a female, even though doing so would violate Meriwether’s religious beliefs.

Dean Milliken referred the matter to Shawnee State’s Title IX office. Over the coming months, the university’s Title IX staff conducted a less-than-thorough investigation. They interviewed just four witnesses—Meriwether, Doe, and two other transgender students. They did not ask Meriwether to recommend any potential witnesses. And aside from Doe and Meriwether themselves, none of the witnesses testified about a single interaction between the two.

Shawnee State’s Title IX office concluded that “Meriwether’s disparate treatment [of Doe] ha[d] created a hostile environment” in violation of the university’s nondiscrimination

policies. R. 34-13, Pg. ID 1719. Those policies prohibit “discrimination against any individual because of . . . gender identity.” R. 34-1, Pg. ID 1509. They define gender identity as a “person’s innermost concept of self as male or female or both or neither.” R. 34-2, Pg. ID 1522. And they define a hostile educational environment as “any situation in which there is harassing conduct that limits, interferes with or denies educational benefits or opportunities, from both a subjective (the complainant’s) and an objective (reasonable person’s) viewpoint.” *Id.* at 1522–23. The Title IX report concluded that because Doe “perceives them self as a female,” and because Meriwether has “refuse[d] to recognize” that identity by using female pronouns, Meriwether engaged in discrimination and “created a hostile environment.” R. 34-13, Pg. ID 1719. The report did not mention Meriwether’s request for an accommodation based on his sincerely held religious beliefs.

After the Title IX report issued, Dean Milliken informed Meriwether that she was bringing a “formal charge” against him under the faculty’s collective bargaining agreement. R. 34-14, Pg. ID 1731. She then issued her own report setting forth her findings: “Because Dr. Meriwether repeatedly refused to change the way he addressed [Doe] in his class due to his views on transgender people, and because the way he treated [Doe] was deliberately different than the way he treated others in the class, . . . he effectively created a hostile environment for [Doe].” R. 34-17, Pg. ID 1742. Milliken’s whole explanation of how Meriwether violated university policy spanned just one paragraph. *Id.* (final paragraph). Finally, to create a “safe educational experience for all students,” Dean Milliken concluded that it was necessary to discipline Meriwether. *Id.* She recommended placing a formal warning in his file.

Provost Jeffrey Bauer was tasked with reviewing Milliken’s disciplinary recommendation before it was imposed. Meriwether wrote Provost Bauer a letter stating that he treated Doe exactly the same as he treated all male students; that he began referring to Doe without pronouns and by Doe’s last name as an accommodation to Doe; and that Doe’s “access to educational benefits and opportunities was never jeopardized.” R. 34-18, Pg. ID 1766. Meriwether further explained that he could not use female pronouns to refer to Doe due to his “conscience and religious convictions.” *Id.* He asked Provost Bauer to allow “reasonable minds . . . to differ” on this “newly emerging cultural issue.” *Id.* Provost Bauer rejected Meriwether’s request, stating

that he “approve[d] Dean Milliken’s recommendation of formal disciplinary action.” R. 34-19, Pg. ID 1770. Bauer did not address Meriwether’s arguments to the contrary, nor did he grapple with Meriwether’s request for a religious accommodation.

Shawnee State then placed a written warning in Meriwether’s file. The warning reprimanded Meriwether and directed him to change the way he addresses transgender students to “avoid further corrective actions.” R. 34-20, Pg. ID 1771. What does “further corrective actions” mean? Suspension without pay and termination, among other possible punishments. R. 34-4, Pg. ID 1646; *see also* R. 34, Pg. ID 1487.

C.

The Shawnee State faculty union then filed a grievance on Meriwether’s behalf. It asked the university to (1) vacate the disciplinary action, and (2) allow Meriwether to keep speaking in a manner consistent with his religious beliefs.

Provost Bauer, who had already rejected Meriwether’s claim once, was tasked with deciding the grievance. A union representative, Dr. Chip Poirot, joined Meriwether to present the grievance at a hearing. From the outset, Bauer exhibited deep hostility. He repeatedly interrupted the representative and made clear that he would not discuss the academic freedom and religious discrimination aspects of the case. The union representative tried to explain the teachings of Meriwether’s church and why Meriwether felt he was being compelled to affirm a position at odds with his faith. At one point during the hearing, Provost Bauer “openly laughed.” R. 34-24, Pg. ID 1780. Indeed, Bauer was so hostile that the union representative “was not able to present the grievance.” *Id.* at 1780–81. Bauer denied the grievance.

The next step in Shawnee State’s grievance process involved an appeal to the university’s president. In a twist of fate, the president turned out to be Bauer. Shortly after Provost Bauer denied the grievance, he was appointed interim university president. Bauer designated two of his representatives, Shawnee State’s Labor Relations Director and General Counsel, to meet with Meriwether and Poirot on his behalf.

The officials agreed with the union that Meriwether’s conduct had not “created a hostile educational environment.” R. 34-27, Pg. ID 1799. But they recommended ruling against Meriwether anyway. This was, they said, not a hostile-environment case; instead, it was a “differential treatment” case. *Id.* This change in theory contradicted the Title IX investigation and Dean Milliken’s disciplinary recommendation (which Provost Bauer approved)—both of which accused Meriwether of violating university policy by “creat[ing] a hostile environment for [Doe].” R. 34-13, Pg. ID 1719; R. 34-17, Pg. ID 1741–42. The officials justified the university’s refusal to accommodate Meriwether’s religious beliefs by equating his views to those of a hypothetical racist or sexist. R. 34, Pg. ID 1490; R. 34-27, Pg. ID 1799. Since the university would not accommodate religiously motivated racism or sexism, it ought not accommodate Meriwether’s religious beliefs. Bauer adopted his representatives’ findings and denied the grievance again.

That was the end of the grievance process at Shawnee State. Because Meriwether now fears that he will be fired or suspended without pay if he does not toe the university’s line on gender identity, he alleges he cannot address “a high profile issue of public concern that has significant philosophical implications.” R. 34, Pg. ID 1492–93. He steers class discussions away from gender-identity issues and has refused to address the subject when students have raised it in class. The warning letter in Meriwether’s file will also make it “difficult, if not impossible,” for him to obtain a position at another institution once he retires from Shawnee State. *Id.* at 1493.

D.

Out of options at Shawnee State, Meriwether filed this lawsuit. He alleged that the university violated his rights under: (1) the Free Speech and Free Exercise Clauses of the First Amendment; (2) the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (3) the Ohio Constitution; and (4) his contract with the university.

The district court referred the case to a magistrate judge. Doe and an organization, Sexuality and Gender Acceptance, then moved to intervene, and the magistrate granted their motion. Next, the defendants and intervenors filed separate motions to dismiss under Rule

12(b)(6). The magistrate recommended dismissing all of Meriwether's federal claims and declining to exercise supplemental jurisdiction over his state-law claims. Meriwether then objected to the magistrate's report and recommendation. But the district court adopted it in full.

Meriwether now appeals the district court's decision, except for its dismissal of his equal-protection claim. We first address Meriwether's free-speech claim before turning to his free-exercise and due-process claims.

II.

"Universities have historically been fierce guardians of intellectual debate and free speech." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 761 (6th Cir. 2019). But here, Meriwether alleges that Shawnee State's application of its gender-identity policy violated the Free Speech Clause of the First Amendment. The district court rejected this argument and held that a professor's speech in the classroom is never protected by the First Amendment. We disagree: Under controlling Supreme Court and Sixth Circuit precedent, the First Amendment protects the academic speech of university professors. Since Meriwether has plausibly alleged that Shawnee State violated his First Amendment rights by compelling his speech or silence and casting a pall of orthodoxy over the classroom, his free-speech claim may proceed.

A.

1.

Start with the basics. The First Amendment protects "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Thus, the government "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). When the government tries to do so anyway, it violates this "cardinal constitutional command." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018).

It should come as little surprise, then, "that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed." *Id.* at 2471 & n.8 (citing examples including Thomas Jefferson, Oliver

Ellsworth, and Noah Webster). Why? Because free speech is “essential to our democratic form of government.” *Id.* at 2464. Without genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish. *See id.*

Courts have often recognized that the Free Speech Clause applies at public universities. *See, e.g., Ward v. Polite*, 667 F.3d 727, 732–33 (6th Cir. 2012). Thus, the state may not act as though professors or students “shed their constitutional rights to freedom of speech or expression at the [university] gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Government officials violate the First Amendment whenever they try to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” and when they “force citizens to confess by word or act their faith therein.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

To be sure, free-speech rules apply differently when the government is doing the speaking. And that remains true even when a government employee is doing the talking. Thus, in *Garcetti v. Ceballos*, the Supreme Court held that normally “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” 547 U.S. 410, 421 (2006).

2.

Here, the threshold question is whether the rule announced in *Garcetti* bars Meriwether’s free-speech claim. It does not.

Garcetti set forth a general rule regarding government employees’ speech. But it expressly declined to address whether its analysis would apply “to a case involving speech related to scholarship or teaching.” 547 U.S. at 425; *see also Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011) (“The plain language of *Garcetti* thus explicitly left open the question of whether its principles apply in the academic genre where issues of ‘scholarship or teaching’ are in play.”). Although *Garcetti* declined to address the question, we can turn to the Supreme Court’s prior decisions for guidance. Those decisions have

“long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

Start with *Sweezy v. New Hampshire*. 354 U.S. 234 (1957) (plurality opinion). During the McCarthy era, New Hampshire instituted a loyalty program “to eliminate ‘subversive persons’ among government personnel.” *Id.* at 236. The state legislature authorized the Attorney General to become a “one-man legislative committee” and take appropriate action if he found that a person was “subversive.” *Id.* at 236–37. When the Attorney General questioned public university professor Paul Sweezy, he declined to reveal the contents of a lecture he had delivered to “100 students in [a] humanities course.” *Id.* at 243. The Attorney General then had the court hold him in contempt. *Id.* at 244–45. The case ultimately made its way to the Supreme Court, which held that a legislative inquiry into the contents of a professor’s lectures “unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression.” *Id.* at 250. The Court explained that it “could not be seriously debated” that a professor’s “right to lecture” is protected by the Constitution. *Id.* at 249–50. And it emphasized “[t]he essentiality of freedom in the community of American universities.” *Id.* at 250. When the state targets professors’ academic freedom rather than protects it, scholarship, teaching, and education “cannot flourish.” *Id.*; see also *id.* at 262 (Frankfurter, J., concurring in result) (“Political power must abstain from intrusion into this activity of freedom . . . except for reasons that are exigent and obviously compelling.”).

A decade later, in a case involving a similar New York law banning “subversive” activities, the Supreme Court affirmed that the Constitution protects “academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). It characterized academic freedom as “a special concern of the First Amendment” and said that the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Id.* After all, the classroom is “peculiarly the ‘marketplace of ideas.’” *Id.* And when the state stifles a professor’s viewpoint on a matter of public import, much more than the professor’s rights are at stake. Our nation’s future “depends upon leaders trained through wide exposure to [the] robust exchange of ideas”—not through the

“authoritative” compulsion of orthodox speech. *Id.* (citation omitted); *accord Sweezy*, 354 U.S. at 249–50 (plurality opinion) (“To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”).

Together, *Sweezy* and *Keyishian* establish that the First Amendment protects the free-speech rights of professors when they are teaching. *See also Healy v. James*, 408 U.S. 169, 180–81 (1972) (“[W]e break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.”); *Tinker*, 393 U.S. at 506 (“First Amendment rights . . . are available to teachers[.]”).

As a result, our court has rejected as “totally unpersuasive” “the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction.” *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001). And we have recognized that “a professor’s rights to academic freedom and freedom of expression are paramount in the academic setting.” *Bonnell v. Lorenzo*, 241 F.3d 800, 823 (6th Cir. 2001); *see Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1188–89 (6th Cir. 1995).¹ Simply put, professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship. *See Hardy*, 260 F.3d at 680.

In reaffirming this conclusion, we join three of our sister circuits: the Fourth, Fifth, and Ninth. In *Adams v. Trustees of the University of North Carolina–Wilmington*, the Fourth Circuit held that *Garcetti* left open the question whether professors retained academic-freedom rights under the First Amendment. 640 F.3d at 562. It concluded that the rule announced in *Garcetti* does not apply “in the academic context of a public university.” *Id.*; *see also Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007). The Fifth Circuit has also held that the speech of public university professors is constitutionally protected, reasoning that “academic freedom is a special concern of the First Amendment.” *Buchanan v. Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019) (quotation omitted) (analyzing the claim under the *Pickering-Connick* framework).

¹Shawnee State and the intervenors suggest that our decision in *Evans-Marshall v. Board of Education of Tipp City* is to the contrary. 624 F.3d 332 (6th Cir. 2010). Not so. There, we held that “the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools.” *Id.* at 334. We distinguished college and university professors and made clear that our holding was limited to schoolteachers. *Id.* at 343–44.

Likewise, the Ninth Circuit has recognized that “if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.” *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014). Thus, it held that “*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed ‘pursuant to the official duties’ of a teacher and professor.” *Id.* at 412.

One final point worth considering: If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity. A university president could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as “comrades.” That cannot be. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe” such orthodoxy. *Barnette*, 319 U.S. at 642.

3.

Shawnee State and the intervenors raise several arguments in response.

First, they suggest that we ought not apply the Supreme Court’s academic-freedom cases that preceded *Garcetti*. But our job as lower court judges is to apply existing Supreme Court precedent unless it is expressly overruled. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). And here, the Supreme Court has not overruled its academic-freedom cases. “It is not our prerogative to set this binding precedent aside.” *Mayhew v. Town of Smyrna*, 856 F.3d 456, 464 (6th Cir. 2017). Nor is it our prerogative to cast aside our holding “that a teacher’s in-class speech deserves constitutional protection.” *Hardy*, 260 F.3d at 680. *Garcetti* expressed no view on this issue and even recognized that “expression related to . . . classroom instruction” might not fit within the Court’s “customary employee-speech jurisprudence.” *Garcetti*, 547 U.S. at 425. Thus, we remain bound by prior Supreme Court and Sixth Circuit precedent in this area.

Second, they argue that even if there is an academic-freedom exception to *Garcetti*, it does not protect Meriwether’s use of titles and pronouns in the classroom. As they would have it, the use of pronouns has nothing to do with the academic-freedom interests in the substance of

classroom instruction. But that is not true. Any teacher will tell you that choices about how to lead classroom discussion shape the *content* of the instruction enormously. That is especially so here because Meriwether’s choices touch on gender identity—a hotly contested matter of public concern that “often” comes up during class discussion in Meriwether’s political philosophy courses. R. 34, Pg. ID 1492; *see Janus*, 138 S. Ct. at 2476 (describing gender identity as a “controversial [and] sensitive political topic[] . . . of profound value and concern to the public” (cleaned up)).

By forbidding Meriwether from describing his views on gender identity even in his syllabus, Shawnee State silenced a viewpoint that could have catalyzed a robust and insightful in-class discussion. Under the First Amendment, “the mere dissemination of ideas . . . on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) (per curiam). Rather, the lesson of *Pickering* and the Court’s academic-freedom decisions is that the state may do so only when its interest in restricting a professor’s in-class speech outweighs his interest in speaking.

Remember, too, that the university’s position on titles and pronouns goes both ways. By defendants’ logic, a university could likewise *prohibit* professors from addressing university students by their preferred gender pronouns—no matter the professors’ own views. And it could even impose such a restriction while denying professors the ability to explain to students why they were doing so. But that’s simply not the case. Without sufficient justification, the state cannot wield its authority to categorically silence dissenting viewpoints. *See Keyishian*, 385 U.S. at 602–03; *Sweezy*, 354 U.S. at 250–51 (plurality opinion); *Wieman v. Updegraff*, 344 U.S. 183, 195–96 (1952) (Frankfurter, J., concurring); *Barnette*, 319 U.S. at 639; *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835–36 (1995).

Thus, the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not. The need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings. And a professor’s in-class speech to his students is anything but speech by an ordinary government employee. Indeed, in the college classroom there are three critical interests at stake (all supporting robust speech protection): (1) the students’ interest in receiving

informed opinion, (2) the professor's right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints. *See Lane v. Franks*, 573 U.S. 228, 236 (2014); *Sweezy*, 354 U.S. at 250 (plurality opinion). Because the First Amendment "must always be applied 'in light of the special characteristics of the . . . environment' in the particular case," *Healy*, 408 U.S. at 180 (alteration in original) (quoting *Tinker*, 393 U.S. at 506), public universities do not have a license to act as classroom thought police. They cannot force professors to avoid controversial viewpoints altogether in deference to a state-mandated orthodoxy. Otherwise, our public universities could transform the next generation of leaders into "closed-circuit recipients of only that which the State chooses to communicate." *Tinker*, 393 U.S. at 511. Thus, "what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character." *Dambrot*, 55 F.3d at 1188.

Of course, some classroom speech falls outside the exception: A university might, for example, require teachers to call roll at the start of class, and that type of non-ideological ministerial task would not be protected by the First Amendment. Shawnee State says that the rule at issue is similarly ministerial. But as we discuss below, titles and pronouns carry a message. The university recognizes that and wants its professors to use pronouns to communicate a message: People can have a gender identity inconsistent with their sex at birth. But Meriwether does not agree with that message, and he does not want to communicate it to his students. That's not a matter of classroom management; that's a matter of academic speech.

Finally, defendants argue that academic freedom belongs to public universities, not professors. But we've held that university professors "have . . . First Amendment rights when teaching" that they may assert against the university. *Hardy*, 260 F.3d at 680; *see Bonnell*, 241 F.3d at 823. So this arguments fails.

B.

Although *Garcetti* does not bar Meriwether's free-speech claim, that is not the end of the matter. We must now apply the longstanding *Pickering-Connick* framework to determine whether Meriwether has plausibly alleged that his in-class speech was protected by the First Amendment. *See Hardy*, 260 F.3d at 678 (taking this approach in an academic-speech case);

Adams, 640 F.3d at 564 (same); *Buchanan*, 919 F.3d at 853 (same); *Demers*, 746 F.3d at 412–13 (same). Under that framework, we ask two questions: First, was Meriwether speaking on “a matter of public concern”? *Connick v. Myers*, 461 U.S. 138, 146 (1983). And second, was his interest in doing so greater than the university’s interest in “promoting the efficiency of the public services it performs through” him? *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

1.

To determine whether speech involves a matter of public concern, we look to the “content, form, and context of a given statement, as revealed by the whole record.” *Connick*, 461 U.S. at 147–48. When speech relates “to any matter of political, social, or other concern to the community,” it addresses a matter of public concern. *Id.* at 146. Thus, a teacher’s in-class speech about “race, gender, and power conflicts” addresses matters of public concern. *Hardy*, 260 F.3d at 679. A basketball coach using racial epithets to motivate his players does not. *Dambrot*, 55 F.3d at 1190. “The linchpin of the inquiry is, thus, for both public concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives.” *Id.* at 1189.

Meriwether did just that in refusing to use gender-identity-based pronouns. And the “point of his speech” (or his refusal to speak in a particular manner) was to convey a message. *Id.* at 1187. Taken in context, his speech “concerns a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes.” Professors’ Amicus Br. at 1. That is, his mode of address *was* the message. It reflected his conviction that one’s sex cannot be changed, a topic which has been in the news on many occasions and “has become an issue of contentious political . . . debate.” See *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1051 (6th Cir. 2001).

From courts to schoolrooms this controversy continues. Recently, the Fifth Circuit rejected an appellant’s motion to be referred to by the appellant’s preferred gender pronouns—over an “emphatic[] dissent.” *United States v. Varner*, 948 F.3d 250, 254, 261 (5th Cir. 2020). And, on the other side, a Texas high school generated controversy when it permitted

its students to display preferred gender pronouns on their online profiles.² Further examples abound. In short, the use of gender-specific titles and pronouns has produced a passionate political and social debate. All this points to one conclusion: Pronouns can and do convey a powerful message implicating a sensitive topic of public concern.

The history of pronoun usage in American discourse underscores this point. Following the 1745 publication of Anne Fisher's *A New Grammar*, the "idea that *he*, *him* and *his* should go both ways caught on and was widely adopted."³ But in the latter half of the twentieth century, gendered pronouns became imbued with new meaning. The feminist movement came to view the generic use of masculine pronouns as "a crucial mechanism for the conceptual invisibility of women." Carol Sanger, *Feminism and Disciplinary: The Curl of the Petals*, 27 Loy. L.A. L. Rev. 225, 247 n.87 (1993). It regarded the "generic masculine pronoun" as rooted in "pre-existing cultural prejudice" and subtly "influencing our perceptions and recirculating the sexist prejudice." Deborah Cameron, *Feminism and Linguistic Theory* 137 (2d ed. 1992); see also Susan A. Speer, *Gender Talk: Feminism, Discourse and Conversation Analysis* 2–3 (2005). As a result, "feminist attempts at language reform" served as a means for "sensitiz[ing] individuals to ways in which language is discriminatory towards women." Susan Ehrlich & Ruth King, *Gender-based language reform and the social construction of meaning*, 3 Discourse & Soc'y 151, 156 (1992). To the feminist cause, pronouns mattered.

And history tends to repeat itself. Never before have titles and pronouns been scrutinized as closely as they are today for their power to validate—or invalidate—someone's perceived sex or gender identity. Meriwether took a side in that debate. Through his continued refusal to address Doe as a woman, he advanced a viewpoint on gender identity. See *Dambrot*, 55 F.3d at 1189. Meriwether's speech manifested his belief that "sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." R. 34, Pg. ID 1469. The "focus," "point," "intent," and "communicative purpose" of

²Alexandra Cronin, *Controversy Sparks over Frisco Transgender Students' Right to Choose Preferred Pronouns*, LOCAL PROFILE (Sept. 28, 2020), <https://localprofile.com/2020/09/28/frisco-transgender-students-preferred-pronouns/>.

³Patricia T. O'Conner & Stewart Kellerman, *All-Purpose Pronoun*, N.Y. TIMES MAG. (July 21, 2009), <https://www.nytimes.com/2009/07/26/magazine/26FOB-onlanguage-t.html>.

the speech in question was a matter of public concern. *Farhat v. Jopke*, 370 F.3d 580, 592 (6th Cir. 2004) (citations omitted).

And even the university appears to think this pronoun debate is a hot issue. Otherwise, why would it forbid Meriwether from explaining his “personal and religious beliefs about gender identity” in his syllabus? R. 34, Pg. ID 1478, 1488–91. No one contests that what Meriwether proposed to put in his syllabus involved a matter of public concern. See *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 253, 256 (6th Cir. 2006) (holding that “intended speech” which the plaintiff was later “unable” to make “touched on a matter of public concern”). In short, when Meriwether waded into the pronoun debate, he waded into a matter of public concern.

2.

Because Meriwether was speaking on a matter of public concern, we apply *Pickering* balancing to determine whether the university violated his First Amendment rights. This test requires us “to arrive at a balance between the interests of the [professor], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” 391 U.S. at 568. Here, that balance favors Meriwether.

Start with Meriwether’s interests. We begin with “the robust tradition of academic freedom in our nation’s post-secondary schools.” *Hardy*, 260 F.3d at 680; see also *Keyishian*, 385 U.S. at 603 (“Our Nation is deeply committed to safeguarding academic freedom[.]”). That tradition alone offers a strong reason to protect Professor Meriwether’s speech. After all, academic freedom is “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Keyishian*, 385 U.S. at 603. And the First Amendment interests are especially strong here because Meriwether’s speech also relates to his core religious and philosophical beliefs. Finally, this case implicates an additional element: potentially compelled speech on a matter of public concern. And “[w]hen speech is compelled . . . additional damage is done.” *Janus*, 138 S. Ct. at 2464.

Those interests are powerful. Here, the university refused even to permit Meriwether to comply with its pronoun mandate while expressing his personal convictions in a syllabus

disclaimer. That ban is anathema to the principles underlying the First Amendment, as the “proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)). Indeed, the premise that gender identity is an idea “embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000).

And this is particularly true in the context of the college classroom, where students’ interest in hearing even contrarian views is also at stake. “Teachers and students must always remain free to inquire, to study and to evaluate, [and] to gain new maturity and understanding.” *Sweezy*, 354 U.S. at 250 (plurality opinion); *see also Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994) (noting that “the efficient provision of services” by a university “actually depends, to a degree, on the dissemination in public fora of controversial speech implicating matters of public concern”).

On the other side of the ledger, Shawnee State argues that it has a compelling interest in stopping discrimination against transgender students. It relies on *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* in support of this proposition. 884 F.3d 560 (6th Cir. 2018). But *Harris* does not resolve this case. There, a panel of our court held that an employer violates Title VII when it takes an adverse employment action based on an employee’s transgender status. *Id.* at 571, 591.⁴ The panel did not hold—and indeed, consistent with the First Amendment, could not have held—that the government always has a compelling interest in regulating employees’ speech on matters of public concern. Doing so would reduce *Pickering* to a shell. And it would allow universities to discipline professors, students, and staff any time their speech might cause offense. That is not the law. *See Street v. New York*, 394 U.S. 576, 592 (1969) (“[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”). Purportedly neutral non-discrimination policies cannot be used to

⁴Title VII differs from Title IX in important respects: For example, under Title IX, universities must consider sex in allocating athletic scholarships, 34 C.F.R. § 106.37(c), and may take it into account in “maintaining separate living facilities for the different sexes.” 20 U.S.C. § 1686. Thus, it does not follow that principles announced in the Title VII context automatically apply in the Title IX context.

transform institutions of higher learning into “enclaves of totalitarianism.” *Tinker*, 393 U.S. at 511.

Turning to the facts, the university’s interest in punishing Meriwether’s speech is comparatively weak. *See Hardy*, 260 F.3d at 680–81. When the university demanded that Meriwether refer to Doe using female pronouns, Meriwether proposed a compromise: He would call on Doe using Doe’s last name alone. That seemed like a win-win. Meriwether would not have to violate his religious beliefs, and Doe would not be referred to using pronouns Doe finds offensive. Thus, on the allegations in this complaint, it is hard to see how this would have “create[d] a hostile learning environment that ultimately thwarts the academic process.” *Bonnell*, 241 F.3d at 824. It is telling that Dean Milliken at first approved this proposal. And when Meriwether employed this accommodation throughout the semester, Doe was an active participant in class and ultimately received a high grade.

As we stated in *Hardy*, “a school’s interest in limiting a teacher’s speech is not great when those public statements ‘are neither shown nor can be presumed to have in any way either impeded the teacher’s proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.’” 260 F.3d at 681 (quoting *Pickering*, 391 U.S. at 572–73). The mere “fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Tinker*, 393 U.S. at 508. At this stage of the litigation, there is no suggestion that Meriwether’s speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits. *See Bonnell*, 241 F.3d at 824. Without such a showing, the school’s actions “mandate[] orthodoxy, not anti-discrimination,” and ignore the fact that “[t]olerance is a two-way street.” *Ward*, 667 F.3d at 735. Thus, the *Pickering* balance strongly favors Meriwether.

Finally, Shawnee State and the intervenors argue that Title IX compels a contrary result. We disagree. Title IX prohibits “discrimination under any education program or activity” based on sex. 20 U.S.C. § 1681(a). The requirement “that the discrimination occur ‘under any education program or activity’ suggests that the behavior [must] be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity.” *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999); *see Pahssen v. Merrill Cmty. Sch. Dist.*,

668 F.3d 356, 362 (6th Cir. 2012). But Meriwether’s decision not to refer to Doe using feminine pronouns did not have any such effect. As we have already explained, there is no indication at this stage of the litigation that Meriwether’s speech inhibited Doe’s education or ability to succeed in the classroom. *See* 20 U.S.C. § 1681(a); *Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018) (holding that a Title IX hostile-environment claim requires that one’s “educational experience [be] permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive so as to alter the conditions of the victim’s educational environment” (cleaned up)). Bauer even admitted that Meriwether’s conduct “was not so severe and pervasive that it created a hostile educational environment.” R. 34-27, Pg. ID 1799. Thus, Shawnee State’s purported interest in complying with Title IX is not implicated by Meriwether’s decision to refer to Doe by name rather than Doe’s preferred pronouns.

* * *

In sum, “the Founders of this Nation . . . ‘believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.’” *Dale*, 530 U.S. at 660–61 (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). Shawnee State allegedly flouted that core principle of the First Amendment. Taking the allegations as true, we hold that the university violated Meriwether’s free-speech rights.⁵

III.

Meriwether next argues that as a public university, Shawnee State violated the Free Exercise Clause when it disciplined him for not following the university’s pronoun policy. We agree.

The Constitution requires that the government commit “itself to religious tolerance.” *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). Thus, laws that burden religious exercise are presumptively unconstitutional unless

⁵The district court’s conclusions about Meriwether’s remaining free-speech claims were all premised on the notion that his speech was not protected. Because that premise was legally erroneous, we vacate all of the district court’s free-speech holdings.

they are both neutral and generally applicable. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877–78 (1990). To determine whether a law is neutral, courts must look beyond the text and scrutinize the history, context, and application of a challenged law. *Masterpiece*, 138 S. Ct. at 1731; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). In this way, the Free Exercise Clause guards against “even subtle departures from neutrality on matters of religion.” *Masterpiece*, 138 S. Ct. at 1731 (cleaned up).

A.

Meriwether has plausibly alleged that Shawnee State’s application of its gender-identity policy was not neutral for at least two reasons. First, officials at Shawnee State exhibited hostility to his religious beliefs. And second, irregularities in the university’s adjudication and investigation processes permit a plausible inference of non-neutrality.⁶

1.

State actors must give “neutral and respectful consideration” to a person’s sincerely held religious beliefs. *Masterpiece*, 138 S. Ct. at 1729. When they apply an otherwise-neutral law with religious hostility, they violate the Free Exercise Clause. *Id.* at 1731. In this case, “the pleadings give rise to a sufficient ‘suspicion’ of religious animosity to warrant ‘pause’ for discovery.” *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020) (quoting *Masterpiece*, 138 S. Ct. at 1731). Meriwether “was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided.” *Masterpiece*, 138 S. Ct. at 1732. And that, he at least plausibly did not receive.

Start with one of the individuals Meriwether alleges was involved in the action against him—Department Chair Jennifer Pauley. Meriwether came to her to discuss his religious concerns about the new policy. Pauley might have responded with tolerance, or at least neutral objectivity. She did not. Instead, she remarked that religion “oppresses students” and said that

⁶Of course, to have standing to bring a Free Exercise claim, Meriwether must have also suffered an injury because of the non-neutrality. Here, he claims that the non-neutrality led to his ultimate discipline. So he has standing to bring his claim.

even its “presence” at universities is “counterproductive.” R. 34, Pg. ID 1473. Christians in particular, she said, were “primarily motivated out of fear.” *Id.* In her view, “Christian doctrines . . . should not be taught.” *Id.* And for good measure, she added that Christian professors “should be banned” from teaching courses on Christianity—knowing that Meriwether had done so for decades. *Id.* Neutral and non-hostile? As alleged, no. In fact, it has the makings of the very religious intolerances that “gave concern to those who drafted the Free Exercise Clause.” *Lukumi*, 508 U.S. at 532 (citation omitted).

So what does the university say about these statements? It claims that Pauley was not involved in formulating, interpreting, or applying the university’s gender-identity policy, and that she was not involved in the action against him. Maybe so. But at the motion-to-dismiss stage, courts must accept the allegations as true. And here, the complaint alleges that Pauley was involved.⁷

And Pauley was not the only allegedly hostile actor. After Meriwether was disciplined, a union representative presented Meriwether’s grievance to Provost Bauer—a supposedly neutral adjudicator. But Bauer did not seem so neutral. He repeatedly interrupted the union representative and made clear that he would not discuss the “academic freedom and religious discrimination aspects” of the case. R. 34-24, Pg. ID 1780. The union representative tried to explain Meriwether’s religious beliefs and the teachings of his church. But Provost Bauer responded with open laughter.⁸ And after the laughter, Bauer became “so uncooperative” that the union representative “was not able to present the grievance” at all. R. 34, Pg. ID 1489. Bauer’s alleged actions and words demonstrated anything but the “neutral and respectful consideration” that the Constitution demands. *Masterpiece*, 138 S. Ct. at 1729.

⁷Ultimately, Meriwether bears the burden of proving that Pauley was involved in the decision-making process. And if these were the only allegations in the complaint, this would be a much more difficult case since Meriwether’s assertion that Pauley was involved does not make clear how she influenced the disciplinary decision. But we need not resolve this difficult question now because Meriwether has alleged sufficient additional facts against the university to withstand a motion to dismiss.

⁸The defendants and the district court stress that Poirot’s notes referencing the open laughter state that Bauer laughed “at some point” during the presentation, without saying precisely when. But the complaint itself clarifies that the laughter occurred “[w]hen Dr. Poirot outlined the religious beliefs that Dr. Meriwether and his church hold.” R. 34, Pg. ID 1488; *accord* R. 34-24, Pg. ID 1780 (discussing the laughter in the context of the religious aspects of the presentation). Pending discovery, we must accept that allegation as true.

Shawnee State’s Director of Labor Relations (Bauer’s representative) then piled on when he reviewed the grievance. In his view, Meriwether’s convictions were no better—and no more worthy of tolerant accommodation—than religiously motivated racism or sexism. Bauer adopted this reasoning in denying Meriwether’s grievance once again.

If this sounds familiar, it should. In *Masterpiece Cakeshop*, the Supreme Court reversed a decision of the Colorado Civil Rights Commission when the Commission made hostile statements that “cast doubt on the fairness” of the adjudication. 138 S. Ct. at 1729–30. The Commission had said that “religion has been used to justify all kinds of discrimination throughout history,” suggesting that the defendant was using religion as a pretext for discrimination. *Id.* at 1729. The Supreme Court called such comments “inappropriate” and said they called the Commission’s impartiality into question. *Id.* at 1729–30. That same rationale applies here. Meriwether respectfully sought an accommodation that would both protect his religious beliefs and make Doe feel comfortable. In response, the university derided him and equated his good-faith convictions with racism. An inference of religious hostility is plausible in these circumstances. *See Poole*, 966 F.3d at 168–70.

In sum, Meriwether has plausibly alleged that religious hostility infected the university’s interpretation and application of its gender-identity policy. *See Masterpiece*, 138 S. Ct. at 1730. Whether this claim ultimately prevails will depend on the results of discovery and the clash of proofs at trial. For now, we simply hold that Meriwether has plausibly alleged a free-exercise claim based on religious hostility.

2.

While the hostility Shawnee State exhibited would be enough for Meriwether’s claim to survive a motion to dismiss, Meriwether has more. He alleges that various irregularities in the university’s investigation and adjudication processes also permit an inference of non-neutrality. We agree.

Not all laws that look “neutral and generally applicable” are constitutional. *Lukumi*, 508 U.S. at 534 (“Facial neutrality is not determinative.”). The Free Exercise Clause “forbids subtle departures from neutrality and covert suppression of particular religious beliefs.” *Id.* (cleaned

up); *Ward*, 667 F.3d at 738 (noting that while a law might appear “neutral and generally applicable on its face, . . . in practice [it may be] riddled with exemptions or worse [be] a veiled cover for targeting a belief or a faith-based practice”). Thus, courts have an obligation to meticulously scrutinize irregularities to determine whether a law is being used to suppress religious beliefs. *See Lukumi*, 508 U.S. at 534–35; *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep’t*, 984 F.3d 477, 481–82 (6th Cir. 2020).⁹ And here, that scrutiny reveals signs of non-neutrality.

First, the university’s alleged basis for disciplining Meriwether was a moving target. The Title IX report claimed that Meriwether violated the university’s gender-identity policy by creating a “hostile educational environment.” R. 34-13, Pg. ID 1719. Dean Milliken agreed and recommended disciplining Meriwether for this “hostile environment.” R. 34-17, Pg. ID 1742. Yet when Meriwether grieved his discipline, university officials conceded that Meriwether had never created a hostile environment. Instead, they said the case was about “disparate treatment.” R. 34-27, Pg. ID 1799. But at oral argument, the university changed its position once again: It said that “this really is a hostile-environment case.” Oral Arg. 37:00–04.

These repeated changes in position, along with the alleged religious hostility, permit a plausible inference that the university was not applying a preexisting policy in a neutral way, but was instead using an evolving policy as pretext for targeting Meriwether’s beliefs. *See Ward*, 667 F.3d at 736–37; *see also Lukumi*, 508 U.S. at 534. And it is also plausible that the re-interpretation of the policy was an “after-the-fact invention” designed to justify punishing Meriwether for his religiously motivated speech, not a neutral interpretation of a generally

⁹The obligation to scrutinize irregularities is longstanding. In *Yick Wo v. Hopkins*, for example, the Supreme Court scrutinized the application of a new city ordinance that appeared “fair on its face” only to find that it was being “administered . . . with an evil eye.” 118 U.S. 356, 373–74 (1886). The Supreme Court held that San Francisco violated the Equal Protection Clause when it declined to renew the petitioner’s laundry-business license under its new ordinance. *Id.* at 374. The Court held that the city acted out of discriminatory animus because the petitioner—a Chinese immigrant—had operated his business for twenty-two years without incident, and because San Francisco tended to use its “arbitrary power” under the new ordinance to deny licenses only to Chinese immigrants. *Id.* at 358 (statement of facts); *id.* at 366, 374 (opinion of the Court). The Court found it constitutionally “intolerable” that a man’s “means of living” could be disrupted by the “mere will” of a public official who harbors discriminatory animus against him. *Id.* at 370. The Equal Protection Clause does not tolerate irregular, discriminatory application of “neutral” laws. Nor does the Free Exercise Clause.

applicable policy. *See Ward*, 667 F.3d at 736 (noting that “after-the-fact invention[s]” permit an inference of religious discrimination).

Second, the university’s policy on accommodations was a moving target. Why does this matter? Because when “individualized exemptions from a general requirement are available, the government ‘may not refuse to extend that system to cases of “religious hardship” without compelling reason.’” *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

When Dean Milliken told Meriwether that he was violating the university’s gender-identity policy, Meriwether proposed a compromise: He would address Doe using Doe’s last name and refrain from using pronouns to address Doe. Dean Milliken accepted this accommodation. But several weeks later, she retracted the agreed-upon accommodation and demanded that Meriwether use Doe’s preferred pronouns if he intended to use pronouns to refer to other students. Now the university claims that its policy does not permit *any* religious accommodations.

This about-face permits a plausible inference that the policy allows accommodations, but the university won’t provide one here. If this inference is supported through discovery and trial, a jury could conclude that the university’s refusal to stick to its accommodation is “pretext for punishing [Meriwether’s] religious views and speech.” *Ward*, 667 F.3d at 735.

Third, the university’s Title IX investigation raises several red flags. On their own, these issues might not warrant an inference of non-neutrality. But combined with the other allegations in the complaint, they provide probative “circumstantial evidence” of discrimination. *Lukumi*, 508 U.S. at 540.

For starters, the Title IX investigator interviewed just four witnesses, including Meriwether and Doe. She did not interview a single non-transgender student in any of Meriwether’s classes, nor did she ask Meriwether to recommend any potential witnesses. Indeed, except for Meriwether and Doe, not a single witness testified about any interactions between the two. Even so, the Title IX officer concluded that Meriwether “created a hostile environment.” R. 34-13, Pg. ID 1719.

Under the university's policies, a hostile environment exists only when "there is harassing conduct that limits, interferes with or denies educational benefits or opportunities, from both a subjective (the complainant's) and an objective (reasonable person's) viewpoint." R. 34-2, Pg. ID 1523. But the Title IX report does not explain why declining to use a student's preferred pronouns constitutes harassment. It does not explain how Meriwether's conduct interfered with or denied Doe or Doe's classmates *any* "educational benefits or opportunities," let alone how an "objective observer" could reach such a conclusion. R. 34-2, Pg. ID 1523. And it does not grapple with Meriwether's request for an accommodation based on his sincerely held religious beliefs. In short, the university's cursory investigation and findings provide circumstantial evidence of "subtle departures from neutrality." *Lukumi*, 508 U.S. at 534 (citation omitted). And this suggests that the "neutral . . . consideration to which [Meriwether] was entitled was compromised here." *Masterpiece*, 138 S. Ct. at 1729.

3.

The university raises several counterarguments, none of which we find persuasive.

First, the university seems to suggest that compliance with nondiscrimination laws can *never* burden an individual's religious beliefs under our holding in *Harris Funeral Homes*. If that is their argument, it mischaracterizes the case. In *Harris*, a panel of our court held that Title VII prevented an employer from firing a transgender employee because of the employee's transgender status. 884 F.3d at 574–75. The employer believed that the law burdened the free exercise of his religion because he would have to endorse the mutability of sex to comply. *Id.* at 589. The panel explained that even if the belief were sincere, that did not resolve the question. *Id.* And ultimately, the panel determined that compliance with Title VII did not burden the employer's religious beliefs because "requiring the [employer] to refrain from firing an employee with different . . . views . . . does not, as a matter of law, mean that [the employer] is endorsing or supporting those views." *Id.* As the university would have it, that means that compliance with a nondiscrimination law can never amount to coerced endorsement of contrary religious views.

That is not what we said, and that is not the law. Depending on the circumstances, the application of a nondiscrimination policy could force a person to endorse views incompatible with his religious convictions. And a requirement that an employer *not fire* an employee for expressing a transgender identity is a far cry from what we have here—a requirement that a professor affirmatively change his speech to recognize a person’s transgender identity. The university itself recognizes that *Harris* was careful not to require an “endorsement regarding the mutability of sex.” Defendants’ Br. at 46; *see Harris*, 884 F.3d at 589. Remember, too, that Meriwether proposed a compromise: He would consider referring to students according to their self-asserted gender identity if he could also include a note in the syllabus about his religious beliefs on the issue. The university said no; Meriwether would violate the policy even by disclaiming a belief in transgender identity. It cannot now argue that the policy did not require Meriwether to endorse a view on gender identity contrary to his faith.

Next, the intervenors submit that because Milliken “issued [the] written warning,” and because “there is no allegation that Milliken harbored any animus toward plaintiff’s religious beliefs,” Meriwether’s free-exercise claim must fail. Intervenors’ Br. at 52. Why? Because the original disciplinary decision was not the product of animus. But that argument is both factually and legally flawed.

According to the facts in the complaint, Milliken did not issue the warning. She recommended it, but *Bauer* imposed the punishment and notified Meriwether of it. And in any case, *Masterpiece* forecloses this argument: A disciplinary proceeding that is fair at the beginning still violates the Free Exercise Clause if it is influenced by religious hostility later. In *Masterpiece*, the Colorado Civil Rights Division, like Milliken, first “found probable cause that Phillips violated [the Colorado Anti-Discrimination Act] and referred the case to the Civil Rights Commission.” 138 S. Ct. at 1726. An ALJ then “ruled against Phillips and the cakeshop.” *Id.* And the Commission, like Bauer, “affirmed the ALJ’s decision in full.” *Id.* Neither the Civil Rights Division nor the ALJ exhibited any hostility. But the Commission was hostile, and that was enough. *Id.* at 1725, 1729–30. It doesn’t matter that some stages of a proceeding are fair and neutral if others are not. What matters is whether unconstitutional animus infected the proceedings.

Finally, the university argues that Meriwether simply could have complied with the alternative it offered him: Don't use any pronouns or sex-based terms at all. This offer, the university says, would not violate Meriwether's religious beliefs. But such an offer has two problems. First, it would prohibit Meriwether from speaking in accordance with his belief that sex and gender are conclusively linked. See *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796 (1988) (explaining that the "difference between compelled speech and compelled silence . . . is without constitutional significance"). And second, such a system would be impossible to comply with, especially in a class heavy on discussion and debate. No "Mr." or "Ms." No "yes sir" or "no ma'am." No "he said" or "she said." And when Meriwether slipped up, which he inevitably would (especially after using these titles for twenty-five years), he could face discipline. Our rights do not hinge on such a precarious balance.

The effect of this Hobson's Choice is that Meriwether must adhere to the university's orthodoxy (or face punishment). This is coercion, at the very least of the indirect sort. And we know the Free Exercise Clause protects against both direct and indirect coercion. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017); see also *McDaniel v. Paty*, 435 U.S. 618, 633 (1978) (Brennan, J., concurring in judgment) (The "proposition—that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment—is . . . squarely rejected by precedent."). Simply put, the alternative the university offered does not save its policy.

B.

For the reasons just explained, Meriwether has plausibly alleged that Shawnee State burdened his free-exercise rights. Thus, we apply "the most rigorous of scrutiny" to the university's actions. *Lukumi*, 508 U.S. at 546. We uphold them only if they "advance interests of the highest order" and are "narrowly tailored in pursuit of those interests." *Id.* (cleaned up). The university does not even argue that its application of the policy meets this standard. Thus, we hold that Meriwether's free-exercise claim may proceed.¹⁰

¹⁰Because the complaint sufficiently alleges non-neutrality, we need not consider the harder question of whether *Employment Division v. Smith* applies. Meriwether argues that because the university's speech regulations

III.

Meriwether's final claim is that the policy is unconstitutionally vague as applied to him. The Supreme Court has told us that a policy is so vague as to violate due process when it either (1) fails to inform ordinary people what conduct is prohibited, or (2) allows for arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The standards depend on the legal context: There is "substantially more room for imprecision in regulations bearing only civil, or employment, consequences, than would be tolerated in a criminal code." *Dade v. Baldwin*, 802 F. App'x 878, 885 (6th Cir. 2020) (citing *Arnett v. Kennedy*, 416 U.S. 134, 159–60 (1974) (plurality opinion); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498–99 (1982)). Even where First Amendment values are at stake, "employment standards 'are not void for vagueness as long as ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk'" of discipline. *Dade*, 802 F. App'x at 885 (quoting *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1136 (3d Cir. 1992)); see *Arnett*, 416 U.S. at 158–61 (plurality opinion). Finally, our analysis must turn on the "particular facts at issue, for a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19 (2010) (cleaned up).

Looking to the particular facts here, Meriwether was on notice that the policy prohibited his conduct. As Meriwether alleges, the policy prohibits gender-identity discrimination, with gender-identity being defined to include "how individuals perceive themselves and what they call themselves." R. 34-2, Pg. ID 1522. When Meriwether asked the university administrators for guidance, they ultimately told him he had to use Doe's preferred pronouns. And when he didn't comply, they disciplined him. Since he was clearly on notice that the policy applied to his conduct, he may not challenge it for vagueness. See *Parker v. Levy*, 417 U.S. 733, 755–56 (1974).

are "at odds with our nation's history and traditions," they are not subject to *Smith*'s neutral-and-generally-applicable test. See Appellant Br. 45 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012)). If resolving the applicability of *Smith* becomes necessary as this suit progresses, the district court should do so in the first instance.

Meriwether also failed to argue that the policy allowed for arbitrary and discriminatory enforcement. His conclusory assertion that the policy gives officials “unbridled discretion” in enforcement does not cut it. R. 34, Pg. ID 1465. And to the extent that he developed the point a bit more in his reply brief, that does not suffice. *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010). Thus, Meriwether’s argument that the policy allowed for arbitrary and discriminatory enforcement fails as well.

IV.

For the reasons set forth above, we affirm the district court’s due-process holding, reverse its free-speech and free-exercise holdings, vacate its dismissal of the state-law claims, and remand for further proceedings consistent with this opinion.