

Volume 22 | Issue 2

Summer 2019

The Pressures of Passing, Reinforced by Precedent

Lee Clark

lee.clark@live.law.cuny.edu

Follow this and additional works at: <https://academicworks.cuny.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Recommended citation: Lee Clark, The Pressures of Passing, Reinforced by Precedent, 22 CUNY L. REV. F. 17 (2019).

The CUNY Law Review is published by the Office of Library Services at the City University of New York. For more information please contact cunylr@law.cuny.edu.

The Pressures of Passing, Reinforced by Precedent

Acknowledgements

Lee Clark is a student at CUNY School of Law, and bartender at Happyfun Hideaway in New York City. Lee Clark is an out and proud trans person, who uses they/them pronouns. They would like to thank their partner Waine Thoma, Coco Wheeler, Third Fernandez, Katherine Dennis, Sophie Cohen, Malita Picasso, and all the people who have inspired me and help shape this article. This is a paper originally written for Ruthann Robson's Fashion and the Law class at CUNY Graduate Center.

CUNY LAW REVIEW FOOTNOTE FORUM

September 22, 2019

Recommended citation: Lee Clark, *The Pressures of Passing, Reinforced by Precedent*, 22 CUNY L. REV. F. 17 (2019).

THE PRESSURES OF PASSING, REINFORCED BY PRECEDENT

Lee Clark[†]

INTRODUCTION AND TERMINOLOGY.....	18
I. BACKGROUND INFORMATION & THEORY.....	19
II. COURT CASES.....	21
A. <i>Cases from the 1970s</i>	22
1. <i>City of Columbus v. Zanders</i>	22
2. <i>City of Columbus v. Rogers</i>	24
3. <i>City of Chicago v. Wilson</i>	25
B. <i>Recent Legal Developments</i>	26
1. <i>Evancho v. Pine Richland School District</i>	26
2. <i>Adams v. St. Johns County</i>	27
3. <i>Contemporary Law & Policy</i>	28
III. ACTIVE RESISTANCE.....	29
FINAL WORDS.....	32

As a trans person, one of the places that I have found safety is through the way I represent my gender expression. Clothing is at the pinnacle of my gender expression; it is something that I have had control over for a long time. To quote the famous social theorist Simone De Beauvoir, “One is not born, but rather becomes, a woman.”¹ I might have been assigned female at birth, but I definitely did not express my gender in

[†] Lee Clark is a student at CUNY School of Law, and bartender at Happyfun Hideaway in New York City. Lee Clark is an out and proud trans person, who uses they/them pronouns. They would like to thank their partner Waine Thoma, Coco Wheeler, Third Fernandez, Katherine Dennis, Sophie Cohen, Malita Picasso, and all the people who have inspired them and helped shape this article. This is a paper originally written for Ruthann Robson’s Fashion and the Law class at CUNY Graduate Center.

¹ SIMONE DE BEAUVOIR, *THE SECOND SEX* 330 (Constance Borde & Sheila Malovany-Chevallier trans., Vintage Books 1st ed. 2011) (1949).

feminine ways, opting for clothes from the boys' section of stores rather than the girls' section. One way that people have been classified in society for centuries is through the lens of the gender binary as showcased through clothing, media, and culture. Clothing and fashion are where I recognized my personal autonomy at a young age, and how I could fight back against gender restrictions throughout my life.

A quote from Daniel Friedman, a suit designer from Brooklyn-based tailoring company Bindle & Keep, who works almost exclusively with trans and non-binary² clients, resonated with me: "It's all about feeling great in your body, especially when people have been struggling their entire lives and they finally get into something that really fits them . . . the way they've always envisioned something would fit them. That's not fashion anymore and that's what we're after."³ Obviously, clothing is fashion, as it pertains to garments and construction, but it extends further than that. Bindle & Keep is dedicated to dressing an identity and a body. Clothing and gender have a direct correlation as one of the ways to present one's gender daily. Cis and trans people alike curate outfits and silhouettes that are used to present gender. But while the trans community is fighting for our fit in the courts, we are also fighting the gender binary that has never recognized our identity.

The legal system continues to use language that is exclusively binary to squeeze trans people into traditional gender roles which continues the othering that we have faced our entire lives.⁴ The trans community is fighting for more inclusive language⁵ through fashion, garments, and stores in an industry that is notoriously gendered, yet the legal system is not getting the hint. One would hope that the semantics would have progressed in the almost fifty years since the cases addressing the anti-cross-dressing ordinances of the 1970s, but they have not.

INTRODUCTION AND TERMINOLOGY

The United States legislature has acted and will continue to act in ways that that will affect the transgender and non-binary communities in

² Non-binary is an umbrella term used by someone who does not identify or fit into the categories "man" or "woman." Other words that can be used are genderqueer, agender, and bigender. *Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT'L CTR. FOR TRANSGENDER EQUALITY (Oct. 5, 2018), <https://perma.cc/6YH4-A9JG>.

³ Allison McNearney, *Inside Bindle & Keep, the Tailoring Company Behind the Sharpest Trans Suits*, DAILY BEAST (June 20, 2016, 1:02 AM), <https://perma.cc/Q73V-9D3P>.

⁴ In my and many others' experience, trans people have to listen to cis people ask questions about their bodies and genitals. Additionally, we have to listen to cis people give their opinions about how much a person passes, which is very similar to how courts speak to transness.

⁵ See *infra* Part III.

damaging ways. The outdated language they use has set a precedent for how the legal system interprets and constructs laws and policy around trans rights today. Transgender and non-binary communities are slowly gaining more and more protections via the law, yet in order to achieve these rights we, as a community, are supposed to assimilate to a gender binary.⁶ Transgender people are expected to want gender affirming surgeries, hormones, and name changes, even though this is not necessarily the narrative of everyone in the trans community. Yet, there is one decision that all people make on a daily basis to present their gender, whether cis or trans or non-binary, and that is our clothing curation for the public's eye.

To begin this paper, I would like to recognize the terms that I will be using throughout, which may vary from legal and medical language. As a part of the community, and through lived experience, the respectful terms that I use for my community are *the trans community*, *trans people*, and *trans person*. My identity is crucial to this paper and I feel strongly in self-identification, as there are times in a trans person's life where their own identity and language is all that they have to feel grounded in their surroundings. The legal system, the medical field, and the government use othering terminology, which is language that creates a narrative that a certain group of people are different because of their identity or community. It is a tactic that can be politically utilized to separate and divide people. If othering words are used in this paper, it is a direct quote from one of those fields.

In Section I, I give background information and theory on the transgender community, and in Section II, I argue that there is a direct connection between crossdressing laws of the past which have led to precedent that impedes the transgender community's progress to equality, while creating pressures to pass. In Section III, I explore the strategies trans people have used to fight back and how the judicial system has hindered the trans community's ability to access legal rights, and medical necessities. I then discuss what steps the trans community can take going forward in fighting against gender essentialism.⁷

I. BACKGROUND INFORMATION & THEORY

Background information on harassment and mistreatment of the trans community must be included here in order to truly allow the whole

⁶ See *infra* Section II.B.

⁷ Gender essentialism is the belief that your gender is biologically determined rather than believing that gender is a social construct that has been limited by the construct of the gender binary. See Lori Watson, *The Woman Question*, 3 *TRANSSEXUAL STUD. Q.* 246, 250 (2016).

picture to be seen. The National LGBTQ Task Force⁸ conducted a survey of the struggles faced by the trans community in housing, employment discrimination, hate violence, and more.⁹ The results show that the marginalization of the trans community creates numerous barriers to not only housing and job security, but also peace of mind. For someone to live their authentic self as a trans person or non-binary person, we need to find ways to overcome this marginalization, which can be a struggle. A trans person could decide that to stop feeling dysphoria, they would need a surgery; to obtain this surgery, they would need financial security which might mean insurance coverage.¹⁰

According to the 2015 National Center for Transgender Equality's survey, seventy-seven percent of the trans community has to take drastic action to avoid discrimination in the workplace, like hiding their gender when at work or quitting their job.¹¹ The harassment that trans people experience in the workplace is one of the multiple reasons why trans people feel the need to commit to one end of a binary, and on top of that, feel the need to live stealth and passing. The concept of passing in the trans community is when a trans person is seen in the public's eye as someone who is cisgender. "Passing most of the time is used to signify the *individual* experience and *moment* of being regarded as how trans people *understand themselves*, or how they prefer to be regarded in respect to their self-identified gender/sex."¹² Passing as cisgender can be the goal for a trans person, but it can also be attributed to a means of survival, especially for transfeminine people. Passing as cisgender and living stealth constructs a power dynamic in social interactions that trans people cannot access when out as transgender.

⁸ The National LGBTQ Task Force's mission statement in one line is, "[to] advance[] full freedom, justice, and equality for LGBTQ people." *Mission & History*, NAT'L LGBTQ TASK FORCE, <https://perma.cc/5ZYD-DH5D> (last visited Mar. 20, 2019).

⁹ JAIME M. GRANT ET AL., NAT'L GAY & LESBIAN TASK FORCE, NAT'L CTR. FOR TRANSGENDER EQUAL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* (2011), <https://perma.cc/4M4B-SBK7>. For a more recent survey on these struggles faced by the trans community, see SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 8* (2016), <https://perma.cc/Z92C-CEFA>.

¹⁰ Gender dysphoria is the stress stemming from having a gender that differs from the gender you were assigned at birth. Gender dysphoria is a medical diagnosis. Not all transgender people experience this stress, and do not have gender dysphoria. *Frequently Asked Questions About Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUALITY (July 9, 2016), <https://perma.cc/GN8K-JMWL>.

¹¹ JAMES ET AL., *supra* note 9, at 13.

¹² Jules Tamás Fütty, *Challenges Posed by Transgender - Passing Within Ambiguities and Interrelations*, 7 GRADUATE J. SOC. SCI. 57, 63 (2010) (emphasis in original) (citations omitted).

There is a united approach to purism in the judicial system that honors the gender binary, and we must deconstruct this in order to gain equal rights. Judith Butler, in *Undoing Gender*, examines the structure of gender and where the power of this structure is formed. To quote Butler, “being outside the norm is in some sense being defined still in relation to it.”¹³ This identity of being “outside of the norm” is applicable to the case of a gender nonconforming person who has to prove their gender identity, outside of the binary, to a court system. How will these policies apply when a person does not relate their transness to trans woman or trans man but to a non-binary identity? As long as courts continue to qualify someone’s gender identity by historic traditional roles, people who choose not to assimilate will continue to be harmed.

The legal system has a history of pathologizing people, and trans people are no exception. “Not only are transgender people dehumanized, but when they are treated as people, their identities are treated as intrinsically pathological. For example, the Americans with Disabilities Act lists exclusions from coverage. Transsexualism, transvestism, and gender identity disorders are among these exclusions”¹⁴ In addition to those exclusions, the very same section of the Americans with Disabilities Act (ADA) goes on to exclude people who suffer from “compulsive gambling, kleptomania, or pyromania”¹⁵ and “psychoactive substance use disorders resulting from current illegal use of drugs.”¹⁶ By grouping members of the trans community in with people who experience compulsions to steal or light things on fire, this kind of language perpetuates a legal system where people who do not fit neatly on the gender binary continue to be criminalized and treated as if they are harmful to society. This is what happens throughout court cases, as if the trans community is full of “criminals,” rather than just people who identify on a different spectrum. The paradox is that to contribute to the society that forces assimilation, we need a doctor’s note to access hormones, and surgeries to treat our dysmorphia. It is a cycle of pathologizing our humanness; constantly having to prove our “sickness” to doctors and judges.

II. COURT CASES

In order to move forward in an active resistance, it is important to understand the tools that are used against communities and to gauge the

¹³ JUDITH BUTLER, *UNDOING GENDER* 42 (2004).

¹⁴ Melina Constantine Bell, *Gender Essentialism and American Law: Why and How to Sever the Connection*, 23 *DUKE J. GENDER L. & POL’Y* 163, 192 (2016).

¹⁵ Americans with Disabilities Act of 1990, 42 U.S.C. § 12211(b)(2) (2009).

¹⁶ *Id.* § 12211(b)(3).

language and semantics used by courts. The First International Conference on Transgender Law and Employment Law was held in August 1992. Clyde Williams, an attorney, presented a lecture focusing on the impact of criminal law on the trans community including a discussion of the three cases discussed in this section.¹⁷ These cases are used to hone in on the language used to describe trans people, the ways it continues to pathologize the community, the creation of the burden to pass, and the preservation of the traditional and historic gender binary. Trans people have fought against the crossdressing laws of the past, yet these ordinances still hold power in language.¹⁸

A. *Cases from the 1970s*

1. *City of Columbus v. Zanders*

In 1970 Zanders was arrested for violating a local crossdressing ordinance. The language of the crossdressing ordinance from Columbus, Ohio was, “No person shall appear upon any public street or other public place in a state of nudity or in a dress not belonging to his or her sex, or in an indecent or lewd dress.”¹⁹ The court found that the ordinance had a “real and substantial relation to the public safety and general welfare,” even in times of the changing morals of “The Pepsi Generation.”²⁰ Zanders challenged their arrest on several constitutional grounds.²¹ Here the court held that a person’s transness was excluded by the ordinance because transsexualism, according to medical authorities, is a mental defect negating criminal culpability.²² The judge found that Zanders was a “true

¹⁷ Clyde Williams, Criminal Law & Practice Report, Address at the First International Conference on Transgender and Employment Law (Aug. 26-30, 1992), in THE INTERNATIONAL CONFERENCE ON TRANSGENDER L. & EMP. POL’Y, INC.: INDEX PROC. I-V (1996).

¹⁸ One historical explanation for crossdressing ordinances was to prolong institutionalized discrimination against women. *Id.* at 286. These laws continued the construction of the gender binary while reinforcing structural patriarchy. There is no purpose for crossdressing laws except to perpetuate discrimination. *Id.* This discrimination has since been extended to queer folks, the trans community, and any type of gender variation. The purpose of anti-trans laws is to perpetuate the gender binary while shaming people into assimilation.

¹⁹ *City of Columbus v. Zanders*, 25 Ohio Misc. 144, 145 (Mun. Ct. 1970).

²⁰ *Id.* at 147. See Jimmy Stamp, *The Architectural History of Pepsi-Cola, Part 1: The ‘Mad Men’ Years*, SMITHSONIAN MAG. (Sept. 11, 2013), <https://perma.cc/3JLN-TBDR>, for a discussion of Pepsi-Cola’s 1960s marketing campaign, “The Pepsi Generation,” which encouraged a new, younger generation to exercise their freedom and “come alive.”

²¹ *Zanders*, 25 Ohio Misc. at 146 (asserting a violation of their right of expression under the First Amendment, deprivation of right to privacy under the Fourth Amendment, deprivation of due process under the Fifth Amendment, and cruel and unusual punishment under the Eighth Amendment).

²² *Id.* at 149-50.

transsexual” and was therefore not responsible under the ordinance due to mental illness and compulsion.²³ The judge did not find that the ordinance infringed on Zander’s constitutional rights.²⁴

The case was considered a landmark case within the judicial system for trans people, yet it still forced assimilation, imposed the gender binary, and pathologized our humanness.²⁵ The medical authorities cited in *Zanders* include Dr. Byron Stinson, who was the chairman of the Department of Psychiatry Transsexual Protocol Committee of the Ohio State University Hospital.²⁶ The use of a doctor in *Zanders* was helpful in that it persuaded the judge to recognize Zander’s trans identity, yet it perpetuated the stigmatizing misunderstanding that there was a cure that the medical community could exclusively provide for the trans community. The court also relied on Dr. Harry Benjamin, who wrote, “[t]ranssexuals are rare in number but are among the most unhappy people I have ever met,”²⁷ which is quite the remark and problematic on the surface. A doctor stating that a specific group of people seeking help are the “most unhappy” is absolutely not a diagnosis and is not a nuanced response at all to the community seeking medical help. It is within the very medical definition that in order for a trans person to receive hormones or a gender affirming surgery, they must be diagnosed with gender dysphoria. The doctor stated that trans people are “often in a stage of depression and on the verge of self-mutilation or suicide.”²⁸ The trans community literally has to tell most doctors that they are depressed and on the verge of self-mutilation in order to get through all the gatekeeping in the medical field. Additionally, many trans people are not “clinically” distressed and do not have impaired social skills because of our gender identity, but rather because we are the subjects of much ostracism and discrimination.²⁹

²³ *Id.* at 145, 150.

²⁴ *Id.* at 147 (“We hold, therefore, that Section 2343.04 of the Columbus City Code has a real and substantial relation to the public safety and is therefore constitutional and a valid exercise of the police power.”).

²⁵ The outcome of this case pushed people who identify as trans or nonbinary to assimilate and adhere to the gender binary. Dr. Byron Stinson stated that Zanders scored “very high on the feminine scale” to prove that Zanders was a “true transsexual.” *Id.* at 145. The fact that the doctor used a scale is monumental in recognizing that there this is not a binary but rather a spectrum of gender expression, yet he also used cisnormative language such as “natural and normal” to discuss gender. *Id.* This is consistent with the use of non-binary exclusive language—the type of language that is still used in courts today.

²⁶ *Zanders*, 25 Ohio Misc. at 145.

²⁷ *Id.* at 148.

²⁸ *Id.*

²⁹ Bell, *supra* note 14, at 193 (quoting AM. PSYCHIATRIC ASS’N, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 453 (5th ed. 2013)).

The opinion in *City of Columbus v. Zanders* used cisnormative language that adheres strongly to the gender binary. Zanders was diagnosed as “transsexual,” yet the pronouns he and him were used throughout the case.³⁰ While it is not clear what Zanders’ pronouns were, the court resisted the recognition of Zanders being transgender. Dr. Benjamin, who wrote articles on transsexualism and was considered an expert used quotations marks around the words ‘woman’ and ‘her’ in reference to Christine Jorgensen, a trans pioneer and actor.³¹ Jorgensen was a woman, and was famously out about her transition,³² meanwhile Dr. Benjamin continued to qualify her femininity by announcing she was “attractive.”³³ A person’s identity is not dependent on beauty according to a purported expert yet it is a theme in the language of the courts. Whether someone passes well enough to the public’s eye is a significant factor in the language of the court’s ruling and outcome.

2. *City of Columbus v. Rogers*

The same Columbus city ordinance was challenged five years after *Zanders* in *Rogers*.³⁴ In 1975, the Supreme Court of Ohio found that the ordinance was unconstitutional because it violated the Fourteenth Amendment right to due process.³⁵ The court found that the statute was:

[S]o vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Therefore . . . violat[ing] the due process clause of the Fourteenth Amendment to the United States Constitution.³⁶

This hinted at non-binary aspects of fashion recognized by legal system. There was no objective way to evaluate the crime the ordinance was enforcing. Who was being charged with violating the ordinance was completely subjective because, as recognized by this court, gender is performed differently all the time, based on factors such as culture, religion, age, and location: “[m]odes of dress for both men and women are historically subject to changes in fashion.”³⁷ While this language might seem trivial, it was opening the landscape to include the concept of *non-binary*

³⁰ *Zanders*, 25 Ohio Misc. at 144.

³¹ *Id.* at 148.

³² See CHRISTINE JORGENSEN, A PERSONAL AUTOBIOGRAPHY (1967) for more on Jorgensen.

³³ See *Zanders*, 25 Ohio Misc. at 148.

³⁴ *City of Columbus v. Rogers*, 41 Ohio St. 2d 161 (1975).

³⁵ *Id.* at 165.

³⁶ *Id.* at 164 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

³⁷ *Id.* at 165.

into policy and legal frameworks. Unfortunately, this is not the way courts continued to rule regarding matters of the trans community.

3. *City of Chicago v. Wilson*

In 1976, two people, who were identified as preoperative transsexuals, were tried under a Chicago city ordinance.³⁸ The language of the ordinance was, “Any person who shall appear in a public place . . . in a dress not belonging to his or her sex, with intent to conceal his or her sex . . . shall be fined.”³⁹ The defendants argued that they had the right to dress as they pleased.⁴⁰ The city argued that the ban on cross-dressing was to protect citizens from being misled, to detect criminals, to protect from bathroom harassment, and to deter “antisocial conduct.”⁴¹ The reviewing court, on appeal, found that there was no evidence for any of the reasons provided by the city.⁴² The court recognized that the cross-dressing in this case was a part of a “preoperative therapy program.”⁴³ The court held that “cross-dressing” in public was not harmful to society, and that the ordinance as applied was an unconstitutional deprivation of the defendants’ liberty interest.⁴⁴

Ruthann Robson, Professor of Law & University Distinguished Professor, discussed the importance of the court’s ruling that these ordinances were unconstitutional as applied because the defendants were identified as “transsexuals” and not simply crossdressers.⁴⁵ Interpreting these ordinances to apply to separate groups of people perpetuated the otherness the trans community deals with daily. The courts in *Chicago v. Wilson* classified trans people according to their genitals, and semiotics based on gender essentialism.⁴⁶ This creates classism within the law, as most trans people who consider surgery and hormone replacement therapy may not be able to access these gender affirming procedures without funds or insurance. Gender-based discrimination based on cisnormativity is still present

³⁸ *City of Chi. v. Wilson*, 44 Ill. App. 3d 620, 621-22 (App. Ct. 1976), *rev’d*, 75 Ill. 2d 525 (1978).

³⁹ *Id.* at 622 (citation omitted).

⁴⁰ *Id.* at 623 (arguing under the Personal Liberty Clause of the Ninth Amendment, the Due Process Clause of the Fourteenth Amendment, the privacy penumbra in the Bill of Rights, and the Right of Expression Clause of the First Amendment).

⁴¹ *City of Chi. v. Wilson*, 75 Ill.2d 525, 532 (1978).

⁴² *Id.* at 534.

⁴³ *Id.* at 533-34.

⁴⁴ *Id.*

⁴⁵ RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* 61-62 (2013).

⁴⁶ *City of Chi. v. Wilson*, 44 Ill. App. 3d 620, 624 (App. Ct. 1976), *rev’d*, 75 Ill. 2d 525 (1978).

in legal opinions. The courts seem unable to push past the gender binary and continue to qualify people by their passability.

B. Recent Legal Developments

1. Evancho v. Pine Richland School District

The 2017 decision in *Evancho* which allowed the trans community to see steps toward equality still forced trans people to adhere to the binary.⁴⁷ While this case is considered a victory for the transgender and non-binary community by LGBTQ organizations,⁴⁸ it is important to stay critical of the court's language. This case used language that reinforced the binary gender roles and put sizable pressure on trans and non-binary folks to pass. *Evancho* is a case about a school board enacting a policy (Resolution 2) intended to prevent trans students from using the bathroom that corresponded with their gender identity. Parents in the Pine-Richland School District received the following notification of this new policy:

This resolution agreed to by a majority of the Board of Directors of the Pine-Richland School District indicates our support to return to the long-standing practice of providing sex specific facility usage. All students will have the choice of using either the facilities that correspond to their biological sex or unisex facilities. This practice will remain in place until such time that a policy may be developed and approved.⁴⁹

U.S. District Court Judge Mark R. Hornak granted the students' motion to restore the *status quo ante* and overturn Resolution 2 in their school district.⁵⁰ This meant that the students were able to use the restroom that corresponded to their gender identity rather than biological sex, which was the policy in place before Resolution 2 was passed.

This was fantastic news for trans students who found that their form of gender expression did fit within the binary—but it became problematic for people who were nonconforming. The problems with this case were

⁴⁷ *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017).

⁴⁸ See, e.g., *Lambda Legal Lawsuit Forces End to School District Anti-Transgender Bathroom Policy*, LAMBDA LEGAL (Aug. 1, 2017), https://www.lambdalegal.org/news/pa_20170801_pine-richland-settlement [<https://perma.cc/R4CL-YJ9J>] (“This is a victory for transgender students everywhere and sends a clear warning to school districts with anti-transgender bathroom policies . . .”) (quoting Lambda Legal Staff Attorney Omar Gonzalez-Pagan).

⁴⁹ *Evancho*, 237 F. Supp. 3d at 273 n.4. For contemporary coverage of the school board's actions, see Colin Deppen, *Pittsburgh-Area School Ends Transgender Bathroom Choice, Putting It at Odds with Feds, Obama*, PENNLIVE (Sept. 13, 2016), <https://perma.cc/J74W-3VNC>.

⁵⁰ *Id.* at 294-95.

Judge Hornak's description of the trans students' physical appearance, students' popularity within the school, and generally upholding the gender binary. The fact that Judge Hornak includes that Evancho, one of the trans students in this case, was elected to the "Homecoming Court,"⁵¹ speaks volumes. Evancho and all trans people should be granted the same rights as everyone else, independent of their popularity in school, appearance, and passability.⁵² Stating that someone is elected to homecoming court suggests that they are doing "normal" activities—this coded language means that are being legally recognized only for assimilating to society's cisnormative culture. Trans people should not have to prove that they are striving for a place on the binary.

This case set precedent that judges can be the decision makers on transness, and that trans people do not get to declare their own identities. Judges become the gender police in determining if someone is truly living in a certain type of welcomed transness. One of the first lines in Judge Hornak's opinion is, "Juliet Evancho and Elissa Ridenour have lived all facets of their lives as girls, and A.S has done so as a boy."⁵³ This language could be destructive to a trans person who might not live all facets of their life on one side of the binary. Even if Evancho wanted to wear a suit instead of a dress on the homecoming court, an outfit that our culture would describe as masculine, being an out transwoman still means that she should be able to use the women's bathroom. *Evancho* exploited the binary to grant rights to the trans community while pressuring us to "live in all facets" on one side of the gender binary.⁵⁴ This creates the illusion that we can only be granted safety and rights if we pass as cisgender, when these rights should exist whether or not a person passes.

2. *Adams v. St. Johns County*

In 2018 a transgender student brought a claim under Title IX as well as an Equal Protection claim under 42 U.S.C. § 1983 because his school did not allow him to use the boys' bathroom. The court gave a history of the young transgender boy's life, and cited his emotional distress and "external genitalia" at birth as proof that he was trans.⁵⁵ The court wrote,

⁵¹ *Id.* at 276.

⁵² Passing is a word used to suggest that a trans person looks cisgender in the public's eyes. *Gender Pronouns*, TRANS STUDENT EDUC. RESOURCES, <http://perma.cc/Z8T5-UXP6> (last visited Mar. 31, 2019). This resource points out that "these are not the only pronouns. There are an infinite number of pronouns as new ones emerge in our language. Always ask someone for their pronouns." *Id.*

⁵³ *Evancho*, 237 F. Supp. 3d at 272.

⁵⁴ *Id.* at 275.

⁵⁵ *Adams v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1300 (M.D. Fla. 2018).

“The evidence has established that Drew Adams is a transgender boy.”⁵⁶ The case was not about whether the plaintiff is transgender, but whether his rights were violated by the high school.⁵⁷ This unnecessary invocation of, and reliance on, binary language continues to exclude people, specifically folks who do not find that a binary bathroom is a place where they feel comfortable.

3. Contemporary Law and Policy

Crossdressing laws and ordinances might seem to be a thing of the past, yet this discrimination is still present. Trans people in North Carolina are punished under the same circumstances even today. On March 23, 2016, HB-2 was approved. HB-2 granted permission to the public to judge people based on their clothing, and appearance by policing that person’s choice of bathroom. The language of the bill was violently transphobic, and yet, it did not include the word trans in any capacity.⁵⁸ HB-2 told the trans community that they could not use the bathroom closest to their gender, but only of the sex assigned to us at birth. HB-2 perpetuated the false notion that there are only two choices for gender, and that one can automatically identify someone’s gender based on their outer appearance. It encouraged passing and cisnormativity.

HB-2 has since been repealed and replaced with HB-142.⁵⁹ The new bill was constructed in the same form: to focus exclusively on biological sex and exclude any protections for trans people until 2020.⁶⁰ The only change in HB-142 was to go back to the ways bathrooms were treated before HB-2 existed, which does not ensure safety for the trans community. People are policing bathrooms by another’s outward appearance and their own perceptions of gender, rather than allowing a person to pick whatever bathroom they are most comfortable in. HB-2 is a clear example of where the crossdressing laws of the past, pressures of passing in present cases, and clothing all come into importance. Creating an otherness surrounding trans communities marginalizes the community, just like the crossdressing laws of the past.

Some trans people can hide or pass extremely well, others choose not to hide or assimilate, and some do not have a choice in the matter as their bodies do not conform to the standard the courts and society have created

⁵⁶ *Id.* at 1326.

⁵⁷ *See generally id.*

⁵⁸ Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3, *repealed by* Act of Mar. 30, 2017, 2017 N.C. Sess. Laws 4.

⁵⁹ Paul A. Specht & Will Doran, *LGBT North Carolinians Can Challenge Ban on Cities’ Pro-Transgender Bathroom Laws*, NEWS & OBSERVER (last updated Oct. 1, 2018, 6:30 PM), <https://perma.cc/8Q5Q-6KHS>.

⁶⁰ Act of Mar. 30, 2017, 2017 N.C. Sess. Laws 4.

for the trans community. There is no safe option even for a trans person who adheres to the language in HB-2 and chooses the bathroom of their assigned sex at birth. It is likely that this person might be harassed for the clothing they are wearing, the profile of their body, and their behaviors that do not conform to notions of how someone of a specific gender should act. Every time a trans person is placed in front of sex-segregated bathrooms, they make an intentional choice. Trans people risk something every time they enter the bathroom whether it is dignity, safety, or both. If there were no forced assimilation, if there were no binary to adhere to, then trans, non-binary, and intersex people would be less likely to encounter danger when using bathrooms.

Similar discriminatory policies have been discussed at a federal level. Last spring, the Trump administration considered changing the definition of “sex” under the Title IX Act, which is the act frequently used when trans people bring claims in court.⁶¹ The proposal stated that uniformity across government agencies is necessary, and that the definition of sex will be the one listed on a birth certificate “as originally issued.”⁶² This proposal is nothing but transphobia and not only does it ignore the medical community’s definition of transgender, it more importantly continues to silence the needs and wants of the trans community. While gender discrimination is likely to always exist, we must continue our efforts to abolish a binary used to acquiesce rights.

III. ACTIVE RESISTANCE

There are a variety of ways to form active resistance towards non-binary exclusive language, and to begin our move away from the traditional gender norms. Some ways that I have access to resistance in my life include being out and proud of my non-binary identity (which is a privilege that I have as I pass in most spaces), supporting my community, listening to others and their acts of resistance, and educating people. In order to progress against discrimination, it is important to understand the tools that are used against communities and analyzing the language and semantics in court is one step forward in our fight. Other trans people and allies are doing that in new ways within the legal system, the medical community, and the fashion world.

⁶¹ Erica L. Green et al., *‘Transgender’ Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://perma.cc/V7Q4-RFW5> (“The Trump administration is considering narrowly defining gender as a biological, immutable condition determined by genitalia at birth, the most drastic move yet in a governmentwide effort to roll back recognition and protections of transgender people under federal civil rights law.”).

⁶² *Id.*

I am fortunate to have friends that work endlessly in their own fight to distinguish their gender and to help others through their own internal fight to prove their gender. There are different fashion lines that are working hard to end the gender design that marketing has created in fashion houses. There is trans-owned line Gogo Graham, who was the first designer to showcase a fashion line highlighting only trans people.⁶³ The line's "mission is to responsibly facilitate economic empowerment and distribution of financial capital to TGNC/NB (trans/gender non-conforming/non-binary) femmes with an emphasis on prioritizing femmes of color."⁶⁴ Gogo Graham was applauded throughout the fashion world and has been featured in *Vogue*.⁶⁵ Trans people know fashion from head to toe because we must think in terms of striving for passability, and how that affects our safety and access to rights in the courts.

Another designer, Third Fernandez, has been constructing her own clothing line. Third and I sat down to discuss how we find safety within clothing, and how her line will help other trans people. She spoke about how the mainstream definition of trans is completely different from ours within the community, we discussed the importance of non-binary pronouns,⁶⁶ and she captivated me when she spoke about how women have to think about their silhouette. Third spoke about how we all have our own individual blend of masculinity and femininity in our clothing curation, how every garment she wore was labeled as men's, yet she knew her body and silhouette and how to construct a feminine look.

There is a reason for why people are dressed a certain way, and for the trans community it is bound to our safety and get our identity as well Regardless, of what I wear, I know who I am. I not only wear this so I pass, but I wear this 'cause I feel good wearing this.⁶⁷

The trans community exists, and society along with the courts can exclude us from their language, but forcing us back into the closet will

⁶³ *Gogo Graham: Eternal Peep Show*, NEW MUSEUM, <https://perma.cc/ULR8-JTKW> (last visited Feb. 12, 2019). To see more of Gogo Graham's fashion line, see GOGO GRAHAM, <https://perma.cc/J5G2-YQ62> (last visited Feb. 12, 2019).

⁶⁴ *Gogo Graham: Eternal Peep Show*, NEW MUSEUM, <https://perma.cc/ULR8-JTKW> (last visited Feb. 12, 2019).

⁶⁵ Kristin Anderson & Steff Yotka, *The Definitive Guide to Fashion's New Guard*, VOGUE (Mar. 22, 2016), <https://www.vogue.com/slideshow/fall-2016-young-designers>.

⁶⁶ Examples include they/them/theirs, ze, hir or zir, hirs or zirs, and hirself or zirself. This is a non-exhaustive list. You should always ask someone what their pronouns are. *Gender Pronouns*, TRANS STUDENT EDUC. RESOURCES, <http://perma.cc/Z8T5-UXP6> (last visited Mar. 31, 2019).

⁶⁷ Interview with Third Fernandez, Designer, in Happyfun Hideaway, Brooklyn, N.Y. (May 17, 2017).

not silence us. We are wearing and dressing the identities that we have built, and courts should be trying harder to be more inclusive with their language.

Another way that people acting within the legal system are fighting back is by educating judges, attorneys, and juries about what “trans panic” is and how it is an expression of toxic masculinity. “Trans panic” is a defense used in court to justify the behavior of violent crimes against the transgender community.⁶⁸ Cynthia Lee and Peter Kwan wrote an article focused on how advocates can help the trans community and fight against the defense of “trans panic.”⁶⁹ Lee and Kwan suggest that banning the “trans panic” defense will help fight against hate crimes, but it will not be enough to denounce them.⁷⁰ They created a toolkit for litigators and advocates that provides educational resources on the transgender and non-binary community.⁷¹ The toolkit provides ways to fight against anti-trans policies and to humanize the community, rather than pathologize us.⁷² It includes resources that lawyers can use to teach juries about structures of masculinity that then create violent attacks against femme individuals, who trans people are, and most importantly changes the wording of “trans panic” to “trans rage” to highlight that this defense is truly transphobic.⁷³

In New York City, Callen-Lorde is a medical sanctuary for the HIV and trans community, as they provide services for marginalized communities.⁷⁴ They have a program called “Pronouns Matter,” which features stickers throughout the medical facilities where people can write their pronouns down so everyone is aware of them.⁷⁵ Most importantly, Callen-Lorde uses the informed consent approach to grant access to hormone replacement therapy and surgeries via one informational visit, a consent

⁶⁸ “[T]rans ‘panic’ defense is a legal strategy which asks a jury to find that a victim’s . . . gender identity is to blame for the defendant’s violent reaction, including murder When the defense is employed, the perpetrator claims that their victim’s . . . gender identity not only explains – but excuses – their loss of self-control and subsequent assault.” *Gay/Trans Panic Defense*, NAT’L LGBT BAR ASS’N, <https://perma.cc/P29C-9D3Y> (last visited Feb. 19, 2019). “[T]rans panic is usually asserted by heterosexual men charged with murdering transgender women.” Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77, 80 n.7 (2014).

⁶⁹ See generally *id.*

⁷⁰ *Id.* at 80. Banning the defense of “trans panic” is a small step that merely reforms the criminal legal system that is systemically racist and transphobic and must be abolished.

⁷¹ *Id.* at 123-28.

⁷² *Id.*

⁷³ Lee & Kwan, *supra* note 68, at 123-28.

⁷⁴ *About Us*, CALLEN-LORDE, <https://perma.cc/2846-86H3> (last visited Feb. 19, 2019).

⁷⁵ Callen-Lorde, *Pronouns Matter*, YOUTUBE (June 1, 2016), https://www.youtube.com/watch?v=QQIVjE_P5jA.

form, and one blood work test.⁷⁶ It is not a long overdue process of going through a therapist, “presenting as your gender” for three months, and getting different notes via medical providers.⁷⁷ Callen-Lorde is progressive because it allows trans people to tell the doctor what their identity is, instead of a doctor diagnosing someone’s identity.

FINAL WORDS

Imposing the gender binary on society creates an environment of suppression. Past case law created violent and marginalizing language that has been exclusive of the trans community, and this language has continued throughout modern cases and policy. While there is active resistance throughout small community organizing, usually because of transgender people, there has to be more done from our cisgender allies. To get rid of the binary is imperative for all. We deserve more as a society and moving forward, active resistance, pressure on the courts, and ultimately breaking down the gender binary will lead to new equalities for trans and non-binary people.

⁷⁶ CALLEN-LORDE CMTY. HEALTH CTR., PROTOCOLS FOR THE PROVISION OF HORMONE THERAPY (2014), <https://perma.cc/5GUK-U9P3>.

⁷⁷ For an example of an alternate timeline see *Timeline of Gender Transition*, MASS. TRANSGENDER POL. COALITION, <https://perma.cc/E4SH-XREB> (last visited Mar. 5, 2019).