

Lifestyle Balancing: Queerness and the Practice of Law

By SLATER STANLEY*

Introduction

TO FIND YOUR PLACE WITHIN A SYSTEM you need to understand it, and yourself in relation to it. The purpose of such an evaluation might be productivity, survival, comfort, power, or a combination thereof. Growing up in a conservative environment as a queer¹ child without queer role models, I am not unfamiliar with suppressing characteristics and desires that feel natural to me to fit more neatly within hegemonic heteronormative² expectations. I applied to undergraduate universities—and later law schools—with this in mind: I want to be somewhere socially liberal.

In my first year at New York University, I “came out”³ for the first time. From that time on, I began to embrace the concept of pride, which remains a touchstone for the LGBTQ+⁴ community. I registered for gender and

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1. See GENDER EQUITY RES. CTR., QUEER 1, <https://www.ocf.berkeley.edu/~geneq/docs/infoSheets/Queer.pdf> [<https://perma.cc/7MBD-MYBL>] (indicating that the word “queer” can have multiple meanings: (1) “an umbrella term for the lesbian, gay, bisexual, transgender community”; (2) “a political statement, as well as a sexual orientation, which advocates breaking binary thinking by recognizing both sexual orientation and gender identity as potentially fluid”; and/or (3) “a simple label to explain a complex set of sexual behaviors and desires.”).

2. See *Understanding Heteronormativity with 6 Examples*, MASTERCLASS (June 7, 2021), <https://www.masterclass.com/articles/understanding-heteronormativity> [<https://perma.cc/G5CA-JQVY>] (defining “heteronormativity” as “the belief that heterosexuality is the only natural expression of sexuality in our society.”).

3. See Olivia B. Waxman, *The History Behind Why We Say a Person ‘Came Out of the Closet’*, TIME (Oct. 11, 2017, 9:05 AM), <https://time.com/4975404/national-coming-out-day-closet-metaphor-history/> [<https://perma.cc/Z6UJ-L4WF>] (stating that the term “came out” is a shortened version of the phrase “came out of the closet”).

4. See *Definition of Terms*, U.C. BERKELEY CTRS. FOR EDUC. JUST. & CMTY.

sexuality courses, experimented with aesthetic changes to my appearance, and socialized with other queer people in spaces designated for us like the school LGBTQ+ center and historic queer bars. There's something special about being gender nonconforming ("GNC")⁵ in a space where it's encouraged.

The exposure to community led me down a path to performing in night-life, lip-synching to Peaches⁶ and other queer icons in makeup and heels. With my embrace of androgyny came a sense of heightened creativity, but also an introduction to street harassment, which I equated with being perceived as a woman. An understanding of the transformative power of makeup—and how people treat you because of it, for better or worse—led me to what became a career as a freelance makeup artist, and in that capacity I had the opportunity to assist clients in their own self-actualization of beauty and gender ideals.⁷

With the onset of the COVID-19 pandemic,⁸ work as a makeup artist functionally evaporated due to restrictions on in-person work and requirements related to facial coverings, with no end in sight.⁹ With the encouragement of my family—in particular, my father, an attorney—I considered a legal career as a next step. Many transferable skills exist between the two fields since both involve working closely with clients, strategizing, and occasionally working as part of a team. Despite my excitement about the possibility of a career that would empower me to promote my community and stabilize my finances

ENGAGEMENT (May 2019), <https://cejce.berkeley.edu/geneq/resources/lgbtq-resources/definition-terms> [<https://perma.cc/S97K-EX46>] (indicating that the LGBTQ+ acronym stands for "Lesbian, Gay, Bisexual, Transgender, Queer" and that "[t]he '+' signifies that one may identify with a sexual orientation or gender identity that is not represented within this acronym, but would still be considered apart [sic] of the LGBTQ+ community (e.g., pansexual).").

5. See ALOK VAID-MENON, POCKET CHANGE COLLECTIVE: BEYOND THE GENDER BINARY 13–14 (2020) (defining gender nonconforming individuals as "people who visibly defy society's understanding of what a man or a woman should look like").

6. *Talking to: Peaches*, THE EVERYDAY, <https://theeverydaymagazine.co.uk/music-1/talking-to-peaches> (last accessed Dec. 21, 2022). Peaches is a recording artist and performer who is regarded as "a true feminist and queer icon." *Id.*; *Lip-Synch*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/lip-synch> [<https://perma.cc/5NGY-PP9P>] (defining lip-synching as "to pretend to sing or say at precisely the same time with recorded sound").

7. This included, on occasion, demonstrations catering to transgender women showcasing specific technical skills that allow for more agency over one's appearance.

8. See generally *Coronavirus Disease (COVID-19) Pandemic: Overview*, WORLD HEALTH ORG.: EUROPE, <https://www.who.int/europe/emergencies/situations/covid-19> [<https://perma.cc/5GKG-KS2G>] (indicating 2019 as the origin date of what became a global, multiyear pandemic of the SARS-CoV-2 virus).

9. See Luis Ferré-Sadurní & Maria Cramer, *New York Orders Residents to Wear Masks in Public*, N.Y. TIMES (April 15, 2020), <https://www.nytimes.com/2020/04/15/nyregion/coronavirus-face-masks-andrew-cuomo.html> [<https://perma.cc/8FJE-UHWC>] (noting that New York Governor Andrew Cuomo would start requiring face coverings in public effective April 17, 2020, when social distancing is not feasible).

in a way that my makeup career had not allowed me, I felt unsure about how much of the queer identity I had taken so many years to embrace and develop I would have to tuck back into “the closet.” As a law student and future attorney, to what extent would I be expected to cover tattoos, remove piercings, refrain from painting my nails or wearing makeup—all aspects of my queer identity—to increase my chances of success in a traditionally conservative field?¹⁰

Part I of this Essay considers why relatively few openly LGBTQ+ attorneys exist despite our community’s breadth—and the media’s impact on that reality. Part II explores how these practitioners can do themselves justice and add value to their professional relationships by expressing their identities rather than suppressing them. Specifically, I consider the role of gender non-conforming expression, which is often, but not always, related to queerness. Part III considers an example of a double standard regarding representation: the official way that California’s legal system acknowledges the identities of nonbinary¹¹ parties—so long as they are not facing criminal charges. I conclude with a few hopes and recommendations for queer practitioners and allies.

I. Media Representation of Openly Queer Attorneys, or Lack Thereof

“Most of our folks, who have wanted to achieve business success, have done it from the closet. . . . Too many of our community members have achieved success by compartmentalizing their lives, or by being in the closet.”

– Annise Parker, first openly lesbian mayor of a major U.S. city¹²

“It’s widely understood that ‘male’ and ‘female’ are constructed well before birth, which means that by the time a person enters the workforce he or she

10. The historically conservative field of the law is evolving. See Edgar Bodenheimer, *The Inherent Conservatism of the Legal Profession*, 23 IND. L.J. 221, 223, 226 (1948). But see Debra Cassens Weiss, *Lawyers Are More Liberal than General Population, Study Finds; What About Judges?*, A.B.A. J.: DAILY NEWS (Feb. 2, 2015, 7:56 AM), https://www.abajournal.com/news/article/lawyersare_more_liberal_than_general_population_study_finds_what_about_judges/ [https://perma.cc/US8D-EMRF]. (“Law professors and lawyers are more liberal than the general population, while judges are more conservative than the average lawyer.”); I’m not the only one who has posed the question of nail polish in the legal field. See @u/lucky95charms, *Nail Polish on a Man in Big Law*, REDDIT (Oct. 20, 2020, 7:54 PM), https://www.reddit.com/r/LawSchool/comments/jf4ss8/nail_polish_on_a_man_in_big_law/ [https://perma.cc/8TX5-WB8U] (asking whether “[n]ail polish on a man” is something the user can continue in a big law job).

11. See *Definition of Terms*, *supra* note 4 (“Nonbinary” is “[a] term for gender identities that fall outside the gender binary [terms]” of “male” or “female”).

12. ANDREW GELWICKS, *THE QUEER ADVANTAGE: CONVERSATIONS WITH LGBTQ+ LEADERS ON THE POWER OF IDENTITY* 313 (2020).

has had twenty to thirty years of standard gender construction and reinforcement woven into every fiber of the individual's life."

– C.T. Whitley, author of *Trans-Corporation: A Benefit Analysis of a Transgender Man in a Corporate Setting*¹³

The above perspectives discuss corporate culture in general, but the sentiment transfers to the practice of law. A 2017 survey by the National Association for Law Placement ("NALP") reports that out of 100,850 participating lawyers, whose firm sizes ranged from less than 100 lawyers to over 700 lawyers, 2,644 identified as "LGBT"—only 2.64% of the group.¹⁴ Of those 2,644 lawyers, 880 were in positions of power as firm partners, a miniscule 1.99% of the total 100,850 surveyed.¹⁵ Queer attorneys implicitly understand that being "out" at work carries potential liability as it relates to the possibility for career growth.¹⁶

Perhaps it is millennial entitlement,¹⁷ but I do not want to wait to be myself (again); I prefer to feel that I can express myself *while* establishing myself in a field—not afterward. It's one factor that has supported my interest in public interest law rather than corporate practice. How many more queer attorneys exist alongside these 100,850 attorneys at big firms—and in non-profits, government agencies, and law-adjacent fields like professorship—who choose, willfully or by necessity, to abate their queerness in professional settings? Below, I consider how lack of representation in the media and a lack of representation in law firms go hand in hand, ultimately to the detriment of, not only the attorneys themselves, but to queer people considering the practice of law and seeking role models.

Representation of queer attorneys in pop culture provides some insight as to the predicament: The results are scant, and those characters I was able to locate are primarily straight-acting white men who risk professional

13. KATE BORNSTEIN & S. BEAR BERGMAN, GENDER OUTLAWS: THE NEXT GENERATION 35 (2010).

14. NALP Bulletin, *LGBT Representation Among Lawyers in 2017*, NALP (Jan. 2018), <https://www.nalp.org/0118research> [https://perma.cc/VW72-EBYF].

15. *Id.*

16. See Trudy Knockless, *LGBTQ+ Lawyers Say They're Still Cautious About How Much to Say at Work*, LAW.COM (Oct. 26, 2021, 3:17 PM), <https://www.law.com/international-edition/2021/10/26/lgbtq-lawyers-say-theyre-still-cautious-about-how-much-to-say-at-work-378-180914/?slre-turn=20220728022403> [https://perma.cc/WF57-VCQP].

17. See Larry Alton, *Millennials and Entitlement in the Workplace: The Good, the Bad, and the Ugly*, FORBES (Nov. 22, 2017, 2:52 PM), <https://www.forbes.com/sites/larryalton/2017/11/22/millennials-and-entitlement-in-the-workplace-the-good-the-bad-and-the-ugly/?sh=28f3c7ba3943> [https://perma.cc/PTR5-KAHP].

consequences by revealing their queer lifestyle.¹⁸ The 1985 television drama, *An Early Frost*, depicts the struggles of gay attorney, Michael Pierson, as he navigates his career, relationship, and family following his AIDS diagnosis and subsequent “coming out.”¹⁹ Although the film shows his *family* ultimately accepting him despite his queerness and affliction, the story ends with him leaving the provisional care of his family to return to Chicago, begging the question—will the gay attorney be able to keep his position as a firm partner now that he’s out?²⁰ Supporting the idea that queer attorneys must remain subdued in their expression is *Will & Grace*, the sitcom that first aired in 1998 that featured the day-to-day of attorney Will Truman, who is also a gay white man.²¹ Will’s relatively straight-acting character serves as a juxtaposition to fellow gay character, Jack McFarland, who is the more stereotypically flamboyant of the two.²² Jack relies on Will for financial support,²³ and the contrast in their financial stability reinforces the narrative that to be taken seriously in the professional world, a queer man must assimilate to typical heteronormative ideals.

Media representation of openly queer women leaves even more to be desired—not only are the characters similarly lacking diversity, but, for the most part, references to female queerness in legal environments are either superficial or auxiliary to the plots of the primary characters.²⁴ In *Sex and the City*,²⁵ Miranda Hobbes is a corporate attorney who pretends to be a lesbian to appeal to the diversity interests of her boss, a partner at her firm, before

18. *But see Queer as Folk* (Showtime 2022). Johnny Sibilly plays lawyer Noah Hernandez in this television series drama that “centers on a group of club-going friends who find support in the gay community following a tragedy.” *Queer as Folk*, IMDB, https://www.imdb.com/title/tt9569528/?ref_=nv_sr_srsrg_1 [https://perma.cc/2WQB-GRB8].

19. *AN EARLY FROST* (NBC television broadcast Nov. 11, 1985). “A young lawyer hasn’t told his parents about his sexuality. Now he must tell them—at a time when the diagnosis was still a death sentence—that he has AIDS.” *An Early Frost*, IMDB, <https://www.imdb.com/title/tt0089069/> [https://perma.cc/5RHR-LSQA].

20. *AN EARLY FROST*, *supra* note 19.

21. *Will & Grace* (NBC 1998). “Gay lawyer Will and straight interior designer Grace share a New York City apartment. Their best friends are gleeful and proud gay Jack and charismatic, filthy-rich, amoral socialite Karen.” *Will & Grace*, IMDB, <https://www.imdb.com/title/tt0157246/> [https://perma.cc/VL2R-76NK].

22. *Will & Grace*, *supra* note 21.

23. *See e.g., Will & Grace*, IMDB, https://www.imdb.com/title/tt10696386/?ref_=ttep_ep7 [https://perma.cc/U3EN-HNSG].

24. *But see The L Word* (Showtime 2004). Jane Lynch plays Joyce Wischnia, an impactful LGBT civil rights attorney. *See The L Word*, IMDB, https://www.imdb.com/title/tt0330251/?ref_=fn_al_tt_0 [https://perma.cc/H54C-8CBE].

25. *Sex and the City* (HBO 1998). “Four female New Yorkers gossip about their sex lives (or lack thereof) and find new ways to deal with being a woman in the late 1990s.” *Sex and the City*, IMDB, <https://www.imdb.com/title/tt0159206/> [https://perma.cc/MS9N-LDFK].

ultimately confessing to the charade.²⁶ In *Legally Blonde*,²⁷ the character of Enid Wexler, who “single-handedly organized the march for lesbians against drunk driving,” carries an extremely small role as one of Elle Woods’ law school classmates and sees no substantial character development or depth of consideration.²⁸

I’d like to see more stories in mainstream media about openly queer attorneys that are flamboyant in their queerness *and* successful in their legal careers. As a third-year law student, I bring up these cultural references to support feelings of uncertainty that I have only just begun to overcome as I have asked questions, studied, and interned in the legal system. LGBTQ+ individuals bring a wealth of knowledge and perspective to their fields, and it is important that they feel comfortable presenting themselves fully at work, not only for the benefit of themselves, but for their clients, their work environments, and future generations of social-justice-minded attorneys. In the following sections, I discuss both the origins of such insecurity and examples of how some queer people in legal settings might feel constricted today.

II. Queer Futurity²⁹ in the Legal Context: Balancing Personal and Professional Dignities

“Queerness is essentially about the rejection of the here and now and an insistence on potentiality or concrete possibility for another world.”

– José Esteban Muñoz, author of *Cruising Utopia*³⁰

To become an attorney—that is, to join our legal system as an “officer of the court”—requires a promise to “strive to conduct [oneself] at all times with

26. *Sex and the City*, *supra* note 25; but see *And Just Like That...* (HBO Max 2021). Miranda, many years later, pursues public interest law and a genuine, albeit flawed, relationship with a new nonbinary character, Che. See *And Just Like That...*, IMDB, https://www.imdb.com/title/tt13819960/?ref_=fn_al_tt_0 [<https://perma.cc/D7QH-G2TN>].

27. *LEGALLY BLONDE* (Type A Films 2001). “Elle Woods, a fashionable sorority queen, is dumped by her boyfriend. She then decides to go to follow him to law school. While she is there, she figures out that there is more to her than just looks.” *Legally Blonde*, IMDB, <https://www.imdb.com/title/tt0250494/> [<https://perma.cc/K83X-78C9>].

28. See *Legally Blonde: Meredith Scott Lynn: Enid*, IMDB, https://www.imdb.com/title/tt0250494/characters/nm0528761?ref_=tt_mv_close [<https://perma.cc/79SM-CHEH>] (indicating that Enid has roughly two quotes in the film).

29. See JOSÉ ESTEBAN MUÑOZ, *CRUISING UTOPIA: THE THEN AND THERE OF QUEER FUTURITY* 49 (NYU Press 10th ed. 2009) (noting that “queer futurity” concerns the relationship of queer people to the future). “Futurity can be a problem. Heterosexual culture depends on a notion of the future: as the song goes, ‘the children are our future.’ But that is not the case for different cultures of sexual dissidence.” *Id.*

30. *Id.* at 1.

dignity, courtesy and integrity.”³¹ These are values that I share. What is less clear to me as a law student looking up at the legal system is whether *my* idea of dignified self-expression will allow me the necessary credibility to be successful as a professional advocate in the eyes of supervisors, colleagues, and judges.

Consider the “dignity” described in Michael Warner’s 1999 work, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life*, where he observes:

The lesbian and gay movement at its best has always been rooted in a queer ethic of dignity in shame. This is what Stonewall stands for. A political movement based in this kind of dignity, however, should extend far beyond questions of sex or sexual identity . . . Nelly boys and butch girls can be fagbashed or taunted, and being heterosexual will not protect them very much. In the same contexts, homosexuals whose gender conforms more to the norm can often be silently accepted . . . It’s even true that people of very unremarkable gender identity, object choice, *and* sexual practice might still passionately identify with and associate with queer people. Subjectively, they feel nothing of the normalcy that might be attributed to them.³²

Thus, queerness is not only about how you identify; it’s about how the world views you.³³ It may seem trivial, but for me, having my nails painted is an aesthetic and political signifier—a means of indicating from afar that I have unlearned associations socially and stereotypically attached to one gender and not another. As a future advocate, though, I am ultimately concerned with my clients’ well-being. Would the combination of a suit and nail polish, even in legal spaces where women can wear nail polish, reflect poorly on me as a

31. *Attorney’s Oath*, THE STATE BAR OF CAL., [https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Attorneys-Oath#:~:text=OATH%20\(to%20be%20taken%20before,and%20counselor%20at%20law%20to](https://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Attorneys-Oath#:~:text=OATH%20(to%20be%20taken%20before,and%20counselor%20at%20law%20to) [https://perma.cc/XUW8-SAX8].

32. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 37 (1999). “Stonewall” refers to a historic confrontation between the police and a group of patrons and local residents at a West Village bar, Stonewall Inn, in 1969. *Stonewall Riots*, HISTORY (May 31, 2022), <https://www.history.com/topics/gay-rights/the-stonewall-riots> [https://perma.cc/M2F8-R5G9]. Many regard the Stonewall riots as one event signaling the commencement of the modern gay rights movement. *Id.* Same-sex relations were criminalized in New York City at this time, and LGBT individuals flocked to gay bars and clubs, “places of refuge where they could express themselves openly and socialize without worry. However, the New York State Liquor Authority penalized and shut down establishments that served alcohol to known or suspected LGBT individuals, arguing that the mere gathering of homosexuals was ‘disorderly.’” *Id.* The term “fagbashed” refers to “[t]he hobby/act of seeking out homosexuals to physically assault.” @VitoVane, *Fag Bashing*, URBAN DICTIONARY (Dec. 2, 2017), <https://www.urbandictionary.com/define.php?term=Fag%20Bash> [https://perma.cc/NC5V-J33U].

33. *See also* JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 34 (2007) (promulgating the theory that an individual’s “gender” is a constructed performance manifested through interactions with others who interpret the performance through their own socio-cultural lens, assign a gender to the individual, and treat them accordingly).

professional, or worse, invite some sort of implicit homophobia or transphobia that might be a detriment to my client's case?³⁴

My personal experiences have provided some answers. During the summer following my first year of law school I worked as an intern at Oasis Legal Services. There, I had the privilege of assisting LGBTQ+ asylum seekers with their asylum applications and representing clients at their asylum interviews at the San Francisco Asylum Office ("AO"). My wearing of nail polish in that context was ultimately a non-issue. It seemed to me that what my supervisors cared most about was that I cared about the clients—not how I chose to express myself. I distinctly remember sitting in the waiting room at the AO with a client who feared returning to his home country due to past persecution. We both had our nails painted, and we were talking about them while we waited. The tender moment serves as a reminder that I can add value by presenting my queerness in legal settings rather than suppressing it.

Though not about legal work in particular, the October 2022 article, *The Joys of Having a Gender Nonconforming Boss*, underscores the value of working alongside, and particularly under, queer- and trans-friendly colleagues.³⁵ Author Aeightch Frederick states:

Never before had I felt the right to say, unequivocally, "These are my pronouns, and if you want to be respectful of me, these are the pronouns you'll use for me." Knowing that the person interviewing me for the new role [at a LGBTQIA+ nonprofit organization] was trans gave me a sense of relief.³⁶

The same logic can and should be applied not only in employer-employee relationships, but also in attorney-client relationships.

III. Advocating for Nonbinary and Gender Nonconforming Clients

"The issue is not that we are failing to be men or women. It's that the criteria used to evaluate us to begin with is the problem. . . . Gender is a story, not just a word. There are as many ways to be a woman as there are women. There are as many ways to be a man as there are men. There are as many ways to be nonbinary as there are nonbinary people."

– Alok Vaid-Menon, author of *Beyond the Gender Binary*³⁷

34. See Ruth Carter, *Non-Binary Lawyering: What's Courtroom Attire?*, ATTORNEY AT WORK (Aug. 9, 2018), <https://www.attorneyatwork.com/non-binary-lawyering-ruth/> [https://perma.cc/F7DF-V5Y8] (discussing the importance of courtroom attire for nonbinary lawyers and clients).

35. Aeightch Frederick, *The Joys of Having a Gender-Nonconforming Boss*, TRANSLASH MEDIA (Oct. 16, 2022), <https://translash.org/the-joys-of-having-a-gender-nonconforming-boss/> [https://perma.cc/GV9P-E2CC].

36. *Id.*

37. VAID-MENON, *supra* note 5, at 6, 60.

To holistically represent their nonbinary and GNC clients, attorneys should be aware of the history of gender diversity across cultures, and the fact that these identities are not new—they have simply been expunged to promote a “Western” gender binary ideal.³⁸ These include “two-spirit among American Indians, hijra in South Asia, waria in Indonesia, muxe in Mexico, just to name a few.”³⁹ Kenji Tokawa, in a submission to the anthology, *Gender Outlaws*, notes:

In many cultures of color, pre-colonial history shows societies valuing these people specifically because they are outside the norm of gender, often choosing them for positions of spiritual power and authority. However, witch hunts and other rigid reforms in gender occurring in the white west, coupled with the need to topple indigenous authority figures, influenced European colonizers to seek out and destroy these ambiguously-gendered people. Transphobia is now rampant in formerly colonized places, as a legacy of colonialism.⁴⁰

In acknowledgement of this history and in support of the fact that clients are individuals and not case numbers, attorneys should do their best to understand their client’s worldview, particularly so that the attorney, in a position of power as an advocate, can educate the court about their client’s experience.

An article addressing the official use of an individual’s pronouns in legal proceedings speaks to the current level of respect extended to nonbinary individuals in the courtroom.⁴¹ The article describes a recent criminal case with a nonbinary defendant, Mx.⁴² Thomason, where defense counsel objected to 134 instances of “purposeful and deliberate misgendering” by prosecutors at trial.⁴³ On appeal, Judge Steven M. Colloton of the Eighth Circuit stated, “Clarity suffers and confusion may follow when legal writing refers to a single individual as ‘they,’ especially when the materials advert to other actors who are naturally described as ‘they’ or ‘them’ in the traditional plural.”⁴⁴ I can

38. *Id.* at 39–40.

39. *Id.*

40. BORNSTEIN & BERGMAN, *supra* note 13, at 211–12.

41. See Britni De La Cretaz, *Judges Say Using Nonbinary Defendant’s Correct Pronouns Is Too Hard*, THEM (Mar. 18, 2021), <https://www.them.us/story/judges-misgender-say-using-nonbinary-defendants-correct-pronouns-too-hard> [https://perma.cc/LWF3-GV38].

42. “‘Mx.,’ pronounced ‘mix,’ is a coinage preferred by some transgender people who do not identify as either male or female and so do not want to use ‘Mr.’ or ‘Ms.’” Philip Corbett, *‘Mx.’? Did The Times Adopt a New, Gender-Neutral Courtesy Title?*, N.Y. TIMES (Dec. 3, 2015), <https://www.nytimes.com/2015/12/03/insider/mx-did-the-times-adopt-a-new-transgender-courtesy-title.html#:~:text=%E2%80%9CMx.%E2%80%9D%20pronounced%20%E2%80%9C,%E2%80%9D%20or%20%E2%80%9CMs.%E2%80%9D> [https://perma.cc/89U2-WY2R].

43. De La Cretaz, *supra* note 41.

44. *Id.*

understand why an appellate judge confined to the record might feel this way generally, but when one of the issues on appeal *is* misgendering,⁴⁵ it seems to me that systemic reform is in order. Updating jury instructions is one possible solution for assuring that the trial process respectfully observes a client's identity *by default*.

California's jury instructions reflect some progress, albeit imperfectly. The California Judicial Branch ("CJB") states, "The goal of [jury] instructions is to improve the quality of jury decision making by providing standardized instructions that accurately state the law in a way that is understandable to the average juror."⁴⁶ I would argue that jury instructions similarly serve to educate judges, juries, practitioners, and courtroom-attendees in general about advances in our societal understanding and mutual respect for nonbinary individuals. Despite the CJB goal quoted above, the updated 2022 California Jury Instructions show a glaring disparity in the way a court is invited to think about how a party identifies. The difference in wording between the jury instructions for the *tort* of assault and the jury instructions for the *crime* of simple assault exemplify how far we have come—and how far we have to go.

In *civil* assault cases, the California jury instructions begin as follows: "[Name of plaintiff] claims that [name of defendant] assaulted [him/her/*non-binary pronoun*]."⁴⁷ I was pleasantly surprised to see the inclusion of a nonbinary option when I first read these instructions, and even more so because the option did not assume that the only nonbinary option would be "they/them," which seems to have become the most popular method for referring to someone who does not identify as male or female.⁴⁸ The instructions provide for some wiggle room as to self-identification and, along with it, a respect for agency and bodily autonomy in a difficult situation.

In contrast, in *criminal* simple assault cases, the California jury is given *no* formal invitation to consider that the defendant may not identify as male or female.⁴⁹ For example, the jury instruction for the third element of criminal assault, the first of its elements to reference the defendant's gender identity at all, reads: "When the defendant acted, (*he/she*) was aware of facts that would

45. See generally Chan Tov McNamara, *Misgendering as Misconduct*, 68 UCLA L. REV. DISCOURSE 40 (2020).

46. *Civil Jury Instructions Resource Center*, CAL. JUD. BRANCH, <https://www.courts.ca.gov/partners/313.htm#:~:text=The%20goal%20of%20these%20instructions,understandable%20to%20the%20average%20juror> [https://perma.cc/YFW4-F3GC].

47. Cal. Civil Jury Instruction CACI No. 1301 Assault (2022) (emphasis added).

48. See N.D. HEALTH, A GUIDE TO USING PERSONAL PRONOUNS, <https://www.hhs.nd.gov/sites/www/files/documents/DOH%20Legacy/Pronouns.pdf> [https://perma.cc/GHW8-EQZ5].

49. Cal. Crim. Jury Instruction CALCRIM No. 915(iv) Simple Assault (2022).

lead a reasonable person to realize that (*his/her*) act by its nature would directly and probably result in the application of force to someone.”⁵⁰ The contrast in offerings between the civil and criminal jury instructions seems to imply that the State of California is aware that there are people who exist outside of a constructed gender binary, but that these individuals are nevertheless only deserving of respect as to their identity when they are not being prosecuted for a crime.

This may be particularly detrimental for GNC clients of color. For example, Latinx and Black individuals comprise the majority of people arrested in California,⁵¹ so it follows that nonbinary individuals from these racial backgrounds are especially susceptible to having their gender identities ignored in criminal courtroom situations. Where there is no structural prompt for the court to consider nonbinary identities, and in the interest of preserving true and accurate testimony, attorneys should make a point to clarify any ambiguity as to their client’s pronouns or identity on the record, as Mx. Thomason’s counsel attempted to do, to ensure correct recognition and to mitigate the chances of continued misgendering on appeal. As Alok put it so neatly, “Using gender-neutral language isn’t about being politically correct, it’s just about being correct.”⁵²

Conclusion

“We have to be visible. We should not be ashamed of who we are. We have to show the world that there we’re numerous.”

– Sylvia Rivera, belated Latinx transgender activist⁵³

This is not a reflection about an absence of LGBTQ+ people working in legal settings; there are many. My considerations revolve around *how* we are—how open and how visible, and how this affects our relationships with our clients, colleagues, and ourselves. As reflected in popular media, queers in the legal field sometimes subdue personal dignity implicitly gained through the coming out process to command professional respect. As reflected in California’s jury instructions, disparities exist in the legal system as to whose gender

50. *Id.* (emphasis added).

51. *See, e.g.*, Magnus Lofstrom et al., *Racial Disparities in California Arrests*, PUB. POL’Y INST. OF CAL. (Oct. 2019), <https://www.ppic.org/publication/racial-disparities-in-california-arrests/> [https://perma.cc/4799-LXXX].

52. VAID-MENON, *supra* note 5, at 47.

53. Isabel Gonçalves, *Honoring Trailblazers Who Paved the Way for the LGBTQ Movement*, SALESFORCE: THE 360 BLOG (June 19, 2019), <https://www.salesforce.com/blog/stonewall-lgbtq-history-pride-month/> [https://perma.cc/STD7-BXM2].

identity is deserving of respect and when. Queer attorneys are uniquely positioned to advocate for queer clients through their shared experiences. I hope that the considerations above encourage queer people who may have an interest in working in the legal system to follow that interest, step into their power, and become progressive attorneys sensitive to the lived experiences of their own and other traditionally underrepresented groups.