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## *ESSAY*

### SOME NOTES ON COURTS AND COURTESY

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*This Essay is a short reflection on misgendering by judges, told through a critical assessment of three cases from the Fifth and Eighth Circuits: Gibson v. Collier, United States v. Varner, and United States v. Thomason. In the trio, judges refused to refer to trans and nonbinary parties with the appropriate titles, honorifics, and pronouns, and offered eight rationalizations to defend their doing so.*

*The primary task of this Essay is to entertain the justifications. It finds they come up wanting. The arguments misconstrue precedent, or are incoherent, incomplete, or just plainly unpersuasive.*

*Against these inadequate defenses, the Essay's second task is to offer one case against judicial misgendering. The argument focuses on the significance and institutionally protective nature of courtesy from members of the bench, which Gibson, Varner, and Thomason either overlooked or too hastily dismissed. Judicial courtesy serves to maintain the judiciary's legitimacy, moral authority, and reputation—*

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This Essay builds upon and rounds out ideas introduced in prior work. See Chan Tov McNamarah, *Misgendering as Misconduct*, 68 *UCLA L. Rev. Disc.* 40 (2020); Chan Tov McNamarah, *Misgendering*, 109 *Cal. L. Rev.* 2227 (2021).

*all essential to generate citizen confidence and compliance, and thus all necessary for the judiciary's basic institutional function. Given these critical interests, the Essay concludes that courtesy calls judges to refer to parties with the appropriate pronouns, honorifics, and names.*

#### INTRODUCTION

From the moment it was published, the *Bostock v. Clayton County*<sup>1</sup> decision became a cause célèbre. Generating a cottage industry of commentary, thus far the case has been picked apart and scrutinized from a variety of angles. Most readily, commentators have taken on the author and method. Others have looked ahead, exploring what the decision portends.<sup>2</sup> At the same time, naturally, *Bostock* has been both celebrated and reviled for becoming the first Supreme Court case directly considering and impacting the transgender community, all while adding another link in the ever-growing chain of Court victories for lesbians and gay men.<sup>3</sup>

Still, while *Bostock*'s substance—what the opinion means and does—has attracted and will continue to attract scholarly attention, *Bostock*'s equally noteworthy style—how the opinion says what it does—has not. Amidst the litany of commentary, fanfare, and criticism, an aesthetic aspect of the decision has largely<sup>4</sup> gone overlooked: The majority's use of she/her pronouns when referencing Aimee Stephens.

<sup>1</sup> 140 S.Ct. 1731 (2020) (holding that Title VII's prohibition against sex discrimination in employment applies to gay and transgender individuals).

<sup>2</sup> E.g., Rachel Slepoy, *Bostock's Inclusive Queer Frame*, 107 Va. L. Rev. Online 67, 67-68, 82 (2020) (explaining the case's inclusive account of sex-based discrimination, and underscoring the import for trans discrimination case law moving forward); Guha Krishnamurthi & Peter Salib, *Bostock and Conceptual Causation*, Yale J. Reg. Notice & Comment (July 22, 2020), <https://www.yalejreg.com/nc/bostock-and-conceptual-causation-by-guha-krishnamurthi-peter-salib/> [<https://perma.cc/WU2G-QZZV>] (using the case as a case study to tease out issues of multifactorial causation in antidiscrimination jurisprudence).

<sup>3</sup> Compare Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers*, Supreme Court Rules, N.Y. Times (June 15, 2020), <https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html> [<https://perma.cc/9NFA-URBN>] (summarizing celebration of the holding), with Hadley Arkes, *A Morally Empty Jurisprudence*, First Things (June 17, 2020), <https://www.firstthings.com/web-exclusives/2020/06/a-morally-empty-jurisprudence> [<https://perma.cc/BH3Q-ZUEP>] (calling the case “the *Roe v. Wade* for transgenderism [sic], with effects that will ripple out widely in our country, touching and disfiguring our private lives.”).

<sup>4</sup> Unsurprisingly, trans-antagonistic commentators have, however, been more wont to notice this. E.g., Ed Whelan, *Bostock Majority: A ‘Trans Woman’ Is Not a Woman*, Nat'l Rev. (June

This is not a trivial nicety. It represents the first time that a Supreme Court majority has used gender-appropriate language when discussing an openly transgender litigant. Until now, the Court has cautiously relied on gender-neutral language, choosing to address trans parties as “petitioner” “respondent,” or by last name sans gendered titles.<sup>5</sup> *Bostock*’s stark stylistic sea-change thus prompts some obvious questions. What, if any, is the significance of the Court’s choice to use gender-appropriate language when referring to Stephens? And, more generally speaking, how should courts reference and address trans parties in their writing moving forward?

Unfortunately, *Bostock* did not provide much by way of answers. But this Essay will fashion some. It does so primarily by reviewing three circuit court decisions, *Gibson v. Collier*,<sup>6</sup> *United States v. Varner*,<sup>7</sup> and *United States v. Thomason*.<sup>8</sup> In the three, panels deliberately misgendered the appellants, Vanessa Lynn Gibson, Katherine Nicole Jett, and Shawn Kelly Thomason, respectively. Said differently, where *Bostock* was courteous, *Gibson*, *Varner*, and *Thomason* decidedly were not. Juxtaposing the opinions’ approaches, therefore, provides an ideal platform to judge the cases both in favor and against courts addressing gender diverse parties with gender-appropriate language. Ultimately, the Essay concludes that *Bostock*’s approach—which is to say, deferring to the way litigants refer to themselves—is best.

I reach that verdict in roughly two steps. Part II examines the cases made by the trio of opinions in defense of their misgendering. It will show that none of the justifications offered are particularly persuasive and, as it turns out, many are simply unsound. Even so, of the many reasons offered, one is more troubling than the rest. *Varner* rejected the use of gender-appropriate language as “purely . . . a courtesy to parties.”<sup>9</sup> That statement casts judicial showings of courtesy as unimportant and dismissible, in addition to inviting reflection on the troubling prospect

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18, 2020), <https://www.nationalreview.com/bench-memos/bostock-majority-a-trans-woman-is-not-a-woman/> (lamenting the Court’s “parrot[ing] . . . the rhetoric of transgender ideology” and calling the opinion’s reasoning “deeply unsound.”).

<sup>5</sup> E.g., *Burt v. Titlow*, 571 U.S. 12 (2013) (using the gender neutral “respondent” throughout); *Farmer v. Brennan*, 511 U.S. 825 (1994) (using the gender neutral “petitioner” throughout).

<sup>6</sup> 920 F.3d 212 (5th Cir. 2019).

<sup>7</sup> 948 F.3d 250 (5th Cir. 2020).

<sup>8</sup> 991 F.3d 910 (8th Cir. 2021).

<sup>9</sup> 948 F.3d at 255.

that respect, etiquette, and even mere kindness should not factor into the analysis of whether courts should misgender trans parties in their opinions.

Part III takes the bait. Using *Varner*'s last rationale as a provocative, Section III.A argues such a trivializing account is incorrect. It makes the case for judicial courtesy towards trans litigants by zeroing in on the institutional importance of courtesy. The resulting picture is that, far from inconsequential, judicial courtesy shores up the courts' legitimacy, moral authority, and the esteem in which it is held, along with serving several practical benefits.

Section III.B closes the Essay by considering and refuting a probable antagonism to my argument: That misgendering in judicial opinions is an acknowledgement of an "objective truth," such that, even if there was in fact a duty of courtesy to litigants, it would not require judges to employ gender-appropriate language in their writing.

#### I. OF COURTS: RECENT ARGUMENTS FOR MISGENDERING IN JUDICIAL WRITING

This Part spells out the problems with defenses for misgendering in judicial writing, as offered by three recent cases. The cases warrant focus for a few reasons. One is that they are some of the most recent Circuit court decisions to misclassify the gender of a trans litigant. From the time of the first holding, the overwhelming majority of Circuit panels have employed gender appropriate language.<sup>10</sup>

Another reason is the extent of the misgendering. Thomason is addressed by male pronouns twenty-six times and Gibson is referred to as male some forty-six times. Far more egregiously, over the course of eleven pages, the *Varner* majority refers to Jett with he/him pronouns and her birth name a collective sixty-six times. *Varner* also goes as far as to alter any quotations that address her appropriately.

The most significant reason by far, however, is that the cases unabashedly defend their gender misclassifications. Conventionally, courts choosing to misgender trans persons provide little by way of explanation. *Gibson*, *Varner*, and *Thomason*, however, are anything but

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<sup>10</sup> *United States v. Pinson*, 835 F. App'x. 390 (10th Cir. 2020) (adopting gender appropriate language for trans litigant); accord *United States v. Rivera*, 824 F. App'x. 930 (11th Cir. 2020); accord *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); accord *Jackson v. Kuepper*, 813 F. App'x. 230 (7th Cir. 2020); *Gomez-Ortega v. Barr*, 804 F. App'x. 738 (9th Cir. 2020); accord *Arrivillaga v. Att'y Gen. United States*, 811 F. App'x. 756 (3d Cir. 2020).

reticent. Between the three, the cases offered eight justifications for misaddressing the litigants.<sup>11</sup>

#### *A. Gibson v. Collier's Arguments*

In *Gibson*, the Fifth Circuit considered whether refusing Vanessa Lynn Gibson, a transgender prisoner with severe gender dysphoria, gender-confirmation surgery violated the Eighth Amendment.<sup>12</sup> The panel concluded it did not. In the course of doing so, the court defended misgendering Ms. Gibson in three ways. The opinion: (1) cited Texas Department of Criminal Justice policy (TDCJ), emphasizing that Gibson was placed in a male penal facility; (2) cited *Frontiero v. Richardson* for the proposition that sex “is an immutable characteristic determined solely by . . . birth,”<sup>13</sup> implying pronouns are strictly genitally-referent; and (3) cited Supreme Court and Fifth Circuit case law allegedly misgendering trans litigants. Can any of these reasons adequately justify misgendering Gibson? In a word, no.

Justification (1) rests on courts' traditional deference to penal institutions, while ignoring whether the rationales for doing so were applicable. Ordinarily, courts defer to penal policies on the logic that institutions, rather than judges, are better equipped to determine how best to advance penological interests in security and rehabilitation. Here, however, neither interest applies. It is difficult to imagine how a court using gender-appropriate language for a trans litigant alters the safety of prisons and, if anything, more respectful conduct by actors in the criminal

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<sup>11</sup> Before evaluating the justifications, a short caveat is probably in order. In engaging with the arguments, I will set aside the authoring judges' alleged histories of anti-LGBT positions and even overt transphobia. See, e.g., 39 LGBT Groups Oppose Confirmation of Stuart Kyle Duncan, *Lambda Legal* (Jan. 17, 2018), [https://www.lambdalegal.org/in-court/legal-docs/dc\\_20180117\\_opposition-of-stuart-kyle-duncan](https://www.lambdalegal.org/in-court/legal-docs/dc_20180117_opposition-of-stuart-kyle-duncan) [<https://perma.cc/S9QD-XAD4>]; *Lambda Legal Letter of Concern About the Nomination of James Ho*, *Lambda Legal* (Dec. 6, 2017), [https://www.lambdalegal.org/in-court/legal-docs/dc\\_20171206\\_letter-of-concern-about-james-ho](https://www.lambdalegal.org/in-court/legal-docs/dc_20171206_letter-of-concern-about-james-ho) [<https://perma.cc/KRW3-NSMK>]; Lisa Keen, *A Look at the LGBT Records of Trump's Potential Court Picks*, *Bay Area Reporter* (May 25, 2016), <https://www.ebar.com/news///246311> [<https://perma.cc/B792-RTMZ>].

I will assume that, while reviewing the cases before them, the judges set those histories aside as well.

<sup>12</sup> 920 F.3d at 217.

<sup>13</sup> *Id.* (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

legal system would increase the chances of rehabilitation.<sup>14</sup> The failure to advance either penal interest renders the first justification deficient.

Justification (2) similarly misses the mark. Whether sex is immutable is wholly irrelevant.<sup>15</sup> For the majority of modern history, pronoun use has been unhinged from persons' genital characteristics. Think, for example, of the centuries of male-generics, applied to women. Even at present, pronouns are most typically used based on perception-related assumptions; that is, perceived sex.<sup>16</sup> Said differently, we use language depending on what we see in others, rather than confirming facts about their bodies. This is why, for instance, we might use the incorrect forms of address for a short-haired woman, or on the phone with a man with a higher-pitched voice. So, based on how language is used in the real world, an argument based on persons' physical features cannot work.

Concurrently, the reliance on case law for support on a technical matter, is a move as misguided as it is dangerous. Judges are not scientists, and the science on sex in general and trans persons specifically has drastically evolved since 1973, when *Frontiero* was decided. It cannot be reasonable to justify present conduct based on outdated science.

Justification (3) fails as well. The rationalization relies on citations to case law purportedly misgendering trans parties. To what end? The implication is that, in some way, these cited cases countenance *Gibson's* own misgendering. Arguably, the opinion would not have offered support unless it was meant to lend credence or cover to its own conduct.

Here's the rub. Contra *Gibson's* account, the *Farmer v. Brennan* majority opinion, which *Gibson* cites as "using male pronouns for transgender prisoner born male,"<sup>17</sup> never actually does that. Throughout, the *Farmer* majority meticulously used the gender-neutral "petitioner" in all references to Dee Farmer.<sup>18</sup> Tellingly, as well, at oral argument, the

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<sup>14</sup> See *Konitzer v. Frank*, 711 F. Supp. 2d., 874, 912 (E.D.Wis. 2010) (finding referring to an inmate by her correct pronouns "does not appear to impinge on any . . . security issues.").

<sup>15</sup> Recent Case: *Gibson v. Collier*, Harv. L. Rev. Blog (Apr. 12, 2019), <https://blog.harvardlawreview.org/recent-case-gibson-v-collier/> [<https://perma.cc/W37M-JEAA>] (noting that the opinion "cit[ed] *Frontiero* out of context").

<sup>16</sup> See Chan Tov McNamara, *Misgendering as Misconduct*, 68 UCLA L. Rev. Disc. 40, 52 (2020).

<sup>17</sup> *Gibson*, 920 F.3d at 217 n.2.

<sup>18</sup> See Brief for the Petitioner, R.G. & G.R. Harris Funeral Homes, No. 18-107, 8 (U.S. Aug. 16, 2019) ("Out of respect for Stephens and following this Court's lead in *Farmer v. Brennan* [citation omitted], Harris tries to avoid use of pronouns and sex-specific terms when referring to Stephens."); Amicus Brief of Free Speech Advocates in Support of Petitioner at 2, R.G. & G.R. Harris Funeral Homes, No. 18-107, 2 (U.S. Aug. 22, 2019) ("In *Farmer v. Brennan*, a

Justices referred to Ms. Farmer with the appropriate female language.<sup>19</sup> Stated bluntly, at best, *Gibson* misreads the case it cites as support and, at worse, *Gibson* disfigures it.

### *B. United States v. Varner's Arguments*

In *Varner* the Fifth Circuit considered Kathrine Nicole Jett's appeal from a district court's denial of a motion to change the name on an earlier judgement.<sup>20</sup> The panel vacated the denial for lack of jurisdiction. Then, in a seven-page soliloquy, the Court provided ample reasons why it rejected Jett's simultaneous motion to "use female pronouns when addressing [her]."<sup>21</sup>

The court defended the refusal on three grounds. That: (4) using gender-appropriate language would give the impression of wrongful partiality towards Jett; (5) that allowing Jett's motion would open a slippery-slope whereby courts would be forced to use uncommon neopronouns (i.e., pronouns like *ze*, *xe*, etc.); and (6) that no authority exists persuading the court to use gender-appropriate language.

Perhaps there are some closer-to-satisfactory arguments for why an opinion contains misgendering language, but *Varner* didn't offer any.<sup>22</sup> Justification (4), the warning that a court respecting the gender of a trans litigant implies improper bias is vastly exaggerated, if not just illogical. Many courts have respected trans parties, while ruling against them, or

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case involving a 'transsexual' prisoner 'who is biologically male,' this Court's eight-Justice majority opinion, authored by Justice Souter, scrupulously (and presumably intentionally) avoided all pronouns in referring to the prisoner (except when directly quoting other sources) [citations omitted].").

<sup>19</sup> See Ezra Ishmael Young, What the Supreme Court Could Have Heard in *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 Cal. L. Rev. Online 9, 33-34 (2020) (analyzing oral argument transcript).

<sup>20</sup> 948 F.3d at 252 (5th Cir. 2020).

<sup>21</sup> *Id.* at 253.

<sup>22</sup> To be clear, I think that an opinion *using* misgendering language differs from one *mentioning* or *quoting* it. See Paul Saka, Quotation and the Use-Mention Distinction, 107 Mind 113 (1998). To see the difference, imagine a discrimination case where the court is quoting misgendering language as proof of bias or prejudice. I could be convinced that there might be good reason to quote exactly what was said to aid the reader fully grasp the nature of the discriminatory context, at least with an inserted "sic." See McNamarah, *supra* note 16, at 60-61 (using that convention).

Alternatively, the court could use the parenthetical "misgendering in original" after the citation, to distance itself from the language. See, e.g., Lihi Yona & Ido Katri, The Limits of Transgender Incarceration Reform, 31 Yale J.L. & Feminism 201, 212 n.39 (2020) (using that convention).

explicitly indicating that the language used had no bearing on the case. *Varner*, though, apparently fails to consider that possibility. What's more, accepting the reasoning, the proper course to maintain judicial neutrality would appear to be employing gender-neutral language, rather than misgendering the trans party.<sup>23</sup> Strangely enough, the opinion conspicuously sidestepped that conclusion.

Next comes justification (5), a slippery-slope excuse. The contention is that, by respecting Jett's binary gender pronouns, the court will have to respect less-common ones (i.e., gender neutral pronouns like they/them, or neopronouns like zhir/zhem etc.) in the future. Nothing compels that conclusion.<sup>24</sup> However, insofar as we credit the justification, *Varner* doesn't even attempt to provide a convincing explanation why doing so would be undesirable. Surely, particularly during the present polarized times, most would agree that more respectful conduct by courts—and wider society—should be welcomed, rather than derided.

Even setting that issue aside, there is another. Much of the argument's persuasiveness hinges on an empirically unsubstantiated prediction: Scores of non-binary litigants, using neopronouns, entering the legal system and requiring judges to learn and employ a litany of new pronouns. Yet, most studies suggest gender expansive persons account for less than 1 percent of the adult population<sup>25</sup> and, of these, only 4-6 percent of trans individuals use neopronouns.<sup>26</sup> Thus, the chances of a judge actually overseeing a case that includes a trans litigant who uses neopronouns are borderline nonexistent. Quite tellingly, there are almost as many judicial opinions decrying the use of neo and gender-neutral pronouns, as there are cases with trans litigants actually requesting courts use them.<sup>27</sup>

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<sup>23</sup> Even that approach, though, would be problematic unless the court used gender-neutral references for all parties, rather than singling out gender diverse ones.

<sup>24</sup> The slope needn't be slippery. For the sake of argument: A court could plausibly differentiate binary and gender-neutral pronouns from neopronouns on the argument that the former are widely used, while the latter are not. Put as such, neopronouns require the speaker or author to learn a completely new set of pronouns; binary and gender-neutral pronouns do not.

<sup>25</sup> See Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?* 2 (Jun. 2016) (concluding transfolk account for 0.6% of the adult population).

<sup>26</sup> See Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 49-50 (2016) (finding only 29% of the 27,700+ trans respondents used they/them/their pronouns, 2% used ze/hir pronouns, and a mere 4% used neopronouns).

<sup>27</sup> Compare *Bostock v. Clayton County* at 1782 (Alito, J., dissenting), and *Varner*, 948 F.3d 257, with *SAI v. Transp. Sec. Admin.*, 315 F. Supp. 3d 218, 249 (D.D.C. 2018) (using the gender neutral they/them) and *Doe v. Fedcap Rehab. Servs.*, 2018 U.S. Dist. LEXIS 71174 at

Last, to justification (6). The account claims that “no authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric litigants with pronouns matching their subjective gender identity.”<sup>28</sup> Going further, the court stated that “sometimes” federal courts have used gender-appropriate language, but the ones who have “have done so *purely as a courtesy* to parties. . . . None has adopted the practice as a matter of binding precedent, and none has purported to obligate litigants or others to follow the practice.”<sup>29</sup>

The justification is wrong thrice over. First, in direct contrast to the claim that no authority supports prohibiting misgendering, the Model Code of Judicial Conduct and the Code of Conduct for United States Judges both obligate judges to require respectful and courteous conduct from litigants, lawyers, and court staff.<sup>30</sup> Given that misgendering is, in fact, incredibly disrespectful and discourteous, it would seem the regulations apply. Second, the statement that no courts have obligated persons to use gender appropriate language or avoid misgendering is misrepresentative. Courts have done just that.<sup>31</sup> Third, the remark that “federal courts *sometimes* choose to refer to” trans parties with gender-appropriate language can be interpreted in at least one of two ways. “Sometimes,” suggests either that (i) the actual number of opinions using gender-appropriate/misgendering language is immeasurable; or (ii) only a minority of courts respect trans parties by using gender-appropriate language.

I’ve done the math. Both suggestions are misleading. Reviewing all cases involving transgender parties and discussions of pronouns from 1979 to 2018, yields a total of 335 cases.<sup>32</sup> From there, considering the language used when referring to the trans party, whether appropriate (i.e., uses titles and pronouns in-line with their current sex), misgendering (i.e.,

\*1 (S.D.N.Y. 2018) (same), and *Henderson v. Minnesota*, 2019 U.S. Dist. LEXIS 228230 at \*2 n.2 (D. Minn. 2019).

<sup>28</sup> *Varner*, 948 F.3d 250, 254–55 (5th Cir. 2020).

<sup>29</sup> *Id.* at 255 (emphasis added).

<sup>30</sup> See Code of Conduct for United States Judges Canon 3(A)(3) (2019); Model Code Of Judicial Conduct Canon 2 r. 2.8(B) (Am. Bar Ass’n 2020).

<sup>31</sup> E.g., *Lynch v. Lewis*, 2014 U.S. Dist. LEXIS 63111, at \*4 n.3 (M.D. Ga. Mar. 24, 2014) (granting in part a trans plaintiff’s “Motion for Feminine Form of Address and Use of Female Pronouns” requiring defense use female pronouns in court and filings); *Qz’Etax v. Ortiz*, 170 Fed. App’x. 551, 553 (10th Cir. 2006) (upholding pro se trans appellant’s “motion for the continued usage of proper female pronouns”).

<sup>32</sup> See Chan Tov McNamarah, *Language Use in Cases Involving Trans Parties, 1979–2018*, (unpublished manuscript on file).

uses titles and pronouns at odds with their current sex), inconsistent (i.e., uses language both in-line and at odds with parties' current sex) finds the overwhelming majority of courts defer to the gendered language of the trans party: Of the 335 cases, 282 or 84.17 percent use gender appropriate language.<sup>33</sup> Only some 8.5 percent misgender trans litigants. Thus, *Varner's* final attempted defense also fails on the facts.

### C. United States v. Thomason's Arguments

In *Thomason*, the Eighth Circuit considered Shawn Kelly Thomason's appeal from a sentence of a three-year term of supervised release.<sup>34</sup> Among their five other arguments, Thomason alleged prosecutorial misconduct based on the prosecutor's use of masculine pronouns and labels (e.g., "gunman" and "boyfriend") at trial.<sup>35</sup> The Eighth Circuit rejected Thomason's appeal, and while doing so, misgendered them on two bases: (7) to be "consistent with the proceedings in the district court"; and (8) for the sake of "clarity."<sup>36</sup>

Neither of these arguments holds water. Justification (7) appeals to consistency, the idea being that, once a lower court addresses a litigant in one way, appellate courts are bound to do the same. When pressed, the reasoning doesn't work. Accepting that appellate courts are bound by factual determinations from below, the argument collapses because the lower court did not make—nor purport to make—a determination of Thomason's sex. Further, insofar as the justification's underpinning concern is that readers need to consistently identify Thomason over the course of multiple opinions, a note stating that in previous litigation the litigant was referred to by male pronouns but that the present opinion uses the gender-neutral pronouns, suffices.<sup>37</sup>

Clarity does not convince either. To support justification (8), the opinion charged "[a]s the filings in this case illustrate, clarity suffers and

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<sup>33</sup> The other results: 39 misgender trans parties (11.64%), 5 use inconsistent language (1.49%), and in 9 references the parties' gender—and thus pronouns—are unclear (2.68%).  
Id.

<sup>34</sup> *Thomason*, 2021 U.S. App. LEXIS 7552 (8th Cir. Mar. 16, 2021).

<sup>35</sup> Id. at \*5.

<sup>36</sup> Id. at \*6.

<sup>37</sup> The rationale also ignores the number of appellate courts that have used gender-appropriate language, despite district courts in earlier proceedings misgendering litigants. Compare, e.g., *Farmer v. Moritsugu*, 742 F. Supp. 525, 526 (W.D. Wisc. 1990) (misgendering Dee Farmer), with *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993) ("Farmer prefers the female pronoun and we shall respect her preference").

confusion may follow when legal writing refers to a single individual as ‘they,’ especially when the materials advert to other actors who are naturally described as ‘they’ or ‘them’ in the traditional plural.”<sup>38</sup>

The final defense overestimates any potential confusion and doubly underestimates readers. As a matter of fact, the gender-neutral “they” is quite widely used and understood.<sup>39</sup> And, to concerns about confusion, the countless opinions using they/them pronouns for non-binary parties or for parties whose gender is unknown, forcefully demonstrate that skillful drafting provides countless ways to minimize uncertainty.<sup>40</sup> The opinion could easily use names instead of third-person language, or again, explicitly alert readers that the litigant uses gender-neutral pronouns. Seen as such, *Thomason*’s last defense also succumbs to reason.

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Tallied up, the justifications offered by *Gibson*, *Varner*, and *Thomason* don’t appear to succeed.

## II. OF COURTESY: ONE CASE AGAINST MISGENDERING IN JUDICIAL WRITING

As we know, in *Bostock* the Supreme Court considered whether it violated Title VII for an employer to terminate a worker for being gay or transgender. And, as we know, the Court found it did. While doing so, the Court referred to one plaintiff, Aimee Stephens, with the appropriate pronouns and honorific.

At least three characteristics call us to view this choice as meaningful. First, as previously mentioned, the Court has never before used the appropriate language in a majority opinion. Second is the deliberateness inherent in writing; in judicial writing especially, very little is left to chance. Third, and perhaps most tellingly, several amici flagged the issue of gender-appropriate language prior to the holding. Trans-antagonistic

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<sup>38</sup> *Thomason*, 2021 U.S. App. LEXIS 7552 at \*6.

<sup>39</sup> Cf. generally Darren K. LaScotte, *Singular They: An Empirical Study of Generic Pronoun Use*, 91 *Am. Speech* 62 (2016); Evan D. Bradley, *The Influence of Linguistic and Social Attitudes on Grammaticality Judgments of Singular ‘They,’* 78 *Lang. Sci.* 1, 1 (2020); Laura Louise Paterson, *Epicene Pronouns in UK National Newspapers: A Diachronic Study*, 35 *ICAME J.* 171 (2011).

<sup>40</sup> *Chanticleer Holdings Inc.*, 2020 NLRB LEXIS 72, at \*8 (Nat’l Lab. Rels. Bd. Feb. 19, 2020).

briefs went as far as to counsel the Court to misgender Ms. Stephens, or else “un-gender”<sup>41</sup> her by referring to her with no pronouns or titles at all.<sup>42</sup> That the Court chose to ignore such counsel, again, suggests using the appropriate language in references to Ms. Stephens cannot be cast aside as a mistake or oversight.

But *Bostock* otherwise leaves us wanting for an explanation. In other words: What, precisely, justifies the Court’s choice to use gender-appropriate language? This Part presents one possibility, relying on the principles of courtesy *Varner* cavalierly cast aside, and *Gibson* and *Thomason* failed to consider altogether.

#### A. *The Institutionally Protective Qualities of Judicial Courtesy*

Most would agree that courteous conduct is important. At surface level, courtesy helps everyday life and interpersonal interactions go smoothly. At a deeper level, courtesy promotes social order and peace,<sup>43</sup> and courtesy is a means of expressing our moral commitments to respect the equality and dignity of our fellow persons.<sup>44</sup> By some accounts, courtesy even aids in the preservation of democracy. On Justice Gorsuch’s telling, a functional democracy “turns on our treating each other as equals—as

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<sup>41</sup> “To ‘ungender’ . . . involves the asymmetrical use of gendered titles, terms, or pronouns for cisgender people but not for gender-diverse ones. It may also involve the deliberate use of gender-neutral language where the referent explicitly” makes their gender known. Chan Tov McNamarah, *Misgendering*, 109 Cal. L. Rev. 101, 127 (2021).

Ungendering is discriminatory because it involves disparate withholding of acknowledgement and respect from gender minorities, while offering it to cisgender persons—akin to historical examples of the refusal to use honorifics when addressing or referring to Black persons, or professional titles for women, while offering them to white persons and men, respectively. *Id.* at 128.

<sup>42</sup> See Brief of Free Speech Advocates in Support of Petitioner at 2, *R.G. & G.R. Harris Funeral Homes v. Equal Emp. Opportunity Comm’n*, No. 18-107 (U.S. Aug. 22, 2019) (stating the “Court should either follow the *Farmer* model and simply refer to ‘Stephens’ or ‘respondent,’ or else . . . employ pronouns as they have been used since the dawn of language, namely, to refer to the biological sex of a person.”).

Centuries of male generics used in reference for women or mixed-sex groups render the latter half of the brief’s reasoning historically inaccurate.

<sup>43</sup> Susan Burgess, *Outing Courtesy: The Role of Rude Dissent in Rule of Law Systems*, 38 L. & Soc. Inquiry 206, 207 (2013) (writing courtesy “facilitates interpersonal exchange and fosters social peace despite small or even great differences that arise in the course of everyday life.”); David McPherson, *Manners and the Moral Life*, in *The Theory and Practice of Virtue Education* (2018) (arguing courtesy helps “social life to go well”).

<sup>44</sup> Sarah Buss, *Appearing Respectful: The Moral Significance of Manners*, 109 Ethics 795, 796–97 (1999).

persons, with the courtesy and respect each person deserves—even when we vigorously disagree.”<sup>45</sup>

Courtesy is crucial at an institutional level as well. The modern civility movement has forcefully made the case that attorney courtesy and professionalism serve to preserve and enhance the legal system’s reputation in the eyes of the public.<sup>46</sup>

The same is even more true of judges. As the primary representatives of the law, judges have a duty to maintain “the perceived integrity of the Court.”<sup>47</sup> That is why, time and again, the Supreme Court and individual Justices have emphasized the necessity of judicial temperaments of patience, tolerance, and respect. To take just one example, the Court in *in re Snyder* emphasized that “[a]ll persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants.”<sup>48</sup>

This commentary gestures towards a conclusion, that I will make plain below: judicial courtesy serves several institutionally preservative functions and, because of these functions, it is imperative that judges maintain a courteous tone in their writing.

The functions are these. For one, judicial courtesy has practical benefits. When opinions are courteous, they avoid distracting from the underlying legal reasoning,<sup>49</sup> and undercutting the judiciary’s most fundamental function: saying what the law is. Simultaneously, courteous opinions avoid spurring satellite disputes, which place additional pressure on the already overburdened court system.<sup>50</sup> On a final practical note, judicial courtesy invites advocate courtesy as well. Judges, through both

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<sup>45</sup> Neil M. Gorsuch, *A Republic, If You Can Keep It* 31 (2019).

<sup>46</sup> See Josh O’Hara, *Creating Civility: Using Reference Group Theory to Improve Inter-Lawyer Relations*, 31 *Vermont L. Rev.* 965, 968 (2007) (describing costs of lawyer incivility and the movement’s development in response to incivility); Kathleen P. Browe, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 *Marq. L. Rev.* 751, 752–57 (1994) (detailing the history of lawyer civility efforts, and the harms of lawyer incivility).

<sup>47</sup> Deborah Hellman, *The Importance of Appearing Principled*, 37 *Ariz. L. Rev.* 1107, 1125 (1995); cf. *Liteky v. United States*, 510 U.S. 540, 565 (1994) (“In matters of ethics, appearance and reality often converge as one.”).

<sup>48</sup> *In re Snyder*, 472 U.S. 634, 647 (1985).

<sup>49</sup> Randall T. Shepard, *The Special Professional Challenges of Appellate Judging*, 35 *Ind. L. Rev.* 381, 389 (2002) (“Venomous language obscures the law . . .”).

<sup>50</sup> Following the *Varner* decision numerous amici joined appeal, specifically taking issue with the opinion’s egregious language. The time taken—both for the brief writers and for the appellate courts to sift through the briefs—could have easily been avoided.

their in-court conduct and opinion writing, set the tone from the top.<sup>51</sup> Discourteous writing, can contribute to, if not fuel, attorney incivility and the attendant problems it causes.<sup>52</sup>

For two, courtesy advances the institutional goal of administering justice. Obviously, litigants are not likely to partake in processes in which they believe they will be disrespected.<sup>53</sup> When opinions are discourteous, they increase the likelihood that persons will seek justice extrajudicially, rather than by invoking the judicial process. As such, judicial courtesy contributes to social order.

For three, courtesy avoids sanctioning societal oppression, thereby preserving public trust in the judiciary. Given the authority accorded to courts, when their members use discourteous language particularly towards minority group members, they provide cover for others to be discourteous as well. To see this point in action, consider that, following *Varner*, the appellant 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.”<sup>54</sup> Courteous language avoids the appearance of judicial approval of discrimination.<sup>55</sup> Since faith in institutions is eroded where citizens view them as furthering oppression, judicial courtesy is important, as it avoids any diminution of public trust.<sup>56</sup>

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<sup>51</sup> See Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. Haw. L. Rev. 385, 386 (2000); J. Lyn Entrikin, *Disrespectful Dissent: Justice Scalia’s Regrettable Legacy of Incivility*, 18 J. App. Practice & Process 201, 263 (2017).

<sup>52</sup> In the aftermath of *Varner* attorneys have repeatedly cited the opinions to justify their own offensive misgendering in filings. E.g., Brief of Amicus Curiae Women’s Liberation Front in Support of Appellants and Reversal at 34–35, *Hecox v. Little*, 20-35813 (9th Cir. Nov. 19, 2020); Reply Memorandum in Support of Plaintiff’s Motion to Disqualify at 5, *Soule v. Connecticut Assoc. Schools*, 3:20-cv-00201-RNC (D. Conn. June 12, 2020).

<sup>53</sup> Brief of 83 Legal Ethics Professors as Amici Curiae in Support of Rehearing En Banc at 10, *United States v. Varner*, No. 19-40016 (5th Cir. 2020).

<sup>54</sup> Petition for Rehearing En Banc at 11, *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020).

<sup>55</sup> Cf. Code of Conduct for U.S. Judges Canon 2 cmt. (Am. Bar Ass’n 2019) (“[P]ublic manifestation by a judge of the judge’s knowing approval of invidious discrimination on any basis gives the appearance of impropriety . . . and diminishes public confidence in the integrity and impartiality of the judiciary.”).

<sup>56</sup> Cf. Judge Vanessa Ruiz, *The Role of Women Judges and a Gender Perspective in Ensuring Judicial Independence and Integrity*, UNODC (n.d.), <https://www.unodc.org/dohadecaration/en/news/2019/01/the-role-of-women-judges-and-a-gender-perspective-in-ensuring-judicial-independence-and-integrity.html> [<https://perma.cc/L687-PKZC>] (“The judiciary will not be trusted if it is viewed as a bastion of entrenched elitism, exclusivity, and privilege, oblivious to changes in society and to the needs of the most vulnerable. Indeed,

For four, courtesy preserves public confidence in the courts. The idea that the judiciary is honorable remains “indispensable to justice in our society.”<sup>57</sup> A part of that confidence is maintained through judges’ conduct.<sup>58</sup> Understandably, the public has more confidence in, and views more favorably, a judge whose behaviors evidence a commitment to fairness and equality. And, as the main source of court-citizen contact, opinions are read to stand for the values of the judges who write them. Thus, courteous opinions shore up our faith in the judiciary.

For five, judicial courtesy maintains the appearance of impartial and principled judgement, and in doing so preserves the courts’ legitimacy.<sup>59</sup> Having “neither sword nor purse,” the judiciary relies on its institutional legitimacy to effectuate compliance.<sup>60</sup> Discourteous writing threatens this, by raising questions of judicial bias and personal hostility, whether or not they actually exist.<sup>61</sup> Judicial courtesy, therefore, safeguards the legitimacy of the court by avoiding the cast of suspicion on holdings in individual cases,<sup>62</sup> and on the legal system on the whole.

Viewed thusly, judicial courtesy serves purposes that *Varner*’s dismissive account clearly misses. Courteous opinions have several practical benefits in addition to promoting the administration of justice, and preserving public confidence and trust in the judiciary, and bolstering the legitimacy of the courts as an institution.

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citizens will find it hard to accept the judiciary as the guarantor of law and human rights if judges themselves act in a discriminatory manner.”).

<sup>57</sup> Code of Conduct for U.S. Judges Canon 1 (Am. Bar Ass’n 2019).

<sup>58</sup> Leslie W. Abramson, Canon 2 of the Code of Judicial Conduct, 79 Marq. L. Rev. 949, 951 (1996) (“The public has confidence in judges who show character, impartiality, and diligence.”).

<sup>59</sup> Brief of Amici Curiae Civil Rights Organizations in Support of Appellant’s Petition for Rehearing En Banc at 8, *United States v. Varner*, No.19-40016 (5th Cir. 2020) (“[R]efusal to respect a party’s self-identity . . . can suggest bias and call into question whether the litigant received a fair hearing.”); Deborah Hellman, *The Importance of Appearing Principled*, 37 Ariz. L. Rev. 1107, 1126 (1995) (documenting “the view that public officials generally have a duty to maintain an appropriate appearance in order to foster the public trust necessary to their role . . .”).

<sup>60</sup> The Federalist No. 78 (Alexander Hamilton).

<sup>61</sup> *Liteky v. United States*, 510 U.S. 540, 565 (1994) (“In matters of ethics, appearance and reality often converge as one.”).

<sup>62</sup> Joshua E. Kastenberg, *Evaluating Judicial Standards of Conduct in the Current Political and Social Climate: The Need to Strengthen Impropriety Standards and Removal Remedies to Include Procedural Justice and Community Harm*, 82 Albany L. Rev. 1495, 1506 (2019) (“In situations in which a judge has evidenced overt bias or lack of respect against an identifiable group . . . the judge may cause the result of his or her trials to be suspect”).

Weighed alongside the laxity of the defenses outlined in the above Part, the answer to how courts should address gender diverse parties appears straightforward. Given that their role inherently requires judges to preserve the courts as an institution, they must strive to be courteous. Judges, therefore, should address trans litigants by their appropriate names, pronouns, and honorifics in legal opinions.

*B. A Probable Counter: Misgendering as a Not Discourteous Acknowledgement of “Objective Truth”*

This final Section closes the Essay by preempting a likely objection to my notes on the implications of judicial courtesy for misgendering in legal opinions. The argument is that using language corresponsive to genitals or sex-assigned-at-birth is an acknowledgement of “objective truth,” such that, even if judges do owe a duty of courtesy that instructs them to avoid offensive language, misgendering would not qualify.

The protestation has recently been gaining traction. Repeatedly, advocates for anti-transgender positions have couched their misgendering in claims about objective, unimpeachable truths.<sup>63</sup> For instance, in a recent motion to intervene in *Hecox v. Little*, attorneys for the anti-LGBT group Alliance Defending Freedom alleged that their misgendering was “neither said nor intended [to be] discourteous,” but instead was a statement of “necessary accuracy.”<sup>64</sup> With the increasing popularity of the same and similar excuses, it is worth considering how the objection would play out in the context of court opinions.

In this case, as in others, the objection is unconvincing. Without conceding that there is any confirmable “objective truth” involved, at the most basic level, the objection mistakenly relies on the premise that by virtue of being true, a statement is rendered acceptable. Obviously, that isn’t right. Quite often, the truth hurts. And, regularly, tact calls us to avoid making truthful statements when doing so will disparage.

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<sup>63</sup> See, e.g., Brief of Great Lakes Justice Center as Amicus Curiae in Support of Petitioner at 6, *R.G. & G.R. Harris Funeral Homes v. Equal Emp. Opportunity Comm’n.*, No. 18-107 (U.S. Aug. 21, 2019) (claiming sex is “an objective reality” and “immutable, innate, and a biological truth.”); Brief of Amicus Curiae Dr. Paul R. McHugh, M.D., in Support of Petitioner at 4, *Gloucester Cty. Sch. Bd. v. G.G.*, No. 16-273 (U.S. Jan. 10, 2017) (claiming sex is an “objective biological reality”).

<sup>64</sup> Reply Memorandum in Support of Motion to Intervene at 8, *Hecox v. Little*, 1:20-cv-00184-CWD (D. Idaho June 16, 2020) (arguing “to speak coherently about the goals, justifications, and validity of the Fairness in Women’s Sports Act, it is necessary rather than ‘uncivil’ to” misgender).

In particular, it is clear that misgendering easily qualifies as discourteous conduct. A concrete illustration will help make this plain. Suppose upon marriage a woman chooses not to publicly adopt her partner's name. Instead, she uses her pre-marital name, along with the title "Ms." rather than "Mrs." In that scenario, for someone who knows her decision to insist on using "Mrs." and referring to her by her spouse's last name—or worse, with the convention, *Mrs. Partner's Name*—would, quite clearly, be wrong. As would choosing to disparately refer to her by her first name, while using last names and titles for others, in an effort to avoid acknowledging the woman's appropriate forms of address. In either case, the speaker's references serve to treat the woman in a manner she has made known she dislikes, in addition to willfully ignoring the choices the woman has made for herself, disregarding her autonomy, and frustrating her asserted identity. For these and other reasons, we can agree those forms of address would be disrespectful, and perhaps even insulting. Misgendering, whether considered "objectively true" or not, is discourteous on the same logic.<sup>65</sup>

At the same time, the objection assumes misgendering is the only means of capturing the "truth." That reasoning is lacking. As we know, sometimes, courtesy requires us to use euphemisms without changing our point. It is quite possible to cut to the heart of the same matter in both offensive and non-offensive ways. If courts need to make a point differentiating between or specifying cisgender and transgender persons the language "cisgender" and "transgender" accomplishes just that.

Finally, the argument takes as given that the context and timing of the purported "truth" are meaningless. Again, that is false. Speaking what one views to be an "objective truth" may be appropriate in one situation, and inappropriate in another. This is particularly true for decisionmakers. Recall that in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court reasoned that a Commissioner's statements that "religion has been used to justify all kinds of discrimination throughout history," was evidence of anti-religious animus.<sup>66</sup>

Yet, the Commissioner's statements were ones of fact: objective truths, if you will. After all, countless forms of discrimination and oppression

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<sup>65</sup> For a more extensive analysis of why misgendering is discourteous, offensive, discriminatory, and harmful, see McNamarah, *supra* note 41, at 131–60.

<sup>66</sup> *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1729 (2018).

have advanced and been defended on religious grounds.<sup>67</sup> Strikingly, however, it was not the veracity of the statements that struck the *Masterpiece* Court as improper. Though the Commissioner’s statements were categorically true, it was the timing of the opinions that was inappropriate. If *Masterpiece* means anything, it is that the context of the purported “truths”—rather than their accuracy or reliability—which is the dispositive factor in determining when decisionmakers’ statements demonstrate bias. Accordingly, regardless of how “objectively true” one might view misgendering language to be, the context and timing makes it inappropriate for legal opinions.

#### CONCLUSION

The language judges use matters. No matter how insignificant the choice of words may seem, legal opinions send important messages about which citizens are respected, and how we should treat others. Recently, apparently ignoring those principles, judges have offered several reasons to justify their misgendering of gender diverse parties in their legal writing.

The arguments don’t work. As demonstrated, of the eight defenses of judicial misgendering examined here, most suffer from explanatory deficiencies, several are implausible, others misconstrue case law, and none are particularly convincing. Rather than giving unsound arguments in defense of their language, courts should instead remember the institutionally-protective qualities of judicial courtesy. Doing so finds courtesy calls courts to use gender appropriate forms of address in their written opinions.

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<sup>67</sup> Examples come easily. To take just one, anti-Black discrimination in American history, from enslavement to Jim Crow segregation and anti-miscegenation laws, has benefited from religious cover. See Leora F. Eisenstadt, *Enemy and Ally: Religion in Loving v. Virginia and Beyond*, 86 *Ford. L. Rev.* 2659, 2660–63 (2018); Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 *Cardozo L. Rev.* 67, 74–76 (2020).