

Assimilation, Expansion, and Ambivalence: Strategic Fault Lines in the Pro-Trans Legal Movement

J.S. Welsh*

For the past five decades, lawyers advocating on behalf of trans people have used arguments based in a binary understanding of gender to win critical legal battles in the fight for gender justice. These binary arguments clearly serve a strategic purpose: achieving major legal victories. Judges from state trial courts to the U.S. Supreme Court seem determined to reify traditional notions of gender identity. But this assimilationist strategy has its costs. The lived experiences of many queer, trans, and gender-nonconforming people is not necessarily consistent with the political goals implicit in the assimilationist approach. As the trans rights movement enters the law reform mainstream, this rift is increasingly exposed. This Article explores the conflicts that arise between groups within the pro-trans legal movement over who “counts” as trans for purposes of organizing and litigating, what compromises are necessary to push the movement forward, and who is included and excluded from political benefits.

Introduction	1448
I. Competing Visions of the Pro-Trans Movement	1452
A. Trans Assimilation Current	1454
B. Queer Expansion Current	1459
C. Ambivalent Utilitarian Current	1464
II. Framing the Pro-Trans Law Reform Movement	1468
A. The Framing Debate	1468

DOI: <https://doi.org/10.15779/Z38FF3M13S>

Copyright © 2022 J.S. Welsh.

* J.S. Welsh is an attorney in the Capital Habeas Unit of the Federal Community Defender Office for the Eastern District of Pennsylvania. Many people contributed to the development of this Article. I am grateful to Janet Halley, Gabriel Arkles, D Dangaran, Milo Inglehart, and Eli Plenk for their invaluable feedback on several drafts. I would also like to thank the Feminist Legal Theory seminar at Harvard Law School, whose insights on an early draft contributed to my analysis on this topic. Finally, special thanks to Blaine Valencia, Kira Setren, and the rest of the team at the *California Law Review* for their thoughtful and diligent editorial assistance.

1. Framing Sex.....	1471
B. The Fight for Title VII Protection.....	1473
1. The “Sex” Debate in Title VII Litigation	1473
2. Definitions of Sex in the Harris Funeral Homes Litigation	1476
C. The Fight for Identification	1484
1. Accurate State-Issued Identification Documents are Essential	1486
2. Challenges to Genital Surgery Requirements Have Historically Relied on Assimilationist Strategies	1489
3. Activists Experiment with Alternative Strategies	1494
4. Ideological Compromises in the Fight for Pro-Trans ID Policies	1497
Conclusion.....	1499

INTRODUCTION

Queer and trans theory, in addition to queer and trans political goals, are not internally consistent. As the trans rights movement enters the law reform mainstream, this conflict is increasingly exposed. This Article brings into conversation three ideological currents within the pro-trans legal movement, which the Article calls: (1) the assimilationist current, characterized by a desire for inclusion within the normative gender regime; (2) the gender-expansionist current, characterized by a desire to eliminate the normative gender regime; and (3) the ambivalent utilitarian current, characterized by conflicting desires to both disrupt the gender regime in the long-term and improve the quality of life for trans people in the short-term. These currents are, at times, in friction with one another within progressive social movements in general, and in legal rights advocacy in particular.

The fissures in the pro-trans legal movement are on display in *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, a case that asked whether a funeral home employer violated Title VII for firing an employee, Aimee Stephens, because she came out as a trans woman.¹ This case was consolidated under *Bostock v. Clayton County, Georgia*,² the landmark 6–3 decision in which the Supreme Court held that Title VII’s prohibition on workplace discrimination “because of sex” encompasses sexual orientation and transgender status, and therefore protects trans people from

1. 884 F.3d 560, 560–61 (6th Cir. 2018), *aff’d sub nom.* *Bostock v. Clayton Cnty.*, Georgia, 140 S. Ct. 1731 (2020).

2. *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, 884 F.3d 560, and *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), were consolidated under *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). The Supreme Court authored an opinion on all three cases under *Bostock*. See 140 S. Ct. at 1738.

work-based discrimination. But this outcome was by no means preordained, and arguments leading up to this decision illustrate a long battle over the legal definitions of “sex” and “gender.”³ Importantly, litigation and discourse surrounding *Harris* revealed ideological fissures present in the pro-trans movement.

Before *Harris*, political conservatives defined sex as a purely biological binary, attempted to delegitimize trans identities, and stirred up fears about trans people.⁴ In response, an alliance of pro-trans advocates utilized a legal definition of sex and gender that emphasized normative, assimilationist, and biological characteristics of trans identity. The debate over definitions of “sex” and “gender” appeared at oral argument in *Harris*, where anti-trans rhetoric saturated the courtroom. John Bursch, counsel for *Harris*, lost no chance to play up the “parade of horrors”⁵ that characterizes much of anti-trans rhetoric. The Justices indicated a nebulous discomfort with gender deviance.

In response, David Cole, National Legal Director of the American Civil Liberties Union (ACLU) and counsel for plaintiff Aimee Stephens, continuously emphasized that a decision in favor of Stephens would not unsettle the gender binary. He distinguished between non-disruptive, assimilated trans people on the one hand, and obvious non-conformity on the other. In drawing this distinction, Cole made it clear who he was advocating for.

With the Court’s holding in favor of Stephens, the pro-trans alliance scored a historic victory. Yet, despite the success, some stakeholders were left dissatisfied. Some scholars and activists criticized David Cole’s approach for overly relying on the essentialist model of trans identity.⁶ This model may not serve the needs of the most marginalized people of trans experience, as it relies on medical evaluation, diagnosis, and treatment—things that may not be available to low-income, homeless, or undocumented people. It also makes legal benefits unavailable to those who do not, cannot, or will not present their bodies or express their identities in the accepted binary terms. In other words, it risks “legitimiz[ing] a distinction between ‘real’ and ‘fake’ transgender identities.”⁷

3. *Bostock*, 140 S. Ct. at 1744.

4. See Transcript of Oral Argument at 29, *Harris*, 139 S. Ct. 2049 (No. 18-107).

5. *Id.* at 31 (Justice Breyer characterizing Bursch’s reasoning as a “parade of horrors argument”); *id.* at 36 (Justice Sotomayor referencing the “parade of horrors”). In Bursch’s own words: “Gender identity is a broad concept. You could have a male employee who identifies as a woman but doesn’t dress as a woman, looks like a man, showing up in the shower and the locker room.” *Id.* at 45. Bursch repeatedly used invalidating language, describing trans women as “[men] who . . . identify[] as . . . wom[en].” *Id.* at 10.

6. See Alexander Chen, *The Supreme Court Doesn’t Understand Transgender People*, SLATE (Oct. 18, 2019), <https://slate.com/news-and-politics/2019/10/supreme-court-transgender-discrimination-sex.html> [<https://perma.cc/39L4-NA97>]; Ezra Ishmael Young, *What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 CALIF. L. REV. ONLINE 9, 13–14 (Mar. 2020), <https://www.californialawreview.org/what-supreme-court-could-have-heard> [<https://perma.cc/V9YV-6NRB>].

7. Maayan Sudai, *Toward a Functional Analysis of “Sex” in Federal Antidiscrimination Law*, 42 HARV. J.L. & GENDER 421, 430 (2019).

In Part I, the Article identifies three ideological currents within the pro-trans legal movement. The first ideological framework, the assimilationist current, is characterized by a desire for inclusion within the normative gender regime. It adopts a theory of gender characterized by a binary outlook in which the categories of “male” and “female” are understood in relatively stable opposition.⁸ Under this assimilationist framework, trans people move from one pole to the other over the course of their lifetime—from male to female, or female to male. Individual identity within this current is consistent, and the trans person pursues medical and social changes to bring their presentation in line with their gender identity. Importantly, the political goals in this framework center around formal legal inclusion.

The second ideological current in the pro-trans legal movement is the gender-expansionist current. In contrast to the assimilationist current’s concern with a stable gender binary and formal legal inclusion, the gender expansionist framework considers the male-female dichotomy as an inadequate approach to understand gender difference. Under this current, gender identity is fluid and slippery. Ideological goals in this current oppose all forms of state gender classification.

The third ideological current is the ambivalent utilitarian current. This current is concerned with social pragmatism and prioritizes improving material conditions in the lives of trans people regardless of strategy or political ideology. This current is characterized by an ambivalence toward the two broad gender regimes, and often utilizes assimilationist rhetoric as part of a broader expansionist agenda. While the ambivalent utilitarian current can appear internally inconsistent or cross-purposeful, it can also translate gender expansionist theory into strategic, movement-centered practice.

Part I articulates the respective visions, goals, and political strategies of each current and explores the ways in which they sit in fundamental tension with one another. It further examines pro-trans action toward broader political, legal, and institutional change; examines the ways in which the legal system itself shapes; and limits the potential for progress.

Before moving forward, it is important to note these three currents are not rigid categories. Almost no person fits neatly into one ideology or the other; rather, people and institutions hold beliefs and adopt strategies that traverse these

8. As Megan Davidson explained: “Current understandings of sex, gender, and sexuality in the United States are structured by a belief that bodies come sexed in one of two ways and an assumption that binary gender is a cultural elaboration of these natural differences. In this system, genitals, sex, and gender must match: For example, a person born with a vagina is a female and will have the gender identity woman. This ideology of sex-gender binary not only divides all people into one of two intelligible categories but also structures the possibilities for sexual desire through a heterosexual matrix (Butler, 1999). In this matrix, gender identities always correlate to sexed bodies and sexual practices and desires are then mapped onto this binary of possibilities, structuring a hetero-homo understanding of all sexualities.” Megan Davidson, *Seeking Refuge Under the Umbrella: Inclusion, Exclusion, and Organizing Within the Category Transgender*, 4 *SEXUALITY RSCH. & SOC. POL’Y* 60, 77 (2007).

categories. Moreover, self-identification does not determine which ideological current any individual aligns with. For example, “nonbinary” has emerged as its own distinct identity category, and refers broadly to anyone “who is not exclusively a woman or a man.”⁹ While many who self-identify as nonbinary resonate with an idea of gender fluidity,¹⁰ many others consider nonbinary identity as inborn and static.¹¹ Members of the former group may identify with the gender expansionist current, while members of the latter group may identify with identity politics and the legal strategies associated with the assimilationist current.¹²

The cumulative result is a pro-trans law reform movement that is often conflicting and inconsistent in its pursuits. But no matter the individual’s commitment, the overarching goal across these currents is a desire to do good.

Part II examines the ways these three currents play out in two legal movement contexts: the fight for trans rights under Title VII, and the fight for access to gender-affirming state identification documents. Part II describes how, for the past five decades, pro-trans advocates from a range of ideological backgrounds have used arguments based on gender binarism to win legal battles. It also examines the costs of these victories—namely, how pro-trans advocates may rely on gender binarism to the detriment of nonbinary, genderqueer, and intersex people by making access to the legal and political victories contingent on specific forms of identity expression and medical diagnoses. Part II further argues that reliance on the assimilation current in both the Title VII and identification access contexts, despite its significant successes, may undermine broader gender expansionist goals.

In short, this Article explores the theoretical and practical contradictions within the trans rights movement. Using queer theory as a mode of analysis,¹³ it examines the discursive dynamics surrounding pro-trans litigation. Along the

9. *The Future is Nonbinary*, BEYOND BINARY LEGAL, <https://www.beyondbinarylegal.org/> [<https://perma.cc/K7M9-SKLD>].

10. See *infra* Section I.B.

11. See Daniel Bergner, *The Struggles of Rejecting the Gender Binary*, N.Y. TIMES MAG. (June 4, 2019), <https://www.nytimes.com/2019/06/04/magazine/gender-nonbinary.html> [<https://perma.cc/36MR-H892>].

12. See Shawn Thomas Meerkamper, Note, *Contesting Sex Classification: The Need for Genderqueers as a Cognizable Class*, 12 DUKEMINIER AWARDS J. 1, 2–11 (2013) (discussing genderqueer as a social identity and legal classification).

13. Teemu Rusokla explained:

I use the word queer to refer to a range of non-normative subject positions. These positions are at once sexual, social, and political. Thus defined, queer positions are occupied by all subjects at some point (whether they wish to acknowledge it or not) and by no subject at all times (even if they so desire). Queer theory provides a method for analyzing how queer and normative subject positions are constituted in relation to one another and how they are secured, but also how they remain necessarily unstable and provisional. In short, it is a method for analyzing the discursive dynamics by which subjects are made and unmade, maintained and destabilized.

Aziza Ahmed, *When Men Are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib*, 11 UCLA J. ISLAMIC & NEAR E. L. 1, 14–15 (2012) (quoting Teemu Rusokla).

way, the Article explores whether the framing strategies adopted by pro-trans movement lawyers serve the needs of the most marginalized people of trans experience;¹⁴ whether the movement is over-reliant on medical evaluation, diagnosis, and treatment—things that may not be available to low-income, homeless, or undocumented people;¹⁵ and whether this reliance risks “legitimiz[ing] a distinction between ‘real’ and ‘fake’ transgender identities.”¹⁶

I.

COMPETING VISIONS OF THE PRO-TRANS MOVEMENT

The term “trans” has no singular, fixed meaning.¹⁷ Rather, scholars and activists conceptualize it as a term encompassing many identities and modes of organizing.¹⁸ The term “trans” is understood as “inclusive of the identities and experiences of some (or perhaps all) gender-variant, gender- or sex-changing, gender-blending, and gender-bending people.”¹⁹ Susan Stryker, a prominent trans scholar writing in the 1990s, explained:

I use *transgender* not to refer to one particular identity or way of being embodied but rather as an umbrella term for a wide variety of bodily effects that disrupt or denaturalize heteronormatively constructed linkages between an individual’s anatomy at birth, a nonconsensually assigned gender category, psychical identifications with sexed body images and/or gendered subject positions, and the performance of specifically gendered social, sexual, or kinship functions.²⁰

This Section discusses three competing frameworks within the pro-trans law reform movement, which this Article labels: (1) the assimilationist current, characterized by a desire for inclusion within the normative gender regime;²¹ (2) the gender-expansionist current, characterized by a desire to altogether do away with the normative gender regime; and (3) the ambivalent utilitarian

14. See, e.g., Jonathan L. Koenig, *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619, 643 (2011) (describing how the essentialist model adopted by pro-trans activists distributes benefits unevenly across populations).

15. See Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 730–35 (2005); Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 17 (2003) (noting that medical evidence may be required to obtain documentation of a changed gender); KIMBERLY YURACKO, GENDER NONCONFORMITY AND THE LAW 95–96 (2016) (illustrating how courts rely on medical evidence to determine which gendered bathroom a worker may use).

16. See Sudai, *supra* note 7, at 430.

17. Davidson, *supra* note 8, at 60; see Susan Stryker, Paisley Currah & Lisa Jean Moore, *Trans-, Trans, or Transgender?*, 36 WOMEN’S STUD. Q. 11, 11–12 (2008).

18. See Stryker, Currah & Moore, *supra* note 17, at 11–12.

19. Davidson, *supra* note 8, at 60.

20. Susan Stryker, *The Transgender Issue: An Introduction*, 4 GLQ: J. LESBIAN & GAY STUD. 145, 149 (1998).

21. JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 270 (2006).

current, characterized by desires to *both* disrupt the gender regime in the long-term *and* improve the quality of life for trans people in the short-term.

As with any attempt at classification, these three frameworks will inevitably fall short of capturing the full range of motivations, philosophies, hopes, and fears of the pro-trans law reform movement. In politics, in identity, and *especially* in identity politics, categorization is only useful insofar as it helps us recognize that our movements are tangled, contradictory, and beautiful messes.²² The categories are not distinct in reality, but reflect a methodological “utopia” that “cannot be found empirically anywhere in reality.”²³ Indeed, the categories described in this Article have porous boundaries. Some pro-trans activists promote the assimilationist current of political rights because they are invested in inclusion within the binary gender regime. Other pro-trans activists reject reliance on assimilation and binary gender categories altogether, maintaining that any assimilation does long-term harm to individuals and the movement.²⁴ A third group holds expansive queer visions but utilizes assimilationist politics out of exigency.²⁵ People move between these groups all the time.²⁶

This Article explores the conflict that arises between groups within the pro-trans legal movement over who “counts” as trans for the purposes of organizing, what compromises are necessary to push the movement forward, and who is included and excluded from political benefits.²⁷ This Article analyzes different players within the pro-trans movement. The Article additionally articulates the players’ visions, goals, and political strategies, and explores the ways in which those ideas sit in fundamental tension.²⁸ The Article then examines the ways these competing approaches play out in two legal movement contexts: Title VII and state identification documents. In these different spheres, the binary asserts

22. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1242–45, 1297–99 (1991).

23. If it is helpful, think of the classification system as borrowing from Max Weber’s concept of ideal types: a fictional analytical category used to make sense of complex social phenomena. As he wrote, “[a]n ideal type is formed by the one sided *accentuation* of one or more points of view” according to which “concrete individual phenomena . . . are arranged . . . into a unified *analytical* construct.” *Max Weber (1864–1920)*, in MICHELE DILLON, INTRODUCTION TO SOCIOLOGICAL THEORY: THEORISTS, CONCEPTS, AND THEIR APPLICABILITY TO THE TWENTY-FIRST CENTURY 128–29 (2010) (quoting MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 90 (Edward A. Shils & Henry A. Finch eds. & trans., 1st ed. 1949)), http://fs2.american.edu/dfagel/www/Class%20Readings/Weber/weber_on_methodology_of_social_sciences.pdf [<https://perma.cc/U7PB-WYRM>].

24. See LESLIE FEINBERG, *TRANS LIBERATION: BEYOND PINK OR BLUE* 7 (1998) (“The human anatomical spectrum can’t be understood, let alone appreciated, as long as female or male are considered to be all that exists.”).

25. See *infra* notes 109–127 and accompanying text.

26. See, e.g., Dean Spade, *Laws as Tactics*, COLUM. J. GENDER & L. 40, 48–49 (2012).

27. See Davidson, *supra* note 8, at 64.

28. See HALLEY, *supra* note 21, at 264 (“But an alliance, unlike a corporation, suggests a provisional or strategic union between parties whose different interests ought not to be—indeed, cannot totally be—merged.”).

itself in distinct ways. This Article argues that reliance on trans assimilation in the Title VII context, regardless of its ultimate success, undermines pro-trans goals in the state identification context. In particular, transferred definitions of sex and gender from Title VII cases exclude non-binary and intersex people and make identity documents contingent on access to specific medical diagnoses. Along the way, this Article asks: at what point does the strategic union between assimilationist and ambivalent utilitarian pro-trans activists undermine expansionist political goals through minoritizing social movement politics?²⁹

A. *Trans Assimilation Current*

Some pro-trans advocates adhere to essentialist notions of trans identity and adopt assimilationist goals and strategies. Broadly speaking, gender essentialism is the belief in a core or “essential” gendered experience—for example, a singular womanhood—that can be “described independently of . . . other realities of experience” like race, class, national origin, or sexual orientation.³⁰ Within this framework, trans people understand themselves to belong to a coherent identity group defined by common experiences and biological traits. Sex and gender are framed in binary terms of male and female and these categories remain in relatively stable opposition. Under this framework, people of trans experience are often described as “born in the wrong body,” meaning their sex assigned at birth did not match their stable gender identity. People of trans experience therefore shift their gender expression and physiology from male to female, or from female to male, in order to bring their appearance in line with their identity.³¹

On a theoretical level, some trans activists in this current reject anti-foundationalist queer theory³² that seeks to destabilize categories of gender and sex. Jay Prosser summarized the view: “[T]here are transgendered trajectories, in particular *transsexual* trajectories, that aspire to that which this [queer] scheme devalues. Namely there are transsexuals who seek very pointedly to be nonperformative, to be constative, quite simply, to *be*.”³³ This vision of transness

29. *Id.* at 270 (“[A]ttaching normativity and coercive regulatory force to [trans objects of desire] is what liberalism, the regulatory family, and compulsory heterosexuality have been doing for centuries. Political and legal gains for transsexuals might well be losses for many feminist, gay, and queer projects.”).

30. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

31. This framing can be tweaked slightly to include the growing nonbinary rights movement. There are, similarly, competing strands. On the one hand, some advocates promote a third gender category—nonbinary—that is often framed as a coherent, stable identity group. These advocates seek rights and inclusion for this group, with political goals like formal minority group status, anti-discrimination legislation, and “X” gender marker options on identity documents. Other nonbinary advocates fall squarely into the “queer expansionist” or “ambivalent utilitarian” camps.

32. For a discussion of anti-foundationalism in queer theory, see LYNNE HUFFER, *ARE THE LIPS A GRAVE? A QUEER FEMINIST ON THE ETHICS OF SEX* (2013).

33. JAY PROSSER, *SECOND SKINS: THE BODY NARRATIVES OF TRANSSEXUALITY* 32 (Carolyn G. Heilbrun & Nancy K. Miller eds., 1998).

explicitly seeks assimilation and strives for “belonging in the body and in the world.”³⁴ Some assimilationists reject the label of “transgender” altogether. For example, activist Margaret Deidre O’Hartigan remarked that “[e]very application of the term *transgender* to me is an attempt to mask what I’ve done and as such co-opts my life, denies my experience, violates my very soul.”³⁵ She insisted that she was a woman, not a trans woman: “I took cold steel to myself and proved that anatomy is not destiny.”³⁶

Medical science has been critical to the development of a binary trans identity and political outlook in the twentieth century.³⁷ “Psychomedical concepts” of sex and gender, such as “transsexuality,” Gender Identity Disorder (GID), and the like, have served as sites for identity formation and “rights mobilization among some trans activists.”³⁸ Moreover, these frameworks offer people a way to access basic resources, like medical care, that are essential to survival.

It is important to note that the medical model is overemphasized in scholarship on the topic, as much of what we know about trans people in the twentieth century comes from the archives of medical professionals who conducted interviews with people seeking gender-affirming care.³⁹ People seeking gender-affirming care from doctors faced enormous incentives to tell a certain story about themselves and their identities, and often had to align their self-narratives with the ones they knew medical gatekeepers wanted to hear.⁴⁰ This is not to say that trans identities were exclusively shaped by medical science, and not the other way around. Historian Jules Gill-Peterson⁴¹ encouraged us to understand trans people as “active participants in the construction and contestation of medical discourse . . . rather than as passive objects of knowledge.”⁴²

Reed Erickson, a wealthy philanthropist and trans man, is credited with shaping the pro-trans social movement in the twentieth century.⁴³ Erickson

34. *Id.* at 59.

35. PAT CALIFIA, *SEX CHANGES: THE POLITICS OF TRANSGENDERISM* 261 (1997).

36. *Id.*

37. *See, e.g.*, SUSAN STRYKER, *TRANSGENDER HISTORY: THE ROOTS OF TODAY’S REVOLUTION* 51–54 (Seal Press 2d ed. 2017) (2008); JULIAN GILL-PETERSON, *HISTORIES OF THE TRANSGENDER CHILD* 16 (2018).

38. Davidson, *supra* note 8, at 65.

39. GILL-PETERSON, *supra* note 37, at 12–13. Gill-Peterson argues that there is “a completely overlooked field of lived experience, knowledge, and embodiment that has been lost through positivist mythologies of twenty-first-century medical discourse, narratives of American identity politics, and the partial biopolitical normalization of certain trans subjects.” *Id.* at 16.

40. *Id.* at 16. It is also important to note that the group represented in medical archives is overwhelmingly White. *Id.* at 21.

41. *See* Jules Gill-Peterson, *My Undead Name*, *LEGACY: J. AM. WOMEN WRITERS* (Oct. 5, 2020), <https://legacywomenwriters.org/2020/10/05/my-undead-name/> [https://perma.cc/8LNM-NNMF].

42. GILL-PETERSON, *supra* note 37, at 16.

43. *See id.* at 19.

created the Erickson Educational Foundation (EEF) in 1964, through which he financed and shaped the contemporary landscape of trans medicine and social services.⁴⁴ The EEF's work is emblematic of an assimilationist strategy of the pro-trans movement. Erickson's vision and influence promoted a shift toward trans people being considered a "distinct minority group deserving of social respect, medical recognition, and legal rights."⁴⁵

The EEF drew direct parallels between the civil rights struggles of Black, gay, and trans communities,⁴⁶ and argued that trans people are part of a discrete minoritized community deserving of equal rights under law. In a pamphlet titled "Legal Aspects of Transsexualism and Information on Administrative Procedures," the EEF used rights-based discourse to accomplish this objective:

Although it is impossible to legislate acceptance of any minority, religious or otherwise, the law can provide new opportunities for members of minority groups to expand their lives into areas from which they were once excluded. This enables their fellow citizens for the first time to have the chance to know them as individuals and to discover in them their special talents as well as the common humanity we all share. Through this direct social experience, prejudices are overturned.⁴⁷

The EEF also helped shape the contemporary landscape of trans medicine. The EEF supported an influential network of doctors and researchers treating trans patients, and contributed to the creation of the Gender Identity Clinic at Johns Hopkins University in 1965—the first of its kind in North America.⁴⁸ The EEF created a network of support and services for trans people across the country, and began intervening on behalf of trans people in the state apparatus.⁴⁹ For example, the EEF created identification and authorization documents for people undergoing medical transition to present to police if arrested for cross-

44. See Aaron Devor & Nicholas Matte, *Building a Better World for Transpeople: Reed Erickson and the Erickson Educational Foundation*, 10 INT'L J. OF TRANSGENDERISM 47, 51 (2007) ("Erickson's general vision, combined with his ability to put this vision into practice had a major impact on trans history and has significantly influenced our present social circumstances, especially in its focus on developing professional expertise and improving the provision of medical services for transsexuals.").

45. *Id.* at 53.

46. See *Newsletter*, HARRY BENJAMIN INT'L GENDER DYSPHORIA ASS'N NEWSL. (Paul A. Walker & Zeldia R. Suplee eds.), vol. 1, no. 1, Spring 1983, at 2 (discussing "civil rights and the transsexual" and drawing direct comparisons between the civil rights struggles of Black, gay, and trans Americans).

47. ERICKSON EDUC. FOUND., LEGAL ASPECTS OF TRANSEXUALISM AND INFORMATION ON ADMINISTRATIVE PROCEDURES 1 (rev. ed. 1971), <https://archive.org/details/legalaspectsoftr0000noau/mode/2up>.

48. Thomas Buckley, *A Changing of Sex Surgery Begun at Johns Hopkins*, N.Y. TIMES, Nov. 21, 1966, at A1.

49. See ERICKSON EDUC. FOUND., CONCERNING THE ERICKSON EDUCATIONAL FOUNDATION 2, <https://archive.org/details/concerningericks0000eric/mode/2up>.

dressings.⁵⁰ On at least one occasion, the EEF advocated on behalf of a trans individual during naturalization proceedings, who was later granted citizenship.⁵¹

The EEF provided trainings to professional associations, police departments, and colleges. In these trainings, the EEF promoted a message of assimilation and respectability. EEF materials distributed to law enforcement officers defined its constituents as follows:

The transsexual is an individual who has a conviction that he or she belongs to the opposite sex, and desires to have the body and social status of that sex, a goal which is now attainable through medical therapies including sex reassignment surgeries.⁵²

Like many successful minoritizing social movements, the EEF promoted non-threatening and non-disruptive subjects. As one EEF-distributed pamphlet advised, “if you are going to cross-dress, don’t be obvious about it.”⁵³ This preference was reflected in the EEF’s choice of spokespeople. A college professor who regularly hosted EEF speakers and presentations in her classroom described the presenters in the following way:

[T]hey must have hand picked the people who got to speak at these colleges . . . every single one was attractive, credible, articulate and somebody who was able to get the students to sympathize with them, with their story. They were people it was impossible to see as any other gender than they presented themselves.⁵⁴

The EEF is one example in a long tradition of trans activists embracing a pro-establishment attitude. As historian Joanne Meyerowitz explained, many trans activists in the 1960s and 1970s “did not consider themselves radicals, feminists, or hippies, and they dissociated themselves from gays.”⁵⁵ They attempted to “project an image of ‘middle-class respectability’” and aimed not for “radical change,” but for trans women to be “accepted as women.”⁵⁶ At the same time, others in this group aligned themselves with liberal causes and “saw similarities in the civil rights struggles of blacks, gays, and transsexuals.”⁵⁷

50. See Devor & Matte, *supra* note 44, at 53; ERICKSON EDUC. FOUND., *supra* note 47, at 2 n.1. The pamphlet guides readers through the process of legally changing their name, birth certificate, social security card, driver’s license, passport, occupational license, education record, welfare, insurance, bequests, and income taxes. See ERICKSON EDUC. FOUND., *supra* note 47, at 2–12.

51. See Devor & Matte, *supra* note 44, at 53.

52. ERICKSON EDUC. FOUND., INFORMATION ON TRANSEXUALISM FOR LAW ENFORCEMENT OFFICERS 5 (1974), <https://archive.org/details/informationontra0000noau>.

53. ERICKSON EDUC. FOUND., *supra* note 47, at 2 (quoting Dr. Jon Meyer of Johns Hopkins Hospital).

54. See Devor & Matte, *supra* note 44, at 54–55.

55. JOANNE MEYEROWITZ, HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES 233 (2004).

56. *Id.* at 233, 236.

57. *Id.* at 233.

Trans assimilationists engage in a politics of recognition and embrace rights as a tool for change.⁵⁸ Rights are seen as a powerful instrument for social acceptance, political inclusion, and legitimation of identity.⁵⁹ And for good reason, as trans people have faced extraordinary levels of interpersonal and systemic violence.⁶⁰ Moreover, this was a moment in the United States when policy victories stemming from social movements' strategic use of rights-based discourse led to substantial improvements in the material conditions under which historically marginalized communities lived.⁶¹ To many within the trans assimilationist movement, gender expansionist critiques of rights discourse are undermining, or even threatening, because they risk negating the incremental victories achieved within a rights-centric legal system.⁶²

Trans assimilationists had early successes in the legal system using rights discourse supported by science.⁶³ Groups of medical clinicians, lawyers, and trans activists effectively promoted a model of trans identity based on medical science and a binary understanding of sex and gender.⁶⁴ In the 1960s and 1970s, clinics began offering sex change operations to “good candidates,”⁶⁵ law review articles began to theorize new definitions of sex that could accommodate binary

58. The rhetoric, goals, and strategies of trans assimilationists fit squarely within the rubric of identity politics. In *“Like Race” Arguments*, Janet Halley identified some core features of contemporary identity movements:

[T]hat identity inheres in group members, that group membership brings with it a uniformly shared range (or even core) of authentic experience and attitude; that the political and legal interests of the group are similarly coherent; and that the group members are thus able to draw on their own experiences to discern those interests and to establish the authority they need to speak for the group.

Janet E. Halley, *“Like Race” Arguments*, in *WHAT’S LEFT OF THEORY? NEW WORK ON THE POLITICS OF LITERARY THEORY* 40–41 (Judith Butler, John Guillory & Kendall Thomas eds., 2000).

59. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 154 (1991).

60. Trans women of color, in particular, are murdered at alarming rates. See HUM. RTS. CAMPAIGN, *ADDRESSING ANTI-TRANSGENDER VIOLENCE: EXPLORING REALITIES, CHALLENGES AND SOLUTIONS FOR POLICYMAKERS AND COMMUNITY ADVOCATES* 28 (2019).

61. See generally TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-1963* (1988); JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954-1965* (2013).

62. See WILLIAMS, *supra* note 59, at 152 (“The argument that rights are disutile, even harmful, trivializes . . . black experience specifically, as well as that of any person or group whose vulnerability has been truly protected by rights.”).

63. See *infra* notes 294–302.

64. See, e.g., ERICKSON EDUC. FOUND., *AN OUTLINE OF MEDICAL MANAGEMENT OF THE TRANSEXUAL: ENDOCRINOLOGY, SURGERY, PSYCHIATRY* 2–8, <https://archive.org/details/outlineofmedical0000noau/mode/2up>.

65. The medical establishment acted as gatekeepers to gender-affirming medical care. See STRYKER, *supra* note 37, at 93–94 (“[A]s trans people seeking surgery and hormones quickly discovered, the new university-based scientific research programs were far more concerned with restabilizing the gender system Access to transsexual medical services thus became entangled with a socially conservative attempt to maintain traditional gender, in which changing sex was grudgingly permitted for the few seeking to do so, to the extent that the practice did not trouble the gender binary for the many.”).

trans people in the male-female dichotomy,⁶⁶ and liberal judges began to grant name and sex marker changes on identification documents to trans people.⁶⁷

The advocates for trans assimilationism continue to use rights discourse to work toward a shared set of political assertions and goals, including that: (1) trans people are a protected class under the Fourteenth Amendment, meaning any government policy that applies specifically to trans people should be examined with strict scrutiny; (2) trans people should be protected under state and federal anti-discrimination legislation, meaning that they should not be fired or denied employment, housing, credit, or access to public accommodations based on their trans status; (3) trans people should be able to fully participate in sex-segregated activities according to their gender identity, not their sex assigned at birth, including dress codes, bathroom use, and membership on sports teams; and (4) gender-affirming care should be covered by insurance.

B. *Queer Expansion Current*

Not all members of the pro-trans movement identify with an assimilationist approach. This Article uses “expansionist” to refer to a broad array of people, ideas, and identifications that seek to undermine binary notions of sex and gender.⁶⁸ The expansionist current falls in the lineage of radical queer movements, characterized by an “‘in your face’ politics” and a “willingness to confront normalizing power by emphasizing and exaggerating their own anti-normative characteristics and non-stable behavior.”⁶⁹ People aligned with queer expansionist ideas are those who have never been, and likely will never be, part of the mainstream.⁷⁰ This Article means to include the genderfuckers of

66. See Douglas K. Smith, Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 CORNELL L. REV. 963, 965 (1971); *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD. L. REV. 236, 253 (1971); Edward S. David, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288, 307 (1975).

67. See MEYEROWITZ, *supra* note 55, at 246.

68. The notion that sex and gender are linked has been challenged by feminist, queer, and postmodern theorists. See KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US* 26–31 (1994) (differentiating definitions of sex and gender); JUDITH BUTLER, *GENDER TROUBLE* 6–7 (1990) (describing the social construction of gender); RIKI ANNE WILCHINS, *READ MY LIPS: SEXUAL SUBVERSION AND THE END OF GENDER* 51 (1997) (“Gender is not what culture creates out of my body’s sex; rather, sex is what culture makes when it genders my body.”); Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, SCIS., Mar.–Apr. 1993, at 20 (suggesting that conceptions of two dimorphic sexes are not biologically accurate).

69. Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ: J. LESBIAN & GAY STUDIES 437, 439 (1997); see also BORNSTEIN, *supra* note 68, at 121 (“Power seems basic to gender, and gets played out *through* gender, usually without the permission or even the understanding of the people involved in the playing.”).

70. See LARRY MITCHELL, *THE F[*]GGOTS & THEIR FRIENDS BETWEEN REVOLUTIONS* 22 (1977) (“[They] have never been asked to join the vanguard. [They], it was noticed, do not know how to keep a straight face and the vanguard demands constantly straight faces. [They], it was noticed, want only to eat so they can play love play while the vanguard demands endless talk about the hunger of others and the seriousness of work. [They], it was noticed, are too quick to believe that the revolution

Lavender Hill, queens like Marsha and Sylvia, freaky theys and silken aliens, daddies and fairies, street kids, and gender-expansive kiddos, all of the fairies and their friends between revolutions.⁷¹ Some, but not all, people who associate with nonbinary identity fall into this category.

Unlike many identity-based movement groups, a goal of the expansionist current is “*the destabilization of collective identity*.”⁷² If this ideological current is unified by anything, it is a commitment to “epistemic disorientation” and a resistance to being “tethered at the top.”⁷³ As such, people who resonate with a gender expansionist current theorize and express identity with enormous variety.⁷⁴

Starting in the 1960s and 1970s, some queer activists embraced a radical “politics of confrontation” aligned with gay liberation, radical queens, fairies, and the lesbian feminists who made gender transgression part of their political movements.⁷⁵ This politics owes its form, in large part, to the activist movements of people of color, feminists, and other marginalized communities.⁷⁶ An explicitly “queer politics” re-emerged in the 1990s as a response to “the scientific ‘de-gayng’ and assimilationist tendencies of AIDS activism” and queer “invisibility” within “traditional civil rights politics of lesbian and gay organizations.”⁷⁷ While some factions of the queer movement adhered to identity-based in-group politics, others rejected all attempts at theoretical classification.⁷⁸

had come and so too quick to celebrate. The vanguard demands that the revolution go on forever and so demands that the celebration only be planned, never enacted.”).

71. See HALLEY, *supra* note 21, at 200 (“Pursuing this hedonics, queer theory produces lists that emphasize not repetition, homology, analogy, and sameness, but variety, incommensurability, and endless difference—and it sees something like Foucault’s sense of surprise, wonder, comedy, and the frisson of epistemic disorientation.”).

72. Joshua Gamson, *Must Identity Movements Self-Destruct? A Queer Dilemma*, 42 J. SOC. PROBS. 390, 403 (1995).

73. HALLEY, *supra* note 21, at 200, 202.

74. See Jack Harrison, Jaime Grant & Jody L. Herman, *A Gender Not Listed Here: Genderqueers, Gender Rebels, and Otherwise in the National Transgender Discrimination Survey*, 2 LGBTQ PUB. POL’Y J. 13, 20 (2012) (examining the results of a survey that asked 6,450 transgender and gender nonconforming people to describe their gender); DAVID VALENTINE, *IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY* 105 (2007).

75. See MEYEROWITZ, *supra* note 55, at 235.

76. See Barbara Smith, *Queer Politics: Where’s the Revolution?*, NATION (July 5, 1993), <https://www.thenation.com/article/activism/wheres-revolution/> [https://perma.cc/C9FY-AGKG] (describing a “queer” politics that has forgotten its ideological and practical ties to left Black and feminist movements, operating instead in an invented “historical and ideological vacuum”).

77. Cohen, *supra* note 69, at 439.

78. See *id.*; LIBBY ADLER, *GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM* 8 (2018).

Many activists in this current reject the binary model of trans identity and the conceptual coherence of sex, gender, and genitals.⁷⁹ Others aim to destabilize the notion of switching sex or gender within a binary system, and instead call for “greater fluidity, multiplicity, ambiguity, and a queering of the boundaries between male-female and masculine-feminine.”⁸⁰ Some question the category of “transgender” altogether.⁸¹

Activists in this current reject the notion that non-normative gender expression is a pathology that requires correction,⁸² oppose the psychomedical establishment’s gatekeeping of “surgically defined identities,”⁸³ and instead promote utilizing medical interventions to affirm self-understanding beyond the binary.⁸⁴

Many queer activists see binary and assimilationist definitions of sex and gender as actively harmful.⁸⁵ Author and activist Mattilda Bernstein Sycamore described assimilation as “not just the violence of cultural erasure, but the violence of stepping on anyone more vulnerable than you in order to get

79. See, e.g., Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, 10 CAMERA OBSCURA 151, 156, 168 (1992) (rejecting the “binary, oppositional mode of gender identification,” and instead promoting a “myriad of alterities”); see generally BORNSTEIN, *supra* note 68 (rejecting rigid gender classification); FEINBERG, *supra* note 24 (rejecting the same); David Valentine & Riki Anne Wilchins, *One Percent on the Burn Chart: Gender, Genitals, and Hermaphrodites with Attitude*, 52/53 SOC. TEXT 215 (1997) (rejecting the same).

80. Davidson, *supra* note 8, at 66; see also, e.g., Susan Stryker, *Transsexuality: The Postmodern Body and/as Technology*, 30 EXPOSURE: J. FOR SOC’Y FOR PHOTOGRAPHIC EDUC. 38, 42 (1995) (“Transsexuality is . . . a radical practice that promises to explode the dominant constructions of self and society.”); DONNA J. HARAWAY, SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 155 (1991) (challenging gender essentialism by undermining the assumption that is it possible to distinguish between male and female in an absolute sense to begin with); FEINBERG, *supra* note 24, at ix (“[T]here are no pronouns in the English language as complex as I am, and I do not want to simplify myself in order to neatly fit one or the other.”); Spade, *supra* note 15, at 28 (“Many of the trans people I have talked to do not imagine themselves entering a realm of ‘real manness’ or ‘real womanness’ . . . Rather, they recognize the absence of meaning in such terms. They regard their transformations as freeing them to express more of themselves.”).

81. WILCHINS, *supra* note 68, at 51, 67 (1997) (“I’d also like us to investigate the means by which categories like transgender are produced, maintained, and inflicted on people like me. . . . It is only within a system of gender oppression that transgender exists in the first place.”).

82. See STRYKER, *supra* note 37, at 52 (“[M]edical science has always been a two-edged sword—its representatives’ willingness to intervene has gone hand in hand with their power to define and judge. Far too often, access to medical services for transgender people has depended on constructing transgender phenomena as symptoms of a mental illness or physical malady, partly because ‘sickness’ is the condition that typically legitimizes medical intervention.”).

83. Davidson, *supra* note 8, at 64; see MEYEROWITZ, *supra* note 55, at 239.

84. See, e.g., Alex Verman, *What It’s Like to Medically Transition as a Nonbinary Person*, THEM (Aug. 1, 2018), <https://www.them.us/story/nonbinary-medical-transition> [<https://perma.cc/6PUD-RALS>].

85. See, e.g., Queers United Against Straight-acting Homosexuals (QUASH), *Assimilation Is Killing Us: Fight for a Queer United Front*, in WHY I HATED THE MARCH ON WASHINGTON 4, 4 (“Assimilation is killing us . . . [E]mpowerment comes through grassroots activism, not mainstream politics . . . real change occurs when we are inclusive, not exclusive.”).

ahead.”⁸⁶ Assimilation, for Bernstein Sycamore, “robs queer identity of anything meaningful, relevant, or challenging—and calls this progress.”⁸⁷

In place of assimilation, the queer expansionist current is invested in constructivism and a thorough critique of identity politics.⁸⁸ As Bernstein Sycamore said, “the radical potential of queer identity lies in remaining outside—in challenging and seeking to dismantle the sickening culture that surrounds us.”⁸⁹ This queer liberationist view places little faith in the ability of traditional rights-based strategies,⁹⁰ such as impact litigation,⁹¹ to achieve structural change.⁹² Drawing on critical race theory, activist and scholar Dean Spade described the “paradox of rights” in the pro-trans legal movement:

Rights mediate emergent social groups, and rights claims often serve as the resistance framework of such groups, yet declarations of universal rights actually mask and perpetuate the structured conditions of harm

86. THAT’S REVOLTING! QUEER STRATEGIES FOR RESISTING ASSIMILATION 3 (Mattilda Bernstein Sycamore ed., 2004); *see also* Cohen, *supra* note 69, at 443 (“[S]trategies built upon the possibility of incorporation and assimilation . . . simply expand[] and make[] accessible the status quo for more privileged members of marginalized groups, while the most vulnerable in our communities continue to be stigmatized and oppressed.”).

87. THAT’S REVOLTING!, *supra* note 86, at 3, 5.

88. *See* Halley, *supra* note 58, at 42 (“Queer theory argues that identity is not the core truth and safe zone of authenticity and authority posited by our most widely shared assumptions about identity politics; instead it suggests that identity may be part of the problem.”).

89. THAT’S REVOLTING!, *supra* note 86, at 3.

90. *See* WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 124 (1995) (“Rights discourse in liberal capitalist culture casts as private potentially political contests about distribution of resources and about relevant parties to decision making. It converts social problems into matters of individualized, dehistoricized injury and entitlement, into matters in which there is no harm if there is no agent and no tangibly violated subject.”).

91. *See, e.g.*, JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 22 (1978). As used in this Article, “impact litigation” can be defined as follows:

Impact Litigation (IL) refers to the strategic process of selecting and pursuing legal actions to achieve far-reaching and lasting effects beyond the particular case involved . . . Unlike traditional litigation, IL combines a series of legal, political, and social techniques that define the exercise from inception to the calculated, strategic outcome, which is not limited to the judicial decision itself, but also anticipates and addresses parties’ compliance with such decision. It invokes a rights-based approach to achieving social change through the use of complex litigation strategies and non-litigation tactics, such as the use of social media, grassroots organizing, and engagement with academic institutions.

Am. UNIV. WASH. COLL. OF L., CTR. FOR H.R. & HUMANITARIAN L., IMPACT LITIGATION: AN INTRODUCTORY GUIDE 1 (2016), <https://www.wcl.american.edu/index.cfm?LinkServID=B1E612B7-0D73-2112-D9045D014AF27809> [https://perma.cc/36MX-TB9P].

92. Urvashi Vaid recognized the limits of civil rights strategies in confronting homophobia: [C]ivil rights do not change the social order in dramatic ways; they change only the privileges of the group asserting those rights. Civil rights strategies do not challenge the moral and antisexual underpinnings of homophobia, because homophobia does not originate in our lack of full civil equality. Rather, homophobia arises from the nature and construction of the political legal, economic, sexual, racial and family systems within which we live. URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 183 (1995).

and disparity faced by those groups.⁹³

Pooja Gehi, a radical legal services provider who works primarily with low-income trans people of color, remarked that “most of [her] clients were not really protected by employment non-discrimination bills . . . because they didn’t have jobs or couldn’t get jobs,” due in part to their trans identity.⁹⁴ The tools, strategies, and potential outcomes available through rights-based impact litigation simply do not address or affect the daily lives of people on the margins, whether because their identity doesn’t fit the binary or because of other vectors of oppression like class, race, and national origin.⁹⁵ Instead of addressing broad conditions of distribution, anti-discrimination campaigns promote an individualized understanding of discrimination and run the risk of stabilizing and upholding relations of disparity.⁹⁶

Many queer liberationists thus look to solutions outside the traditional legal change framework. According to Gehi, “[t]he revolution is the answer.”⁹⁷ She explains that, while the law is one “tool of many that can be used for social change . . . I definitely don’t think it is the tool that is going to set us free.”⁹⁸ Rather, “organizing, and public education, building political power . . . are things that [will] move . . . this political moment.”⁹⁹ Some of the first political groups in this lineage—for example, Vanguard in San Francisco and Street Transvestite Action Revolutionaries (STAR) in New York City—were organized by and for “street kids” and focused on providing for the basic needs of queer youth in urban areas.¹⁰⁰

Queer expansionist activists are often concerned with the governing norms that constrain individual choice and maintain systems that distribute literal and figurative goods, from food and health care to security and recognition, unevenly across populations.¹⁰¹ As Spade observed: “For trans people, administrative

93. DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 10 (Duke Univ. Press rev. ed. 2015) (2011).

94. Julie Suk, Kate Shaw, Noah Lewis, Andy Izenson, Harper Jean Tobin, Pooja Gehi, Ezra Cukor & Joshua Block, *Litigating Transphobic Bathroom Bills: Envisioning Comprehensive Legal Strategies for Trans Liberation*, 23 *CARDOZO J.L. & GENDER* 171, 198 (2016).

95. Spade, *supra* note 26, at 65–66 (Anti-discrimination campaigns “generally center on stories of white, professional, patriotic, authorized . . . workers whose only barrier to gainful employment was their trans identity.”).

96. *See id.* at 64–65 (“[C]ritics of anti-discrimination law inclusion campaigns argue that the single-vector rhetoric of these campaigns, which focus on being deprived employment or other opportunities ‘just for being trans’ erase the systemic exploitation and economic marginalization that produces and maintains a racialized and gendered wealth gap and suggest that ‘but for’ people being fired ‘just for being trans’ equal opportunity exists and the economy is fair.”).

97. Suk et al., *supra* note 94, at 212.

98. *Id.* at 209.

99. *Id.*

100. *See* STRYKER, *supra* note 37, at 71, 86.

101. *See Distributive Justice*, STAN. ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/justice-distributive> [<https://perma.cc/CKD8-QAN6>] (“The economic,

gender classification and the problems it creates for those who are difficult to classify or are misclassified is a major vector of violence and diminished life chances and life spans.”¹⁰² Thus, the political goals articulated by queer expansionists shift away from rights-based, dignitary arguments and toward challenges to systems of classification. They include the following: (1) people should be free to identify and express their gender in any way they want, meaning that gender-affirming health care should be accessible at will, regardless of how a person identifies; (2) sex-based classifications should be abolished, including sex-segregated bathrooms, dress codes, and sports teams; (3) the government should not include gender designation in any government databases and identity documents, meaning the government should not require birth certificates to assign people a gender at birth or organize people according to gender for purposes of social services, health care, immigration, or law enforcement.

Other queer expansionists, highly skeptical of the law, believe the primary role of political strategy is harm reduction. As such, many activists believe political strategies should be tailored to the immediate needs of trans people, and they are frequently concerned with issues of poverty and social welfare. For example, instead of pursuing a politics of recognition and rights-based grievances, since the 1960s, radical queer activists have focused political energy on the “more severe problems” facing trans people, such as incarceration, criminalization, police violence, and exploitation by medical professionals.¹⁰³

C. *Ambivalent Utilitarian Current*

The queer expansionist movement has struggled internally with theoretical and practical goals. Many activists who articulate visions of a radical queer future recognize that those theories can be inconsistent with the immediate needs of people in crisis.¹⁰⁴ Ambivalent utilitarians are those queer expansionists who make strategic concessions in order to achieve incremental change.¹⁰⁵ They engage in assimilationist strategies as the only feasible operation of radical

political, and social frameworks that each society has—its laws, institutions, policies, etc.—result in different distributions of benefits and burdens across members of the society. These frameworks are the result of human political processes and they constantly change both across societies and within societies over time. The structure of these frameworks is important because the distributions of benefits and burdens resulting from them fundamentally affect people’s lives.”). For more on uneven resource distribution, see generally Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); J. Lamont, *The Concept of Desert in Distributive Justice*, 44 PHIL. Q. 45–64 (1994).

102. SPADE, *supra* note 93, at 77.

103. MEYEROWITZ, *supra* note 55, at 239.

104. See, e.g., TOURMALINE, *Preface*, *THE F[*]GGOTS & THEIR FRIENDS BETWEEN REVOLUTIONS* at x; Spade, *supra* note 15, at 29–30.

105. See, e.g., Spade, *supra* note 26, at 53–54.

change under the present legal regime.¹⁰⁶ Ambivalent utilitarians play a key role in the pro-trans legal movement.¹⁰⁷

Those at the intersection of genderqueer and other marginalized identities experience a biting tension. On the one hand, there is an ideological commitment to radical visions of queer utopia. On the other hand, there is a pressing need for housing, welfare, health care, community, and safety. Artist and activist Tourmaline described this bind:

I remember going to organizing meetings with other trans people, many of whom were also disabled and poor and people of color, and most of us could barely stay on topic. We were too busy talking and emoting about our basic survival needs: housing, welfare, healthcare, community, not being harassed every time we left our home. We were too busy dreaming up another space-time, where and when we could be our full selves.¹⁰⁸

Ambivalent utilitarians take a strategic approach to this double bind—keeping the broad liberatory goals in mind, while utilizing tactics most likely to succeed in the short term. For many ambivalent utilitarians, the ultimate goal is queer liberation.¹⁰⁹ They desire freedom for all people to determine their own gender identity and the complete deregulation of gender.¹¹⁰ Spade, for example, wants to end all policies and “practices that coerce people into expressing gender identity through a narrowly defined binary.”¹¹¹ He wrote, “I would like to see the end of gender designation on government documents, the end of gender segregation of bathroom and locker room facilities, and the end of involuntary ‘corrective’ surgeries for babies with intersex conditions.”¹¹² At the same time, Spade recognizes the practical limitations to his queer theoretical vision.¹¹³ In terms of available strategies, Spade admitted the queer approach has limited short-term traction within an advocacy context:

106. See, e.g., Sudai, *supra* note 7, at 440 n.109 (describing how trans activists utilize “strategic essentialism,” a tactic in which “minorities . . . represent themselves in an essentialist and simplified manner in order to achieve political gains”).

107. This Article assumes that most pro-trans activists hold some level of ambivalence about their political projects. Those aligned with the assimilationist current make strategic choices about how to present their political aspirations and may tailor their language to attain success. The Article does not examine this group as a distinct analytical category because the goals of trans assimilationists are, for the most part, theoretically aligned with mainstream liberal identity categories. While they ask for inclusion, they do not seek to fundamentally alter the systems. The Article examines the queer-expansionist-leaning ambivalent utilitarians as a distinct category because their political goals and their political tactics often rest on conflicting epistemological and ontological ground.

108. TOURMALINE, *Preface*, THE F[*]GGOTS & THEIR FRIENDS BETWEEN REVOLUTIONS at x.

109. See Spade, *supra* note 15, at 29; Suk et al., *supra* note 94, at 213.

110. See Spade, *supra* note 15, at 29.

111. *Id.*

112. *Id.*

113. *Id.* at 18 (“[N]o legal strategist can avoid working within requirements of medical documentation,” as “reliance on medical evidence and the medical assessment of gender identity is so deeply entrenched.”).

These are my goals for gender and law, but in my work as an advocate for low-income gender transgressive people I am often forced to recognize how far we are from attaining these goals. Consequently, I engage in compromises that I hope will be steps toward the deregulation of gender, compromises which provide access to vitally needed services and entitlements for gender transgressive people who are in crisis now.¹¹⁴

Ambivalent utilitarians can be characterized by their use of “laws as tactics.”¹¹⁵ They utilize legal strategies to achieve their discrete political goals, while recognizing that they operate within a “decentralized context in which multiple and competing goals co-exist.”¹¹⁶

Many contemporary ambivalent utilitarians focus on material conditions of the most marginalized, rather than purely symbolic rights-based victories.¹¹⁷ For example, Ezra Cukor, an activist-lawyer, described a model of poverty lawyering that focuses on “helping people solve problems in their lives so that they don’t have to worry about being homeless, . . . losing their job, losing their public benefits, whatever, so [their] clients can do . . . wonderful, creative, beautiful, liberatory things.”¹¹⁸ The role for lawyers and the law, in other words, is to ease the material trappings of oppression and then get out of the way. Other ambivalent utilitarians utilize strategies associated with impact litigation. Lawyer and trans rights advocate Chase Strangio, for example, had initially “wanted to provide direct services to clients who wouldn’t otherwise have access to legal counsel,” but later turned to impact litigation, because they realized “there is no best way to do law—rather, there are lots of flawed ways.”¹¹⁹

In light of ambivalent utilitarians’ use of assimilationist strategies to achieve incremental change, much of the group’s past advocacy has relied upon a binary model of gender.¹²⁰ As a result, some legal and policy victories for trans people have made access to legal remedies—including discrimination protection, identity document changes, immigration status/benefits, and social

114. *Id.* at 30 (emphasis added).

115. *See* Spade, *supra* note 26, at 54.

116. *Id.*

117. *See* Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 24 (1993) (distinguishing between ideological and material victories); *id.* at 26 (explaining how some ideological victories can impede material progress).

118. Suk et al., *supra* note 94, at 213; *see* Michael Grinthal, *Power with: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 37–38 (2011).

119. Masha Gessen, *Chase Strangio’s Victories for Transgender Rights*, NEW YORKER (Oct. 19, 2020), <https://www.newyorker.com/magazine/2020/10/19/chase-strangios-victories-for-transgender-rights> [<https://perma.cc/TK9L-QDW6>].

120. For discussion of this phenomenon, *see* YURACKO, *supra* note 15, at 103–04 (2016) (arguing that the binary medical model was so essential to “transsexual victories” that it incentivized transgender plaintiffs to downplay or reject aspects of their gender that conformed to their biological sex).

services—reliant on medical “proof” of binary transness.¹²¹ People must produce medical documentation of official diagnoses of GID, hormone replacement therapy, and/or body modification surgery to gain access to these benefits.¹²² As scholar Megan Davidson observed:

To the extent that current cultural understandings of binary sex and gender and a coherence of sex, gender, and genitals centrally animate medical discourses about transsexuality and gender dysphoria, transsexual people seeking medical treatment and their advocates are limited in their contestations of these hegemonic assumptions Therefore, these definitions of disorder are perhaps still strategically necessary [M]edical models and psychiatric diagnoses have helped many appeals in the courts gain success (e.g., giving prisoners access to hormones, allowing sex-reassignment surgeries as a medical expense in tax deductions, and affirming the adoptions and marriages of trans people).¹²³

The ambivalent utilitarian group generally has a radical orientation, but it draws tactics selectively from the political goals of both assimilationist and expansionist currents.¹²⁴ The group uses strategic interventions to provide for people in immediate need, while hoping these interventions eventually bend the law toward their goals.¹²⁵

Political compromises made by ambivalent utilitarians are manifold. We see contemporary examples of these compromises in the legal organizing around identification documents, medical gatekeeping, and gender segregation in the workplace. With documents, gender expansionists who selectively employ utilitarian strategies adopt a long-term goal to eradicate gender identification documents, but in the interim fight for a third-gender option, like an “X” marker. Another example lies in gender expansionists’ goal of ending medical gatekeeping of trans identity. Establishing self-attestation as the only requirement for a GID diagnosis is the more immediate, practical strategy in

121. Spade, *supra* note 15, at 16–18 (“In almost every trans-related case, whether it be about the legitimacy of a trans person’s marriage, the custody of hir children, hir right not to be discriminated against in employment, hir right to wear gender appropriate clothing in school or foster care, hir rights in prison, or whatever other context brings hir to court, medical evidence will be the cornerstone of the determination of hir rights.”); Romeo, *supra* note 15, at 726 (“The medical model of gender nonconformity has proven to be one of the few ways in which gender nonconforming people have been able to garner respect and recognition of rights in legal settings.”); D Dangaran, *Abolition as Lodestar: Rethinking Prison Reform from a Trans Perspective*, 44 HARV. J.L. & GENDER 161, 170 (2021); Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & C.R. L. REV. 27, 34 (1996) (“In cases involving transsexuals, it is apparent that courts often base their decisions upon one or more of the factors used in the medical community to determine sex.”); Alvin Lee, Note, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J.L. & GENDER 447, 470 (2008) (“[T]he medical model has thus far proven to be the most successful tool in advocating on behalf of trans people.”).

122. See *supra* note 121 and accompanying text.

123. Davidson, *supra* note 8, at 65.

124. See Spade, *supra* note 26, at 54.

125. See *id.*; Koenig, *supra* note 14, at 626–27.

addressing this issue under an ambivalent utilitarian frame. Finally, if the long-term, gender-expansionist goal is to eliminate gender-segregated requirements and spaces in workplaces and schools (for example: uniforms, bathrooms, and sports teams), the short-term strategy is to advocate for access to the gender-specific option that aligns with an individual's gender identity.

At the same time, ambivalent utilitarians must be aware of the potential negative consequences of their tactics. Legal change work includes a “danger of merely tinkering with the legal window dressing” while actually stabilizing conditions of inequality and oppression.¹²⁶ In particular, there are heightened challenges when advocates attempt to balance vigorous advocacy for an individual plaintiff with the long-term goal of creating liberatory change beyond the legal system.¹²⁷

II.

FRAMING THE PRO-TRANS LAW REFORM MOVEMENT

A. *The Framing Debate*

Social movement lawyers face important decisions¹²⁸ when defining goals and developing strategies.¹²⁹ Much of the power, and danger, of social movements is in the “framing”—the process of defining a core set of beliefs and meanings that motivate political goals and actions.¹³⁰ Through framing, social movements engage in “conscious strategic efforts . . . to fashion shared understandings of the world and of themselves that legitimate and motivate collective action.”¹³¹ It is the process through which movements define their

126. Spade, *supra* note 26, at 57.

127. See Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 660 (2002). For further discussion about competing client interests, see generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

128. It is not possible for movement lawyers to remain “neutral” with respect to intra-movement debates. See Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 459 (2018) (“Because social movements are internally contested, lawyers who align themselves with social movements are necessarily forced to make decisions to represent the interests of particular factions over others.”). This raises a number of legal ethical concerns. *Id.* at 460–62; see Anthony V. Alfieri, *Things Fall Apart: Hard Choices in Public Interest Law*, 31 GEO. J. LEGAL ETHICS 335, 343 (2018).

129. See, e.g., Scott L. Cummings, *How Lawyers Manage Intragroup Dissent*, 89 CHI.-KENT L. REV. 547, 552 (2014); Rubenstein, *supra* note 127, at 1633.

130. Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIO. 611, 613, 615–17 (2000); Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 892 (2013).

131. DOUG MCADAM, JOHN D. MCCARTHY & MAYER N. ZALD, *Introduction: Opportunities, Mobilizing Structures, and Framing Processes – Toward a Synthetic, Comparative Perspective on Social Movements*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 1, 6 (1996).

constituents, identify problems, and mobilize for change.¹³² It is also the process that can determine who benefits from the social movement's efforts—and who is left behind.

As a social movement strategy, impact litigation¹³³ has been both exalted and roundly critiqued.¹³⁴ Impact litigation has been the vehicle for many major social movement victories from school desegregation to marriage equality.¹³⁵ However, activists and scholars observe that litigation requires reliance on rights-based frameworks that can detract from movement mobilization;¹³⁶ donor preferences inhibit the work impact litigation organizations are able to accomplish;¹³⁷ and litigation often serves to further legitimize preexisting legal and social structures, even when it “succeeds.”¹³⁸ Even with knowledge of the limitations of rights-based litigation strategies, however, many activists press on because they share a belief that, like all social movement strategies, “litigation is . . . imperfect but indispensable.”¹³⁹

The framing process of the gay and lesbian law reform movement has been widely discussed; as the pro-trans law reform movement has adopted many of the same institutions, it serves as a useful point of comparison.¹⁴⁰ Culminating in the landmark Supreme Court decision in *Obergefell v. Hodges*, the marriage equality movement can be viewed as one of the greatest law reform victories in

132. See NeJaime, *supra* note 130, at 892 (“Frames . . . identify problems, expose responsible parties, and suggest solutions.”); Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 558 n.6 (2019).

133. See sources cited *supra* note 91.

134. See Dangaran, *supra* note 121, at 172–77.

135. See MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at xi–xiii (1987); Jane Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 SO. CAL. L. REV. 1153, 1154 (2018); HANDLER, *supra* note 91, at 1.

136. See, e.g., STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 3–10 (1974) (warning against the “myth of rights,” which diverts attention and drains resources from power-building); Tushnet, *supra* note 117, at 24–26 (1993) (explaining how rights-based legal strategy can impede progressive social change); see also GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 1–11 (1992) (calling on the legal profession to rethink movement strategies and center community over formal rights); Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 942–59 (2007) (cataloging the criticisms of rights strategies).

137. See Jeffrey Kosbie, *Donor Preferences and the Crisis in Public Interest Law*, 57 SANTA CLARA L. REV. 43, 46 (2017); Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 605 (2009) (explaining that “money matters: how public interest law is financed affects the kinds of cases that can be pursued and their likely social impact”).

138. See Cummings & Rhode, *supra* note 137, at 608; Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 370 (1982).

139. Cummings & Rhode, *supra* note 137, at 604 (further explaining that “[o]ur challenge is to increase [impact litigation’s] effectiveness through better understanding of its capacities and constraints”).

140. See Dangaran, *supra* note 121, at 172–77.

social movement history. Despite its successes, many have critiqued the mainstreaming and assimilationist strategies of the marriage equality movement.¹⁴¹ The decision to adopt marriage as a political goal was hotly contested¹⁴² and critiqued¹⁴³ within law reform organizations. So, too, was the choice to focus on the “perfect plaintiffs”¹⁴⁴ and to present gay and lesbian people as assimilated and mainstream.¹⁴⁵

The pro-trans law reform movement is in the midst of a framing debate of its own. While the debate is far from settled, many law reform actors—movement lawyers, in particular—have adopted assimilationist framing strategies.¹⁴⁶ Strategic framing aligned with the assimilationist current defines the movement’s goal as trans people’s inclusion within mainstream society—and describes trans people in binary and undisruptive terms.¹⁴⁷ Legal advocates’ choices to rely on the gender binary can be seen *either* as a reflection of genuine essentialist and assimilationist ideas of trans identity, *or* as a strategic choice by

141. See, e.g., MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 165 (2013); Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WIS. L. REV. 441, 470; Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1210 (2016).

142. This conflict was captured in the public debate in OUT/LOOK Magazine between and Lambda Legal’s Executive Director Tom Stoddard, and Lambda Legal’s Legal Director Paula Ettlebrick. Stoddard advocated strongly for the gay rights movement to “aggressively” prioritize legal recognition of same-sex marriages, because marriage is the political issue “most likely to lead ultimately to a world free from discrimination against lesbians and gay men.” Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK 9, 10, 12 (1989). Ettlebrick responded with equal conviction, arguing that “marriage will not liberate us as lesbians and gay men. In fact, it will constrain us, make us more invisible, force our assimilation into the mainstream, and undermine the goals of gay liberation . . . [which include] the realignment of power imbalances among individuals and classes of people in society.” Paula Ettlebrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK 14 (1989).

143. SPADE, *supra* note 93, at 31 (“Since the availability of marriage does not protect straight people of color, poor people, indigenous people, prisoners, or people with disabilities . . . it is unlikely to do so for queer poor people, queer people of color, queer indigenous people, queer prisoners, and queer people with disabilities.”).

144. Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 153–54 (2015).

145. George, *supra* note 132, at 559 (describing plaintiffs as “heterosexual[] in all but the gender of their sexual partner”).

146. *Id.* (“Much as they once did for gay and lesbian rights, LGBT rights groups have tended to adopt the most assimilationist posture possible, in that the transgender individuals they feature in campaign materials are all-but-fully transitioned, conventionally attractive men and women.”).

147. *Id.* at 555 (describing how, in ballot measure campaigns, in order “[t]o persuade voters to maintain gender identity antidiscrimination protections, LGBT rights campaigns presented trans identity in a specific, but limited, way. These campaigns emphasized gender-conforming transgender individuals—those who adhere to male and female stereotypes—and thereby implicitly reinforced the gender binary.”).

ambivalent utilitarians to articulate identity in language that may be received favorably in federal court.¹⁴⁸ In practice, both are at play.¹⁴⁹

1. Framing Sex

Within trans rights litigation, “sex” is a divisive and decisive word.¹⁵⁰ Anti-trans advocates generally characterize “sex” as a biological phenomenon with two mutually opposed subjects, male and female, which are defined by fixed, stable, and immutable physiological traits.¹⁵¹ The anti-trans movement uses these definitions to attempt to deny trans people legal rights, access, and autonomy.

For example, in so-called “bathroom claims” under Title VII and Title IX, anti-trans conservatives effectively weaponize fear of the non-normative by emphasizing the threat of “male” predators in “female” bathrooms.¹⁵² They characterize trans people as “perverts and freaks and violent and incomprehensible . . . who are, at the very base of it all, rapist men in dresses.”¹⁵³ Trans plaintiffs notoriously fail to win these claims in court.¹⁵⁴

Facing this transphobic rhetoric, pro-trans advocates understand it is advantageous to rely on normative, assimilationist, and biological characteristics when defining sex and trans identity.¹⁵⁵ Advocates go out of their way to counter the conservative narrative. For example, when some pro-trans law reform organizations mobilized for equality ballot initiatives, they adopted a “hearts and

148. See, e.g., Jeremiah A. Ho, *Queer Sacrifice in Masterpiece Cakeshop*, 31 YALE J.L. & FEMINISM 249, 249 (2020) (discussing how the Supreme Court “has been more willing to accommodate gay individuals who appear more assimilated and respectable . . . than LGBTQ individuals who are less ‘mainstream’ and whose exhibited queerness appear threatening to the heteronormative status quo”).

149. Chase Strangio, detailing the process of building a strategy that advances trans interests, identified the necessity of “having to merge a lot of people’s views of those things. It can be brutal. Each sentence gets rewritten fifty times.” Gessen, *supra* note 119.

150. See Sudai, *supra* note 7, at 425.

151. See *infra* notes 295, 322–23 and accompanying text.

152. Amicus briefs expressed the most blatant anti-trans rhetoric. See, e.g., Brief of Amici Curiae Women’s Liberation Front and Family Policy Alliance in Support of Petitioner at *2, Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 192762 (“[W]omen will lose their physical privacy and face an increased risk of sexual assault. This redefinition allows *any* man to justify his presence in *any* women-only space simply by uttering the magic words, ‘I identify as a woman[.]’”). One pro-trans activist characterizes the tone and message of conservative anti-trans advocates as such: “I, as an individual person who is writing this letter to you, State Senator, am really worried about my wife and my children being attacked in the bathroom by trans people . . .” Suk, *supra* note 94, at 178–79.

153. Suk, *supra* note 94, at 178–79.

154. See YURACKO, *supra* note 15, at 96; Sudai, *supra* note 7, at 432. For examples of failed bathroom claims from trans plaintiffs, see, for example, *Goins v. W. Grp.*, 635 N.W.2d 717, 723–25 (Minn. 2001); *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 47 (N.Y. App. Div. 2005); and *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1227 (10th Cir. 2007).

155. In the context of ballot measures, some pro-trans legal groups may have adopted assimilationist and conformist approaches to trans rights because “they believe doing so is the most effective way to win the ballot measure contests – and they very well may be correct.” George, *supra* note 132, at 561.

minds” media strategy that emphasized gender normativity and conformity.¹⁵⁶ The promotional videos centered “fully transitioned” trans men and women, for example, displaying a trans man “in a suit and tie as he counseled clients and drafted documents” and a woman in a cocktail dress “pull[ing] cookies out of her kitchen oven.”¹⁵⁷

Judges are the ultimate audience in litigation-based activism. Like the general public, judges may bring their own ignorance, assumptions, or biases to the courtroom.¹⁵⁸ The advocate’s role before a judge is to simultaneously educate, dispel prejudice, and persuade.¹⁵⁹ This creates major constraints on the types of arguments a savvy litigator is willing to make. Attorney Ezra Ishmael Young explained this point in the following way:

The biggest challenge by far is that many judges are unfamiliar with transgender people and harbor the same negative stereotypes that employers contesting coverage have—that transgender people are freakish, their asserted identities as women or men are delusional, gender transition amounts to no more than a change of a person’s external appearance, and a transgender woman in particular is little more than a man in a dress. Left unchecked, negative attitudes about transgender people overly influence outcomes.¹⁶⁰

To counter negative judicial narratives, an alliance has emerged within the pro-trans law reform movement between assimilationist and utilitarian pro-trans advocates, coalescing around certain core framings of sex and gender that emphasize normative and binary trans identities.¹⁶¹ Mainstream pro-trans impact litigation has typically defined “sex” as a combination of a person’s stable “gender identity” and their completed “social transition.”¹⁶² Some of the core definitional assumptions include: (1) sex is comprised of two categories, male and female; (2) a person’s sex, defined by their gender identity, is stable throughout their lifetime; and (3) gender identity has a biological basis comprised of a certain collection of innate traits.¹⁶³ While this definition rejects the anatomical essentialism of anti-trans conservatives, it often relies on an essential, stable, and binary conception of sex and gender.¹⁶⁴ In this view, gender identity need not correspond to anatomical traits, but gender remains binary,

156. Cummings, *supra* note 141, at 470, 472.

157. George, *supra* note 132, at 599 (describing campaign videos from the pro-trans organization Freedom for All Massachusetts).

158. See Charles R. Lawrence II, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 380 (1987).

159. See Nancy D. Polikoff, *Educating Judges About Lesbian and Gay Parenting: A Simulation*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 173, 174–75 (1991) (describing tactics used by lawyers of lesbian and gay parents to educate judges and dispel myths about lesbian and gay parenting).

160. Young, *supra* note 6, at 13–14.

161. See YURACKO, *supra* note 15, at 93–95.

162. See *infra* notes 222–224, 305–328 and accompanying text.

163. See *infra* notes 222–224, 305–328 and accompanying text.

164. See Sudai, *supra* note 7, at 440.

male and female. They agreed, in short, upon “the desirability of the category of ‘sex’” as a winning legal strategy.¹⁶⁵

The strategic adoption of this assimilationist framing leaves little room for expansionist viewpoints that reject the gender binary. To mainstream pro-trans litigation organizations, the queer expansionist perspective may appear irrelevant at best, and a liability at worst. Fronting ideas perceived as “radical” risks an argument’s credibility before a judge; as a result, these ideas are downplayed in judicial-facing arms of the movement. Consequently, fluid, expansive definitions of sex—ones that would encompass nonbinary gender identity and reject immutability—have an uncomfortable role in the mainstream pro-trans legal movement.

To evaluate these tensions, this Section will explore the legal strategies used by pro-trans advocates in two legal contexts. First, this Section will discuss the Supreme Court’s recent decision in *Bostock v. Clayton County*, which resolved the issues raised in the *Harris* litigation and held that discrimination based on a person’s transgender status is sex discrimination under Title VII. Second, this Section will examine identity document litigation, where advocates have long relied on essentialist and assimilationist arguments to best advocate for their clients, but are more recently pushing the envelope with expansionist ideas.

B. *The Fight for Title VII Protection*

1. *The “Sex” Debate in Title VII Litigation*

Congress enacted Title VII as part of the Civil Rights Act of 1964; it states, in relevant part, that it is “an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate . . . , because of such individual’s race, color, religion, sex, or national origin.”¹⁶⁶ Title VII thus prohibits employers from taking adverse actions against an employee “because of” that individual’s “sex.”¹⁶⁷ Congress amended the statute in 1991 to provide for employer liability whenever “sex” was a “motivating factor for any employment practice, even though other factors also motivated the practice.”¹⁶⁸

Since Title VII’s enactment, legal scholars and litigants alike have debated the contours of the definition of “sex,” and there has been a particular lack of

165. *Id.* at 424.

166. 42 U.S.C. § 2000e-2(a)(1).

167. *Id.*

168. *Id.* § 2000e-2(m).

consensus regarding Title VII's applicability to discrimination against trans people.¹⁶⁹

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) is central to the debate over the interpretation and application of Title VII's prohibition against sex discrimination.¹⁷⁰ In *Price Waterhouse*, the four-Justice plurality opinion held that sex stereotyping (i.e., negative employment actions based on assumptions about how a man or a woman *should* behave) had "legal relevance" to Title VII,¹⁷¹ and that "an employer who acts on the basis of [sex stereotypes] has acted on the basis of gender," running afoul of Title VII.¹⁷² The plurality reasoned that, when enacting Title VII, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."¹⁷³ *Price Waterhouse*'s progeny further developed and solidified the "sex stereotyping" theory of Title VII liability.¹⁷⁴

Leading up to *Harris Funeral Homes*, there was a triple split among federal circuit courts regarding how the *Price Waterhouse* sex stereotyping framework applied to cases of anti-trans discrimination under Title VII.¹⁷⁵ The Eighth and Tenth Circuits held that Title VII does *not* extend protections to trans individuals who are discriminated against based on their trans status.¹⁷⁶ In *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007), for example, the Tenth Circuit concluded that "discrimination against a transsexual because she is a transsexual is not 'discrimination because of sex'" and that "transsexuals are not a protected

169. See, e.g., Sudai, *supra* note 7, at 425; Melinda Chow, Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination Under Title VII, 28 HARV. J.L. & GENDER 208-14 (2005); Romeo, *supra* note 15, at 721-22, 740-42; Ilona M. Turner, Sex Stereotyping Per Se: Transgender Employees and Title VII, 95 CALIF. L. REV. 561 (2007); Alex Binsfeld, Transgender Rights: Shifting Strategies in a Changing Nation, 17 HASTINGS RACE & POVERTY L.J. 177 (2020).

170. See Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1338-54 (2014); Zachary R. Herz, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 422-28 (2014).

171. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

172. *Id.*

173. *Id.* at 251 (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

174. See, e.g., *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 79 (1998) (holding that same-sex sexual harassment is actionable under Title VII, even though this was "not the principal evil Congress was concerned with when it enacted Title VII").

175. Compare *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) (holding that discrimination against a trans employee does not violate Title VII), with *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047 (7th Cir. 2017) (holding that discrimination against a trans employee based on their perceived failure to conform to sex stereotypes violates Title IX), and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574-75 (6th Cir. 2018) (holding that discrimination on the basis of transgender status is a per se violation of Title VII), *aff'd sub. nom. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

176. See *Etsitty*, 502 F.3d at 1221; see also *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam) (concluding that "discrimination based on one's transsexualism does not fall within the protective purview of [Title VII].").

class under Title VII.”¹⁷⁷ According to these circuits, the plain meaning of “sex” under Title VII is the “binary conception” of “male and female,” and does not include a person’s gender identity.¹⁷⁸ In this view, under “the *Price Waterhouse* theory of protection,” any trans woman would have to bring a Title VII claim as “a man who fails to conform to sex stereotypes,” as opposed to as a trans woman.¹⁷⁹ To seek legal remedy under this theory, trans people would be forced to portray themselves in a derogatory manner. As a result, many would likely refrain from legal remedies altogether.

A second group of circuit courts, including the First, Third, Seventh, and Ninth Circuits, expressly recognized a Title VII cause of action under *Price Waterhouse* for trans employees discriminated against based on their failure to conform to stereotypical gender norms.¹⁸⁰ For example, the Seventh Circuit reasoned in *Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034, 1047 (7th Cir. 2017) that because discrimination against trans people is “[b]y definition” based on the individual’s failure to “conform to . . . sex-based stereotypes” of how a woman or a man should properly behave, such discrimination always amounts to unlawful sex stereotyping under Title VII.¹⁸¹ Before *Bostock* was decided, activists had recognized this framework as the most promising theory for operationalizing gender expansionism in the legal context.¹⁸²

Until 2017, the Sixth Circuit fell into this second category.¹⁸³ In *Harris Funeral Homes*, however, the Sixth Circuit held that being transgender (or being in the process of transitioning) is a protected status under Title VII, not only because discrimination against trans people violates the *Price Waterhouse* sex stereotyping principles,¹⁸⁴ but also because trans discrimination is per se sex

177. *Etsitty*, 502 F.3d at 1222.

178. *Id.*; *see also Sommers*, 667 F.2d at 749 (“[T]he Court does not believe that Congress intended by its laws prohibiting sex discrimination to require the courts to ignore anatomical classification and determine a person’s sex according to the psychological makeup of that individual.”).

179. *Id.* at 1224.

180. *See, e.g., Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262–64 (3d Cir. 2001); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 580–81 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874–75 (9th Cir. 2001).

181. *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048–49 (7th Cir. 2017); *see also Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (holding that “[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII,” and that “under *Price Waterhouse*, ‘sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and gender”).

182. *See Herz, supra* note 170, at 422–28.

183. *See, e.g., Smith v. City of Salem*, 378 F.3d 566, 572–73 (6th Cir. 2004) (holding that trans employees are protected from discrimination based on the sex stereotyping theory of *Price Waterhouse*, which “eviscerated” earlier Title VII jurisprudence); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (applying *Smith* and holding that discrimination based on gender nonconformity violated Title VII “irrespective of the cause of that behavior”).

184. *Smith*, 378 F.3d at 576 (“[D]iscrimination against transgender persons necessarily implicates Title VII’s proscriptions against sex stereotyping.”).

discrimination: “We . . . hold that discrimination on the basis of transgender and transitioning status violates Title VII.”¹⁸⁵ As the court reasoned, it is “analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex.”¹⁸⁶ In short, the meaning of “sex” in Title VII includes trans status.

Harris Funeral Homes appealed the Sixth Circuit’s decision in a writ of certiorari to the Supreme Court,¹⁸⁷ and, in April 2019, the Supreme Court granted the writ alongside a pair of cases that raised similar questions related to Title VII discrimination based on sexual orientation.¹⁸⁸ The three cases were consolidated under *Bostock v. Clayton County*.¹⁸⁹

2. *Definitions of Sex in the Harris Funeral Homes Litigation*

In *Harris Funeral Homes*, the Supreme Court intended to resolve whether Title VII prohibits discrimination against trans individuals, either as a form of per se sex discrimination or as impermissible “sex stereotyping” under *Price Waterhouse*.¹⁹⁰ The plaintiff, Aimee Stephens, had worked as a funeral director for R.G. and G.R. Harris Funeral Homes, a regional chain of funeral homes in Michigan, for over five years.¹⁹¹ Despite knowing she was a woman since childhood, Ms. Stephens continued to present as male for much of her adult life.¹⁹² In 2013, Ms. Stephens wrote a letter to her supervisor and co-workers announcing that she would begin living as a woman.¹⁹³ She wrote:

What I must tell you is very difficult for me and is taking all the courage I can muster. I have felt imprisoned in a body that does not match my mind, and this has caused me great despair and loneliness . . . I will return to work as my true self, Aimee Australia Stephens, in appropriate business attire. I hope we can enjoy it together. It is my wish that I can continue my work at R.G. and G.R. Harris Funeral Homes doing what I always have, which is my best!¹⁹⁴

185. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 574–75 (6th Cir. 2018).

186. *Id.* at 575.

187. Petition for Writ of Certiorari, *Harris*, 139 S. Ct. 2049 (No. 18-107).

188. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

189. *Id.*

190. According to the Supreme Court’s grant of certiorari on April 22, 2019, the questions presented were limited to the following 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).” Order Granting Certiorari, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 2049 (No. 18-107), <https://www.supremecourt.gov/qp/18-00107qp.pdf> [<https://perma.cc/4KL6-5V75>].

191. Brief for Respondent Aimee Stephens at 3, *Harris*, 139 S. Ct. 2049 (No. 18-107).

192. *Id.* at 6.

193. Appendix to Brief in Opposition of Writ of Certiorari at 5, *Harris*, 139 S. Ct. 2049 (No. 18-107).

194. *Id.*

She was fired two weeks later.¹⁹⁵ When asked in court for the specific reason he fired Ms. Stephens, her supervisor said: “Well, because he – he was no longer going to represent himself as a man. He wanted to dress as a woman.”¹⁹⁶

To summarize the positions of each party: in the Supreme Court, petitioners argued that Harris Funeral Home was within its rights to fire Ms. Stephens because she was transitioning, since discrimination against trans people is not covered under Title VII based on either a per se sex discrimination or sex stereotyping theory of liability.¹⁹⁷ The ACLU’s briefs argued that firing Ms. Stephens due to her trans identity violates Title VII because it necessarily involves sex stereotyping, making sex a but-for cause of the adverse employment action.¹⁹⁸

Anticipating that the conservative-majority Supreme Court would not be sympathetic to identity-based arguments, the ACLU’s briefing avoided explicitly defining “sex”.¹⁹⁹ They wrote:

[T]his case does not require the Court to decide whether the term “sex” in 1964 included gender identity. Ms. Stephens prevails even if “sex” is limited to the definitions proposed by Harris Homes and the United States, namely “a person’s status as male or female as objectively determined by anatomical and physiological factors, particularly those involved in reproduction,” or “[the] physiological distinction[]’ between ‘male and female.’”²⁰⁰

The definition of “sex” was technically uncontested; nevertheless, the definitions of sex, gender, and trans status were a major point of debate in both the briefing and oral argument.²⁰¹ This debate reflects the significance of framing the pro-trans legal movement with a judicial objective in mind.

195. Joint Appendix at 54, *Harris*, 139 S. Ct. 2049 (No. 18-107).

196. *Id.*

197. See Brief for Petitioner at 2–3, *Harris*, 139 S. Ct. 2049 (No. 18-107).

198. *Id.*

199. Brief for Respondent Aimee Stephens at 16, *Harris*, 139 S. Ct. 2049 (No. 18-107) (“[E]ven assuming arguendo that gender identity is not encompassed within the term “sex” in Title VII, and that Ms. Stephens’s female gender identity was an additional but-for cause of her firing, her male assigned sex at birth was a but-for cause of her discharge and that is sufficient to establish liability under Title VII.”).

200. *Id.* at 24 (internal quotations and citations omitted).

201. See Brief for Petitioner at 23, *Harris*, 139 S. Ct. 2049 (No. 18-107); Brief for Federal Respondent in Opposition at 17, *Harris*, 139 S. Ct. 2049 (No. 18-107); Transcript of Oral Argument at 46–49, *Harris*, 139 S. Ct. 2049 (No. 18-107). For more on the debate of these definitions, see Brief of Kenneth B. Mehlman et al. as Amici Curiae Supporting Employees, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020); Brief of Am. Med. Ass’n et al. as Amici Curiae Supporting Employees, *Bostock*, 140 S. Ct. 1731 (2020); Brief of Nat’l Med. and Pol’y Grps. That Study Sex and Gender Identity as Amici Curiae Supporting Employers, *Harris*, 139 S. Ct. 2049 (No. 18-107); Brief of the Transgender L. Ctr. et al. as Amici Curiae Supporting Employees, *Harris*, 139 S. Ct. 2049 (No. 18-107); Brief of the Women’s Liberation Front as Amicus Curiae Supporting Petitioner, *Harris*, 139 S. Ct. 2049 (No. 18-107).

Indeed, the Supreme Court Justices' questions at oral argument indicated a nebulous discomfort with trans people in general, and gender deviance in particular. Within minutes of the opening statements, Chief Justice John Roberts shifted the conversation to gender non-conformity and sex segregated spaces, a question that was not before the Court.²⁰² Justice Neil Gorsuch also expressed concern over the "drastic" changes and "massive social upheaval" that would follow any pro-trans decision,²⁰³ citing the end of sex-differentiated dress codes and sex-segregated bathrooms as examples.²⁰⁴ Even the more liberal Justices on the Court demonstrated a discomfort with gender deviance. Justice Sonia Sotomayor, for example, expressed concern for the cis women who "are made uncomfortable" and feel "intruded upon" when a trans woman "who still ha[s] male characteristics" uses a women's bathroom.²⁰⁵ She asked: "[H]ow do we deal with that?"²⁰⁶ While Justice Sotomayor emphasized that the trans woman was "rightly . . . identifying as a woman," she appeared to still be concerned with trans people who obviously and visibly deviate from the gender binary.²⁰⁷

The petitioners, on behalf of Harris Funeral Homes, argued that "sex" under Title VII was, and still remains, a trans-exclusionary term, and their arguments relied on familiar conservative definitions of sex, gender, and transgender status.²⁰⁸ According to the petitioners, transgender status—characterized by "a discrepancy between biological sex and gender identity"—is excluded from the legal definition of "sex."²⁰⁹ At the time Title VII was adopted, petitioners argued, the ordinary meaning of "sex" was "biological sex," defined as "the physiological distinction between male and female."²¹⁰ In this view, a person's

202. Chief Justice Roberts asked the ACLU how it would analyze a situation where a transgender individual objects on the basis of wanting to use a bathroom consistent with their "gender identity, rather than biological sex." Transcript of Oral Argument at 6, *Harris*, 139 S. Ct. 2049 (No. 18-107). He wanted to know whether the ACLU would analyze it as "affecting based on the transgender status" or "on the basis of biological sex." *Id.*

203. *Id.* at 24, 26.

204. *Id.* at 24.

205. *Id.* at 10–11.

206. *Id.*

207. A few moments later, Justice Sotomayor reiterated and asked how a "reasonable woman" might feel if a "man" were to use the women's bathroom. *Id.* at 12. While the phrasing is ambiguous, it seems as if the "man" she referred to is the trans woman from the hypothetical. *See id.* at 11.

208. Petitioner's filings defined "sex" variously as "the status of male or female as determined by reproductive biology," Brief for Petitioner at 23, *Harris*, 139 S. Ct. 2049 (No. 18-107), "a person's status as male or female as objectively determined by anatomical and physiological factors, particularly those involved in reproduction," Petition for Writ of Certiorari at 6, *Harris*, 139 S. Ct. 2049 (No. 18-107), and "[the] physiological distinction[]" between 'male and female,'" Brief for Federal Respondent in Opposition at 17, *Harris*, 139 S. Ct. 2049 (No. 18-107).

209. Brief for the Federal Respondent Supporting Reversal at 20, *Harris*, 139 S. Ct. 2049 (No. 18-107) (emphasis in original).

210. Brief for the Federal Respondent Supporting Reversal at 17, *Harris*, 139 S. Ct. 2049 (No. 18-107) (quoting *Sex*, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2296 (2d ed. 1958) (*Webster's Second*) (internal quotations omitted)); *see also* Brief for

sex—their “status” as male or female—is an “objective fact” based in reproductive anatomy and physiology;²¹¹ it does not include identity²¹² and cannot be altered even through gender reassignment surgery.²¹³

The petitioners’ definition of sex not only excluded trans people from legal protection; it invalidated their existence.²¹⁴ Ms. Stephens, they asserted, was not a woman, but “a biological male” who was “dress[ing] as a . . . female.”²¹⁵ In an amicus brief on behalf of petitioner, the Women’s Liberation Front said: “Simply, Aimee Stephens is a man [who] wanted to wear a skirt while at work.”²¹⁶ Other anti-trans advocates in amici briefs repeatedly referenced expansionist understandings of gender in negative terms²¹⁷ and argued that

Petitioner at 19, *Harris*, 139 S. Ct. 2049 (No. 18-107) (“In common, ordinary usage in 1964, the word “sex” meant biologically male or female, based on reproductive organs.”) (citing WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (College ed. 1962); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1969)); Petition for a Writ of Certiorari at 15–16, *Harris*, 139 S. Ct. 2049 (No. 18-107) (Employers favorably citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (defining the “plain meaning of ‘sex’” as the “binary conception” of “male and female”) and *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748–49 (8th Cir. 1982) (per curiam) (defining sex according to “anatomical classification” as opposed to “the psychological makeup of that individual”).

211. In the Solicitor General’s brief addressing a potential grant of certiorari, sex is defined variously as “[o]ne of the two divisions of organisms formed on the distinction of male and female;” “[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism;” “the distinctive function of the male or female in reproduction;” and based on “physiological distinctions.” Brief for the Federal Respondent in Opposition at 17–18, *Harris*, 139 S. Ct. 2049 (No. 18-107) (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2296 (2d ed. 1958) (*Webster’s Second*) (internal quotations omitted)).

212. *Id.* at 18. The petitioner’s cert petition further describes “gender identity” as “a subjective belief determined by internal perceptions without a fixed external referent.” Petition for Writ of Certiorari at 30, *Harris*, 139 S. Ct. 2049 (No. 18-107) (internal quotations omitted).

213. In the petition for a writ of certiorari, R.G. & G.R. Harris Funeral Homes stated that binary sex categories are based on discernable anatomical traits like chromosomes, gonads, and external genitalia. Petition for Writ of Certiorari at 30, *Harris*, 139 S. Ct. 2049 (No. 18-107) (“[S]ex views the status of male and female as an objective fact based in reproductive anatomy and physiology.”).

214. See Brief for the Federal Respondent in Opposition at 3, *Harris*, 139 S. Ct. 2049 (No. 18-107) (quoting Ms. Stephens’ former boss, who said he refused to “support[] the idea that sex is a changeable social construct rather than an immutable God-given gift”) (internal citation omitted).

215. Brief for the Federal Respondent Supporting Reversal at 34, *Harris*, 139 S. Ct. 2049 (No. 18-107).

216. Brief of Women’s Liberation Front as Amicus Curiae Supporting Petitioner at 5, *Harris*, 139 S. Ct. 2049 (No. 18-107).

217. See, e.g., Brief of Nat’l Med. and Pol’y Grps. That Study Sex and Gender Identity as Amici Curiae Supporting Employers at 11–12, 38, *Harris*, 139 S. Ct. 2049 (No. 18-107) (explaining that some trans people “identify their gender as falling outside the binary constructs of ‘male’ and ‘female,’ to include ‘androgynous, multigendered, gender nonconforming, third gender, and two-spirit,’” and describing how gender variance has “negative repercussions” including medical risks, comorbidity with mental illness, and detransitioning) (internal quotations omitted).

horrible things would come if the Court were to embrace such a definition.²¹⁸ Petitioner's statements at oral argument mirrored these beliefs.²¹⁹

In contrast, the ACLU's briefs defined sex, gender identity, and trans status in broad terms. In an apparent attempt to balance their rhetoric between effectively speaking to a socially conservative Supreme Court and remaining inclusive of a broad range of trans identities and expressions, the ACLU's briefs delicately avoided definitions of sex, gender identity, and trans status that explicitly included or excluded expansionist identities and concepts.²²⁰ That said, the ACLU still relied on some mainstreaming, assimilationist, and rights-based logic that would appeal to the Justices.²²¹ For example, the ACLU defined the term "transgender" as follows: "By definition, a transgender person is someone who *lives* and *identifies* with a sex different than the sex assigned to the person at birth."²²² Read one way, this definition is binary and assimilationist—i.e., trans people live as and identify with the opposite sex. Read another way, this definition is inclusive of a broader range of identities—i.e., trans people live as and identify with a "different" sex, which can include a myriad of possibilities. This definition has two main elements that rely on familiar assimilationist concepts of immutability and medicalization: first, *identifying with* a particular sex (i.e., gender identity) and second, *living as* a member of that sex (i.e., social transition).

In a nod to the assimilationist current, the ACLU's briefs defined "gender identity" as an immutable element of self-knowledge: "Gender identity is not a whim, but a fundamental sense of self that cannot be voluntarily altered."²²³ This contrasts with the expansionist idea that gender is socially constructed and fundamentally performative. The briefs did not mention the possibility that trans

218. Brief of Women's Liberation Front as Amicus Curiae Supporting Petitioner at 2 ("Legally redefining 'female' as anyone who claims to be female results in the erasure of female people as a class. If, as a matter of law, anyone can be a woman, then *no one* is a woman, and sex-based protections in the law have no meaning whatsoever."); *id.* at 7 ("[R]equiring the R.G. and G.R. Harris Funeral Homes to recognize Aimee Stephens as a woman would result in compelled speech, in violation of the First Amendment to the U.S. Constitution.").

219. *See, e.g.*, Transcript of Oral Argument at 29–30, *Harris*, 139 S. Ct. 2049 (No. 18-107) ("First, my friend's but-for test would mean that a women's overnight shelter must hire a man who identifies as a woman to serve as a counsellor to women who have been raped, trafficked, and abused and also share restroom, shower, and locker room facilities with them. That is because, but for the man's sex, he would be allowed to — to hold that job and to use those facilities."); *id.* at 38 ("Their position is that it's stereotyping not to treat the man who identifies as a woman as a woman . . . All of the distinctions between men and women are gone forever."); *id.* at 45 ("Gender identity is a broad concept. You could have a male employee who identifies as a woman but doesn't dress as a woman, looks like a man, showing up in the shower and the locker room, and, again, the employer wouldn't be able to do anything about that . . .").

220. *See* Brief for Respondent Aimee Stephens at 16, *Harris*, 139 S. Ct. 2049 (No. 18-107).

221. *See id.*

222. *See* Reply Brief for Respondent Aimee Stephens at 4–5, *Harris*, 139 S. Ct. 2049 (No. 18-107) (citing Amici Brief of Am. Med. Ass'n as not using the term "biological sex," and instead use "sex assigned at birth").

223. *Id.* at 19.

people may identify as nonbinary, intersex, genderfluid, or any other self-determined gender, but neither did they explicitly state that trans people must only identify as a man or a woman. The ACLU's briefs defined "social transition," an aspect of the "medical treatment" for gender dysphoria, and said that it includes altering one's "name, pronouns, appearance, and dress" to conform to the conventions of the sex with which that person identifies.²²⁴ Again, the briefs did not explicitly articulate the range of what a social transition may look like; a reader could assume the briefs refer to a binary "transition" from male to female or female to male, or to a wide range of identities and expressions.

The ACLU's delicate treatment of sex and gender in their briefs was lost in oral arguments. Throughout the proceedings, David Cole, National Legal Director and oralist for the ACLU, continuously emphasized that a decision in favor of the plaintiff Aimee Stephens would not unsettle the gender binary.²²⁵ There would be, he asserted, no massive social "upheaval,"²²⁶ no threat to "dress codes and sex-segregated restrooms."²²⁷ This language did not come from thin air but was a direct response to the conservative characterization of trans identity.²²⁸ In contrast with the submitted briefs, which were careful not to use language that would lead to exclusion, Cole impressed upon the Justices that the ACLU's position represented an assimilationist, non-disruptive definition of trans identity. He explicitly said: "Transgender people follow the rule that's associated with their gender identity. It's not disruptive."²²⁹ He went on to emphasize that trans people can and do fully assimilate, pointing, for example, to his colleagues—the "transgender male lawyers in this courtroom" who were "following the male dress code and going to the men's room."²³⁰ Then he declared that "the Court's dress code and sex-segregated restrooms have not fallen."²³¹ In short, Cole presented trans people as "perfect plaintiffs," completely assimilated into the mainstream.²³² Perhaps because he thought it would play better with the Justices, Cole framed trans identity in a way that would allow the Justices to think of Ms. Stephens as an "insufficiently masculine" man.²³³

The ACLU's framing of "sex" and "gender" in the *Harris Funeral Homes* litigation reflects both the strategic alliance and continuing tension between advocates who believe in the assimilationist model of trans identity, advocates

224. *Id.* at 20.

225. See Transcript of Oral Argument at 4, *Harris*, 139 S. Ct. 2049 (No. 18-107) (asserting that the plaintiff was not "ask[ing] this Court to redefine or, in Judge Posner's words, update sex").

226. *Id.* at 27.

227. *Id.*

228. See *supra* notes 210–18 and accompanying text.

229. *Id.*

230. *Id.*

231. *Id.*

232. Godsoe, *supra* note 144, at 153–54.

233. Transcript of Oral Argument at 28, *Harris*, 139 S. Ct. 2049 (No. 18-107) ("[B]ut my client can be fired for being insufficiently masculine?").

who wish to expand the concept of gender identity itself, and those ambivalent utilitarians who understand that they must describe trans identity in a particular way to win. In *Harris Funeral Homes*, the mainstreaming frame adopted by this alliance served an important purpose. It was tailored to their audience: nine Supreme Court Justices who may not understand even the basics of trans identity, or who may hold similar prejudices to the ones expressed by the employers.²³⁴

Whatever the downsides of the ACLU's strategy, it worked for the Supreme Court. Justice Gorsuch wrote a strictly textualist opinion,²³⁵ focusing on the simple meaning of the phrase "because of sex" in Title VII,²³⁶ which, at bottom, both ensured protection for trans workers under Title VII *and* avoided getting into the business of developing particularized definitions of sex and gender. While Justice Gorsuch acknowledged that there was an active debate regarding the definition of "sex" within Title VII,²³⁷ he declined to officially take a stand and explicitly define sex.²³⁸ Critically, Justice Gorsuch noted that "nothing in our approach to these cases turns on the outcome of the parties' debate" over the definition of sex.²³⁹ Taking a cue from the ACLU, Justice Gorsuch accepted the employer's narrow definition of sex for the sake of argument²⁴⁰ and proceeded to analyze whether the phrase "because of sex," taken together, protects people discriminated against at work based on their trans status.²⁴¹

Justice Gorsuch found that it does, writing that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."²⁴² He reasoned that sex discrimination occurs whenever sex is a "but-for" cause of a negative employment decision,

234. See Young, *supra* note 6 (footnotes omitted).

235. Some conservative commentators were displeased with this use of textualism. See J. Remy Green and Akiva M. Cohen, *Taking Stock of Bostock: Reactions on the Right*, ARC DIGITAL MEDIA (June 30, 2020), <https://arcdigital.media/taking-stock-of-bostock-reactions-on-the-right-af3a8e57f64> [<https://perma.cc/Z25Z-N5JH>].

236. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) ("The only statutorily protected characteristic at issue in today's cases is 'sex'—and that is also the primary term in Title VII whose meaning the parties dispute.").

237. Justice Gorsuch observed that, on the one hand, employers argued that "sex" referred to "status as either male or female [as] determined by reproductive biology," while on the other hand, the employees argued that the term "bore a broader scope" than simple anatomical categorization, and "reach[ed] at least some norms concerning gender identity." *Id.*

238. The Court avoids proposing its own definition of "transgender," suggesting only that the definition of "transgender" must contain some reference to "man, woman, or sex." The Court writes:

There is no way for an applicant to decide whether to check the . . . transgender box without considering sex. To see why, imagine an applicant doesn't know what the word[] . . . transgender mean[s]. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done.

Id. at 1746.

239. *Id.* at 1739.

240. *Id.* ("[B]ecause the employees concede the point for argument's sake, we proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female.").

241. *Id.*

242. *Id.* at 1741.

explaining that, “[i]f changing the employee’s sex would have yielded a different choice,” the employer has run afoul of Title VII.²⁴³ Justice Gorsuch used the following example to illustrate how, when framed in the above terms, discrimination against a trans person must run afoul of Title VII’s prohibition on discrimination because of sex: if an employer fires a trans woman for being a woman, but does not fire a cis woman for being a woman, “the employer intentionally penalizes a person identified as male at birth for *traits or actions* that it tolerates in an employee identified as female at birth.”²⁴⁴ In this example—and in all instances of trans discrimination—the employee’s sex assigned at birth “plays an unmistakable and impermissible role in the discharge decision.”²⁴⁵

While the pro-trans legal movement’s choice of argumentation was ultimately successful, some also see downsides. Framing can be generative—it can help movements define their constituents, identify problems, and motivate for change—but it also can perpetuate line-drawing.²⁴⁶ To some in the pro-trans movement, the legal move of accepting *arguendo* the conservative definition of sex was insensitive and exclusionary; they believed that there was a stronger textualist argument available to the plaintiffs that did not require conceding to the conservative definition.²⁴⁷

Numerous observers saw a missed opportunity to make strong dignitary arguments that show respect to trans people and their experiences.²⁴⁸ According to attorney and activist Ezra Ishmael Young, the best way to overcome bias through litigation is to “teach courts about who transgender people actually are, tell their stories, and take every available opportunity to affirm the lived experience of the client and underscore her right to be treated with equal dignity and respect.”²⁴⁹ Alexander Chen, the founding Director of the LGBTQ+ Advocacy Clinic at Harvard Law School, saw a failure to do this by the ACLU, particularly in oral argument, where instead of describing Aimee Stephens as a trans woman deserving of protection, Cole described her “as an ‘insufficiently masculine’ man who was fired for not adhering to male stereotypes.”²⁵⁰ Journalist Masha Gessen observed that “Cole’s reassurance that trans people, if granted full civil rights, would behave appropriately—would remain more or less invisible—had a tinge of humiliation.”²⁵¹

243. *Id.*

244. *Id.* (emphasis added).

245. *Id.* at 1741–42.

246. *See generally* Young, *supra* note 6 (detailing the textualist and dignitary arguments the ACLU could have made on behalf of Aimee Stephens).

247. *See id.*

248. *See* Chen, *supra* note 6; Young, *supra* note 6, at 13–14.

249. Young, *supra* note 6, at 13–14.

250. *See* Chen, *supra* note 6.

251. Masha Gessen, *Chase Strangio’s Victories for Transgender Rights*, NEW YORKER (Oct. 19, 2020), <https://www.newyorker.com/magazine/2020/10/19/chase-strangios-victories-for-transgender-rights> [<https://perma.cc/TK9L-QDW6>].

In addition, the assimilationist framing used in the *Harris Funeral Homes* litigation was likely unappealing to those uncompromising queer expansionists who want to explode the gender binary altogether. Some activists in the expansionist camp may see little benefit to this type of symbolic victory, which absorbed numerous resources and significant movement energy, and which may never actually benefit the most marginalized.²⁵² Others may worry that the victory itself may have negative downstream consequences for some elements in the pro-trans legal movement—particularly that the victory may have prompted conservative counter-organizing.²⁵³

Because of the multiple, diverse philosophies embedded in the movement, there is no way one legal strategy could possibly serve all motives. Chase Strangio, an ACLU lawyer involved in the litigation, described the process of building a strategy that advanced varying interests. Strangio explained that the attorneys had to “merge a lot of people’s views,” and noted that the process “can be brutal. Each sentence gets rewritten fifty times.”²⁵⁴

C. *The Fight for Identification*

Binary definitions of sex and gender are subject to debate in another legal context: access to state identification documents. Here, as in the context of access to public welfare, more generally, it is actively harmful to tie distribution of legal goods²⁵⁵ to expectations of normative, binary, and non-disruptive gender identity and expression.²⁵⁶ The reason for this is simple: binary gender assumptions lead to state-imposed requirements of medical transition or genital surgery.

Access to state identification is essential for trans people, but municipal governments impose restrictions on people seeking to change the gender marker on formal identification documents.²⁵⁷ Requirements range from a simple self-attested declaration, to a doctor’s note, to a formal court order.²⁵⁸ In the most conservative jurisdictions, trans people are barred from obtaining an accurate state ID unless they furnish proof of surgery.²⁵⁹ Because “most people do not or

252. See Tushnet, *supra* note 117, at 26.

253. See Gessen, *supra* note 251.

254. *Id.*

255. See sources cited *supra* note 129.

256. See Romeo, *supra* note 15, at 716 (“Public relief systems actively regulate gender. Many of the institutions through which public aid is administered are sex segregated or involve the perpetuation of traditional and stereotypical sex roles. This creates a dual barrier for transgender people, who are frequently in need of these services because of their socially marginalized status, but are unable to safely and effectively access the services because of their failure to conform to the hyper-normative gender requirements imposed by the institutions.”).

257. *Equality Maps: Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/identity_document_laws [https://perma.cc/S7VJ-L9RA].

258. *Id.*

259. See Dean Spade, Gabriel Arkles, Phil Duran, Pooja Gehi & Huy Nguyen, *Medicaid Policy & Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 SEATTLE J. FOR SOC. JUST. 497, 498–99 (2010).

cannot undergo surgery,” this type of requirement blocks trans peoples’ access to basic necessities.²⁶⁰

This Section discusses the strategies activists and legal workers adopt to both help people access identification documents in the short-term and challenge discriminatory document policies in the long-term. Activists understand that accurate identification documents are essential for trans people to access the benefits of mainstream society.²⁶¹ When supporting clients seeking accurate ID, legal workers often utilize assimilationist strategies and emphasize binary gender expressions. From a gender expansionist viewpoint, this reliance on assimilationist strategies has major downsides; however, purely gender expansionist tactics that fully reject government regulation of gender lack practical traction in the present political reality.

Activists aligned with the ambivalent utilitarian current grapple with the benefits and drawbacks of each strategy. Here, as in the Title VII context, advocates have successfully relied on assimilationist strategies to achieve incremental political goals. Significantly, by aligning with binary concepts of sex and gender, many trans individuals are able to secure accurate identification documents in more conservative jurisdictions that require a court order or doctor’s certification.²⁶² As a long-term political goal, many pro-trans legal organizations oppose medical requirements and advocate instead for a policy of self-attestation, where individuals formally certify to their own gender without a doctor’s note or court order.²⁶³ In jurisdictions where this is not feasible, many activists opt to promote a liberalized medical certification policy.²⁶⁴ Still, other pro-trans legal organizations are pushing beyond the binary, advocating for a third gender marker, such as “X.”²⁶⁵ Each of these policy goals can be understood as strategic ideological compromise. Consistently, of course, individuals must use whatever legal regime they find themselves in to advocate for their own needs.

260. *Id.* at 499.

261. Andrew Cray & Jack Harrison, *ID Accurately Reflecting One’s Gender Identity Is a Human Right*, CTR. FOR AM. PROGRESS (Dec. 18, 2012), <https://www.americanprogress.org/article/id-accurately-reflecting-ones-gender-identity-is-a-human-right/> [<https://perma.cc/8JG8-K8HM>].

262. *See Equality Maps*, *supra* note 257; *Summary of State Birth Certificate Gender Change Laws*, NAT’L CTR. FOR TRANSGENDER EQUAL. (updated Apr. 2020), <https://transequality.org/sites/default/files/images/Summary%20of%20State%20Birth%20Certificate%20Laws%20Apr%2028%202020.pdf> [<https://perma.cc/W87N-68EZ>].

263. *See* Koenig, *supra* note 14, at 629; Laura K. Langley, Note, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. ON C.L. & C.R. 101, 102 (2006); *see also* GLAD, GLAD COMMENTS ON CHANGES TO 10-146 CODE OF MAINE RULES CHAPTER 16, “GENDER MARKER ON BIRTH RECORD RULE” 3–4, 6, 8 (Mar. 9, 2020) (recommending a gender marker modification process based on individual self-attestation); *About SRLP*, SYLVIA RIVERA L. PROJECT, <https://srlp.org/about> [<https://perma.cc/CLS6-NYUM>] (noting that the organization “works to guarantee that all people are free to self-determine their gender and expression”).

264. *See Equality Maps*, *supra* note 257; *Summary of State Birth Certificate Gender Change Laws*, *supra* note 262.

265. *Equality Maps*, *supra* note 257.

1. *Accurate State-Issued Identification Documents are Essential*

Having a state-issued identification document that accurately reflects one's gender is a matter of dignity, participation, and, most importantly, survival.²⁶⁶ An accurate state ID can be the key to avoiding harassment and discrimination in day-to-day life: at a bar, during a traffic stop, or in the process of applying to a job.²⁶⁷ Without accurate identification documents, trans people are effectively "outed" any time they display ID.²⁶⁸ Trans people without accurate identification are therefore at greater risk of violence, discrimination, and interpersonal animus whenever they need to produce their ID.²⁶⁹ According to the National Transgender Discrimination survey, nearly one-third (32 percent) of surveyed individuals reported negative experiences, such as being harassed, denied services or benefits, or physically assaulted, when they showed an ID with a name or gender that did not match their presentation.²⁷⁰

In addition, many under-documented trans people experience barriers to meeting their basic needs and exercising their fundamental rights. They are denied health care, marriage recognition, government benefits, housing, and civic participation like voting rights.²⁷¹ When trans people without the correct documents are arrested, they are often sent to the wrong sex-segregated facility.²⁷²

266. See Doran Shemin, *My Body Is My Temple*, 24 AM. U. J. GENDER SOC. POL'Y & L. 491, 492–93 (2016). The heightened risk of violence and harassment faced by trans people is well documented. See, e.g., NAT'L COAL. ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED COMMUNITIES IN THE U.S. IN 2011, at 8–9 (2012); Emilia L. Lombardi, Riki Anne Wilchins, Dana Priesing & Diana Malouf, *Gender Violence: Transgender Experiences with Violence and Discrimination*, 42 J. HOMOSEXUALITY 89 (2001); Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION & VIOLENT BEHAV. 170 (2009).

267. Cray & Harrison, *supra* note 261.

268. *Name Changes and Forced Outing: A Small Victory*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Nov. 19, 2009), <https://transequality.org/blog/name-changes-and-forced-outing-a-small-victory> [<https://perma.cc/D79B-LMQE>].

269. See SANDY JAMES, JODY HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 89–90 (2016); see also Pooja Gehi, *Struggles From the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS. L. REP. 315, 328 (2009) ("For transgender individuals, attaining identification that matches one's gender identity is essential for protection from discrimination, legal interactions, consistency, gender affirmation, and self-esteem.").

270. JAMES ET AL., *supra* note 269, at 9.

271. Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 397–99 (2013); James Haynes, *Identification Problems and Voting Obstacles for Transgender Americans*, 1 IND. J.L. & SOC. EQUAL. 165, 166 (2013) ("Without gender-congruent identification, transgender individuals in states with voter photo identification laws may be subjected to suspicion, harassment, and discrimination at the polls.").

272. *Appropriate Placement of Transgender Prisoners (Resolution 15-A-17)*, in AM. MED. ASS'N, REPORTS OF THE BOARD OF TRUSTEES (2018), <https://www.ama-assn.org/system/files/2018-10/a18-bot-reports.pdf> [<https://perma.cc/45QC-W3AF>]; see Danganan, *supra* note 121, at 189 (describing the disproportionate violence trans people face in sex-segregated prisons).

Many trans people are unable to update their identification documents to accurately reflect their gender. According to the National Transgender Discrimination Survey, 41 percent of respondents who had “transitioned” were still unable to change the gender designation marker on their driver’s license.²⁷³ One-third of the respondents indicated they had *no* identification documents—birth certificate, passport, or state-issued ID card—matching their current gender expression.²⁷⁴

For overlapping legal and social reasons, in many states it is difficult—if not impossible—for a trans person to obtain an accurate state identification document without undergoing genital surgery or, in more “liberal” parts of the United States, a physician-confirmed medical transition.²⁷⁵ State laws and policies explicitly define what forms of gender definition give rise to formal recognition on an ID card and restrict the circumstances under which a person may change the gender marker on their state ID.²⁷⁶ Most commonly, states allow only “M” and “F” gender designations, but some states have recently passed laws adopting a third gender option, such as “X.”²⁷⁷ Others, like California, allow blank or unspecified fields on birth certificates.²⁷⁸ Ten states and territories currently have explicit requirements that trans people undergo “sex reassignment surgery” as a prerequisite to update the gender marker on state IDs and driver’s licenses.²⁷⁹ Eighteen states have a similar surgery requirement to amend birth certificates.²⁸⁰ These state policies require trans people to produce a doctor’s

273. JAIME M. GRANT, LISA A. MOTTET, JUSTIN TANIS, JACK HARRISON, JODY L. HERMAN & MARA KEISLING, NAT’L CTR. TRANSGENDER EQUAL., NAT’L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 152 (2011).

274. *See id.*

275. *See Equality Maps, supra* note 257. A physician-confirmed medical transition requires, at a minimum, an official statement from a healthcare provider certifying an individual’s gender transition. *See Summary of State Birth Certificate Gender Change Laws, supra* note 262.

276. *See Equality Maps, supra* note 257; *Summary of State Birth Certificate Gender Change Laws, supra* note 262.

277. *See Equality Maps, supra* note 257 (noting that 21 states and D.C. allow residents to mark M, F, or X on their driver’s license); *see also* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 897 (2019) (collecting statutes).

278. Christina Caron, *Californians Will Soon Have Nonbinary as a Gender Option on Birth Certificates*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/us/birth-certificate-nonbinary-gender-california.html> [<https://perma.cc/Y636-G2CD>].

279. *How Trans-Friendly Is the Driver’s License Gender Change Policy in Your State?*, NAT’L CTR. FOR TRANSGENDER EQUAL., https://transequality.org/sites/default/files/Drivers%20License%20Grades%20July%202021a_0.pdf [<https://perma.cc/FSJ8-GBH6>] (states and territories with surgery requirements for amending state identification include Georgia, Iowa, Kentucky, Louisiana, Oklahoma, South Carolina, Tennessee, Texas, Guam, and the Northern Mariana Islands).

280. *State-by-State Overview: Rules for Changing Gender Markers on Birth Certificates*, TRANSGENDER L. CTR., <https://transgenderlawcenter.org/resources/id/state-by-state-overview-changing-gender-markers-on-birth-certificates> [<https://perma.cc/GS33-2UXY>] (states with surgery requirements for amending birth certificates include Alabama, Arizona, Arkansas, Colorado, Delaware, Georgia, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Virginia, West Virginia, and Wisconsin).

letter stating that they have undergone “sex reassignment surgery” or a “surgical sex-change procedure” before updating the gender marker on their identification documents.²⁸¹ Some state courts have interpreted these phrases to only include *genital* surgery,²⁸² meaning vaginoplasty for trans women and phalloplasty or metoidioplasty for trans men.²⁸³ In other states, trans people may change the sex designation on identity documents if they submit a letter from a medical professional indicating that the person has made a “complete” transition to the “opposite” gender.²⁸⁴ In this scheme, obtaining an accurate ID is easier, but still requires certification from a doctor.²⁸⁵ A small number of cities and municipalities allow people to self-attest to their gender. In New York City (NYC), for example, people may change the gender marker on their birth certificate using a “self-attestation form.”²⁸⁶ On NYC IDs, people must merely select the gender designation they would like—male, female, or not designated—with no additional requirements.²⁸⁷

In addition to these formal rules, informal procedures, practices, and social conventions create structural barriers to access for gender-consistent ID documents, causing a lag between the “law on the books” and the “law in action.”²⁸⁸ Even in jurisdictions with more “liberal” formal policies, there is still a significant gap in access to ID documents.²⁸⁹ To begin, many trans people feel comfortable with their bodies, and simply do not want to undergo *any* medical intervention; for them, even a liberal policy requiring a certified physician’s note is arduous.²⁹⁰ For those who seek gender-affirming care, many are unable to follow through, because they lack the requisite money²⁹¹ or access to medical

281. *Id.*

282. See Harper Jean Tobin, *Against the Surgical Requirement for Change of Legal Sex*, 38 CASE W. RES. J. INT’L L. 393, 416 (2006).

283. *Id.* at 399.

284. See Clarke, *supra* note 277, at 936.

285. See *Equality Maps*, *supra* note 257; *Summary of State Birth Certificate Gender Change Laws*, *supra* note 262.

286. See *Self-Attestation Form for Registrants 18 Years of Age or Older*, NYC HEALTH, <https://www1.nyc.gov/assets/doh/downloads/pdf/vr/birth-certificate-gender-self-attestation.pdf> [<https://perma.cc/3ZW4-MKAM>].

287. See *IDNYC Application*, CITY OF N.Y., https://www1.nyc.gov/assets/idnyc/downloads/pdf/application-materials/application_english.pdf [<https://perma.cc/3M45-BR47>].

288. *Id.* The law around identification documents can thus be seen as a Holmesian system of incentives—one that constrains choices and distributes life-chances across populations.

289. The U.S. Transgender Survey reported that less than one-third (29 percent) of all trans respondents who had a driver’s license or state ID and wanted to change the gender on it were able to do so. Even fewer (9 percent) had successfully updated their birth certificate. JAMES ET AL., *supra* note 269, at 9.

290. See Tobin, *supra* note 282, at 427–28.

291. JAMES ET AL., *supra* note 269, at 89 (“Nearly one-third (32%) of respondents who did not have their preferred gender on any of their IDs or records reported that they could not afford to change them.”).

resources.²⁹² Often, the legal bureaucracy itself is a barrier—forty-nine states and all five U.S. territories require a court order to obtain a legal name change.²⁹³

2. *Challenges to Genital Surgery Requirements Have Historically Relied on Assimilationist Strategies*

Pro-trans legal advocates face vexing problems when bringing litigation challenges to genital surgery marker policies. Historically, trans litigants tended to win if—and only if—they convinced judges that their position did not challenge the gender binary.²⁹⁴ More often than not, the legal arguments adopted by pro-trans litigants relied on a binary model of transness aligned with the assimilationist current, where gender identity was immutable and the body was medically altered to conform to societal norms regarding the maleness or femaleness of the psyche.²⁹⁵

In early examples of court-ordered name changes, plaintiffs were successful only if they underwent surgery that aligned their bodies almost completely to social expectations for maleness or femaleness.²⁹⁶ For example, in 1968, Judge Francis Pecora—then considered a progressive judge—approved a name change for a trans woman.²⁹⁷ This was one of the first name changes in the Civil Court of the City of New York.²⁹⁸ The judge relied on the fact that the trans plaintiff had undergone “surgical corrective sex change” in which “all male organs were removed,”²⁹⁹ and opined that “[a] male transsexual who submits to a sex-reassignment . . . is anatomically and physiologically a female in fact.”³⁰⁰ As a result, in the growing movement in the 1960s to obtain legal name and gender marker changes, trans plaintiffs and their lawyers increasingly relied on

292. *Id.* (“Twenty-five percent (25%) of these respondents believed they were not allowed to change the gender on their IDs or records, for reasons such as not having undergone medical treatment needed to change their gender on an ID or not having a doctor’s letter.”).

293. *Id.* at 91 n.1.

294. *See, e.g.*, Spade, *supra* note 15, at 17–18 (“In almost every trans-related case, whether it be about the legitimacy of a trans person’s marriage, the custody of hir children, hir right not to be discriminated against in employment, hir right to wear gender appropriate clothing in school or foster care, hir rights in prison, or whatever other context brings hir to court, medical evidence will be the cornerstone of the determination of hir rights.”); *see* Jerry L. Dasti, *Advocating a Broader Understanding of the Necessity of Sex-Reassignment Surgery Under Medicaid*, 77 N.Y.U. L. REV. 1738, 1742 (2002) (“While the law’s conception of gender identity is inconsistent and ad hoc, one theme emerges: Courts will not recognize a transgender person’s chosen sex or gender without successful completion of sex- reassignment surgery.”).

295. *See* Romeo, *supra* note 15, at 726 (“The medical model of gender nonconformity has proven to be one of the few ways in which gender nonconforming people have been able to garner respect and recognition of rights in legal settings. While the biological model of gender has resulted in the blanket denial of legal protections to transgender litigants, courts have looked to the medical model as a way of legitimizing certain gender nonconformity.”).

296. *See* Meyerowitz, *supra* note 55, at 208–09.

297. *See id.* at 208.

298. *Id.*

299. *Id.*

300. *Id.*

doctors who performed so-called sex change operations to testify as expert witnesses.³⁰¹ It is clear that from early on in this movement, success in the courts was tied to physical appearance and an official medical stamp of approval.³⁰²

More recent challenges to genital surgery requirements by major law reform organizations continue to adhere to assimilationist strategies. As reflected in the Title VII litigation, pro-trans law reform activists have shifted away from a primarily physical definition of sex and gender, and toward a primarily psychological definition.³⁰³ Many contemporary pro-trans political-legal organizations reject the conservative claim that sex is defined by anatomical characteristics, and increasingly promote gender self-attestation—the principle that individuals should be allowed to self-report their gender without requiring verification from a medical provider.³⁰⁴

Nonetheless, the dominant legal and political strategy in challenging genital surgery requirements frames the issues facing trans people in assimilationist terms and relies on static definitions of sex and gender. Assimilationist concepts are baked into the law, and, unsurprisingly, recent pro-trans litigation reflects the hegemony of the assimilationist framework. Pleadings submitted by pro-trans law reform organizations in the past few years tend to define gender identity as a person’s “internal personal identification as a man or a woman.”³⁰⁵ Likewise,

301. *Id.* at 209.

302. *See* Spade, *supra* note 15, at 17–18; Lee, *supra* note 121, at 470 (“[T]he medical model has thus far proven to be the most successful tool in advocating on behalf of trans people.”).

303. *See, e.g.*, Paisley Currah and Lisa Jean Moore, “*We Won’t Know Who You Are*”: *Contesting Sex Designations in New York City Birth Certificates*, 24 HYPATIA 113, 115 (2009) (discussing an example of this phenomenon in New York where “transgender individuals who tried to change the criteria for sex designation on birth certificates were not resisting the imposition of a binary sex/gender frame onto their bodies and identities They were simply attempting to argue that the criteria on which the classification is based should be changed, that they did not reflect current ‘expert’ knowledges, that a misidentification had taken place.”).

304. *See, e.g.*, *President Biden: Accurate IDs for All Now*, AM. C.L. UNION, https://action.aclu.org/send-message/president-biden-accurate-ids-all-now?initms_aff=nat&initms_chan=web&utm_medium=web&initms=210608_theythepeople_nbc_earned&utm_source=earned&utm_campaign=theythepeople&utm_content=210608_lgbtq_nbc&ms_aff=nat&ms_chan=web&ms=210608_theythepeople_nbc_earned&redirect=theythepeople [https://perma.cc/LUY4-MDEQ] (“President Biden, please direct all federal agencies to implement self-attestation of gender markers, and allow for a gender neutral “X” designation on all federal IDs and records.”); *A Win for Transgender Rhode Islanders: Self Attestation for Updating Birth Records*, GLBTQ LEGAL ADVOC. & DEFS. (Mar. 31, 2021), <https://www.glad.org/post/a-win-for-transgender-rhode-islanders-self-attestation-for-updating-birth-records/> [https://perma.cc/QA4K-WD3W] (“[T]here is tremendous positive news out of Rhode Island for transgender and non-binary people. As of today, March 31, 2021, gender on Rhode Island birth certificates can be updated through a self-attestation form. This means that Rhode Islanders can change their birth certificate to align with their affirmed gender (X, F, or M) without a notarized medical professional affidavit.”).

305. Amended Complaint at 8, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009) (quotations omitted); *see also* Brief of Appellant at 3, *K.L. v. Alaska*, No. 3AN-11-05431 (Super. Ct. Alaska 2012) (“Gender identity is a person’s basic sense of being a *man or a woman*.”); Affidavit of Walter O. Bockting at 6–7, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009) (Trans people “have a core *crossgender* identity . . . and live full time in the *crossgender* role.”); Complaint at 4, *Love v. Johnson*,

plaintiffs in pro-trans litigation have not typically challenged binary and assimilationist assumptions about what it means to be trans.³⁰⁶ Continued reliance on assimilationist frameworks reflect the strategic choices and ideological compromises activists must make to work within the constraints of the legal system.³⁰⁷

In a typical case, a trans plaintiff challenges a state policy that requires the them to present evidence of genital surgery before obtaining an accurate identification document.³⁰⁸ For example, in the 2005 case *In Re Rockefeller*, the ACLU challenged a New York court’s denial of a legal name change petition because the plaintiff, a trans man, had not presented “medical evidence” demonstrating that his intention to live as a male was “irreversible and completely permanent”—meaning he had not had genital surgery to “attach a penis.”³⁰⁹ Similarly, in the 2009 case *Kirk v. Arnold*, the ACLU challenged an Illinois policy that denies gender marker changes to trans men who had not “completed a specific type of surgery—surgery to attempt to create/attach/form a viable penis.”³¹⁰ Likewise, in the 2015 case *Love v. Johnson*, the ACLU filed a federal lawsuit against the Michigan Secretary of State over a policy requiring proof of “sex-reassignment surgery.”³¹¹ Furthermore, in 2011, *K.L. v. State of Alaska* challenged a DMV policy that requires individuals wishing to change the sex marker on their driver’s license to submit proof of a surgical sex change.³¹² And again in *Corbitt v. Taylor*, the ACLU filed federal lawsuits against the Alabama Law Enforcement Agency over policies requiring proof of “certain gender-confirming surgery”³¹³ to correct the gender markers on state documents.³¹⁴

This advocacy is consistent with the ideology, strategy, and goals associated with the assimilationist current—or, alternatively, with ambivalent utilitarian usage of the assimilationist framework. When framing legal issues, defining gender and sex, describing plaintiffs’ self-identity, and locating the harms trans people experience, the litigation relies on several core assertions about sex and gender. All of these assertions emphasize assimilationist and normative views of sex: “sex” is someone’s status as a man or woman, male or

146 F. Supp. 3d 848 (E.D. Mich. 2015) (“‘Gender identity,’ . . . is a person’s innate self-identification as *male or female*”); Motion to Dismiss at 3, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009) (“Persons who are transsexual strongly identify with *the other sex*; . . . and live full time identifying themselves in *the other gender*.”) (all emphasis added).

306. See sources cited *supra* notes 280–300.

307. See Koenig, *supra* note 14, at 626–27.

308. See, e.g., *In Re Rockefeller*, No. 12940 (Sup. Ct. N.Y. 2015).

309. Brief for Petitioner at 8, *In Re Rockefeller*, No. 12940 (Sup. Ct. N.Y. 2015).

310. Second Amended Complaint at 2, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009).

311. *Love v. Johnson*, 146 F. Supp. 3d 848, 851 (E.D. Mich. 2015).

312. Brief for Petitioner I, *K.L. v. Alaska*, No. 3AN-11-05431 (Super. Ct. Alaska 2012).

313. *Court Cases: Corbitt v. Taylor*, AM. C.L. UNION (Sept. 2, 2022), <https://www.aclu.org/cases/corbitt-v-taylor> [<https://perma.cc/Y9UQ-ZZ7R>].

314. *Corbitt v. Taylor*, No. 2:18cv91-MHT (M.D. Ala. 2019).

female,³¹⁵ and trans plaintiffs seek to fully assimilate into life in the “other” gender, including in appearance,³¹⁶ through a “complete” transition.³¹⁷ While the litigation deemphasizes surgery,³¹⁸ it stresses that trans status is a static condition.³¹⁹ The briefs further explain that gender identity is involuntary, not the result of “conscious choice.”³²⁰ They also describe how gender identity develops through a biological process,³²¹ is typically established by early

315. See, e.g., Brief of Appellant at 3, *K.L. v. Alaska*, No. 3AN-11-05431, (Super. Ct. Alaska 2012) (“Gender identity is a person’s basic sense of being a *man or a woman*.”); Affidavit of Walter O. Bockting at 6–7, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009) (Trans people “have a core *crossgender* identity . . . and live full time in the *crossgender* role.”); Complaint at 8, *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015) (“‘Gender identity,’ . . . is a person’s innate self-identification as *male or female*”); Motion to Dismiss at 3, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009) (“Persons who are transsexual strongly identify with *the other sex* . . . and live full time identifying themselves in *the other gender*.”) (all emphasis added).

316. See Amended Complaint at 10, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009) (“[A] female transsexual will act and present herself as female in all aspects of her life.”).

317. According to the litigation complaint, transition is “complete” when a person’s body is physically “aligned” with the opposite gender appearance and presentation. See Amended Complaint at 4, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009) (explaining that, while the plaintiff had not had genital surgery, “he has completed other medical treatment – including hormone therapy, a bilateral mastectomy, and a hysterectomy – that has aligned his body to his male gender identity”).

318. The litigation briefing describes how medical *treatment* for trans people has moved away from “surgical sex change,” and toward a more flexible process of “liv[ing] as the other sex.” Brief for Petitioner at 8, In Re Rockefeller, No. 12940 (Sup. Ct. N.Y. 2015) (further explaining that a focus on gender reassignment surgery “reflects medically obsolete notions of what it means to be transgender”); see also *id.* at 3 (describing how, as medical care developed throughout the past several decades, “medical experts recognized that some persons with bona fide gender identity disorders neither desired nor were candidates for sex reassignment surgery”).

319. Other briefs define three phases of current medical treatment, “known as triadic therapy,” that are all aimed at assimilating to the “desired gender.” Brief for Petitioner at 3, In Re Rockefeller, No. 12940 (Sup. Ct. N.Y. 2015) (describing the three phases of triadactic therapy: “[F]irst, a real-life experience in the desired gender; second, the administration of hormones of the desired gender; and third, surgery to change the genitalia and other sex characteristics.”); see also Complaint at 10, *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015) (“Gender reassignment generally consists of one or more of the following three components: (1) social transition; (2) hormone therapy; and/or (3) gender confirmation surgery or surgeries.”); Brief for Petitioner at 8, In Re Rockefeller, No. 12940 (Sup. Ct. N.Y. 2015) (“[T]he modern standard of care for transgender individuals now encompasses a triadic process in which the transgender individual first lives as the other sex, then receives hormones of the desired gender and ultimately, may—or may not—undergo surgery.”).

320. See Amended Complaint at 8, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009)

321. See Affidavit of Walter O. Bockting at 6, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009) (“What causes Gender Identity Disorder remains unknown. Biological factors (hormonal, genetic, brain structure) and psychological factors (culture, upbringing) most likely interact, but research is still in its infancy and findings to date are inconclusive.”); Brief for Petitioner at 2, In Re Rockefeller, No. 12940 (Sup. Ct. N.Y. 2015) (“Although the etiology of gender identity disorder is unknown, the weight of scientific evidence suggests that the condition has a biological, rather than purely psychological, basis.”).

childhood,³²² and is immutable once established.³²³ The briefs characterize the plaintiffs as having firm, unambivalent gender identities. For example, a complaint stated that one plaintiff’s gender identity “has been female her entire life.”³²⁴ Of another plaintiff, it said: “K.L. could not imagine a circumstance in the future in which she would no longer identify as a woman.”³²⁵

In addition, the litigation emphasized the centrality of medical *treatment* for trans people, an analytical decision that is strongly associated with the assimilationist current—or an ambivalent utilization of assimilationist logic. The litigation argues that medical treatment has moved away from “surgical sex change,”³²⁶ and toward a more flexible process of “liv[ing] as the other sex.”³²⁷ The consistent goal with physical treatment, however, is to “bring[] a person’s appearance and body into alignment with the person’s core gender identity.”³²⁸ While the litigation deemphasizes genital surgery,³²⁹ it does not challenge the idea that trans people require medical intervention to become actualized, nor does it challenge the assumption that trans people would move strictly from one gender pole to the opposite. This serves as evidence that the litigators decided, at least out of utility, to make use of assimilationist concepts to appeal to judges and promote their client’s interests.

322. See Amended Complaint at 8, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009) (“Medical specialists in gender identity agree that gender identity establishes itself very early – sometimes as early as three years of age.”); Brief for Appellant at 3, *K.L. v. Alaska*, No. 3AN-11-05431, (Super. Ct. Alaska 2012) (“An individual’s gender identity develops in early childhood and is usually firmly established by early childhood.”); Complaint at 5, *Ray v. Himes*, 2:18-cv-00272-MHW-CMV (S.D. Ohio 2018) (“Gender identity is . . . typically fixed at an early age.”); Complaint at 9, *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015) (“Gender identity develops in early childhood and is believed to be firmly established by the age of four.”).

323. See Amended Complaint at 8, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009) (“A person’s gender identity cannot be changed.”); Affidavit of Walter O. Bocking at 13, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009) (“Gender identity can be viewed as the sex of the brain, which, once established cannot be changed.”); Brief for Appellant at 3, *K.L. v. Alaska*, No. 3AN-11-05431, (Super. Ct. Alaska 2012) (“Contemporary medical knowledge indicates that gender identity cannot be changed and that attempts to change a person’s gender identity are futile and unethical.”); Complaint at 5, *Ray v. Himes*, 2:18-cv-00272-MHW-CMV (S.D. Ohio 2018) (“Gender identity is innate.”); Complaint at 9, *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015) (“The medical literature establishes that a person’s gender identity is an immutable characteristic and cannot be changed.”).

324. Amended Complaint at 5, *Kirk v. Arnold*, No. 09-CH-3226 (Ill. Cir. Ct. 2009).

325. Brief of Appellant at 3, *K.L. v. Alaska*, No. 3AN-11-05431, (Super. Ct. Alaska 2012).

326. Brief for Petitioner at 8, *In Re Rockefeller*, No. 12940 (Sup. Ct. N.Y. 2015).

327. *Id.* at 3 (quoting the current Diagnostic and Statistical Manual of Mental Disorders (DSM), the litigation states that GID may be treated either by “adopting the social role of the other sex” or by “acquiring the physical appearance of the other sex through hormonal or surgical manipulation.”).

328. Complaint at 10, *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015); see also Brief for Petitioner at 8, *In Re Rockefeller*, No. 12940 (Sup. Ct. N.Y. 2015) (“Gender reassignment [surgery] does not ‘change’ a person’s gender.”).

329. Brief for Petitioner at 8, *In Re Rockefeller*, No. 12940 (Sup. Ct. N.Y. 2015) (explaining that a focus on gender reassignment surgery “reflects medically obsolete notions of what it means to be transgender”); see also *id.* at 3 (describing how, as medical care developed throughout the past several decades, “medical experts recognized that some persons with bona fide gender identity disorders neither desired nor were candidates for sex reassignment surgery”).

3. *Activists Experiment with Alternative Strategies*

From a gender expansionist perspective, by embracing assimilationist definitions of sex, pro-trans advocates may rely on the binary to the detriment of people whose identities do not neatly fall into one of the two delineated categories.³³⁰ The assimilationist language of pro-trans advocacy is uncomfortably stretched when applied to trans people who don't, can't, or won't map their bodies and identities to the male-female binary.

Activists aligned with the expansionist current argue that assimilationist legal arguments grounded in binary ideas of sex and gender often fall short of accurately reflecting the interests and needs of many trans plaintiffs in the ID-change context.³³¹ While the binary definitions of sex and conformist descriptions of trans experiences reflect the identities of many trans people, they do not represent all trans experiences.³³² The model strains to accommodate bodies and identities that cannot, or will not, conform to the binary—for example, intersex and nonbinary people. Indeed, many plaintiffs challenge state policies precisely *because* they do not want to undergo surgery to conform their bodies to the anatomical binary.³³³ In addition, enforcing binary gender categories on trans people in the legal system excludes those who do not identify with the gender binary.

An expansionist alternative would be to engage in movement organizing to build community power and challenge the policies from below, asking what right a state agency has to define gender,³³⁴ or stating that the relationship between biological sex and gender is not fixed, but rather imposed through social norms.³³⁵ Because these gender-expansive viewpoints are not viable in a courtroom setting, they are often not explicit in ID litigation.

In *Zzyym v. Pompeo*, for example, a plaintiff and activist lawyers from Lambda Legal tested the boundaries of expansionist strategies within the pro-trans advocacy movement.³³⁶ Their strategic choices exemplify the push and pull between expansionist goals and assimilationist constraints that are characteristic of the ambivalent utilitarian position. Legal activists involved in *Zzyym* rejected strategic descriptive choices made in prior ID litigation, which relied on assimilationist logic that excluded people whose bodies and identities do not assimilate to the strict male-female binary. *Zzyym* was inclusive of a wider range of identities and promoted expansionist definitions of sex and gender. However,

330. See Koenig, *supra* note 14, at 627 (“Critics of the medical model argue that it fails to describe a vast portion of the trans community, and thereby precludes many gender-non-conforming individuals from taking advantage of the movement’s legal and social gains.”).

331. See *id.* at 627.

332. *Id.*

333. See sources cited *supra* notes 305–311.

334. As Dean Spade asks, “[w]hy is gender identification taken for granted as a legitimate domain of governance?” Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 738 (2008).

335. Currah & Moore, *supra* note 303, at 115.

336. *Zzyym v. Pompeo*, 958 F.3d 1014 (10th Cir. 2020)

as this Section describes, even this case embraced some forms of assimilationist logic.

The plaintiff, Dana Zzyym, is an intersex person who identifies as nonbinary and uses they/them pronouns.³³⁷ In *Zzyym*, Lambda Legal sued the U.S. State Department for denying Zzyym a passport because they could not accurately select male or female on the passport application form,³³⁸ and the form did not provide for any other gender designation option.³³⁹

The State Department policy challenged in *Zzyym* is consistent with the types of policies the assimilationist strategy is working toward. Prior to 2010, the Department only permitted gender marker changes on passports when trans people underwent “[s]exual reassignment surger[ies].”³⁴⁰ As an amicus brief from the National Center for Transgender Equality explained, the pre-2010 policy was “based on an idea that all women and all men should have the same sort of external genitalia.”³⁴¹ After pressure from LGBTQ organizations, the Department announced it would change its policy.³⁴² The new policy allowed gender changes on passports if an applicant undergoes “appropriate clinical treatment for gender transition” as certified by a medical professional.³⁴³ The State Department policy, while consistent with the demands of assimilationist pro-trans activists, *still* excludes intersex and non-binary people from obtaining accurate passports. Under the new State Department policy, trans people who articulate a binary gender identity are granted gender marker changes. However, because Zzyym is both intersex and non-binary—meaning neither their anatomy nor their identity fit typical notions of maleness or femaleness—they cannot obtain an accurate passport.

By challenging this rule, *Zzyym* breaks the assimilationist mold. The definitions promoted in *Zzyym* are increasingly inclusive of a range of

337. Response Brief of Appellee at 2, *Zzyym v. Pompeo*, 958 F.3d 1014 (No. 18-1453) (10th Cir. 2019) (“Dana was born intersex, with ambiguous external genitalia, and their gender identity – the innate sense of being male, female, both or neither – is neither male nor female (that is, nonbinary).”).

338. *Id.* The Passport Agency denied Dana’s application for a passport when they submitted the forms without selecting “M” or “F,” and wrote “intersex” on the sex field of the passport application.

339. *Id.* at 2–3 (“[T]he State Department maintains that if Dana wishes to secure a U.S. passport, Dana must incorrectly select a binary gender marker – ‘M’ or ‘F’ – on their passport application. As a result, Dana, a law-abiding veteran, cannot leave the country they defended because they refuse to be untruthful about who they are.”).

340. *New Policy on Gender Change in Passports Announced*, U.S. DEP’T STATE (June 2010), <https://2009-2017.state.gov/r/pa/prs/ps/2010/06/142922.htm> [<https://perma.cc/PCB4-S7KR>].

341. Brief of Nat’l Ctr. for Transgender Equal. as Amicus Curiae Supporting Petitioner at 12, *Zzyym v. Pompeo*, 958 F.3d 1014 (No. 18-1453) (10th Cir. 2019).

342. The Department self-consciously timed the rollout of this new policy to coincide with Pride Month. See *New Policy on Gender Change in Passports*, *supra* note 340 (“The U.S. Department of State is pleased to use the occasion of Lesbian, Gay, Bisexual, Transgender Pride Month to announce its new policy guidelines regarding gender change in passports and Consular Reports of Birth Abroad.”).

343. *Id.*

identities³⁴⁴ and bodies.³⁴⁵ The briefs take the familiar definitions of sex and gender described above and tweak them to be inclusive of a wider range of trans and gender nonconforming identities. They define gender and sex as “[a] person’s gender identity, . . . the innate sense of being male, female, *both, or neither*, is the most important determinant of that person’s sex.”³⁴⁶ In addition, the plaintiff is not described as someone who has always known their gender, who desires to live as the opposite sex, or has a crossgender identification.³⁴⁷ Instead, Zzyym is described as having no interest in assimilating to a binary gender.³⁴⁸

At the same time, Zzyym relies on some familiar assimilationist definitions of sex. The briefs from Lambda Legal, for example, rely heavily on scientific and medical knowledge to validate Zzyym’s gender identity and expression.³⁴⁹ One of the State Department’s primary defenses to Zzyym’s claim is that “there is no consensus in the medical community” regarding appropriate treatment “when a person’s gender identity is something other than male or female.”³⁵⁰ In other words, the Department will not permit Zzyym to receive a passport accurately indicating that they are neither male nor female, because they do not define themselves in a manner consistent with the binary medical model of sex and gender. In response, Lambda Legal’s briefs emphasize the biological bases for intersex conditions and non-binary gender identities.³⁵¹

344. See Brief of Nat’l Ctr. for Transgender Equal. as Amicus Curiae Supporting Plaintiff-Appellee at 9, *Zzyym v. Pompeo*, 958 F.3d 1014 (No. 18-1453) (10th Cir. 2019) (“Transgender people are people who have a gender identity (the innate knowledge of one’s own gender that all people have) that is different from the gender they were assigned at birth. Many transgender people are men or women – that is, their gender identity is male or female. Many other transgender people are nonbinary – that is, their gender identity is neither male nor female. For people who are not male or female, the appropriate gender marker is a gender-neutral designation, typically an ‘X.’”).

345. See *id.* (“Intersex people are born with sex characteristics (including genitals, gonads, and chromosome patterns) that do not fit typical notions of male or female bodies. Intersex people can be of any gender identity.”).

346. Complaint at 4, *Zzyym*, 958 F.3d 1014 (No. 18-1453) (emphasis added).

347. This description contrasts sharply with the plaintiffs in many Title VII cases. See *supra* notes 220–224 and accompanying text.

348. The briefs describe how they tried to live full-time both as a man and as a woman, and rejected both. See Complaint at 5, *Zzyym*, 958 F.3d 1014 (No. 18-1453) (describing how, as a child, Dana was “subjected to several irreversible, invasive, painful, and medically unnecessary ‘masculinizing’ surgeries designed to make their body conform to male sex stereotypes,” and following additional procedures they “attempted to live as a woman” before accepting their intersex and nonbinary identity).

349. See, e.g., Response Brief of Appellee at 4, *Zzyym*, 958 F.3d 1014 (No. 18-1453) (“Although there is not yet one definitive explanation for what determines gender identity, recent research points to the influence of biological factors, most notable the role of sex differentiation in the brain in gender-identity development.”); Brief of Intersex & Genderqueer Recognition Project as Amicus Curiae Supporting Plaintiff-Appellee at 3, *Zzyym*, 958 F.3d 1014 (No. 18-1453) (“Gender identity refers to a person’s inner sense of belonging to a particular gender; it is an innate, core component of human identity, with a strong biological basis.”).

350. Response Brief of Appellee at 43, *Zzyym*, 958 F.3d 1014 (No. 18-1453).

351. See *id.* at 4; Brief of Intersex & Genderqueer Recognition Project as Amicus Curiae Supporting Plaintiff-Appellee at 3, *Zzyym*, 958 F.3d 1014 (No. 18-1453).

In sum, *Zzyym* is inclusive of a wider range of gender identities than previous legal challenges to gender designations on ID documents. Consistent with the goals and strategies of the expansionist current, it aims to expand the category of people protected by this set of legal rights. Its logic still relies, however, on maintaining preexisting legal and social structures such as the role of the government in validating gender identity, the utility of gender markers on ID cards, and the use doctors as a gateway to access resources. This aspect of *Zzyym* is rhetorically consistent with the assimilationist current.

The litigants in *Zzyym* clearly attempted to thread the needle between lofty ideological goals and what was politically feasible—a classic ambivalent compromise—and they emerged with a major political victory. On June 30, 2021, the U.S. State Department announced a new U.S. passport gender marker policy that it will include an “X” gender marker option for non-binary, intersex, and gender non-conforming applicants, and will not require medical certification to change the gender marker on U.S. passports.³⁵²

This major victory is not the end of the story. Without a change to fundamental structures, any legal victory, while essential for protecting many trans people, will necessarily maintain preexisting barriers to access to others. Individuals who are least likely to successfully obtain an accurate ID—those who lack access to legal resources, money, or the court system—will likely still go without.³⁵³

4. *Ideological Compromises in the Fight for Pro-Trans ID Policies*

Outside of the sphere of litigation, pro-trans legal advocates face challenging choices when trying to reshape local policies around ID access. In a compromise characteristic of the ambivalent utilitarian current, many of even the most radical trans activists adopt essentialist language in order to obtain more favorable policies for their clients and communities in the short-term.³⁵⁴ To understand why, take the following example of activists aligned with an expansionist ideology who, driven by practical constraints, selectively utilize assimilationist tactics to achieve incremental goals. New York City-based academics and activists Paisley Currah and Lisa Jean Moore described the city-wide debate in 2005 and 2006 around the policy for gender marker changes on city birth certificates.³⁵⁵ A group of queer activists aligned with the expansionist

352. See *Breaking: State Department to Allow X Gender Markers on U.S. Passports*, LAMBDA LEGAL (June 30, 2021), https://www.lambdalegal.org/news/zzyym_us_20210630_state-department-to-allow-x-gender-markers-on-us-passports [<https://perma.cc/THQ5-SQKR>].

353. Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J.L. & GENDER 491, 492 (2016) (“Ultimately, . . . so long as such documents include a sex designation field, new and seemingly progressive government policies of gender inclusivity harmfully reify sex classification.”).

354. See Koenig, *supra* note 14, at 626–27.

355. See Currah & Moore, *supra* note 303, at 123.

current were invited to meet with city officials to discuss the new policy. The activists agreed that their ideal policy was to eliminate gender markers on all birth certificates, “as an initial step toward getting the state out of the business of defining sex.”³⁵⁶ They further agreed that the next best policy would be to allow individuals to change their birth certificates by providing a simple written statement affirming their new gender identity.

There were, however, pragmatic concerns about both of these policy proposals. As it stood, the city appeared committed to continuing gender identification, and would not accept more radical proposals. During the discussions, for example, city officials expressed the belief that they had a “bureaucratic imperative” to distinguish between people who are “temporarily living in the other gender” and people whose “transition was ‘permanent and irreversible.’”³⁵⁷ From this perspective, the city’s most obvious preference would be to require an “irreversible surgical sex change.”³⁵⁸ In an effort to avoid this result, the activists made a strategic choice: they decided not to raise the idea of removing gender markers altogether or requiring only self-certification, since these ideas “could have been read by others as naïve, radical, or even unintelligible, and risk leaving the transgender advocates outside the realm of pragmatic policy reform.”³⁵⁹ Instead, they settled on a compromise—individuals could change the gender marker on their birth certificate with a doctor’s certification that their transition to the opposite gender was “permanent.”³⁶⁰ This became the city’s policy after several years of public debate.³⁶¹

Circumstances like these are common. To make gains, ambivalent utilitarian activists must assess where lawmakers stand and estimate how far they can be moved. Lawyer-activists who provide direct legal services to trans communities are forced to weigh long-term principles against the short-term goals of their clients and thus face pragmatic compromises. Andy Izenon, a queer lawyer-activist working in community legal services, articulated this conflict in the context of ID litigation: “[A]re we fighting to get it easier or more possible or possible at all to change the gender marker on your ID or are we questioning why we have gender markers on IDs at all?”³⁶² Izenon has a clear answer: the former—fighting for immediate access to accurate IDs, even if it requires adopting essentialist definitions of gender or sex—is the preferable

356. *Id.*

357. *Id.* at 122–23.

358. *Id.*

359. *Id.*

360. N.Y. CNTY. LAWS. ASS’N, REPORT AND RECOMMENDATION OF THE NEW YORK COUNTY LAWYERS’ ASSOCIATION: COMMITTEE ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER ISSUES REGARDING REVISION OF POLICIES WITH RESPECT TO A CHANGE OF SEX DESIGNATION ON NEW YORK STATE AND NEW YORK CITY BIRTH CERTIFICATES FOR TRANSGENDER INDIVIDUALS 1 (Feb. 23, 2012), https://www.nycla.org/siteFiles/Publications/Publications1522_0.pdf [<https://perma.cc/8G5H-Y6ZM>].

361. *See* Currah & Moore, *supra* note 303, at 123.

362. Suk et al., *supra* note 94, at 185.

strategy. Izenson argued this because doing so addresses “the immediate needs of the members of our community,” namely, the ways in which carrying an inconsistent ID “subjects [trans people] to violence.”³⁶³ And the latter—why have gender markers at all—is “a philosophical matter” that is “worth talking about,” but should not be the priority of “policy folks.”³⁶⁴ This opinion is characteristic of many ambivalent utilitarian activists, who believe legal strategies should be tailored to the immediate needs of trans people and who are willing to make compromises along the way.³⁶⁵

This compromise may not fully satisfy staunchly expansionist thinkers, who believe the project of liberalizing identification documents reinforces state authority over sex and gender. As many have argued, the fact that state documents include sex designations in the first place is repugnant to the queer expansionist values of anti-foundationalism, self-determination, and untethered possibilities. It may encourage a process by which people become social subjects under law, and subjugated by the law, as they conform their identities and self-expressions to align with governing norms.³⁶⁶

CONCLUSION

In both the Title VII and identity document litigation contexts, strategic use of assimilationist framing has contributed to major legal victories. To maximize success for their clients, pro-trans movement lawyers have emphasized particular identities, relied on medical diagnoses, and described gender expression in specific terms to tailor their message to a judge. The important successes within pro-trans litigation and shifting narratives in popular culture indicate that parts of the mainstream legal system are now becoming more comfortable with and open to trans issues.

Such reliance on assimilationist frameworks in litigation and advocacy reflects strategic choices and ideological compromise.³⁶⁷ It has required buy-in from activists who hold a long-term goal of disrupting the normative gender regime but make compromises to achieve short-term goals. Scholar Jonathan Koenig described a range of reasons an ambivalent advocate who rejects a strict gender binary would nonetheless adopt an assimilationist model in legal advocacy:

First, when a person does experience trans identity as a psychological or medical condition, relying upon the model legitimizes the identity. Second, because these medical arguments are effective, attorneys must sometimes make them to fulfill the ethical obligation to act in the best

363. *Id.*

364. *Id.*

365. See sources cited *supra* notes 109–127.

366. See Spade, *supra* note 15, at 24 (describing the specific ways in which a person must describe their gender in order to obtain medical referrals).

367. See Koenig, *supra* note 14, at 626–27.

interests of their clients, despite opposition from the broader trans movement. Third, because advocates have relied heavily on the medical model in the past, it is necessary to cite the model when making legal argument based on precedent. Fourth, the medical model provides a basis for arguing that gender identity is part of a person's biological sex.³⁶⁸

Yet strategic choices have distributive consequences. In making these choices, lawyers inevitably draw boundaries between insiders and outsiders in a community—between those who are embraced by the movement and those who are not, and those who receive the benefits of the movement's victories and those who do not.³⁶⁹ They may determine the shape and trajectory of the movement,³⁷⁰ and may shape queer identity itself.³⁷¹ To the extent that successful Title VII and identity document litigation relies on assimilationist ideas of sex and gender, it may later result in the denial of rights to trans people who are unable to provide the same level of medical documentation, or whose identities or expression do not correspond with the accepted definitions.³⁷²

Litigation itself has its limits. As legal theorist Marc Galanter wrote in 1974, litigation “serve[s] to secure or solidify symbolic commitments. It is vital tactically in securing temporary advantage or protection, providing leverage for organization and articulation of interests and conferring (or withholding) the mantle of legitimacy.”³⁷³ However, litigation is “unlikely to shape decisively the distribution of power in society.”³⁷⁴

Indeed, tangible rewards do not always follow symbolic ones, and legal victories do not guarantee that any material benefits will reach those who could use them most.³⁷⁵ Even if litigation is successful, individuals who need the most services will still face barriers. Regardless of the reigning definition of sex and gender in federal litigation, social capital, money, and medical care will likely

368. *Id.*

369. PATRICIA EWICK AND SUSAN SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 39–40 (1998) (“Through its organization, society provides us with specific opportunities for thought and action. Through language, society furnishes images of what those opportunities and resources are: how the world works, what is possible and what is not. These schemas . . . include cultural codes, vocabularies of motive, logics, hierarchies of values and conventions, as well as the binary oppositions what make up a society's ‘fundamental tools of thought.’”).

370. Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1673 (2014) (“[P]rotest organizations' reactivity to media coverage appears to have redirected those organizations away from their original priorities and toward legal goals. The protest groups' agendas came to be centered not on their members' priorities, but rather the more limited set of issues that could be translated into formal legal claims.”).

371. See ADLER, *supra* note 78, at 99 (“Equal rights advocacy on behalf of LGBT constituencies represents us in [the] full sense, not merely speaking for us, but shaping our identities.”).

372. Spade, *supra* note 15, at 18–19.

373. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 150 (1974).

374. *Id.*

375. *Id.*

remain the primary determinants of access to affirming outcomes. Indeed, many of the most vulnerable members of the trans community—particularly low-income, homeless, or undocumented people—still lack access to the resources necessary to take advantage of any legal victories. Without changes to the material distribution of power and access in society, many people remain shut out.

Moreover, a movement cannot stop after securing a symbolic legal victory. As critical legal scholars observe, rights assertions compete with, and can even provoke, counter rights assertions.³⁷⁶ Here, pro-trans rights discourse has provoked culturally conservative counter rights assertions to privacy, security, freedom of expression, and freedom of religious exercise.³⁷⁷ And the culture war over the status of trans people is only escalating: Human Rights Campaign labeled the year 2021 the “worst year in recent history for LGBTQ state legislative attacks.”³⁷⁸ Continued organizing is crucial, as “[w]hen supporters become complacent and opponents mobilize, the result of winning the legal victory can be losing the political battle.”³⁷⁹

While the law is an essential tool for movements, it is not, and will never be, the site of truly liberatory change. Progressive legal victories only truly occur when the surrounding political and social circumstances shift.³⁸⁰ This is why many activists will never be satisfied with symbolic victories, because they will never address the pressing economic and social needs of the most disadvantaged members of our communities.

When engaging in pro-trans legal change, lawyers carry conflicting responsibilities to clients, to issues, and to movements. While lawyers can try to strike a balance between these responsibilities, we cannot know the universe of consequences our actions may ultimately bring. There is no perfect foresight, and we can and should be mindful of how we claim and draw boundaries for identities, the ways in which our strategic moves can be useful or harmful, and to whom.

376. ADLER, *supra* note 78, at 89

377. See ADLER, *supra* note 78, at 99.

378. *2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures into Law*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law> [https://perma.cc/Z8RN-5RSS]; see also Matt Lavietes, *At Least 7 States Proposed Anti-Trans Bills in First Week of 2022*, NBC NEWS (Jan. 7, 2022), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/least-7-states-proposed-anti-trans-bills-first-week-2022-rcna11205> [https://perma.cc/VNH3-7GZ7]; *Legislative Tracker: Anti-Transgender Legislation*, FREEDOM FOR ALL AMS., <https://freedomforallamericans.org/legislative-tracker/anti-transgender-legislation/> [https://perma.cc/JAS6-P2XC].

379. Galanter, *supra* note 373, at 30.

380. Tushnet, *supra* note 117, at 32.