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Is Using Preferred Gender Pronouns Important in the Courtroom?

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[Is Using Preferred Gender Pronouns Important in the Courtroom?](#)

[April 12, 2022](#) by [kkleyer1](#) [comments \(0\)](#)

In relation to the Farmer v. Brennan, a case discussed in this blog, it is important to note that triggering language is used in the opinion, as the incorrect pronouns are used to refer to the petitioner throughout.

The use of proper gender pronouns is important to nearly every person in the world. In all cases, proper and preferred gender pronouns are the same. It is respectful and expected to use a person's preferred pronouns e.g., the proper term for the person. Whether you are part of the LGBTQ+ community or not, the use of proper gender pronouns is only the baseline of respect for another human being. Using preferred gender pronouns is also imperative for anyone because it is important to people's sense of identity.

Despite this, there are attorneys who still refuse to use preferred pronouns. In briefs, pleadings, and motions, some attorneys have purposely chosen to address trans people with incorrect pronouns as a strategy to intimidate and harass trans people within the court system. This problem affects more people than just the trans community. [Non-binary people](#), whether they identify as part of the trans community or as part of the cis community, are also affected by this problem. To misgender a person is not only demeaning, but extremely disrespectful and offensive.

The History & Effects of Misgendering



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A person who identifies with their gender identity and expression differently from their assigned sex at birth is known as a [transgender](#) person. While some people decide to go through physical transition, not all people transition in the same way. A person's transition is personal. A person's transition may include changing their body, name, or gender identity to reflect the person they have been inside all along. Some people decide to go through surgery to help their physical appearance align with their gender identity, while others reflect their transition by changing their name and pronouns. Regardless of how a person chooses to transition, a person should be identified with the pronouns they identify with, and not based on their appearance.

Continuous and intentional misgendering can be [mentally damaging](#) to a transgender person. It is important to note when discussing this subject that the [suicide rate for transgender adults](#) is already significantly higher than cisgender adults, and the rates are [even higher for teenagers](#).

While it was believed in the past that the terms sex and gender were interchangeable, it is important to note that [sex refers to biological differences, while gender describes the characteristic](#) that a society or culture defines as masculine or feminine. Sex is in reference to a person's biology, while gender refers to the psychological and [social constructs that are used](#) to express a person's sex. In the past, gender and sex have been used interchangeably in both medical and social fields; however, it is important to note that the noticeable difference between the two is not a new concept. Sigmund Freud, the founding father of psychoanalysis, often distinguished [between the physiological expression of self and the anatomic body that contains it](#).

While there has been a long-standing dispute as to what forces are involved in the development of a person's gender identity, between the 1950s and 1970s the medical field deeply believed that sex-typical gender behaviors were to be determined by the biological sex, and anything outside of that required [treatment](#). Between the 1970s and 1990s, homosexuality was no longer classified as a disorder, so the medical field's approach to gender evolved through research. Though there

were some gains within the LGBTQ+ community, there was still much progress to be made regarding trans people's rights. In 2001, the Harry Benjamin International Gender Dysphoria Association classified transgenderism as a "[disease](#)."



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Today, the medical field understands that a person's biological sex can affect their likeliness to suffer from particular diseases. Since research shows that a person's gender affects their physical health, scientists have taken a large step in deciding ways to develop and measure gender that can [successfully correlate](#) with health outcomes. In the past few years, the study of the difference between gender and sex has become incredibly prevalent, and the acknowledgment of the distinction is more important now than ever.

Where the Treatment of Gender Pronouns Currently Stands

The treatment of the trans community is mixed within the United States, at best. In 2017, the Supreme Court [formally reprimanded](#) two Virginia lawyers that intentionally misgendered the Respondent. This was an important milestone for the Supreme Court, as it set a strong precedent in the constant battle the trans and non-binary communities face. This problem is incredibly important to address, as it illustrated the intentional demeaning behavior of the past would no longer be acceptable in the legal field. The reprimanded lawyer made the argument that Clerk Harris was prejudiced regarding the main issue of the case, due to his choice to refer to the Respondent with his preferred pronouns. The issue with this attorney's reasoning is that, whether the issue in the case addresses a gender-based issue, it would only take an ounce of respect to refer to a person in a way they want to be addressed, regardless of whether their preferred pronouns match their biological sex. Though the rule violated was only in regard to using accurate captions when drafting briefs, [other countries](#) have started to create rules that address gender-based issues. In Canada, the Provincial Court of British Columbia [mandated a procedure](#) that requires lawyers to indicate their preferred pronouns when they introduce themselves to the Court. Though a minor change in the grand scheme, the practice standardized and normalized the use of employing preferred pronouns, whether or not the lawyers are part of the LGBTQ+ community.

Though there has been acceptance in the past, this has not always been the case. In 2019, for example, the U.S. District Court for the District of Maryland [held a person could not pursue a harassment claim](#) based on the misgendering of a person at their place of employment. In January 2020, Trump-appointed Court of Appeals Judge Stuart Kyle Duncan, went out of his way to [express his disagreement](#) to the use of preferred pronouns. In February 2020, a federal court in Ohio dismissed a case regarding gender pronouns and cited the First Amendment as the reason behind it. The Ohio Court used the Freedom of Religion Clause as well as the Freedom of Speech Clause to rule in favor of a teacher who [intentionally misgendered](#) one of his students.

In June 2020, the Supreme Court held that protections against discrimination in the workplace based on sex [would extend](#) to protect people on the basis of sexual preference and gender identity. This landmark ruling helped a lot of people in the LGBTQ+ community, but it did not come without opposition. Three days before the landmark decision was made, the Department of Health and Human Services [removed provisions](#) within the Affordable Care Act that would protect against discrimination due to gender. There is also a long history within the medical field regarding the use of improper gender pronouns, which discourages people from the trans and non-binary communities from seeking medical attention when [needed](#). The new ruling will be used to combat this healthcare discrimination, as the medical field's interpretation of sex would not fall within the precedence set by the Supreme Court.

History of LGBTQ+ Community Being Protected Under Title VII



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In recent history, it is evident that a disparity exists between court opinions on the issue, as some judges choose to treat members of the LGBTQ+ community differently than their cis-gender counterparts. Judges and lawyers of both political spectrums go back and forth as to how to address trans parties in legal cases. Some conservative lawyers refer back to [Farmer v. Brennan](#), a 1994 Supreme Court decision, to use a party's name rather than gender-pronouns to prevent any confusion as to whom the Court was referring to. Dee Farmer's attorney, an ACLU attorney named Elizabeth Alexander, made the [conscious decision](#) to use feminine pronouns when referring to Ms. Farmer within the courtroom. Though the issues of the case did not center

around the use of proper pronouns, Ms. Alexander's use of her client's preferred pronouns illustrated the reluctance and opposition to the use of preferred pronouns in the legal community at the time, as demonstrated by the opposing parties as well as the Court Justices. The opposing party's council actively used masculine pronouns, while Justice Souter [wrote his opinion](#) without using any pronouns to refer to Ms. Farmer. Even when an opinion concurred with Justice Souter, the Justices used masculine pronouns in reference to Ms. Farmer. It has been 27 years since the Court heard *Farmer v. Brennan*, and the world has since made some steps in the right direction regarding the protection of people's gender, race, and sexuality. However, it still has miles to go before these communities reach true equality in the field of law.

In 2016, the legal community illustrated that even when a gender-centric issue was at the front and center of the court, [both sides](#) should use a person's preferred gender pronouns without risking their legal argument or position on the issue. It was ironically that same person, Kyle Duncan, who later [failed to honor his own precedent](#), and actively disparaged a transgender party in a courtroom he was presiding. While Kyle Duncan is an example of a court refusing to use proper pronouns, it seems many courts in the United States do not follow his poor example, and [have been relatively receptive](#) in using preferred pronouns in the courtroom.

While there have been recent strides in the right direction regarding LGBTQ+ issues, there are currently no federal laws that exist to protect transgender people in the workplace. [A recent U.S. Supreme Court case](#) decided that employment discrimination protections are extended to protect LGBTQ+ employees across the country. Though Justice Gorsuch's opinion and ruling on the matter made history regarding protections for the LGBTQ+ community, it was not without controversy. Justice Gorsuch ruled that an employer could not fire someone for being part of the LGBTQ+ community, but it was not on the foundation of an interest to protect that community from harm. Rather, Justice Gorsuch found basis to protect the community on the grounds of a technicality and interpretive methodology as to how Title IX was written, instead of on the grounds that all people should be protected.

In circuit courts, there is a split as to whether discrimination against transgender people is based on sex. Multiple states, including New York and Washington D.C., [passed laws](#) to prevent discrimination through the use of improper pronouns. The laws [passed by New York and Washington D.C.](#) required people to use an employee's preferred pronoun, especially when that employee has established a preference. [New York went even further](#), and expanded on what is considered gender-based discrimination, and includes the non-binary community. These laws, however, have been met with opposition on the basis of First Amendment violations, as the First Amendment not only protects freedom of speech, but also provides protection from [compelled speech](#). The First Amendment argument has been brought up numerous times, especially [in regard](#) to gender issues and policies around using public restrooms. The Court ruled in landmark cases, such as *Barnette*, that it is unconstitutional for the government to force students to salute the flag and recite the Pledge of Allegiance, as it invaded a person's freedom of speech. Even with this case in mind, the government has [constitutionally compelled speech](#) in the past. The courts have [held instances of compelled speech](#) or accommodation of another's speech, but have been skeptical as to whether actual speech or the expression of it is required or if the speaker is forced to change their message. Compelled speech is a doctrine established in the First

Amendment that prevents the government from punishing people for refusing to express a thought they disagree with.

Though argument surrounding compelled speech exists, this argument does not have a foot to stand on. If a person were to argue that they have a deeply held religious conviction that there are only two genders and insisted that forcing them to use a particular pronoun would violate that belief, they would be basically arguing that their protected religious freedom permits gender discrimination. Further, this would question the constitutionality of laws that bars language discrimination under the Fourteenth Amendment, which holds a guarantee of an equal protection of the laws. If the laws in Washington D.C. and New York were to be repealed or removed, the people who need the most protection would become vulnerable. Minority voices that need to be lifted up and whose rights must be protected would ultimately be capsized by the tyranny of those that continue to oppress them. *Barnette* would not apply to the preferred gender pronoun issue, because the use of a person's preferred pronouns does not illustrate any government message. It is ultimately discrimination to refuse to use a person's preferred pronouns, because a person is being treated differently due to their gender status.

Approaches to the Pronoun Issue in Everyday Life.



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Issues regarding gender identity can arise in the area of family law as well, especially in child custody battles. For example, if a transgender woman does not want to be referred to as their child's "biological father," and is triggered by the use of those words, what should their lawyer do? What is the best way for a lawyer to zealously represent their client, especially when they reference their client in documents provided to the court, and identifying their client's relation to the child? My suggestion would be to refer to them as the non-carrying mother of the child, or briefly mention that the child was conceived before the client transitioned. But the question again comes up when there are two men at the forefront of a child custody case. How are they to be

referred to? What is the proper way to address them? The best way to handle cases like this is to ask the client what their preference is.

Throughout the United States, the Courts and Justices are split as to which way to decide. In my experience in family law within the Bay Area, most judges have been all-welcoming to the transgender community, and have made a point to change the legal record to reflect a person's preferred name and preferred gender pronouns. In a sealed parentage case, involving twin biologically female minors, one of the twins came out as a transgender man during their parents' divorce and custody proceeding. As soon as the judge was notified of the minor's change in preferred pronouns, he not only ordered the court to use the minor's preferred pronouns, but also changed the record to reflect the minor's preferred name, instead of keeping his [deadname](#) on record.

The issues highlighted above have also been a topic of discussion among the group of attorneys I currently work for. For example, one of the attorneys completed an intake with a transgender woman who was in a custody battle for her child. My co-worker struggled with finding a way to refer to the woman as the child's "biological father," without triggering gender dysphoria for the client. The client made it very clear that the use of the term "biological father" made her uncomfortable, but my co-worker could not think of another phrase to use in order to reflect the woman's identity. I suggested she refer to her as the "biological non-carrying mother" instead of "biological father." I also suggested my co-worker communicate with the client and ask if she was comfortable with a footnote that referenced her transition occurred after the divorce proceedings started.

Many other organizations, such as the Associated Press, have implemented the use of a party's preferred gender pronouns. Judge Karen Moore, for the Sixth U.S. Circuit Court of Appeals, referred to transgender parties in her courtroom with their preferred pronouns, and recently used a party's preferred name in [EEOC v R.G. & G.R. Harris Funeral Homes](#). The Court also held that the defendant, Harris Funeral Home, engaged in unlawful discrimination against Stephens. The court went on to explain that the discrimination exhibited in the case was not protected by the funeral home's practice of freedom of religion. Further, the court held that "[even if the defendant's religious exercise was substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination against Stephens.](#)"

In [Grimm v. Gloucester](#), the federal appeals court considered whether Title IX would require schools to treat transgender students consistent with their gender identity. In *Grimm*, a 14-year-old boy came out as transgender and legally changed his name and pronouns to align with his gender. He then received permission from his high school to use the male restroom. Some parents had issues with Mr. Grimm using the men's restroom, which led to a vote by the school board that restricted Mr. Grimm to using the school's private restroom or single-stall facilities. As a result, the ACLU initiated a suit under Title IX, which alleged the school's policy preventing Mr. Grimm from using the boys' restroom was discriminatory based on his sex. The case was appealed to the Supreme Court in the fall of 2016. The Supreme Court, which considered the Trump administration's removal of the trans-protective interpretation of the

statute, remanded the case for consideration under the new Department of Education guideline. In regard to Mr. Grimm, many briefs referred to him without gender-appropriate language.

In [*Kenosha Unified School District v. Whitaker*](#), the Court faced the same issue as in *Grimm*, which questioned whether Title IX would protect trans students and allow them to use the facilities that align with their gender identity. Mr. Ashton Whitaker began to transition in 2013 and changed his name in 2016. During that time, Mr. Whitaker's mother met with the school administration to ask permission for her son to use the boys' restroom. The administration reasoned that since Mr. Whitaker was still listed as female in official school records, the school must restrict Mr. Whitaker's access to gender-neutral or female bathrooms. The case was appealed to the Supreme Court in the fall of 2017, but the Court denied the petition for [*certiorari*](#).



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Conclusion

Since the courts are still divided on this issue, and there is still no clear precedent set by the Supreme Court, many lower courts are taking it upon themselves to address misgendering issues in cases in their jurisdiction. While there are examples of judges and attorneys disrespecting those who simply wish to be called by what they identify as, there are also many examples of judges and attorneys who have been entirely accommodating and understanding. It is through this understanding that we work towards a more inclusive legal system for all, and until that work is done, we must continue to shed light on this issue and recognize the part each individual

must play to create a more inclusive, equitable, and respectful legal system, and country as a whole.

Photographs

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