

Gender Identity and the Law

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*For J.C., and trans youth everywhere, with the hope that this book
may in some measure help make your journey easier*

—DBC

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Introduction

Over the past decades, a framework has begun to emerge in U.S. law regarding gender identity and expression, shaping the rights of millions of people who are transgender or “trans,” used here to include gender non-conforming, nonbinary, and other related categories. Having evolved from a patchwork quilt of statutory laws, administrative regulations and policies, and judicial opinions, the emergent framework contains many tensions and inconsistencies yet to be resolved.

The authors of this casebook bring distinct perspectives from within the LGBTQ+ community. David Cruz is Newton Professor of Constitutional Law at the University of Southern California Gould School of Law, a cisgender, out gay Latino, who has written extensively on U.S. constitutional law and sex, gender, and sexual orientation law. He first taught a course on gender identity and the law in 2010. Jillian Weiss, a transgender woman, has a practice primarily representing transgender clients in employment discrimination matters. She is also a retired Professor of Law and Society from Ramapo College of New Jersey and former executive director of the Transgender Legal Defense and Education Fund, and she has widely published in the area of transgender rights.

This casebook is designed to provide students a comprehensive understanding of the decades-long revolution in law and society regarding the concepts of gender identity and expression that affect trans individuals in many related contexts. A background chapter explains the modern conceptions of gender identity and expression, and their relation to traditional notions of sex and gender, that have driven extensive legal developments resulting in hundreds of decisions in areas of law commonly considered unrelated. The book invites students to examine these concepts in a range of contexts nearly as broad as the lives we all live, including government identification, parenting and youth care, schools, employment, disability, healthcare, housing, public accommodations, immigration, and incarceration. It encourages students to analyze how these varied areas are or should be understood as interrelated and integrated, and what they mean for traditional legal and social understandings of sex and gender.

This book enables examination of its topics from the standpoint of trans persons, foregrounding their lived experience and the discriminatory effects of transphobia, transmisogyny, and transmasculine erasure. This stands in distinction to approaches that theorize transgender people’s experiences of law as fundamentally outgrowths of gender or sexual orientation biases. This focus enables students to

theorize the legal wrongs against trans persons as wrongs qua wrongs against their lived identities, understanding them as trespasses against their right to live in their chosen gender, rather than merely as sequelae of incorrect stereotypes of their gender assigned at birth. At the same time, the advances in the social statuses and legal rights of trans people are inseparable from “gender” issues and issues of sex, gender, sex roles, and sex stereotyping.

Students should carry away from a course taught from this casebook an understanding of how gendered our law is, how entrenched gender identity biases are, and ways in which the law has been used to lessen the oppressions experienced by trans people. This book’s role is not only to facilitate teaching the specifics of this area of law, but to show new lawyers how effective the law can be in combatting social ills as well as ways in which it is less effective or ill-suited to the task of social change. It shines an analytic spotlight on a population subject to numerous social harms in which law has sometimes been complicit and whom increasingly law is developing to protect. It is our hope this will inspire a new generation of lawyers to pursue justice for trans people.

In editing materials for this book, the authors have omitted footnotes without indication; preserved original footnote numbering for those sources where footnotes were retained; used lowercase letters for footnotes we have authored; omitted citations and sometimes parentheticals without indication; and altered citations’ formats (e.g., reporters, short form vs. long form) and omitted pinpoint citations generally without indication. Although not entirely consistently in this first edition, the authors tried to indicate with “[*sic*]” when opinions first use terminology that is today widely regarded as derogatory or outdated; we have also albeit incompletely tried to list the movement organizations that have litigated so many of the cases presented. The undercompensated and sometimes unsung efforts of dedicated movement lawyers have been key to the evolution in the law examined in this text.

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