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# **TO EACH THEIR OWN: Using Nonbinary Pronouns to Break Silence in the Legal Field**

Ezra Graham Lintner

## **ABSTRACT**

The last decade has been monumental in the fight for transgender rights, including a growing recognition of transgender identity. This shift has also created space for those with nuanced gender identities—such as those who are nonbinary—to join the conversation. Individuals who identify as nonbinary do not identify as “male” or “female,” but rather as both, neither, or something altogether separate. Nonbinary people often use alternative pronouns, such as “they/them/theirs,” to refer to themselves. While these pronouns are increasingly being accepted into the lexicon of American English, the legal field is far behind in its acceptance and use of nonbinary pronouns.

Although the law has made great strides in recognizing nonbinary identity within the last five years, the legal field cannot support the progress of transgender rights until regularly utilizes nonbinary pronouns, such as “they/them/theirs,” in law school classrooms, legal academic writing, and legal practice. Furthermore, the legal field’s failure to recognize such pronouns is a form of oppressive silencing that serves to uphold a false gender binary while also delegitimizing nonbinary identity. Critical Race Theory provides a generalizable framework for better understanding this silencing so that transgender rights activists and scholars can effectively resist it. Specifically, the scholars behind Critical Race Theory had to break the oppressive silencing forced upon them by white academia in order for the ideas, theories, writing, and scholarship of legal scholars of color to be respected in legal academia. As such, transgender rights activists and scholars can benefit from studying and employing the tactics they used to challenge their silencing.

### ABOUT THE AUTHOR

Ezra Graham Lintner received their J.D. from DePaul University College of Law, where they focused on homelessness advocacy, criminal justice reform, and transgender rights. Ezra currently works in civil legal aid in the San Francisco Bay Area.

### DEDICATION

I would like to extend my sincere appreciation to Professor Sumi Cho and Professor Margaret Montoya for being so generous with their knowledge and perspectives. I would also like to thank my spectacular support team, including Bryanna Jenkins and Devyn Hocevar-Smith, and the staff of *UCLA Women's Law Journal* for their patience, encouragement, and willingness to talk theory at all hours. Finally, I dedicate this to Allyson Grislis, whose decade of friendship, fierce allyship, and penchant for adventure were necessary conditions for this Article's existence.

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“Some people are born in the mountains, while others are born by the sea.  
Some people are happy to live in the place they were born, while others must  
make a journey to reach the climate in which they can flourish and grow.  
Between the ocean and the mountains is a wild forest.  
That is where I want to make my home.”  
—Maia Kobabe

## INTRODUCTION

The transgender community is a diverse one, allowing for endless combinations of expression and identity. One such identity is “nonbinary.”<sup>1</sup> Nonbinary individuals do not identify as “man” or “woman,” but rather as both, neither, or something altogether separate.<sup>2</sup> A nonbinary person may also use pronouns other than “she/her/hers” or “he/him/his.”<sup>3</sup> While there are a multitude of nonbinary pronouns, the most commonly used is “they/them/theirs.”<sup>4</sup>

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1. This Article focuses on the larger transgender community rather than just the nonbinary community. Ultimately, these are differing identities. Some people who identify as nonbinary do not identify as transgender, and many people who are transgender do not identify as nonbinary. Nonetheless, the nonbinary community is housed within the transgender community in this Article. This is done so for brevity and clarity, but also because the nonbinary community often is situated within the transgender community in society, as well. “Nonbinary people are often said to fit under the heading ‘transgender’: ‘An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth.’ But not all non-binary people identify as transgender, and many transgender people identify as men or women.” Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 897–98 (2019) (quoting GLAAD MEDIA REFERENCE GUIDE 11 (10th ed. 2016)), <https://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf> [<https://perma.cc/7AH6-ZQ2F>].

2. *Id.*

3. Katie Reineck, *Running from the Gender Police: Reconceptualizing Gender to Ensure Protection for Non-Binary People*, 24 MICH. J. GENDER & L. 265, 266 (2017). For a beautiful discussion of diversity within the nonbinary community, see Clarke, *supra* note 1, at 905–10.

4. Clarke, *supra* note 1, at 957. “They” is focused on a few reasons: brevity, concision, and a focus on incremental progress. There is great potential that this will eventually be an outdated article, and that we need to argue for more expansive pronouns. That will mean progress has expanded our concepts of gender and language, and this should be celebrated. The legal world will have to reckon with this fact when we get to it. Accepting and using they/them is the beginning of a larger trend into gender creativity. The inclusion of “they/them”

In what follows, I argue that the legal profession should use “they/them” pronouns in law school classrooms, legal academic writing, and legal practice. I further argue that failing to recognize or use such pronouns is a form of oppressive silencing that delegitimizes nonbinary identity.<sup>5</sup> In order to break this form of silencing, transgender rights activists and scholars should study and employ the tactics Critical Race Theorists (colloquially known as “Race Crits”) have used to fight for recognition and respect in legal academia for work by legal scholars of color.<sup>6</sup> Critical Race Theory (CRT) is instructive because it provides a generalizable framework for understanding how hegemony is partially constructed by the linguistic limitations of a field.<sup>7</sup> This framework offers valuable tools for resistance, such as expanding the legal lexicon through self-identification and ensuring calls for change are made by passionate self-advocates. Both of these tools aid in the subversion of dominant language, and accordingly, the subversion of hegemony.

In Part I, I discuss the importance pronouns hold in our society. Pronouns and proper pronoun use are integral to the overall mental health, physical safety, and general welfare of transgender individuals. Transgender people experience significant mental health benefits when speakers use their correct pronouns. People who oppose transgender rights may claim that using accurate pronouns is neither important nor obligatory, but these claims ignore the fact that using a transgender person’s pronouns is inextricably intertwined with respecting the person’s identity and existence. The Sapir-Whorf hypothesis postulates that salient ideas within a culture are partially created by the words that the culture uses.<sup>8</sup>

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is not an end goal, but a starting point of silence breaking.

5. “[S]ilence is oppressive when it is characteristic of a dominated group, and when the group is not allowed to break its silence by its own choice or by any means of any media controlled the power group.” Marsha Houston & Cheri Kramarae, *Speaking from Silence: Methods of Silencing and of Resistance*, 2 DISCOURSE & SOC’Y 387, 388 (1991).

6. See *infra* Part III. It is important to note that Race Crit is one way which those who study CRT have identified. See, e.g., KIMBERLÉ W. CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xxiii (1995). Professor Nolan L. Cabrera has noted that it is not the only term used, though, writing, “. . . many who conduct CRT analyses and do not label themselves ‘Crits.’ Some use the term Critical Race Theorist, others CRTheorist, and some do not have a self-ascribed label.” Nolan R. Cabrera, *Where is the Racial Theory in Critical Race Theory?: A Constructive Criticism of the Crits*, 42 REV. HIGHER EDUC. 209, 210 n.1 (2018). Echoing Professor Cabrera, I am opting to use the title “Race Crits,” but by no means intend to limit the ability of these scholars to self-identify.

7. See *infra* Part III.

8. Bernard Comrie, *Language and Thought*, LINGUISTIC SOC’Y AM., <https://>

Therefore, the faster nonbinary pronouns are incorporated into the law, the faster they will be accepted into the larger fold of society.

In Part II, I explore how nonbinary pronouns are presently received in American English, generally. I argue that nonbinary pronouns are rapidly gaining acceptance in society. My conclusion is based in the ways nonbinary pronouns are treated by three sources: the American Heritage Dictionary, the Merriam-Webster Dictionary, and the American Psychological Association's (APA) style guide for writing. In subpart B, Treatment of Nonbinary Pronouns in Legal Scholarship, I survey the current legal scholarship on nonbinary pronouns. This scholarship generally falls into one of four overarching categories: (1) a complete rejection of they/them pronouns, (2) a cautioned consideration with action relegated to future generations, (3) a begrudged acknowledgement that contemporary scholars have to "deal with" nonbinary pronouns, and (4) a tempered acceptance and promotion of some nonbinary pronouns.

Part III situates the argument for ubiquitous use of nonbinary pronouns within CRT. In Subpart A, Situating the Argument, I address the potential pitfalls of applying CRT to the fight for transgender equality. These pitfalls include scholastic appropriation and the "marriage equality postracialism"<sup>9</sup> ideology. Legal advocates and allies must avoid these pitfalls to ensure people of color are not erased from the conversation. In Subpart B, Major Themes: Analogizing Struggles and Interventions, I explain how CRT provides an overarching structure for my central argument that the legal community should use nonbinary pronouns, even though transgender people are currently afforded only nominal legal protections and rights. CRT began with organized resistance to the oppressive silence forced upon scholars of color in legal academia. Race Critics sought to break that silence by demanding that the white scholars monopolizing both legal academia and conversations around civil rights hear and make space for scholars and people of color. Race Critics produced two interventions that translate to my argument regarding inclusive pronoun use: (1) the need for self-identification,

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[www.linguisticsociety.org/resource/language-and-thought](http://www.linguisticsociety.org/resource/language-and-thought) [https://perma.cc/J3DN-4BYT] (last visited May 12, 2019).

9. Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1017 n.25 (2014) (quoting Sumi Cho, *Post-racialism*, 94 IOWA L. REV. 1589, 1594 (2009)). Robinson utilizes Sumi Cho's definition of postracialism in his construction of this term: "a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decisionmaking or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action."

and (2) the need for passionate self-advocacy. I discuss both and analogize the oppressive silencing Race Critics experienced to the treatment that nonbinary individuals attempting to use “they/them” pronouns in the legal system experience today.

In Part IV, I apply the CRT interventions previously outlined to the use of nonbinary pronouns in three spaces: legal writing, legal academia, and legal practice. Pronouns reflect or symbolize gender identity in the transgender community. Each site of intervention provides unique possibilities of disrupting the current silence forced on nonbinary people.

## I. THE POWER OF NONBINARY PRONOUNS

It is hard to overstate the important role pronouns play in our society, especially within the transgender community. All people deserve to feel secure in their identities, but unlike cisgender people, transgender people do not live in a world in which that security is assumed. While a transgender person might personally feel comfortable with their identity, there is always a risk that others will be neither affirming nor understanding. As a result, transgender people must constantly analyze whether the people they interact with value and respect their gender identity. One’s use of pronouns informs that analysis.

A person’s refusal to use “they/them” pronouns is often indicative of transphobic beliefs, though seldom framed as such. For instance, a bigoted person may say, “I don’t hate transgender people, I just don’t ‘get’ why they need to change their name and pronouns. It’s confusing.” Opposing the use of “they/them” pronouns thus allows a transphobic person to oppose transgender rights while couching their argument in seemingly neutral terms.<sup>10</sup> When a transphobic person purposefully misgenders a transgender person, the underlying message is still clear: the transphobic person does not respect that person’s gender identity. The transphobic person, in essence, has told the transgender person that their identity does not matter.

The inverse is also true—when someone uses a transgender person’s pronouns correctly, this signals that they respect the transgender person.<sup>11</sup> Affording this respect is important in a

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10. Other indicia of transphobia include refusing to use someone’s correct name, questioning whether transgender people should be able to hold certain jobs (for example, serving in the military), and questioning whether transgender people should be able to use bathrooms that correspond with their gender.

11. Put differently, “[p]ronouns are not just an elementary grammatical concept. Pronouns are a fundamental element of recognizing and affirming a transgender person’s identity.” Christy Hall & Connor Suddick, *Beyond*

general sense, as all human beings deserve respect. But it is particularly important to transgender people, because misgendering is psychologically harmful, whether it's perceived as a microaggression or a blatant act of transphobia.<sup>12</sup> In fact, transgender people experience negative health effects when they are misgendered, misnamed, or discriminated against for being transgender.<sup>13</sup> These health consequences can be dire. For example, transgender teens are significantly more likely to be depressed, to self-harm, and to attempt suicide than cisgender teens.<sup>14</sup> This does not need to be the case, though: a recent study by researchers at the University of Texas found that transgender children are significantly less likely to experience depression or attempt suicide when they are able to use the name that reflects their gender,<sup>15</sup> which leads to the inference that experiencing transphobia, rather than being transgender, creates health issues. Indeed, the study found children who were allowed to use their accurate pronouns and names experienced a “seventy-one percent [decrease in] symptoms of severe depression, a thirty-four percent decrease in reported thoughts of suicide, and a sixty-five percent decrease in suicide attempts.”<sup>16</sup> While mental health issues faced by transgender people are not caused only by misgendering, these studies suggest that being called by one's correct name and pronoun communicate respect and acceptance, which in turn improves mental health outcomes for transgender youth.

Finally, society's use of correct pronouns is significant because, according to sociolinguistic theory, a culture is strongly influenced by the words that it uses.<sup>17</sup> The Sapir-Whorf hypothesis, also referred to as “linguistic relativity,” postulates that for a culture to truly conceptualize an idea in a cohesive sense, there must

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*the Binary Practical Advice for Using Gender Pronouns*, BENCH & BAR OF MINN., Feb. 2019, at 22, <https://www.mnbar.org/resources/publications/bench-bar/articles/2019/02/05/beyond-the-binary-practical-advice-for-using-gender-pronouns> [https://perma.cc/TMJ2-MQ52].

12. Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 SELF AND IDENTITY 1 (2014).

13. *Id.*; Samantha Pflum et al., *Social Support, Trans Community Connectedness*, 2 PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY 281.

14. Tracy A. Becerra-Culqui, *Mental Health of Transgender and Gender Nonconforming Youth Compared With Their Peers*, 141 PEDIATRICS 5, (2017).

15. *Using Chosen Names Reduces Odds of Depression and Suicide in Transgender Youths*, U. TEX. NEWS (Mar. 30, 2018), <https://news.utexas.edu/2018/03/30/name-use-matters-for-transgender-youths-mental-health> [https://perma.cc/FE5C-7CKL].

16. *Id.*

17. Comrie, *supra* note 8.



be a word or phrase to represent that idea within the culture.<sup>18</sup> Our words, in essence, deeply influence what we think. One example of this hypothesis is nonbinary identity itself. If someone tried to explain their nonbinary identity in a culture that did not collectively share that idea, the person might say, “Well, I feel neither like a man nor a woman. There are aspects of both that I identify with, but there are also aspects of both that I do not relate to at all. I wish there was a third option for me; something in between man and woman.” If the nonbinary person had the time, space, and energy to explain all this to another person, and then potentially answer any follow up questions, the other person might understand. Of course, each time the nonbinary person explained their identity, it would come out somewhat differently, and the person who they were explaining it to might get a slightly different idea of what they meant. As such, their identity would remain an anomaly, something that takes a paragraph to explain.

On the other hand, in a society in which the idea of nonbinary identity is commonly understood, the nonbinary person would have to simply say, “I’m nonbinary.” This phrase would instantaneously transmit mutually understood information to the listener. Currently, nonbinary people engaging with the legal field have to utilize the paragraph method of communication. There is no option to say, “I use they/them pronouns.” This means that the legal field, according to the Sapir-Whorf hypothesis, does not collectively understand or recognize nonbinary identity. Nonbinary people are consequently presented with a barrier in being seen, much less understood, that cisgender people do not experience.

The sooner nonbinary pronouns are used widely by the legal community, the sooner they will become ubiquitous in society. This shift will not just be one of language, but as the Sapir-Whorf hypothesis implies, it will be one of societal understanding as well.

## II. CURRENT RECEPTION TO NONBINARY PRONOUNS

The use and acceptance of nonbinary pronouns is gaining traction. This shift is evidenced by the inclusion of the pronoun “they/them” in the American Heritage Dictionary, Merriam-Webster’s Dictionary, and the APA’s Publication Manual. However, the legal field has been hesitant to accept nonbinary pronouns, and current legal literature reflects a wide spectrum of attitudes towards incorporating nonbinary pronouns into the law. I argue that the legal community should come into alignment with the leading reference literature.

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18. *Id.*

A. *The Evolution of American English to Include Nonbinary Pronouns*

Dictionaries and writing style guides can provide a compelling metric of where the institution of American English currently stands vis a vis acceptable language. Both types of reference literature are increasingly integrating “they/them” gender pronouns, as is evidenced by recent entries from the Merriam-Webster’s Dictionary and the American Heritage Dictionary, as well as guidance from the APA style guide.

In 2019, the Merriam-Webster Dictionary also added singular “they” to the dictionary with the definition: “used to refer to a single person whose gender identity is non-binary.”<sup>19</sup> It further declared singular “they” as its “Word of the Year” in 2019, noting:

English famously lacks a gender-neutral singular pronoun to correspond neatly with singular pronouns like everyone or someone, and as a consequence they has been used for this purpose for over 600 years. More recently, though, they has also been used to refer to one person whose gender identity is non-binary, a sense that is increasingly common in published, edited text, as well as social media and in daily personal interactions between English speakers. There’s no doubt that its use is established in the English language, which is why it was added to the Merriam-Web dictionary this past September.<sup>20</sup>

The Merriam-Webster Dictionary also observed that in 2019, searches for “they” increased 313 percent over the prior year.<sup>21</sup> This number is closely related to the concept of usage, a criterion for initial addition to the dictionary. Before Merriam-Webster added “they” as a singular pronoun, it had the word on its “Words We’re Watching” blog. The blog discusses words that have not yet been formally entered into the dictionary but are being considered and tracked by the publisher.

In its blog post, Merriam-Webster included a host of illuminating information about the use of singular “they.” It noted that “‘they’ has been in consistent use as a singular pronoun since the late 1300s.”<sup>22</sup> Singular “they” developed similarly to singular “you,”

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19. *They*, MERRIAM-WEBSTER DICTIONARY (11th ed., 2020) <https://www.merriam-webster.com/dictionary/they> [<https://perma.cc/JLR9-LWPV>].

20. *Merriam-Webster’s Words of the Year 2019*, MERRIAM-WEBSTER DICTIONARY (2019), <https://www.merriam-webster.com/words-at-play/word-of-the-year/they> [<https://perma.cc/9YRW-JG5N>].

21. *Id.*

22. *Words We’re Watching: Singular ‘They’*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/words-at-play/singular-nonbinary-they> [<https://perma.cc/SR9P-N4SY>] (last visited Apr. 2, 2019).

but as the blog post quips, “we don’t complain that singular ‘you’ is ungrammatical.”<sup>23</sup> The blog post also observes that “they” is used widely and often in the English language when a writer or speaker does not know the gender of the party about whom they speak.<sup>24</sup> The blog points out that the English language has been in need of nonbinary pronouns for centuries: it notes that English law referred to nonbinary people using “it,” which the publisher notes is dehumanizing.<sup>25</sup> Finally, the blog explains that “they” as a singular pronoun is not a new idea according to its records: “We have evidence in our files of the non-binary ‘they’ dating back to 1950,” it writes, “and it’s likely that there are earlier uses of the non-binary pronoun ‘they’ out there.”<sup>26</sup>

The American Heritage Dictionary also includes an entry for “they.” It is defined as “a singular personal pronoun for someone who doesn’t identify as either male or female.”<sup>27</sup> It similarly explains that use of “they” as a singular pronoun has been in use since the 1300s and that it “is so widespread both in print and in speech that it often passes unnoticed.”<sup>28</sup> It further states that singular use of “they” is desirable for situations when the gender of the person being spoken about is irrelevant or unknown, because it is a gender-neutral substitute for the indefinite “he” and is less “clumsy” than the repeated use of “he or she.”<sup>29</sup>

It is worth noting that the American Heritage Dictionary concedes that nonbinary use of “they” was not particularly popular amongst people surveyed about its usage: only 27 percent of respondents approved of “they” in 2015.<sup>30</sup> However, this share may have grown over the past five years. The American Heritage Dictionary also pointed out that among the respondents, there was “a clear generational shift: approval rate was 4% among [respondents]

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23. *Id.* This is a useful point that can be used to combat the argument that using singular “they” is awkward.

24. *Id.*

25. *Id.*

26. *Id.*

27. *They*, THE AMERICAN HERITAGE DICTIONARY (5th ed., 2015).

28. *Id.*

29. *Id.*

30. *Id.* But see A.W. Geiger & Nikki Graf, *About One-in-Five U.S. Adults Know Someone Who Goes by a Gender-Neutral Pronoun*, FACT TANK (Sept. 5, 2019), <https://www.pewresearch.org/fact-tank/2019/09/05/gender-neutral-pronouns> [https://perma.cc/YRZ4-22Y2]. A 2019 survey found that “roughly half of Americans (52%) say they would be somewhat or very comfortable using a gender-neutral pronoun to refer to someone, while 47% say they would be somewhat or very uncomfortable doing so.” Like the American Heritage Dictionary survey, younger generations appear more comfortable with nonbinary pronouns.

born before 1945, and 40% among [respondents] born later.”<sup>31</sup> This tenfold increase highlights how younger generations are much more open to thinking outside the gender binary than their Baby Boomer counterparts.<sup>32</sup>

The APA is the foremost psychological association, and it provides a prominent stylistic guide for academic writing. The APA usage guide added “they” in 2019, stating:

[The] APA endorses the use of ‘they’ as a singular third-person pronoun in the seventh edition of the *Publication Manual of the American Psychological Association*. This means it is officially good practice in scholarly writing to use the singular ‘they’ . . . [T]he APA advocates for singular ‘they’ because it is inclusive of all people and helps writers avoid making assumptions about gender.<sup>33</sup>

Under the heading “When Should I Use the Singular ‘They’?,” the guide answers:

Writers should use singular ‘they’ in two main cases: (a) when referring to a generic person whose gender is unknown or irrelevant to the context and (b) when referring to a specific, known person who uses ‘they’ as their pronoun.” The usage guide also contains a section titled “What if I Don’t Like the Singular ‘They’—Do I Still Have to Use it?” The APA answers with a resounding yes: “If you are writing about a person who uses ‘they’ as their pronoun, then yes, you have to use it. Respectful and inclusive language is important. And it’s part of APA style.”<sup>34</sup>

There is significant power in a stylistic guide as prominent as the APA making these declarations. Any writer, whether they be a researcher, theorist, or student, must comply with the APA’s rules on inclusive pronoun use if they are to remain in conformity with the style manual. An equivalent in the legal field could have the same impact: it could insist that legal writers adhere to proper pronoun usage. This could have dramatic implications for the transgender

31. *Id.*

32. It would also be interesting to know whether any of the respondents were transgender, or whether this study was another example of a powerful cisgender majority making decisions for the transgender community. I suspect the latter.

33. Chelsea Lee, *Welcome, Singular “They,”* AM. PSYCH. ASS’N STYLE BLOG (Oct. 31, 2019), <https://apastyle.apa.org/blog/singular-they> [<https://perma.cc/W5RM-428Y>].

34. *Id.* The APA’s Style and Grammar Guidelines for Bias Free Language regarding gender is, embarrassingly, leagues ahead of any equivalent in the legal field. See generally *Gender*, AM. PSYCH. ASS’N STYLE BLOG (last visited July 26, 2020), <https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/gender> [<https://perma.cc/8TQV-B7AV>].

community, as there would be more space to focus on actual substantive issues, such as sorely needed rights and protections.

## B. *Current Trends in Legal Scholarship*

The legal scholarship discussing nonbinary pronoun use varies greatly in levels of acceptance and reasons for that acceptance. Some articles argue that a feminist alternative to “she and him” should be applied to any group of people.<sup>35</sup> Very few articles explicitly consider nonbinary people, and many of those that do only consider them in passing or in footnotes.<sup>36</sup> The responses to the proposed use of nonbinary pronouns fall onto the following spectrum: (1) a complete rejection of they/them pronouns, (2) a cautioned consideration with action relegated to future generations, (3) a begrudged acknowledgement that contemporary scholars have to “deal with” nonbinary pronouns, (4) a tempered acceptance and promotion of some nonbinary pronouns.

### 1. Complete Rejection

The first response rejects the use of they/them based on current grammatical conventions. One example is Professor C. Marshall Thatcher’s article, *What Is ‘Eet’? A Proposal to Add a Series of Referent-Inclusive Third Person Singular Pronouns and Possessive Adjectives to the English Language for Use in Legal Drafting*,<sup>37</sup> wherein Thatcher not only rejects they/them pronouns, but proposes alternative pronouns instead. Thatcher does not consider transgender or nonbinary people in his proposed framework but rather ciswomen. In his argument, Thatcher quickly and definitively dispenses with the idea of “they” as a singular pronoun, writing:

[A]lthough the singular ‘they’ usage is preferable to application of the masculine rule, that usage is nonetheless objectionable. Just as the third person singular pronouns ‘he,’ ‘him,’ and ‘his’ should refer exclusively to a masculine noun and should not be used to refer to a male or female noun, so the third person plural pronouns ‘they,’ ‘them,’ and ‘their(s)’ should refer

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35. E.g., C. Marshall Thatcher, *What Is “Eet”? A Proposal to Add A Series of Referent-Inclusive Third Person Singular Pronouns and Possessive Adjectives to the English Language for Use in Legal Drafting*, 59 S.D. L. REV. 79, 87–88 (2014).

36. E.g., Suzanne E. Rowe, *As Language Evolves, Pronouns Leap Forward They/them/theirs*, OR. STATE BAR BULL., Jan. 2020, at 17, 18. See also Brad Charles & Thomas Myers, *Evolving They*, MICH. BAR J., June 2019, at 38. This issue is further discussed below in this subpart.

37. Thatcher, *supra* note 35.

exclusively to a plural noun and should not be used to refer to a singular antecedent noun. ‘No singular can be they.’<sup>38</sup>

Thatcher argues for expanding the available pronouns in the legal field and suggests multiple new pronouns, such as “eet,” which he claims will promote equality in writing between men and women. He states that choosing this new pronoun will also streamline language by eliminating verbosity.<sup>39</sup>

Thatcher’s rejection of an already-existing pronoun for one of his own invention is perplexing. Rather than look to a community that already utilizes expansive pronouns, he takes it upon himself to create his own. His piece further neglects to consider people who would be affected either by his rejection of “they” or by the potential inclusion of his new pronouns.

It is not completely outside of the realm of possibility that given the current conversation around nonbinary pronouns, Thatcher’s belief that “no singular can be they” would change.<sup>40</sup> Perhaps Thatcher would find that a human element, currently absent from his argument, changes his strict adherence to the notions of proper English.

## 2. Considered Delay

A second response considers a shift in pronoun usage important yet urges the *next* generation of legal writers to be the first to transition to they/them usage. Professor Kathleen Dillion Narko’s *They and Ze: The Power of Pronouns*, exemplifies this response.<sup>41</sup> In her article, Narko begins with a promising analysis of what she refers to as “the history of gender expansion” within the legal field.<sup>42</sup> Narko then discusses transgender people as a community with a vested interest in the outcome of the pronoun debate. In doing so, Narko cites one authority: Professor Greg Johnson, another cisgender author discussed below. She then discusses “ze” as the dominant preferred pronoun for people who do not identify with either male

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38. *Id.* at 82 (quoting Gerald Lebovits, *He Said—She Said: Gender-Neutral Writing*, 74 N.Y. STATE BAR ASS’N J. 64, 55 (2002)).

39. *Id.*

40. *Id.* (quoting Gerald Lebovits, *He Said—She Said: Gender-Neutral Writing*, 74 N.Y. STATE BAR ASS’N J. 64, 55 (2002)).

41. Kathleen D. Narko, *Nota Bene: They and Ze: The Power of Pronouns*, CBA REC., January 2017, at 52. For another example, see Tenielle Fordyce-Ruff, *Problems with Pronouns Part III: Gender-Linked Pronouns*, 56 ADVOCATE 48 (2013), although note that Fordyce-Ruff does not seem to consider nonbinary people in their argument, instead only considering the rise of singular “they” as a potential alternative to “he.”

42. Narko, *supra* note 41.

or female identities.<sup>43</sup> Despite acknowledging the history of language in the field and despite contemplating the communities her advice might affect, Narko ultimately advises legal authors “to write conservatively, that is, to follow the traditional rules of grammar” at least when writing to a court.<sup>44</sup> She states it is important to appeal to the reader: a “brief writer does not want his or her style to interfere with the judge’s reading of the brief.”<sup>45</sup> To support her conclusion, Narko quotes Judge Ilana Rovner, who said of writing, “How can you ever be wrong by doing it right?”<sup>46</sup> Narko’s version of “right,” via Judge Rovner, appears to mean strict adherence to current notions of proper English.

Narko acknowledges that her “advice may be different in the not-too-distant future” and notes that “a generational change is afoot.”<sup>47</sup> She cites an email exchange she had with Johnson discussing nonbinary pronouns, then concludes by stating, “language should not exclude another segment of our population. We appear to be facing a new shift in language. Many proponents of gender-neutral pronouns stress we should respect those who do not identify with binary gender. Language is a good place to start.”<sup>48</sup> Notably, this statement comes right after she refuses to advise legal writers to use nonbinary pronouns.

Apart from not citing a single nonbinary or transgender authority, Narko actually considers the transgender experience and still comes down on the side of conservative writing. In doing so, she actively chooses the comfort of the reader over the comfort of the person being written about. She relies on the old truism in law: the judge’s comfort and ease in reading is of paramount importance. True as this idea might be, there must be limits. One such limit is the use of inaccurate and offensive pronouns. Omitting nonbinary

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43. *Id.* Narko is not alone in her misunderstanding of which nonbinary gender pronouns are used most often. A striking amount of cisgender authors give page space to conversations about “xe” and “ze” pronouns. Both are pronouns that are used within the transgender and/or nonbinary communities, but they are currently less common. An uninformed reader would be led to think otherwise if they only read the current menu of cisgender commentary on pronoun use. This is another symptom of cisgender authors citing only one another while not inviting transgender and nonbinary people into the conversation. *But see* Michelle Stansbury, *A Guide to Gender-Neutral Pronouns*, COSMOPOLITAN (Dec. 31, 2019), <https://www.cosmopolitan.com/sex-love/a30368810/gender-neutral-pronouns-guide> [<https://perma.cc/R7DT-Y2ZX>].

44. Narko, *supra* note 41.

45. *Id.*

46. *Id.*

47. *Id.* at 52.

48. *Id.*

pronouns might create a more cohesive piece of writing for an unfamiliar judge, but that comfort is not without cost. Here, the cost is incredibly high: the health, safety, and affirmation of the nonbinary person being written about.

This consideration also answers Judge Rovner's aforementioned question of "[h]ow can you ever be wrong by doing it right?"<sup>49</sup> One can, and in fact *should* be wrong in this circumstance, if "right" means adhering to an archaic power structure that was developed by and for an oppressive majority at the expense of a marginalized individual. In that case, being "wrong" by conventional standards is worthwhile and right.

Of course, attorneys should not leave a judge stranded with unfamiliar language in a brief, especially when it undermines clarity and effectiveness. Still, Narko presents a false dichotomy: a lawyer's only options are not to either avoid nonbinary pronouns altogether or use them and risk alienating the judge. Rather, the author of any brief about a nonbinary client may communicate the inherent risks in using, or not using, the client's correct pronoun.<sup>50</sup> If the client and attorney make a calculated decision to use a client's nonbinary pronoun, the attorney can add a footnote with a statement of the client's pronouns, information about pronoun use generally, and an invitation for the judge to ask questions or seek more information from the attorney. In addition to protecting the client's interests and the attorney's integrity, including this information would increase the judge's exposure to nonbinary identities and the importance of accurate pronoun use.

### 3. Begrudged Acceptance

Some legal writers have approached the expansion of gender pronouns in the legal field with what can best be described as resignation. This is true of Professor Susie Salmon's magazine article *THEM!*<sup>51</sup> Salmon begins by phrasing the contemplation of nonbinary pronoun use in the legal field as "another polarizing issue" in a long line of grammatical quandaries she has researched.<sup>52</sup> She then introduces the reader to they/them pronouns by stating, "[t]hey is now a singular, gender-neutral pronoun. Maybe we should accept it and move on with our lives."<sup>53</sup>

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49. *Id.*

50. *See infra* Part III.

51. Susie Salmon, *Them!*, ARIZ. ATT'Y, Oct. 2018, at 10, <https://www.azattorneymag-digital.com/azattorneymag/201810/MobilePagedReplica.action?pm=2&folio=10#pg13> [<https://perma.cc/7USW-RBET>].

52. *Id.*

53. *Id.*



Salmon continues, arguing that the legal field already experienced expansion in moving away from “he/him” as an acceptable neutral pronoun.<sup>54</sup> Further, she writes that they/them has existed in common English for years, and that some news outlets and linguistics organizations consider the singular use of they/them to be proper.<sup>55</sup> Salmon then reveals that she has “long hoped that the language would evolve to include a unique third-person, gender-neutral, singular pronoun.”<sup>56</sup>

In addressing the legal field, and the reasons that “they/them” might not be widely embraced, Salmon offers this analysis:

Lawyers and judges are notoriously late adopters, especially when it comes to linguistic change. Really, it's not our fault. We're trained to follow precedent, to do things the way they've always been done. Moreover, we don't want our audience to think that our use of the singular 'they' indicates a carelessness about noun/pronoun agreement or ignorance of grammar rules in general.<sup>57</sup>

She concludes with a solution to this final concern, noting, “If you're concerned about confusion, you can always drop a footnote explaining the reasons behind your pronoun usage to your audience.”<sup>58</sup> Salmon also reminds her reader that “if an individual communicates a desire to be addressed and described using a particular set of pronouns, respect that wish.”<sup>59</sup> Ultimately, she states, “we can work with the singular they.”<sup>60</sup>

Salmon's take is notable for two reasons. First, she does not mention transgender or nonbinary people. It is problematic that she explicitly discusses third gender pronouns yet does not discuss the people most likely to utilize them. For instance, she discusses the pronoun “xe,” which members of the transgender community sometimes use. Still, she avoids naming the transgender community, instead opting to describe someone who might use an alternative pronoun as “an individual . . . [who] communicates a desire to be addressed and described using a particular set of pronouns.”<sup>61</sup> This serves to distance the person whom her argument is about from the community they are most certainly a part of. It also makes the

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54. *Id.*

55. *Id.* In particular, Salmon references *The Washington Post*, the American Dialect Society, and the AP Stylebook.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Salmon, *supra* note 51.

hypothetical “individual” seem just that: a person alone in their strange convictions, rather than a person from a community growing in recognition and actively fighting linguistic erasure.

Additionally, the piece is informed by Salmon’s experience as a cisgender person, and she frames the pronoun debate in terms of what the cisgender community can “give up.”<sup>62</sup> She writes about nonbinary pronouns as a burden that the cisgender community must tolerate, something they will have to “accept . . . and move on” from or something they can “work with.” Even her argument for “xe” pronouns is grounded in her personal preference as a cisgender woman: “xe” should be incorporated into English conventions simply because she wants “more words that start with the letter ‘x.’”<sup>63</sup> While Salmon is likely attempting to lighten the mood of her piece, her comment ultimately degrades the transgender community by reducing it to a punchline. It epitomizes how passionless advocacy may lead the dominant class to make potentially beneficial decisions for a marginalized community for entirely the wrong reasons.

#### 4. Tempered Acceptance

A final category of scholarship fully endorses the use of nonbinary pronoun use in the legal field. While this position is the most inclusive and the most likely to benefit the transgender community, these articles are not without their pitfalls. One example is Professor Greg Johnson’s *Welcome to Our Gender Neutral Future*.<sup>64</sup> Johnson begins by writing that his article “is the story of my journey from adamant opposition, to grudging acceptance, to full embrace of using ‘they’ as a singular pronoun. My journey reflects the ever-evolving nature of language, and the ways politics, popular culture, and social justice can influence that evolution.”<sup>65</sup>

From here, Johnson posits that his argument for expansion of acceptable pronouns in the legal field is to advocate for the transgender community. He names both the transgender and the genderqueer communities as the beneficiaries of the potential change. He states that while “language liberates us all[,] . . . at the very least[,] we need to adopt a gender-neutral pronoun to recognize and show respect for members of our community who do not identify with the traditional gender binary.”<sup>66</sup>

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62. Note that this approach is repeated by Professor Greg Johnson in the next subpart.

63. Salmon, *supra*, note 51.

64. Greg Johnson, *Welcome to Our Gender-Neutral Future*, VT. BAR J., Fall 2016, at 36.

65. *Id.*

66. *Id.*

He then summarizes how the legal field arrived at the current debate. Johnson discusses some of the available alternatives to the use of “he/him” to describe the binary population. Finally, he urges his reader to accept “they/them” as a gender-neutral pronoun. Johnson discusses that “they/them” is not the only third gender pronoun available, but the attention he gives to other pronouns is ultimately negative. He discredits other third gender pronouns as being not only rarely used, but “made-up words” that “seem clubby and coded for insiders who are ‘in-the-know.’”<sup>67</sup> Alternatively, he argues for “they/them” by stating, “I like ‘they’ because it is an existing word that actually has been used as a singular pronoun for centuries.”<sup>68</sup>

Johnson then discusses the numerous white, cisgender male writers who have used “they” as a singular pronoun to refer to either women or men. He methodically reviews how “they” has been received throughout history, on college campuses, and elsewhere in academia. He also makes a feminist argument for why we should use nonbinary pronouns:

[G]ender-neutral pronouns benefit the transgender and gender-queer communities, but they also have a broader salutary effect. They blur or erase gender lines and therefore lead to greater gender equality . . . . Using gender-neutral pronouns disrupts and threatens male privilege by redefining gender roles through language: All people are created equal. In this regard, using the singular they (and gender-neutral language in general) is as much a feminist issue as it is a transgender issue.<sup>69</sup>

Johnson concludes by refocusing on transgender and gender-queer people as the intended beneficiaries of his argument: “New voices in the transgender and genderqueer communities are speaking, and it is my hope that we recognize their worth and dignity. Using gender-neutral pronouns is a way to show respect, to show we care.”<sup>70</sup> He leaves his reader with a piece of permission, or advice: “You can start small by using they for indefinite pronouns, and then for generic nouns as your comfort level grows.”<sup>71</sup>

Johnson’s article is a welcome addition to the otherwise bleak landscape of articles on this topic. His contribution also fills in gaps left by other scholars. Specifically, Johnson names transgender and nonbinary groups as distinct; states that these communities are the ones who need and want nonbinary pronouns; and it offers a

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67. *Id.*

68. *Id.*

69. *Id.* at 37.

70. *Id.* at 38.

71. *Id.*

compelling feminist argument for doing so. Nevertheless, Johnson's article could be strengthened by a more focused and inclusive discussion of transgender communities and nonbinary rights.

To begin, while he expresses decided enthusiasm for nonbinary pronouns, his support seems to have its limits. While Johnson is open to "they/them" nonbinary pronouns, he ultimately dismisses other less common nonbinary pronouns as "clubby," as explained above.<sup>72</sup> This implies that unless he has been invited into the club, the club is illegitimate. Johnson's stance towards "they/them" pronouns is not ultimately rooted in his genuine desire to let nonbinary people lead the evolution of language that directly affects them, but rather in his personal stance towards words. By conditioning the acceptance of transgender identity upon his approval, Johnson exposes that his is indeed not approval at all, but rather another version of gatekeeping. His stance is both patronizing and neglectful of the transgender community's rich and vibrant history of advocating for nonbinary pronoun use. While Johnson's acceptance of "they/them" pronouns is certainly desirable, it is still framed in terms of what the cisgender community is "willing to accept," tempering any attempt to break silence. Even more critically, acceptance that is as limited in form as Johnson's may not truly be considered acceptance at all.

On top of conditions to acceptance, Johnson frequently centers the conversation on himself and on cisgender people writ large. Take, for instance, his claim that his "journey" to advocate for nonbinary people "reflects the ever-evolving nature of language, and the ways politics, popular culture, and social justice can influence that evolution."<sup>73</sup> Johnson frames his acceptance of nonbinary pronouns as the focus of the greater push for transgender equality, yet his choice to discuss his own journey takes space away from transgender and nonbinary voices that are sorely lacking in the law.

### III. CRITICAL RACE THEORY APPLIED TO THE PRONOUNS DEBATE

CRT provides a generalizable framework for expanding the language used in discussing identity and allowing for more diverse voices in the debate over nonbinary pronouns. Before doing so, though, I review the potential pitfalls that accompany analogizing to ideas established by Race Critics.

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72. *Id.* at 36.

73. *Id.*

### A. *Situating the Argument*

In advocating for the study and employment of tactics Race Critics developed, I aim to avoid two pitfalls: appropriating the work of scholars of color and positioning “gay as the new Black.”<sup>74</sup> White scholars have appropriated the academic works of scholars of color by adopting their frameworks or applying their ideas to other issues, often without credit or attribution.<sup>75</sup> My goal is to avoid such scholastic appropriation by acknowledging and uplifting the origins of the framework I use.

I also seek to avoid the harmful ideology of “marriage equality postracialism,” which arose in the late 2000s.<sup>76</sup> Critiquing the claim that “gay is the new Black,” Professor Russell K. Robinson observed:

Although the marriage equality movement bills itself as a descendant of the black civil rights movement, it often treats its forefather as dead: the political rhetoric and legal arguments of the gay rights movement routinely embrace postracialism, the notion that American society has moved beyond racial difference and hierarchy. Such arguments imply that the struggle for racial justice is over, with gays supplanting blacks as the paradigmatic stigmatized minority. In the words of *The Advocate*, a leading Lesbian Gay Bisexual Transgender (LGBT) periodical, “Gay Is the New Black.”<sup>77</sup>

While gay rights would indeed become a major focus in the early twenty-first century, analogizing the Black struggle to the gay struggle was not only tenuous, but it led to the erasure of people who were both Black and gay.<sup>78</sup> Ultimately, this erasure “may inadvertently constrict equality for both groups, marking the end of civil rights for both the Black and LGBT communities.”<sup>79</sup>

It is inappropriate and potentially harmful to draw direct comparisons between being a person of color and being transgender.

74. Robinson, *supra* note 9.

75. One definition of cultural appropriation is “taking, from a culture that is not one’s own, intellectual property, cultural expressions and artifacts, history and ways of knowledge.” Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. STATE L.J. 299, 300 (2002) (quoting Lenore Keeshig-Tobias, a writer from one of Canada’s First Nations, as cited in Phillip Marchand, *Dancing to the Pork Barrel Polka*, TORONTO STAR, Aug. 5, 1992, at B6).

76. Robinson, *supra* note 9.

77. *Id.* at 1010, discussing Michael J. Gross, *Gay is the New Black?: The Last Great Civil Rights Struggle*, THE ADVOCATE (Nov. 16, 2008, 12:00AM), <https://www.advocate.com/news/2008/11/16/gay-new-black> [https://perma.cc/T3QW-5T5H].

78. *Id.* at 1016–17.

79. *Id.* at 1010.

Instead, I analogize CRT's struggle to that of transgender people in order to identify relevant interventions that may be helpful in the context of transgender rights. None of these analogies should be understood as suggesting that "transgender is the new Black." Rather, I draw a limited comparison that examines how scholars experiencing marginalization combated legal discourses that erased their experiences.

Legal scholar and Race Crit Angela Harris reminds us that examining a community's struggle without also centering its ability to transcend that struggle is incomplete.<sup>80</sup> Harris thus asks us to see a community<sup>81</sup> not only as being victimized but also as a community whose resilience, resourcefulness, and joy is worth celebrating.<sup>82</sup> Although much of this Article focuses on analogizing struggle and intervention, it also seeks to find solidarity not only in analogical oppression, but also in a deeper connection—one of mutual hope, inspiration, and celebration. Through these interventions, we can see people of color speaking out, shattering silence, and making vibrant noise, not in spite of their oppression, but for the beauty of their song. The nonbinary and transgender community can aspire to do the same.

#### B. *Major Themes: Analogizing Struggles and Interventions*

As Race Critics worked to break the silence imposed upon them by racist academic institutions, they focused on two necessary interventions: (1) self-identification, and (2) passionate self-advocacy. These two interventions also have the potential to break the silence forced upon nonbinary people and, by extension, the transgender community as a whole. CRT's generalizable framework allows us to analyze the interactions between groups in power and groups experiencing subordination in order to gather salient tools for intervention in analogous situations. Thus, CRT helps us analyze cisgender hegemony and the subordination of transgender people through an examination of whiteness and its attempts to subordinate people of color.

I argue that insisting on proper pronoun use as praxis, rather than enforcing proper pronouns use through law, is a realistic place to start, considering the dearth of rights currently afforded to the transgender community.<sup>83</sup> Thus, transgender rights activists

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80. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 612 (1990).

81. In her article, the community is black women.

82. *Id.* at 614.

83. Pablo Fiere defined praxis as "reflection and action directed at the structures to be transformed." (emphasis omitted). See PAULO FREIRE, PEDAGOGY

and scholars should look to CRT for its commitment to breaking silence as praxis. To use affirming pronouns correctly and consistently—to make it a customary practice—will allow nonbinary people to be fully seen in the eyes of the law, opening up more space for conversations about their rights and protections as part of a vulnerable group.

### 1. The Need for Self-Identification

CRT authors initially grappled with articulating their experiences and critiquing an institution that privileged and centered upon whiteness. From their writings on agency and subordination, we can learn about the praxis of telling one's own story on one's own terms.

#### a. Within Critical Race Theory

One of the earliest tasks for Race Critics was breaking the silence imposed by white academics within the legal institution. In the introduction to *Critical Race Theory: The Key Writings That Formed the Movement*, legal scholar and Race Crit Kimberlé Crenshaw discusses how being silenced by white academia was one of the sparks that ignited the CRT movement.<sup>84</sup> She writes that being in a field “dominated by a group consisting of entirely white male constitutional law professors” means the language that she and other scholars of color wanted to use was stunted by what was considered proper academic language at the time.<sup>85</sup> She writes that her and her colleagues' ideas about identity and civil rights “went far beyond what could be articulated in the reigning language of the legal studies we were pursuing.”<sup>86</sup>

As scholars of color began to discuss their identities within legal academia, they realized that they “lacked an adequate critical vocabulary for articulating” their exact thoughts and experiences.<sup>87</sup> Ultimately, Crenshaw wrote, “it was out of this intellectual void that the impetus for a new conceptual approach to race and law was based.”<sup>88</sup> After determining that the very language to which they

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OF THE OPPRESSED 126 (Myra Berman Ramos trans., 2005).

84. CRENSHAW ET AL., *supra* note 6, at xix. Crenshaw notes elsewhere that other major early themes of CRT included “calling for epistemological re-centering of legal subjectivity,” “the critique of rights,” “epistemological questions about ‘perspective,’” especially that of professors of color, “the relationship between race and law, and . . . critical interrogation of traditional legal education more broadly.” Kimberlé W. Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1295, 1271, 1279 (2011).

85. CRENSHAW ET AL., *supra* note 6, at xix.

86. *Id.* at xx.

87. *Id.* at xxi.

88. *Id.*

were restricted was itself a form of oppressive gatekeeping, Race Critics responded by creating a new school of thought. To this end, they began critiquing the existing gatekeeping in legal academia and used their platforms as professors at well-respected institutions to reveal their silencing. Race Critics began introducing words, structures of writing, and methods of thinking that allowed them to represent their ideas to a broader audience in a way that was true to their identities and lived experiences. They consistently integrated these ways of communicating into the legal academy as a means of legitimizing them. The longer these new ways of thinking and communicating existed in the legal field, the more legitimate they became.

One example of this form of silence-breaking is Professor Margaret Montoya's article, *Mascaras, Trenzas, Y Grenas: Unmasking the Self While Un/Braiding Latina Stories and Legal Discourse*. In her article, Montoya writes about her experience as a Latina law student at Harvard.<sup>89</sup> Montoya discusses the oppressive silencing she experienced within law school and challenges the structural norms expected from a "law review style" article.<sup>90</sup> Legal articles are typically written entirely in English, and they often exclude personalized storytelling. Montoya uses both personal narrative and Spanish language to tell her story in a manner true to her identities.<sup>91</sup> She notes that she did so in part to "challenge conventional paradigms within the legal academy and subvert the dominant discourse."<sup>92</sup> The very syntax of her article becomes an active form of breaking silence.

Montoya explores the risks of "masking" one's identities to assimilate into what an oppressive majority deems appropriate or proper. Montoya notes that masking is just as prevalent in academic language, observing that "academic success traditionally has required that one exhibit the linguistic and cognitive characteristics of the dominant culture."<sup>93</sup> Masking is harmful to both the individual trying to straddle two cultures and to the silenced communities as a whole. Moreover, the masking of language often becomes hard to

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89. Margaret E. Montoya, *Mascaras, Trenzas, Y Grenas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994). Montoya has also written powerfully about the use of silence and silencing not just as an absence of sound or language, but as a means of expression. See Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263 (2000).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 192.



detect, as the communities that are being dominated are forced to use the dominant language. On this, Montoya wrote, “[a] significant aspect of subordination is the persistence with which we mimic the styles, preferences, and mannerisms of those who dominate us, even when we have become aware of the mimicry.”<sup>94</sup> In being forced to use the language of the dominant class, members of an oppressed group must engage in their own suppression if they want large-scale acceptance. Discussing one’s domination thus becomes nearly impossible. The silence works to the benefit of the dominant class, as the inability to discuss subordinated identities “lends credence to prevailing perception that there is only one relevant reality.”<sup>95</sup> This cycle therefore continues, prohibiting oppressed groups from discussing their marginalization.

Montoya recognizes that her identities necessitated a constant interaction with the silencing she experienced. This interaction could go one of two ways: “Sometimes it seems that every interaction requires that I overlook the terms of the discourse or that I affirmatively redefine them,” she wrote.<sup>96</sup> “My truths require that I say unconventional things in unconventional ways. Speaking out assumes prerogative. Speaking out is an exercise of privilege. Speaking out takes practice.”<sup>97</sup>

Montoya refers to this breaking of silence as “unmasking,”<sup>98</sup> and identifies her use of both Spanish and English to tell her story as “an individual exercise in resistance against cultural and linguistic domination.”<sup>99</sup> Ultimately, Montoya finds that “import[ing] words and concepts into English and into academic discourse from formerly prohibited languages and taboo knowledge” is a powerful way to reinvent oneself within the dominant language.<sup>100</sup> She writes that doing so can have powerful outcomes: “the disruption of hegemonic tranquility, the ambiguity of discursive variability,

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94. *Id.* at 197.

95. *Id.* at 206.

96. *Id.* at 209.

97. *Id.*

98. *Id.* at 210. Montoya writes that unmasking serves “to examine embedded truth and to expose ideas that lurk behind other more accessible and more conventional conclusions. Professor Mari Matsuda has written that “[t]he work of feminists, critical legal scholars, critical race theorists, and other progressive scholars has been the work of unmasking: unmasking a grab for power disguised as science, unmasking a justification for tyranny disguised as history, unmasking an assault on the poor disguised as law.” *Id.* (citing Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *YALE L.J.* 1329, 1394 (1991)).

99. *Id.*

100. *Id.* at 220.

the cacophony of polyglot voices, the chaos of radical pluralism.”<sup>101</sup> Language, to Montoya, is a powerful place for intervention. The conscientious use of language becomes an opportunity to consistently resist silencing or “masking.” Race Critics have been emphatic about intervening through and by the use of language within academia.<sup>102</sup> The very words with which a subordinated people are able to describe themselves is integral to their ability to resist that subordination.<sup>103</sup> According to CRT, to resist silencing is to resist domination.<sup>104</sup>

b. Application for the Transgender Community

The legal field currently relies on binary pronouns. Thus, someone who wants to discuss the issues facing nonbinary people, or indeed the very existence of a nonbinary person, faces a difficult choice: abandon the use of correct and affirming pronouns or risk being viewed as inarticulate. The legal system thus forces nonbinary people to participate in their own linguistic subordination. Transgender people and transgender rights advocates are forced to “mimic” dominant language, much like Montoya described.<sup>105</sup> In this case, mimicking is a forced adherence to the binary pronouns of the dominant class. This forced erasure leads to the cyclical pattern Montoya observed: when nonbinary pronouns—and by extension, the people who use them—are omitted from legal discourse, the “one relevant reality” is that which comports with the gender binary.

Following Montoya’s framework, this Article is a modest attempt to “say unconventional things in unconventional ways.”<sup>106</sup> If I adhered to the current standards of proper English and proper legal writing, this Article could not exist, as I would be barred from using “they/them” as a singular pronoun from the outset. Thus, the very writing of nonbinary pronouns becomes an act of disruption, intervention, and resistance. Here, disruption in a larger sense demands that the law recognize that gender is not binary. This act of unmasking is a necessary first step in a larger dance of resisting the domination experienced not only by nonbinary people, but by the entire transgender community.

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101. *Id.*

102. Montoya’s article is itself a testament to this idea.

103. Montoya, *supra* note 89.

104. *Id.*

105. *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020). *See infra* Part IV.

106. Montoya, *supra* note 89.

## 2. The Need for Passionate Self-Advocacy

In the 1980s, Race Critics observed that white authors writing about civil rights were exclusively citing other white authors.<sup>107</sup> White scholars did not write about civil rights from a place of passion, nor were their proposed solutions necessarily helpful to communities of color.<sup>108</sup> By studying Race Critics' criticisms of predominantly white discourse around civil rights, we can understand why it is crucial for people advocating for change to be passionate about that issue.

### a. Within Critical Race Theory

The CRT movement advocated for scholars of color to be taken seriously as experts in the field of civil rights.<sup>109</sup> It also highlighted how civil rights scholarship dominated by white scholars was typically dispassionate and marked by the white majority's preference for arguments about procedure over substance.<sup>110</sup> Further, as civil rights attorneys and scholars of color were prevented from discussing their lived experiences in language that resonated with them, they were also excluded from meaningful participation in a field that purported to benefit them as a result.<sup>111</sup> In response, Race Critics proposed the following interventions: value the contributions of scholars with relevant lived experiences, interrogate the law as a site of power, and examine the investment that white scholars had in maintaining the status quo.<sup>112</sup>

Professor Harlon L. Dalton wrote about the experience of being spoken for, and spoken about, but rarely being spoken to

107. Richard Delgado, *The Imperial Scholar: Reflecting on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561 (1984).

108. *Id.* at 567. For an application of this concept, see generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

109. Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 439 (1987); Delgado, *supra* note 107.

110. Delgado, *supra* note 107, at 568.

111. Dalton, *supra* note 109, at 440. Dalton describes the exclusion of scholars of color in that era as being "always invited in for tea, but rarely invited to stay for supper, lest we use the wrong intellectual fork. No matter how smart or bookish we were, we could not retreat from the sights, sounds, and smells of the communities from which we came. We learned from life as well as from books. We learned about injustice, social cruelty, political hypocrisy and sanctioned terrorism from the mouths of our mothers and fathers and from our very own experiences. Books sometimes confirmed that reality; more often they misrepresented or were indifferent to *our* reality." (emphasis in the original). *Id.* at 439.

112. See generally Montoya, *supra* note 89; Delgado, *supra* note 109.

when engaging with white civil rights scholars.<sup>113</sup> For example, white scholars usually only cited one another when writing about civil rights.<sup>114</sup> This “imperial scholarship” created a curious reality: people of color were not invited to participate in the discussion of their own rights.<sup>115</sup> During the 1970s and 1980s, Race Critics and writers of color were publishing about civil rights, but they were not being published in influential law reviews, included in seminars or conferences, or being recognized as valuable practitioners.<sup>116</sup>

Delgado wrote that an “inner circle” of white writers repeatedly cited one another rather than scholars of color.<sup>117</sup> He observed that this phenomenon was less prevalent outside of legal academia. Delgado argued that the exclusion of scholars of color from civil rights discourse was not just microaggressive and patronizing—it was also directly harmful to the communities it allegedly helped.<sup>118</sup>

In particular, Delgado outlined multiple issues that arose from white scholars purporting to explain and address nonwhite experiences.<sup>119</sup> He first noted a lack of passionate advocacy: people who advocate for a community of which they are not a member are often advocating from a removed, theoretical standpoint, rather than from a place of passion.<sup>120</sup> Consequently, the solutions presented by white scholars were based on their ideas of what progress for communities of color should be, thus leading to the maintenance of white supremacy and its supporting structures.<sup>121</sup> Delgado also identified passionless advocacy in white scholars’ preference for procedural rather than substantive arguments about civil rights.<sup>122</sup> White scholars frequently debated civil rights by discussing procedure, such as standing and jurisdiction. In essence, white scholars focused on form over substance, which allowed them to

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113. Dalton, *supra* note 109, at 442 (quoting Professor John Powell). Dalton wrote about three forms of this oppressive silencing within the legal academy. *Id.* at 441. First, he wrote that the “high barriers of entry into discussion” were a major way that people of color were prevented from entering into discussion. *Id.* Next, he wrote that white civil rights activists said that people of color were making them feel “guilty” for being white and male. Third, he wrote that scholars of color were silenced simply by not being invited to the discussions about civil rights. All three mechanisms of silencing are ones that are experienced by transgender people.

114. Delgado, *supra* note 107.

115. *Id.*

116. *Id.*

117. *Id.* at 563.

118. *Id.* at 573.

119. *Id.* at 566.

120. *Id.* at 568.

121. *Id.* at 573.

122. *Id.* at 568.

actively avoid deconstructing systems of white power and privilege. That they further ignored that procedure, too, was built to uphold white supremacy.

When communities advocate for themselves, the advocacy is no longer just a hypothetical conversation about grammar or a thought experiment in standing. Instead, passionate, personalized advocacy is grounded in community needs, lived experience, and firsthand knowledge. It is written by and for the advocate's community.

In *The Imperial Scholar: Reflecting on a Review of Civil Rights Literature*, Delgado observes that white people have a "vested interest in maintenance of the status quo"<sup>123</sup> when it comes to civil rights scholarship, whether that interest is conscious or unconscious. He theorizes that white scholars exclude scholars of color specifically to control the pace of progress, "to make sure that legal change occurs, but not too fast."<sup>124</sup> If white legal scholars determine the scope of civil rights, they can prevent it from becoming "too radical," and thereby neutralize any threat to their concentrated power. There is consequently an inherent risk in letting white legal scholars dictate civil rights discourse.

#### b. Application to the Transgender Community

Transgender activists currently advocating for the use of non-binary pronouns in the legal field face a challenge similar to the one Delgado highlighted: majority-dominated scholarship, passionless advocacy, and a preference for procedure over substance. I discuss these in turn.

When surveying the current legal literature about nonbinary pronouns, it becomes apparent that there are few transgender lawyers or legal scholars.<sup>125</sup> While transgender people write about the law, they are far outnumbered by cisgender legal scholars writing about transgender rights. This creates an insider problem similar to that which Delgado references: cisgender legal professors and scholars repeatedly cite one another's ideas about whether the field can expand to include nonbinary pronouns. And when they do cite a scholar outside of this pool, it is not to cite transgender authors, but rather to cite cisgender people who focus on language generally.<sup>126</sup>

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123. *Id.* at 573.

124. *Id.* at 574.

125. The Transgender Bar Association was founded in 2019. We will hopefully see an emergence of more transgender lawyers as time goes on.

126. *See, e.g.*, Narko, *supra* note 41. Narko does not cite to any transgender people, but cites to Professor Greg Johnson as authority, instead.

It is disappointing that cisgender authors write about the use of nonbinary pronouns without citing transgender authors, activists, and scholars. Further, they do not include information about the need for nonbinary pronoun use in the community most directly impacted. While these scholars are willing to go outside the field of law to cite scholarship about language, there are no similar efforts to delve into the fields of sociology, psychology, or medicine to explore what sort of extralegal impact the use of nonbinary pronouns might have on transgender people themselves. It is as if cisgender scholars are having conversations about nonbinary pronouns while actively trying to avoid transgender and nonbinary people in the process. This lack of personal knowledge, combined with neglect for the human impact of their arguments, highlights Delgado's very point: the writing of the dominant class is inevitably constrained by the identities they possess.

This dispassion is near-constant in the current literature about pronoun use and the law. Legal articles about nonbinary pronouns are rarely written from the perspective of someone who desperately needs legal professionals to recognize nonbinary pronouns.<sup>127</sup> Rather, they are written from the perspectives of cisgender people who are interested, if not rather coldly, in the development of language in the legal field, but not necessarily the humans who will experience the impact of these developments.<sup>128</sup> This lack of passion underscores how cisgender authors have neglected to humanize their arguments. Furthermore, because they do not consult—or even mention, in many cases—the transgender community, legal scholars sometimes present solutions that are potentially harmful to the community.<sup>129</sup> There is also the parallel risk that an *outcome* envisioned by a cisgender scholar could be acceptable within the transgender community, but the means to that end would not.

Another indicator of cisgender scholars' dispassion is their focus on the role of grammar in preventing widespread adoption of they/them in the legal field. This fixation on grammar is analogous to the relentless focus on procedure advanced by white scholars in the civil rights era. Like procedure, grammar reflects traditional values and institutional power. Thus far, scholars have not examined whether the present power structures need to be remade; rather, they ask whether the demanded right fits into existing power structures. This basis for acceptance or rejection is categorically

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127. *E.g.*, Thatcher, *supra* note 35; Salmon, *supra* note 51, at 10.; Johnson, *supra* note 64, at 36; *see also* Narko, *supra* note 41.

128. *See, e.g.*, Salmon, *supra* note 41, at 10.

129. *E.g.*, Thatcher, *supra* note 35.

different than a conversation centered on the lived discomfort of transgender people: it values procedure over substance, and grammar conventions over the lived experiences of transgender people. Ultimately, it requires transgender people to wait indefinitely, to sit in their discomfort, and to adhere to a system that is actively perpetuating their oppression.

Grammar, like procedural law, is an entirely human construct. And what is created by fallible human beings can, and sometimes should, be modified or destroyed. Such structures must be modified even when the modification will not necessarily serve to benefit those in power.

#### IV. LOCATIONS OF RESISTANCE: NEXT STEPS IN NORMALIZING NONBINARY PRONOUNS

The law can no longer require nonbinary people to adhere to a linguistic structure that actively erases them. Instead, the law must expand its notions of proper English, and by extension, the gender binary, to include nonbinary pronouns. The ubiquity of gender pronouns makes it necessary to combat the lack of inclusive pronouns wherever nonbinary clients exist in the legal system. This change will take time. With an eye towards incremental progress, I recommend three locations of change. These places are in (1) law school, (2) academic legal writing, and (3) legal practice. These spaces are important because they are the domain of lawyers, law professors, law students, and judges, all of whom can shape legal institutions and black letter law by normalizing the use of nonbinary pronouns. Widespread adoption of “they/them” is necessary if these words are to transcend mere diction and become a recognizable and accepted concept.

##### A. *Law School*

Legal academia is a critical site for disrupting the silencing of nonbinary people. Law school, in particular, plays a powerful role in teaching budding legal minds different ways of thinking about complex issues and constructs. While thinking about genders outside the binary might be a challenge for some students, it is as teachable and understandable as any doctrinal course. Legal writing classes are a great place for this conversation to begin, because they teach students how to write and how to evaluate legal writing. If law students graduate without hearing or reading nonbinary pronouns, the legal classroom will reinforce that “they/them” is something strange and improper. The inverse is also true. By teaching “they/them” as a valid pronoun in law school and giving

students the tools to navigate pronoun usage, instructors can normalize nonbinary identity.

### B. *Academic Legal Writing*

Academic legal writing should also incorporate nonbinary pronouns. This includes law reviews, journals, and legal textbooks, all of which are important educational tools. Using nonbinary pronouns in these publications also serves to passively normalize nonbinary pronouns and influence powerful actors, including judges.

Passive normalization works when authors of legal textbooks and scholarly articles begin using these pronouns, when appropriate, as a mechanism of inclusivity. While the legal academy may object, citing grammar rules, this small form of academic resistance is ultimately an author's choice. Using transgender people's pronouns, including "they/them," becomes especially relevant if the author is discussing transgender-specific issues, issues of sex discrimination, issues of gender discrimination, or LGBT issues generally. The cautious author, or the author that desires to educate their readers about gender diversity, can include a footnote explaining that their use of "they" is not a grammatical error, but rather a conscious choice to include those with nonbinary gender identities in their work.<sup>130</sup>

Additionally, authors of legal textbooks, treatises, and scholarly articles should utilize "they" as a singular and indefinite pronoun because their particular mediums are respected and valued by changemakers, including politicians and judges. Thus, these writings have the power to be formative,<sup>131</sup> and can help create and legitimize social norms. If legal scholars accept and utilize "they," there is a greater chance that this pronoun will be given more respect and consideration by lawmakers. This is particularly important in an era

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130. For a graceful example, see Adam Herpolsheimer, *A Third Option: Identity Documents, Gender Non-Conformity, & the Law*, 39 WOMEN'S RTS. L. REP. 46, 83 n.11 (2017).

131. On this topic, Delgado wrote: "Courts do cite law review articles; judges, even when they do not rely on an article expressly, may still read and be informed by it. What courts do clearly matters in our society. Moreover, what law professors say in their elegant articles contributes to a legal climate, a culture. Their ideas are read and discussed by legislators, political scientists, and their own students. They affect what goes on in courts, law classrooms, and legislative chambers. Ideologies—perspectives, ways of looking at the world—are powerful. They limit discourse. They also enable the dominant class to maintain and justify its own ascendancy. Law professors at the top universities are part of this dominant class, and their writings contribute to the ideologies that class creates and subscribes to. These writings are not harmless; they have clout." Delgado, *supra* note 107, at 573.



in which states are considering whether transgender people should be able to amend their identity documents.<sup>132</sup>

### C. *Legal Practice*

Legal practice is another area in which lawyers, attorneys, and judges should adopt nonbinary pronouns. The practical application of nonbinary pronouns in legal practice is just as important as the passive normalization of those pronouns in legal academic writing and in law school. It is, in essence, an opportunity for lawyers and judges to put “they” as a singular pronoun into practice. It is also the place in which lawyers and judges are most likely to encounter transgender people. For purposes of this Article, the concept of “legal practice” encompasses all communications, both written and oral, with other attorneys, with the court, and with transgender clients.

While attorneys are not explicitly required to use a client’s correct pronouns, the American Bar Association’s Model Rules of Professional Conduct (Rules) imply they should.<sup>133</sup> A lawyer’s ethical obligations vary by jurisdiction,<sup>134</sup> but the Rules are nevertheless instructive. Rule 8.4(g) states that a lawyer cannot “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . gender identity . . . in conduct related to the practice of law.”<sup>135</sup> The comment accompanying Rule 8.4(g) further illuminates this obligation. It reads, “[d]iscrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others.”<sup>136</sup>

While the Rules do not explicitly mention pronoun use, they do prohibit a lawyer from discriminating against someone through

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132. For an informative discussion on the importance of identity documents for transgender people, see generally transgender rights scholar and activist Bryanna A. Jenkins’ article, *Birth Certificate with A Benefit: Using LGBTQ Jurisprudence to Make the Argument for A Transgender Person’s Constitutional Right to Amended Identity Documents*, 22 CUNY L. REV. 78 (2019).

133. The Rules create model ethical obligations for attorneys in the United States. See generally MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS’N 2000) [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_prprofession\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_prprofession_conduct/model_rules_of_professional_conduct_preamble_scope) [<https://perma.cc/64BP-W7RC>].

134. *Id.*

135. MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS’N) [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_4\\_misconduct/comment\\_on\\_rule\\_8\\_4](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4) [<https://perma.cc/B4KX-GR2T>].

136. *Id.*

the use of “derogatory or demeaning verbal conduct.”<sup>137</sup> As explored earlier, pronouns are of special importance to members of the transgender community. A lawyer who chooses to discriminate by purposefully using a client’s incorrect pronouns would likely qualify as someone who is using “derogatory or demanding verbal conduct.” Lawyers who consistently misgender a client—even unintentionally—are likely in violation of Rule 8.4(g). This is because a lawyer should “know or reasonably know” the action is harassment or discrimination.<sup>138</sup> The Rule can therefore be read to require a lawyer to use a client’s correct pronouns, even without a law to specifically impose this obligation.

Attorneys must also use a client’s preferred pronouns even when that client is not present. Using affirming pronouns only in front of the client would be an issue of ethics and performance, because such conduct signals to their colleagues and opposing counsel that their client’s gender identity is unimportant. Moreover, it can be difficult to switch back and forth between pronouns based on the circumstance. That same attorney is not likely to use their client’s correct pronoun in front of the client if they are not doing so when the client is not present.

It is also crucial for attorneys to examine how their nonbinary client might be “silenced” because of their other identities. For instance, what further silencing does a nonbinary person of color experience? Or a nonbinary person of color who is experiencing poverty? Or a differently abled nonbinary person? Or a nonbinary person who does not speak English fluently? The list is endless. It is therefore up to the practitioner to be aware of these intersecting identities and ensure that their client is not being oppressively silenced because of them. It is further incumbent on the practitioner to ensure they are not complicit in silencing their client.

In terms of speaking before the court, Judge Phyllis Frye has argued that it is an attorney’s obligation to use a client’s correct pronouns, even when the client is not present.<sup>139</sup> She too cites an ethical obligation, writing that it is unethical for an attorney to take on a client they are not prepared to fully advocate for. Furthermore,

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137. *Id.*

138. MODEL RULES OF PRO. CONDUCT, *supra* note 133.

139. Phyllis Randolph Frye & Katrina C. Rose, *Responsible Representation of Your First Transgendered Client*, 66 TEX. B.J. 558, 561 n.12 (2003). Judge Frye is a transgender rights activist also serving as America’s first appointed transgender judge. Deborah Sontag, *Once a Pariah, Now a Judge: The Early Transgender Journey of Phyllis Frye*, N.Y. TIMES (Aug. 29, 2015), <https://www.nytimes.com/2015/08/30/us/transgender-judge-phyllis-fryes-early-transformative-journey.html> [<https://perma.cc/E2DC-W5FB>].

full advocacy naturally includes the use of a client's correct pronouns, even when the client is not present. Judge Frye concedes that using nonbinary pronouns might not curry favor with certain judges, but it is the attorney's obligation to anticipate such risks when determining whether or not to accept the client.<sup>140</sup> Judge Frye made this argument in the early 2000s, and society has made marked progress since then in terms of recognizing and accepting transgender people. Thus, attorneys now have even fewer excuses for misrepresenting a client's gender identity when the client is not present.

Of course, an attorney should have conversations about pronoun usage with their client, especially if using they/them might not be in the client's best interest (i.e., the judge is openly transphobic). After asking for a client's preferred gender pronoun, an attorney should explain where the relevant court stands vis-a-vis nonbinary pronouns. This might require the attorney and client to make a tactical decision together to use one pronoun over another. The client might prefer using "they" if it is their correct and affirming pronoun. Alternatively, they might choose to use the pronoun assigned to them at birth so as not to further prejudice a transphobic judge against them. Either of these options are valid, so long as the decision is made by the client.

Even if a transgender litigant chooses to use a nonbinary pronoun, the court will not necessarily respect a litigant's chosen pronouns. A recent Fifth Circuit Court of Appeals decision authored by Judge Stuart Kyle Duncan reveals how far behind some courts are when it comes to respecting and providing equal treatment for transgender people.<sup>141</sup> In *United States v. Varner*, the appellant, a transgender woman, filed a motion to have her correct name reflected on her judgement of confinement, as well as for the court to address her by female pronouns.<sup>142</sup> A divided panel refused both requests.<sup>143</sup> In reaching this conclusion, the court found the problem was not in a litigant asking to switch from one

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140. While outside the scope of this Article, further consideration is needed in weighing whether resulting refusals to accept clients would create adverse effects for transgender people unable to find counsel. It begs the question: is it better to have no access to a lawyer or access only to a lawyer who does not respect one's identity? It would seem this answer is based entirely on the context.

141. *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020).

142. *Id.* at 252.

143. The plaintiff in this case, Ms. Katherine Nicole Jett, is referred to by her "dead name" and an incorrect pronoun in court filings, including in the 5th Circuit decision. Ms. Jett is referred to using her accurate name and pronouns in this Article.

binary pronoun to another, but from a binary pronoun to a nonbinary one. It opined:

If a court orders one litigant referred to as “her” (instead of “him”), then the court can hardly refuse when the next litigant moves to be referred to as “xemself” (instead of “himself”). Deploying such neologisms could hinder communication among the parties and the court. And presumably the court’s order, if disobeyed, would be enforceable through its contempt power.<sup>144</sup>

Ultimately, the court found that expansive pronouns would only breed confusion in the courtroom and create an unwarranted burden on the judicial system:

When local governments have sought to enforce pronoun usage, they have had to make refined distinctions based on matters such as the types of allowable pronouns and the intent of the “misgendering” offender . . . Courts would have to do the same. We decline to enlist the federal judiciary in this quixotic undertaking.<sup>145</sup>

This ruling, issued earlier in 2020, exposes the hostility and degradation faced by transgender litigants. In this particular case, the court seems unconcerned about the plaintiff’s psychological health, physical health, or equal treatment before the court.<sup>146</sup> Instead, when faced with the opportunity to keep pace with society’s current understanding of gender, these judges opted to prop up the gender binary by hiding behind procedural arguments.

The court’s refusal to use a litigant’s correct pronouns does not remove the intricacies of having gender diverse litigants before the bench, but instead complicates the situation. Now, not only is the transgender person being actively silenced by the court, but they are being forced to assume the form of a nonapplicable gender identity as well. While the court might succeed in limiting language, it does not succeed in minimizing confusion. Above all, this case reveals that while society at large is beginning to accept nonbinary pronouns, the law’s need to integrate “they/them” has never been more urgent.

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144. *Varner*, 948 F.3d at 257.

145. *Id.* at 257–58.

146. *See generally* Brief for Lambda Legal Defense and Education Fund, Inc. et al. as Amici Curiae supporting Defendant-Appellant’s Petition for Rehearing En Banc, *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020); Brief for Civil Rights Organizations Supporting Appellant’s Petition for Rehearing En Banc, *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020).

### CONCLUSION

The fight for transgender recognition, rights, and equality will be a long one resulting from innumerable hard-fought battles.<sup>147</sup> In this Article, I propose incremental interventions that will help advocates and allies break the silence that the legal field has forced upon nonbinary people. Fortunately, CRT provides an important framework and roadmap for identifying and responding to the silencing of transgender people that occurs in legal spaces.

This Article is a modest attempt at breaking the silence forced upon nonbinary individuals in the legal field. By calling attention to the linguistic erasure of nonbinary people in the legal field, I aim to call attention to the treatment of this community generally. I hope it will be seen not as the end of the conversation, but as the beginning of a conversation that allows nonbinary people to be fully seen and respected within the legal community. This baseline can serve as a platform upon which a broader struggle for rights and protections can be built. A community cannot resist nor ultimately overcome in silence. It is my sincere hope that this Article is long outlived by the reverberation it creates.

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147. Recent victories such as *Bostock v. Clayton Cnty.* give transgender rights advocates hope. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).