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R-E-S-P-E-C-T:

Transgender Pronoun Preference and the Application of the Model Code of Judicial Conduct

Francesco G. Salpietro

Amnesty International—a civil-rights organization that “work[s] to protect people wherever justice, freedom, [and] truth . . . [have been] denied”¹—put it best in its mission statement: “We all have a sexual orientation and a gender identity, and this shared fact means that discrimination against members of the Lesbian, Gay, Bisexual[,] and Transgender community, based on sexual orientation and/or gender identity, is an issue that transcends that community and affects all of us.”² Fundamental to this communal conception are notions of dignity and respect, both of which are to be enjoyed by all people of all backgrounds. When transgender individuals litigate in court, the adversarial system sometimes ignores these basic dignities and instead gives way to practices that impede upon such individuals’ ability to freely express themselves in a manner consistent with their own identities. Moreover, under the Model Code of Judicial Conduct and its various state codifications, judges must rely upon traditional notions of justice, judicial integrity, impartiality, and respect³ to ensure that transgender persons enjoy the same rights as do other members of society.

This Note addresses this issue and responds with a set of proposed solutions. Part I introduces a potential problem faced by judges when addressing transgender individuals in court proceedings after being presented a set of conflicting pronouns—individuals’ preferred gender pronouns and those that do not match these individuals’ true identities—and includes a brief discussion of relevant case law. Part II applies the Model Code of Judicial Conduct to the general fact pattern

outlined in Part I and articulates relevant ethical canons, rules, and comments that may give rise to disciplinary violations. Part III provides a set of solutions to this problem, including better educating the courts in areas of LGBT cultural competency and sensitivity, adopting local court rules or standards with respect to LGBT issues, and promulgating amendments to the Model Code of Judicial Conduct to better address the ethical dilemmas surrounding transgender individuals in court.

IT STARTS WITH A PRONOUN—CASE LAW

On August 21, 2013 a military judge convicted former Army Private First Class (PFC) Bradley E. Manning to 35 years in prison for voluntarily disclosing classified documents to Wiki Leaks.⁴ The next day, PFC Manning issued a public statement in response to the court’s conviction on NBC’s *Today* show, including a shocking announcement: “I am Chelsea Manning. I am a female.”⁵ Manning’s announcement prompted nationwide discord as to how to properly address the former military private, now a transitioning transgender individual.⁶ While some media outlets referred to Manning with masculine pronouns,⁷ others consistently referred to Manning in the feminine form.⁸ This debate ultimately prompted Manning to file a court motion upon appeal of her conviction, asking the court to use “[her] legal name, Chelsea Elizabeth Manning, [] to preclude [her] former name, Bradley Edward Manning, and to use female pronouns in reference to [Manning], in all future formal papers” filed with and issued by the U.S. Army Court of Crim-

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Footnotes

1. *About Us*, AMNESTY INT’L, <http://www.amnestyusa.org/about-us> (last visited Dec. 11, 2017).
2. *Gender, Sexuality, & Identity*, AMNESTY INT’L, <https://www.amnestyusa.org/issues/gender-sexuality-identity> (last visited Dec. 11, 2017). This particular mission statement relates to Lesbian, Gay, Bisexual, and Transgender (LGBT) Human Rights and is one of several “Human Rights Issues” for which Amnesty International serves. *Id.*
3. MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B) (AM. BAR ASS’N 2011).
4. Julie Tate, *Bradley Manning Sentenced to 35 Years in WikiLeaks Case*, WASH. POST (Aug. 21, 2013), [https://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-](https://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html)

[476db8ac34cd_story.html](https://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html).

5. Aaron Blake & Julie Tate, *Bradley Manning Comes Out as Transgender: ‘I am a Female’*, WASH. POST (Aug. 22, 2013), https://www.washingtonpost.com/world/national-security/bradley-manning-comes-out-as-transgendered-i-am-a-female/2013/08/22/0ae67750-0b25-11e3-8974-f97ab3b3c677_story.html(quoting an official statement made by Chelsea Manning).
6. Paul Farhi, *Media Wrestles with How to Refer to Manning*, WASH. POST (Aug. 22, 2013), https://www.washingtonpost.com/lifestyle/style/media-wrestles-with-how-to-refer-to-manning/2013/08/22/60dc0f0c-0b44-11e3-b87c-476db8ac34cd_story.html.
7. *Id.* (citing to the *Christian Science Monitor’s* use of the pronoun, “he,” as well as the *Washington Post’s* “early articles,” which drew serious criticism by members of Twitter).
8. *Id.* (citing to ABCNews and the *Today* show, both of which used the pronoun, “she,” to refer to Manning). Other news outlets, such as CNN and later articles published by the *Washington Post*, avoided the question altogether, couching discussions of Manning in gender-neutral forms, including “Manning,” “former Army private,” and “intelligence analyst.” *Id.*

inal Appeals (ACCA).⁹ Notwithstanding public knowledge of this gendered-pronoun controversy, the motion, itself, contained no substantive justification for the request.¹⁰ Accordingly, the government filed a motion in response asking for justification, and Manning responded.¹¹ In her reply, Manning argued that referring to her in the feminine form would not cause confusion for the court and was required by the interests of justice.¹² First, Manning cited to her own psychological condition, gender dysphoria, for which the government's own medical professional consistently referred to her "as female and use[d] female pronouns when referring to [Manning]."¹³ Next, Manning argued that the weight of authority supported the grammatical use of her "[c]orrect [g]ender, which is [f]emale," since other courts traditionally deferred to transitioning individuals by using their preferred gender pronouns.¹⁴ Finally, Manning argued that, based on medical consensus, "[f]ailure to honor a person's gender on legal documents [would be] tantamount to erasing a core part of their identity and [would] be damaging to treatment outcomes and mental health of persons with gender dysphoria."¹⁵ As such, Manning contended that

justice demanded a ruling in her favor.¹⁶

A three-judge panel, writing for the ACCA, agreed with Manning.¹⁷ Without justification, the panel demanded that "[r]eference to [Manning] in all future formal papers filed before this court and all future orders and decisions issued by this court shall either be neutral, e.g., Private First Class Manning or appellant, or employ the feminine pronoun."¹⁸ Some commentators contend that this was the first time a court expressly ruled on a transgender-pronoun issue,¹⁹ and many transgender-rights organizations applauded the ACCA for its acceptance of Manning's pronoun preference: this practice is in accordance with the Gay and Lesbian Association Against Defamation (GLAAD)²⁰ and is further endorsed by Lambda Legal—a legal advocacy group "whose

Some commentators contend that this was the first time a court expressly ruled on a transgender-pronoun issue

9. Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents, United States v. Manning, No. ARMY 20130739 (A. Ct. Crim. App. Feb. 4, 2015) [hereinafter Name Change Recognition Motion]. The Pentagon released a comprehensive set of pleadings, motions, opinions, and orders pursuant to a series of Freedom of Information Act (FOIA) requests demanding full disclosure of Manning's first trial. Adi Robertson, *Pentagon Releases Trial Documents as Bradley Manning Prepares Formal Plea*, THE VERGE (Feb. 27, 2013), <http://www.theverge.com/2013/2/27/4036448/pentagon-releases-trial-documents-as-bradley-manning-prepares-formal/in/3801093>. These documents can be found by searching the Army's FOIA library. Rec. Mgmt. & Declassification Agency, *RMDA Freedom of Information Act Library*, U.S. ARMY, <https://www.foia.army.mil/ReadingRoom/Detail.aspx?freeText=manning> (last visited May 14, 2016).
10. See Name Change Recognition Motion, *supra* note 9.
11. Response to Appellant's Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents, United States v. Manning, No. ARMY 20130739 (A. Ct. Crim. App. Feb. 9, 2015); Reply to Government Response to Appellant's Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents, United States v. Manning, No. ARMY 20130739 (Feb. 18, 2015) [hereinafter Manning Reply].
12. Manning Reply, *supra* note 11, at 2.
13. *Id.* at 2–3 (citing internal court filings).
14. *Id.* at 4 (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1192 n.1 (9th Cir. 2000); *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401, 410 n.1 (6th Cir. 1997); *Merriweather v. Faulkner*, 821 F.2d 408, 408 n.1 (7th Cir. 1987); *Smith v. Rasmussen*, 57 F. Supp. 2d 736, 740 n.2 (N.D. Iowa 1999); and *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014)).
15. *Id.* at 5 (referencing the World Professional Association for Transgender Health, the American Medical Association, the Endocrine Society, and the American Psychological Association). Note that the singular "their" is often used as a third-person singular possessive adjective to reflect the non-binary nature of gender and sexuality; its use is also preferred by many gender non-conform-

- ing individuals. Avinash Chak, *Beyond 'He' and 'She': The Rise of Non-Binary Pronouns*, BBC NEWS (Dec. 7, 2015), <http://www.bbc.com/news/magazine-34901704>.
16. Manning Reply, *supra* note 11, at 5.
 17. Order, United States v. Manning, No. ARMY 20130739 (Mar. 5, 2015) [hereinafter Preferred Gender Pronoun Order]. Note that, unlike state or federal judges who are either elected or appointed and subsequently confirmed by the legislative branch, the military judiciary functions differently:

[T]he military judge . . . is appointed by the Judge Advocate General [] of the appropriate armed service, serves without a fixed term at the pleasure of the Judge Advocate General, and is evaluated at least annually by senior officers. Subsequent promotion and reassignment are dependent upon the judge's annual officer evaluation and the personal knowledge and desires of those senior officers responsible for assignments.
 18. Preferred Gender Pronoun Order, *supra* note 17, at 1–2. Note that the panel added a parenthetical qualifier to Manning's original case name: "nka Chelsea E. Manning." *Id.* In the legal context, the acronym "nka" stands for "now known as." AM. SOC'Y NOTARIES, IDENTIFYING THE SIGNER 1–2 (2005), at <http://www.asnotary.org/img/Identifying%20the%20Signer.pdf>.
 19. Miranda Leitsinger, *Army Must Refer to Chelsea Manning as a Woman*, NBC NEWS (Mar. 5, 2015), <http://www.nbcnews.com/news/us-news/army-must-refer-chelsea-manning-woman-not-man-court-n318286>.
 20. GLAAD *Media Reference Guide—Transgender Issues*, GLAAD, <http://www.glaad.org/reference/transgender> (last visited May 14, 2016); Farhi, *supra* note 6.

[O]ther courts have not been so willing to endorse a transgender party's preferred gender pronouns in court proceedings.

mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, [and] transgender people”²¹

Despite the ACCA's deferential respect for Manning's pronoun preference, especially given her formal name change, other courts have not been so willing to endorse a transgender party's preferred gender pronouns in court proceedings. While certainly not the norm,²² some courts refuse to

defer to a transgender individual on that individual's preferred mode of expression. For example, the U.S. District Court for the Eastern District of Wisconsin recognized that a transgender plaintiff filed an action under her chosen name, but, since she “remain[ed] a biological male,” utilized male pronouns for ease of discussion.²³ Additionally, the U.S. District Court for the District of Massachusetts, although “recogniz[ing] that it is painful for [the plaintiff] to be referred to as ‘he’ and that courts have, at times, referred to male transsexuals as ‘she,’” nevertheless referred to the plaintiff in the masculine form for

the sake of administrative clarity.²⁴ More unpalatably, one immigration-law judge has been reported to have said, in the context of an appeal of a denial of a claim for asylum, that “referring to a transgender woman by her preferred gender pronouns was like actor Paul Reubens requesting to use his stage name Pee-wee Herman”²⁵ By failing to respect a transgender individual's gender-pronoun preference, these judges seem to perpetuate transphobia in modern culture, and, in wake of an individual's express request to use their preferred gender pronouns, may also violate the American Bar Association's (ABA) Model Code of Judicial Conduct, especially in the context of local, state, and federal anti-discrimination laws.

APPLICATION OF THE ABA MODEL CODE OF JUDICIAL CONDUCT

In 1924, the ABA promulgated its first formal Canon of Judicial Ethics (“Canons”), couched in lofty, aspirational goals for the judiciary.²⁶ In 1972, the ABA adopted a more practical Model Code of Judicial Conduct (MCJC), which replaced the Canons with better-articulated “Rules” of judicial conduct under broader canons of aspirational ethics.²⁷ The MCJC went through a series of amendments in the 1980s, 1990s, and 2000s, and it now contains a comprehensive set of provisions

21. *About Us*, LAMBDA LEGAL, <http://www.lambdalegal.org/about-us> (last visited Dec. 11, 2017); *Know Your Rights in Court*, LAMBDA LEGAL, <http://www.lambdalegal.org/know-your-rights/in-court/faq> (last visited Dec. 11, 2017).

22. In a comprehensive search for court orders specifically discussing gender-pronoun preferences of transgender individuals, most courts do, in fact, defer to an individual's preferred gender pronouns. See *Farmer v. Perrill*, 275 F.3d 958, 959 n.1 (10th Cir. 2001) (“Although a biological male, [plaintiff] considers herself to be a female and uses the feminine pronoun in referring to herself. In deference to her wishes, this opinion will do the same.”); *Levy v. Wexford Health Sources, Inc.*, No. TDC-14-3678, 2016 WL 865364, at *1 n.1 (D. Md. Mar. 7, 2016) (“Because [plaintiff] identifies as female, the [c]ourt will use the feminine pronoun to refer to her.”); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 230 n.1 (D. Mass. 2012) (“Although [p]laintiff is biologically male, the court will refer to her using feminine pronouns in deference to her expressed gender identity.”); *Inscow v. Yates*, No. 1:08-cv-001588 DLB PC, 2009 WL 3617810, at *1 n.1 (E.D. Cal. Oct. 28, 2009) (“Plaintiff uses the feminine pronoun for self-identification, which the [c]ourt will use here.”); *Houston v. Trella*, No. 04-1393 (JLL), 2006 WL 2772748, at *1 n.1 (D.N.J. Sept. 26, 2006) (“Because [p]laintiff is a transsexual and identifies herself as feminine, the [c]ourt will use the feminine pronoun when referencing [p]laintiff.”); *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *1 n.4 (Mass. Sup. Ct. Oct. 11, 2000) (“This [c]ourt will use female pronouns when referring to plaintiff: a practice which is consistent with the plaintiff's gender identity and which is common among health and other professionals who work with transgender clients.”). For courts that do not pay such deference, or for courts that have not yet confronted the issue, this Note serves to educate and notify judges of potential risks should they refuse to follow this majority approach.

23. *Konitzer v. Frank*, 711 F. Supp. 2d 874, 877 n.1 (E.D. Wisc. 2010).

24. *Kosilek v. Mahoney*, 221 F. Supp. 2d 156, 158 n.1 (D. Mass. 2002); see also *Gammett v. Idaho State Bd. Dep't of Corr.*, No. CV05-257-

S-MHW, 2007 WL2186896, at *1 n.1 (D. Idaho July 27, 2007) (“Plaintiff was granted a legal name change after filing this lawsuit. Plaintiff is now known as Jenniffer Ann Spencer. Plaintiff's counsel used the feminine pronoun throughout court documents, and [d]efendant's counsel used the male pronoun. The [c]ourt . . . has elected to use the male pronoun for ease of discussion.”).

25. *Jorge Rivas, Court Blasts Judge Who Compared Transgender Immigrant to Pee-wee Herman*, FUSION (Sept. 4, 2015, 1:49 PM), <http://fusion.net/story/193788/circuit-court-blats-immigration-judge-transgender>. Luckily, the Ninth Circuit overruled a series of this immigration-law judge's rulings that blankly rejected transgender persons' asylum claims. See *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1075 (9th Cir. 2015) (“[T]he BIA erred, however, in denying her application for [asylum] relief, ironically exhibiting some of the same misconceptions about the transgender community that Avendano-Hernandez faced in her home country.”). This Note recognizes that immigration-law judges may not fall under the purview of the Model Code of Judicial Conduct. For the purposes of this Note, assume that the judge's discriminatory statement could have been uttered by any judge (elected or appointed, state or federal, etc.) for which the Model Code of Judicial Conduct could apply. For a comparison of immigration-law judges to judges in state and federal court, see Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 428–430 (2011) (arguing that immigration-law judges, because they are appointed by the U.S. Department of Justice, lack true independence and a conscious motive to maintain impartiality).

26. Nancy L. Sholes, *Judicial Ethics: A Sensitive Subject*, 26 SUFFOLK U. L. REV. 379, 381–85 (1992).

27. LaDonna Childress, *To Fulfill a Promise: Using Canons 3B(5) and 3B(6) of the Judicial Code of Conduct to Combat Sexual Orientation Bias Against Gay and Lesbian Criminal Defendants*, 34 SW. U. L. REV. 607, 614 (2005) (citing Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 375–76 (2000)).

“to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct”²⁸ Should a judge refuse to accept a transgender individual’s gender-pronoun preference, that judge may be in violation of the MCJC. This part discusses and applies relevant MCJC Canons to the typical “preferred gender pronoun” situation described above.

A. MCJC Canons 1 & 2: Integrity, Impartiality, and the Manifestation of Bias

In its broadest sense, the MCJC requires a judge to “uphold and promote the independence, integrity, and impartiality of the judiciary”²⁹ Implicit in the definition of “integrity” is the concept of respect—for the law, the parties, the lawyers, the juries, and, most broadly, the public. How can a judge be viewed as exhibiting respect when that same judge ignores an individual’s chosen identity by refusing to adopt an individual’s preferred gender pronouns, either in the courtroom or in a judicial opinion? By failing to defer to an individual’s preferred mode of reference, this lack of respect directly aggravates a chief medical concern of the World Professional Association for Transgender Health—“to reduce the distress of gender dysphoria.”³⁰ Gender dysphoria is an “internationally recognized treatment protocol” that focuses on “affirming people in their true sex—their gender identity—socially, medically, and legally” and is not subject to voluntary control.³¹ Accordingly, the refusal to affirm an individual’s chosen identity carries with it the risk of serious psychological trauma by failing to validate transgender individuals and their identities on a humanistic level.³² Moreover, MCJC Rule 2.8 requires an air of courtesy from judges when dealing with those in court: “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, [and] lawyers. . . .”³³ Thus, the express requirement of courtesy further (and more explicitly) mandates a judge’s respect for litigants, which includes respect for an individual’s gender identity and preferred mode of self-expression. Judges should be cognizant of this risk when addressing transgender individuals in court.

The ignorance of a transgender individual’s proper, medically endorsed treatment further contributes to the very real

problem of microaggressions, or “subtle forms of [intentional or unintentional] discrimination that occur daily and can manifest as behavioral, verbal, or environmental slights.”³⁴ A common example in the LGBT context, cited in Galupo’s study, is the “use of incorrectly gendered terminology,”³⁵ including the disregard of a transgender person’s preferred gender pronouns.³⁶

These aggressions often compound with one another and work to “erode a[n individual’s] feeling of value.”³⁷ Judges should recognize this risk of psychological harm and interference with legitimate methods of treatment and strive to avoid the manifestation of bias, whether conscious or not, by refusing to defer to an individual’s own preferred gender pronouns. Accordingly, to combat implicit biases, judges must first recognize that such biases exist.³⁸ Thereafter, they must “[r]outinely check thought processes and decisions for possible bias” and “possess[] a certain degree of self-awareness” to prevent its manifestation through their conduct in court.³⁹

In fact, the MCJC contains express provisions against this manifestation of bias in judicial proceedings, also expressly outlined in the definition of “impartiality.”⁴⁰ The ABA defines the term “impartiality” broadly to mean the “absence of bias or prejudice,”⁴¹ and MCJC Rule 2.3 contains the following prohibitive provision:

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.⁴²

In fact, the [Model Code] contains express provisions against this manifestation of bias in judicial proceedings

28. MODEL CODE OF JUDICIAL CONDUCT pmbl. (AM. BAR ASS’N 2011).

29. *Id.* Canon 1.

30. WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NON-CONFORMING PEOPLE 167 (Coleman et al. eds., 7th ed. 2012), http://www.wpath.org/uploaded_files/140/files/IJT%20SOC,%20V7.pdf.

31. M. Dru Levasseur, Esq., *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 956 (2015) (internal citations and quotations omitted).

32. *Id.* at 963.

33. MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B) (AM. BAR ASS’N 2011) (emphasis added).

34. M. Paz Galupo et al., *Transgender Microaggressions in the Context of Friendship: Patterns of Experience Across Friends’ Sexual Orientation and Gender Identity*, 1 PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY 461, 461 (2014).

35. *Id.* at 465 tbl.3.

36. *Id.*

37. Astead W. Herndon, *Harvard Allows Students to Pick New Gender Pronouns*, BOSTON GLOBE (Sept. 2, 2015), <https://www.boston-globe.com/metro/2015/09/02/harvard-allows-students-pick-new-gender-pronouns/C0EXpZHw09zwCzo4hVhjdJ/story.html> (quoting Genny Beemyn, director of the Stonewall Center—“a resource center for LGBTQ and allied communities at the University of Massachusetts Amherst”).

38. NAT’L CENTER FOR STATE COURTS, STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 5 (2012), http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx.

39. *Id.* at 10.

40. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (AM. BAR ASS’N 2011); see *id.* TERMINOLOGY (defining “impartiality”).

41. *Id.* TERMINOLOGY.

42. *Id.* R. 2.3(B). Section (C) of Rule 2.3 also requires judges to ensure that lawyers presenting in front of the tribunal “refrain from manifesting bias or prejudice” on the basis of sex, gender, or sexual orientation. *Id.* R. 2.3(C). This proscription carries with it the additional responsibility on judges to ensure that lawyers,

LGBT individuals . . . are part of a traditionally marginalized group, and judges are in a unique position of power in our legal system, charged with promoting and ensuring justice.

In this regard, manifestations of bias are grounds for discipline. Arguably, these include subtle microaggressions such as the refusal to defer to a party's preferred gender pronouns as a form of self-affirming identification. Yet, prominent legal ethics commentator Bruce A. Green argues that the "bias" the MCJC seeks to curtail is not the sort-of implicit bias—that is, "unconscious, non-deliberate attitudes . . . that affect individuals' decisions"—at issue, here.⁴³ This Note argues a different interpretation: the MCJC requires a broader showing

of respect, not just impartiality, by requiring judges to be self-aware of the effects of their conduct. This heightened self-awareness, coupled with the court's responsibility to promote justice,⁴⁴ supports the contention that microaggressions and implicit biases should be actively avoided, even when not apparent on the face of a judge's conduct.⁴⁵ Even so, a judge's refusal to defer to a transgender individual's preferred gender pronouns might not be a reflection of implicit bias at all; absent explanation, it could draw an inference of *overt* discrimination, or, if a judge does provide an explanation, such rationale could be a mere guise—i.e., a mere pretext—for a discriminatory animus against identifying individuals. These "active" forms of discrimination are most certainly grounds for discipline under the MCJC.⁴⁶

Finally, as Martha Minnow argues, each person—especially those in the legal profession—maintains a special responsibility to create "cultures, institutions, and resources to help individuals empathize with those who are oppressed."⁴⁷ LGBT individuals, including transgender persons, are part of a traditionally marginalized group, and judges are in a unique position of power in our legal system, charged with promoting and ensuring justice.⁴⁸ Accordingly, it is a judge's affirmative role to create this culture of upstanding citizenship in the interests of justice, which includes empathy for minority communities. It is arguably unjust for a judge, in the course of a judicial proceeding, to disregard a transgender individual's preferred choice of pronoun, especially when such disregard knowingly (and deleteriously) interferes with treatment techniques for gender dysphoria normally left to the sound discretion of medical professionals. Doing so only strengthens the stigma associated with transgender persons and undercuts their positive inclusion in modern society.

B. "Respect for the Law"

In earlier versions, the MCJC specifically held that a judge must "respect and comply with the law."⁴⁹ Thus, to duly respect the law, judges should be mindful of the current legal landscape regarding transgender issues. The broadly couched term requires a cognizance of the law and posits an affirmative duty to avoid violating the law to "avoid the appearance of impropriety."⁵⁰ For example, the New York City Commission on Human Rights ("Commission") promulgated legal guidance in response to its Human Rights Law, which protects against discrimination on the basis of gender identity, gender expression, and transgender status.⁵¹ Under this local legislative scheme, transgender individuals are protected from discrimination in the areas of

through their written or verbal conduct, do not contribute to the deleterious effects of bias arising out of lawyers' refusal to defer to a transgender individual's preferred gender pronouns. *See id.* Accordingly, judges have the affirmative responsibility to prevent the risk of discriminatory bias from *all* persons in the courtroom from the very outset of litigation.

43. Bruce A. Green, *Legal Discourse and Racial Injustice: The Urge to Call "Bias,"* 28 GEO. J. LEGAL ETHICS 177, 180 (2015) (referencing Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006)); *id.* at 183–85.

44. MODEL CODE OF JUDICIAL CONDUCT pmb. (AM. BAR ASS'N 2011) ("[T]he judiciary plays a central role in the preserving the principles of justice.")

45. Note, too, that Rule 2.3 does not include a "knowledge" requirement. *Id.* R. 2.3. Thus, judges should not be willfully ignorant of bias—implicit or explicit—and should take proactive steps to mitigate any such bias before it manifests in court.

46. *See id.*

47. Martha Minnow, *Upstanders, Whistle-Blowers, and Rescuers*, 2014 KONINGSBERGER LECTURE 1, 31 (2014). Upstanders, as opposed to bystanders, are those who do not idly wait to see social change and progress; instead, they are those who "speak out and act against what is wrong." *Id.* at 1.

48. *See* MODEL CODE OF JUDICIAL CONDUCT pmb. (AM. BAR ASS'N 2011).

49. MODEL CODE OF JUDICIAL CONDUCT 2A (AM. BAR ASS'N 1990). Although the word "respect" was deleted in later versions of the MCJC, the drafters made clear that the term is implicit within

MCJC Canon 2. In fact, the remnants of the "respect" language are found in Rule 2.2, wherein "[a] judge shall uphold and apply the law." ABA JOINT COMM'N TO EVALUATE THE CODE OF JUDICIAL CONDUCT, REPORTER'S EXPLANATION OF CHANGES: ABA MODEL CODE OF JUDICIAL CONDUCT, R. 8 (2007) ("The reference to a judge's duty to 'respect' the law was deleted because it was . . . unnecessary."); MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (AM. BAR ASS'N 2011). Even so, the original language is still maintained in numerous state and federal codifications of the MCJC, so respect for the law, in its broadest sense, is most applicable to the practical judicial profession. *See, e.g.,* GA. CODE OF JUDICIAL CONDUCT R. 1.1 (2016) ("Judges shall respect and comply with the law."); N.C. CODE OF JUDICIAL CONDUCT Canon 2A (2006) (amended 2015) ("A judge should respect and comply with the law . . ."); U.S. COURTS CODE OF JUDICIAL CONDUCT R. 2.15 cmt. (2014) ("*Respect for Law.* A Judge should respect and comply with the law . . ."); 22 NYCCR 100.2(A) (2006) ("A judge shall respect and comply with the law . . .").

50. MODEL CODE OF JUDICIAL CONDUCT R. 1.2. The MCJC defines "impropriety" as "conduct that violates the law, court rules, or provisions of th[e] MCJC, and conduct that undermines a judge's independence, integrity, or impartiality." *Id.* Terminology.

51. N.Y.C. COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON THE DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2016); N.Y.C. Admin. Code 88-102(23), at 3 (Dec. 21, 2015) [hereinafter N.Y.C. LEGAL ENFORCEMENT GUIDANCE], http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide_2015.pdf.

employment, public accommodation, and housing, and those found in violation are potentially liable for up to \$250,000 in civil fines for conduct that is willful, wanton, or malicious.⁵² In its guidance, the Commission provides articulated examples of violations of the law, including “failing to use an individual’s preferred name or pronoun,” since “all people . . . have the right to use their preferred name.”⁵³ Courts in New York City—as places of public accommodation⁵⁴—must be aware of this guidance and must take precaution to avoid potential violations. Again, failing to do so expressly violates the MCJC, since avoiding the “appearance of impropriety” carries with it the duty to avoid violating the law.⁵⁵

Certainly, the obvious response is that judges, themselves, are granted absolute judicial immunity and cannot be held liable for damages under comparable local statutes.⁵⁶ In the landmark decision of *Stump v. Sparkman*, the U.S. Supreme Court held that judges maintain absolute immunity from actions for damages taken in their official capacity, even when judges’ acts are done maliciously or corruptly.⁵⁷ However, the Court in *Pulliam* clarified this holding: while absolute judicial immunity still bars a claim for monetary relief, it does not pre-

clude a claim for injunctive relief, provided the claimant continues to suffer real harm.⁵⁸ Since then, at least one circuit court has made available prospective injunctive relief against courts in other contexts of discrimination.⁵⁹ In fact, seeking injunctive relief to demand the use of a transgender litigant’s preferred gender pronouns is expressly endorsed and encouraged by Lambda Legal.⁶⁰ As such, provided a transgender litigant can show a continued harm that can only be remedied by a prospective injunction, that litigant may be able to successfully seek judicial relief.⁶¹

[S]eeking injunctive relief to demand the use of a transgender litigant’s preferred gender pronouns is expressly endorsed and encouraged by Lambda Legal.

Finally, judicial ethics go beyond these legalistic arguments and reach issues of fundamental morality and integrity. As the MCJC Preamble points out, the MCJC “is not intended as an exhaustive guide for the conduct of judges . . . who are governed in their

52. N.Y.C. ADMIN. CODE § 8-102, 107(23) (West 2016); see also Kelsey Harkness, *In New York, You Could Be Fined \$250K for Failing to Use a Transgender Person’s Preferred Pronoun*, DAILY SIGNAL (Jan. 6, 2016), <http://dailysignal.com/2016/01/06/in-new-york-you-could-be-fined-250k-for-failing-to-use-a-transgender-persons-preferred-pronoun/>. The New York City Administrative Code also provides for injunctive relief. N.Y.C. Admin. Code § 8-402 (West 2016).

53. N.Y.C. LEGAL ENFORCEMENT GUIDANCE, *supra* note 51, at 54. Specifically, the Commission provides the following examples of conduct that give rise to municipal violations:

1. Intentional or repeated refusal to use an individual’s preferred name, pronoun[,] or title. For example, repeated calling a transgender woman “him” or “Mr.” after she has made clear which pronouns and title she uses.
2. Refusal to use an individual’s preferred name, pronoun, or title because they do not conform to gender stereotypes. For example, calling a woman “Mr.” because her appearance is aligned with traditional gender-based stereotypes of masculinity.

Id.; Harkness, *supra* note 52.

54. The New York City Administrative Code defines a “place of public accommodation” as “providers, whether licensed or unlicensed, or goods, services, facilities, accommodations, advantages, or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, services, accommodations, advantages, or privileges or any kind are extended, offered, sold, or otherwise made available.” N.Y.C. Admin. Code § 807(9) (West 2016). In holding out services to all members of the public, as courts are required to do, courthouses and courtrooms arguably constitute “places of public accommodation” under the law. In other contexts of discrimination legislation, courts have generally held that courthouses are subject to such statutes. See, e.g., *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) (finding that courthouses are “public accommodations” subject to the American with Disabilities Act); *Livingston v. Guice*, No. 94-

1915, 1995 WL 610355 (4th Cir. Oct. 18, 1995) (same).

55. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (AM. BAR ASS’N 2011). Notwithstanding an underlying violation of substantive law, the “appearance of impropriety” also reaches conduct in reasonable violation of the MCJC, not just state or federal law. *Id.* Thus, conduct that gives rise to prejudicial bias or the inference of discrimination should be avoided, as MCJC Rule 2.3 expressly prohibits discriminatory conduct. *Id.* r. 2.3(A)–(B). Moreover, judges who fail to act courteously or who lack integrity are also arguably subject to disciplinary action. See *supra* Part II.A.; MODEL CODE OF JUDICIAL CONDUCT R. 2.8 AM. BAR ASS’N 2011).

56. For a comprehensive discussion of judicial immunity, see SHRIVER CENTER, FED. PRACTICE MANUAL FOR LEGAL AID ATTORNEYS § 8.2.A.1 (2013), <http://federalpracticemanual.org/book/export/html/46>.

57. *Stump v. Sparkman*, 435 U.S. 349, 356–57, 59 (1978).

58. *Pulliam v. Allen*, 466 U.S. 522, 541–42 (1984) (holding that judicial immunity does not bar a claim for prospective injunctive relief in a § 1983 civil-rights action).

59. *Livingston*, 68 F.3d 460 (holding in an Americans with Disabilities Act action that, in light of *Pulliam*, the litigant was not foreclosed from bringing a claim for injunctive relief against a state court judge).

60. On its “Know Your Rights in Court” webpage, Lambda Legal provides a sample filing to the court, similar to a motion presented in *Manning*. *Know Your Rights in Court*, *supra* note 21. The sample motion expressly states that: (1) county courts are places of public accommodation; and (2) county legislation expressly prohibits discrimination on the basis of gender identity in any place of public accommodation, including any county “facility, service[,] or program.” LAMBDA LEGAL, SAMPLE MOTION 1–2 (July 30, 2008), http://www.lambdalegal.org/sites/default/files/sample_motion.pdf.

61. A similar argument citing judicial immunity was brought to the Maryland Office of the Attorney General (OAG) by a member of the Maryland House of Delegates. Letter from Md. Assistant Att’y Gen. Kathryn M. Rowe to Md. Delegate Virginia P. Claggett (Mar. 5, 2004), <https://www.oag.state.md.us/Opinions/Advice2004/ClaggettMar12.pdf>.

Rather than forcing judges to address the issue of transgender individuals' preferred gender pronouns . . . as in *Manning*, judges should be more proactive in combatting issues of transgender discrimination.

models to maintain public confidence in the judiciary.⁶⁴

PROPOSED SOLUTIONS

Rather than forcing judges to address the issue of transgender individuals' preferred gender pronouns via formal court motions as in *Manning*,⁶⁵ judges should be more proactive in combatting issues of transgender discrimination. Just as the ABA Model Rules of Professional Conduct (MRPC) direct lawyers to “keep abreast of changes in the law and its practice,”⁶⁶ and just as many state bars mandate a certain allotment of hours dedicated to continuing legal education,⁶⁷ so, too, should judges remain updated with the changing legal landscape and corresponding ethical considerations. Judges can borrow successful efforts of various corporate organizations and educational institutions, both of which routinely engage in LGBT “sensitivity” training for their bodies. For example, prominent business advisory firm EY (formerly Ernst & Young) encourages LGBT inclusion in a “cultural competency” program, educating its employees and clients on the benefits and necessity of fostering an inclusive environment.⁶⁸ Additionally, various educational institutions offer

judicial and personal conduct by general ethical standards. . . .”⁶² Moreover, “judges should strive to exceed the standards of conduct established by the [MCJC],” especially since the “the judiciary plays a central role in preserving the principles of justice” in the U.S. legal system.⁶³ As discussed above, a judge maintains the ethical responsibility to protect the dignity and integrity of the courts, which hinges on the concept of respect. Thus, self-directing judicial standards should maintain a higher level of morality, even beyond the confines of the law, since judges are perceived as role

“Ally” training for their student and professional populations in order to help “participants grow in their personal awareness, knowledge, skills, and ability to act as social justice allies.”⁶⁹ Finally, LGBT advocacy groups across the country offer public materials to organizations to help these organizations conduct their own inclusivity training for their members.⁷⁰ In fact, consistent with the position of this Note, Lambda Legal offers a “Fair Courts Toolkit for Everyday Advocates,” which provides guidance to judges and court staffers as to how to best respect LGBT individuals in a court environment.⁷¹ Education is key.

In addition, to avoid potential conflict at a later stage in litigation, to avoid a potential violation of the MCJC, and to avoid potential trauma to transgender individuals, judges should encourage determinations of this preferred-gender-pronoun issue up front. Thus, courts should consider incorporating transgender sensitivity guidelines into their local rules. For example, the U.S. District Court for the Western District of Pennsylvania prescribes detailed requirements regarding what is to be specifically discussed during pretrial conferences under the Federal Rules of Civil Procedure.⁷² Pursuant to these local rules, parties must answer inquiries related to the underlying litigation, including issues of electronic discovery, use of proposed search terms, anticipated dispositive motions to be filed, proposals for alternative dispute resolution procedures, and other inquiries and deadlines.⁷³ Correspondingly, judges, as managers of these conferences, should encourage full and frank discussions of the potential ethical issues surrounding transgender litigants from the outset of litigation, including, if applicable, a specific inquiry regarding the use of a transgender individual's preferred gender pronouns. Doing so would avoid potential trauma down the line for transgender litigants and expedite litigation by anticipating and resolving likely court motions before they have even been filed. Courts can adequately incorporate this solution in their local rules by adding the following point for discussion to their pretrial conference agenda: “Identify and establish preferred names (including, if applicable, preferred pronouns) for all parties subject to the litigation.” The proposed directive would maintain consistency

62. MODEL CODE OF JUDICIAL CONDUCT pmb1. (AM. BAR ASS'N 2011).

63. *Id.* Scope.

64. *Cf.* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000) (arguing that diverse judges are both role models and figures of public confidence but should be seen as “something more”—as achieving cultural plurality on the bench).

65. Name Change Recognition Motion, *United States v. Manning*, No. ARMY 20130739 (A. Ct. Crim. App. Feb. 4, 2015).

66. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 8 (AM. BAR ASS'N 2011).

67. *MCLE Information by Jurisdiction*, AM. B. ASS'N, https://www.americanbar.org/cle/mandatory_cle/mcle_states.html (last visited Dec. 11, 2017) (providing a list of CLE requirements by state, many of which require one or more hours of legal ethics education).

68. EY (formerly Ernst & Young), *LEADING THROUGH INCLUSION: LGBT INCLUSION IN THE WORKFORCE* (2012). A description of EY's LGBT-inclusion program is on its website at <http://www.ey.com/us/en/about-us/our-people-and-culture/diversity-and-inclusive->

[ness/better-together](https://www.ey.com/us/en/about-us/our-people-and-culture/diversity-and-inclusive-ness/better-together) (last visited February 5, 2018).

69. *Allyhood Development Training*, U. MICH. SPECTRUM CTR., <https://spectrumcenter.umich.edu/article/allyhood-development-training> (last visited May 14, 2016); *LGBT Ally Network*, U. ILL. OFF. INCLUSION & INTERCULTURAL RELATIONS, <https://oii.illinois.edu/lgbt-resource-center/our-programs/lgbt-ally-network> (last visited Dec. 11, 2017).

70. *Diversity Training on Sexual Orientation and Gender Identity Issues*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/diversity-training-on-sexual-orientation-and-gender-identity-issues> (last visited May 14, 2016).

71. LAMBDA LEGAL, *GEAR UP! A FAIR COURTS TOOLKIT FOR EVERYDAY ADVOCATES* (2009), http://data.lambdalegal.org/publications/downloads/gu_gear-up.zip. The toolkit expressly includes guidance on deferring to and affirming a transgender individual's self-identity and use of preferred gender pronouns. *Id.*

72. W.D. PA. LOCAL CIV. R. (LCvR) 16.1.

73. *Id.* app. LCvR 16.1A.

across legal documents and would apply to all litigants—transgender or not. More simply, courts can implement a “check-the-box” system upon initial electronic filings that instructs lawyers to specify a party’s pronoun and salutation preference to guide judges and other court staffers from the outset of litigation.

Even if not formally incorporated in a court’s local rules, state or federal authorities can and should provide official guidance to help judges and courts foster a more inclusive environment. For example, the New York state judicial system already maintains a quick-reference manual to help judges adequately respond to transgender issues.⁷⁴ Included in this document is specific guidance addressing transgender pronoun use: “Transgender people frequently choose to use a name that affirms their gender identity, even if it is not what is on legal documents. . . . Judges should make every effort to use pronouns and salutations that affirm a party’s gender identity.”⁷⁵ Other courts should follow suit. Since judges have an affirmative duty to protect litigants from lawyers who exhibit bias and prejudice against others on the basis of sex, gender, and sexual orientation,⁷⁶ these problems must be addressed as early as possible. Judges should be mindful of this duty and take active steps to avoid a breach of this duty.

Finally, the MCJC could be changed to include an express provision and an associated comment to curtail this problem. First, drafters could amend MCJC Rule 2.3 to expressly include “gender identity” in its list of prohibited bases for bias and prejudice. Although implicit in discrimination on the basis of “sex” and “gender,” an express provision regarding gender *identity* would better guide judges in understanding the repercussions of their actions in court proceedings by explicitly flagging the issue.⁷⁷ Also, the ABA could provide more detailed guidance in its comments to Rule 2.3. Currently, Comment 2 provides examples of manifestations of bias or prejudice: “epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.”⁷⁸ Even though the comment makes clear that these manifestations “include, but are not limited to” those outlined in the non-exhaustive list, more explicit guidance can better flag transgender issues and prevent bias from ever entering into the courtroom in the first place.⁷⁹ Thus, a proposed revision to Comment 2 could include “failing or refusing to adopt a transgender person’s preferred pronoun” to help curtail this risk of potential trauma. Doing so would put judges on better notice of this problem within the judicial system.

CONCLUSION

Judges serve as pillars of the U.S. system of justice. Their unique position of power carries with it the responsibility to promote courtesy, impartiality, dignity, integrity, and respect. The MCJC guides the ethical conduct of judges to protect their status and preserve this notion of justice. In the case of Chelsea Manning, the ACCA undoubtedly reached the correct decision in forcing all parties to utilize Manning’s preferred gender pronouns as per her identification as female. However, judges should not be forced to reach the issue *only* when brought by a party seeking protection; they should proactively seek to protect transgender individuals and their identities from the outset of litigation. Doing so is not only consistent with the MCJC, but also with the current legal landscape of transgender rights in the United States. To promulgate this change, judges do not need to pen a landmark decision for the court. Instead, it starts with education. It starts with respect.

It starts with a pronoun.



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74. SYLVIA RIVERA LAW PROJECT, *TRANSGENDER 101: TERMS AND CONSIDERATIONS FOR OFFICERS OF THE COURT* (2011), <https://www.nycourts.gov/ip/judicialinstitute/transgender/220B.pdf>.

75. *Id.* at 1.

76. MODEL CODE OF JUDICIAL CONDUCT R. 2.3(C) (AM. BAR ASS’N 2011).

77. MODEL CODE OF JUDICIAL CONDUCT R. 2.3. Some state codifications of the MCJC expressly include “gender identity” on the list of protected classes under Rule 2.3. ABA POLY IMPLEMENTATION COMM., *COMPARISON OF ABA MODEL JUDICIAL CODE OF CONDUCT AND STATE VARIATIONS 3–4* (Dec. 11 2015), <http://www.americanbar.org/>

[content/dam/aba/administrative/professional_responsibility/2_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_3.authcheckdam.pdf). These states include Maine, Massachusetts, New Mexico, and Oregon. *Id.*

78. MODEL CODE OF JUDICIAL CONDUCT R. 2.3 cmt. 2.

79. *Id.*