Lessons from *Bostock*: Analysis of the Jurisprudential (Mis)Treatment of "Sex" in Title VII Cases

Allison Greenberg*

The Supreme Court's decision in Bostock v. Clayton County *extended Title VII's prohibition on sex discrimination to lesbian, gay, and transgender individuals. This decision represents the latest step forward in a long line of Title VII jurisprudence, which slowly expanded the definition of "sex" as the cultural understanding of sex, gender identity, and sexual orientation improved. This Note critically reviews that history of jurisprudence, using the* Bostock *decision as a frame to examine the ways in which the courts' definition of "sex" has evolved out of a flawed understanding of the relationships between sex, gender identity, and sexual orientation as categories. This Note argues that the* Bostock *decision, while a great victory for gay and transgender plaintiffs, nonetheless leaves unprotected those individuals who do not conform to a binary interpretation of sex in their gender expression or sexual orientation. The Note concludes with a discussion of potential solutions that would guarantee non-discrimination protections for those whose identities do not conform to the gender binary.*

* J.D., University of California, Irvine School of Law. My thanks to Professor Swethaa Ballakrishnen for the advice and support which made this Note possible, to the staff of the *UC Irvine Law Review* for their thorough and thoughtful editorial assistance, and to my family for their endless support and belief in me.

INTRODUCTION

On June 15, 2020, the Supreme Court issued its decision in the much-lauded case of *Bostock v. Clayton County*,[1] holding that Title VII of the Civil Rights Act of 1964[2] prevented discrimination against gay and transgender employees. The decision in *Bostock* answers the question presented by the circuit split in the decisions of three lower court cases: *Zarda v. Altitude Express, Inc.*; *Bostock v. Clayton County Board of Commissioners*; and *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes*.[3]

In the first case, *Zarda*, the plaintiff alleged that his employer terminated his employment based upon his sexual orientation as a gay man.[4] The Second Circuit

1. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).
2. 42 U.S.C. § 2000e-2(a)(1).
3. Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018), *aff'd sub nom. Bostock*, 140 S. Ct. 1731; Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x. 964, 965 (11th Cir. 2018) (per curiam), *rev'd sub nom. Bostock*, 140 S. Ct. 1731; Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom. Bostock*, 140 S. Ct. 1731.
4. *Zarda*, 883 F.3d at 107.

ruled that Title VII did prohibit discrimination based on sexual orientation, considering it a subset of discrimination on the basis of sex.[5]

In the second case, *Bostock*, the plaintiff alleged that his employer—the school district's Board of Commissioners—violated Title VII by firing him because he was openly gay.[6] Unlike the Second Circuit, the Eleventh Circuit ultimately decided that Title VII's language protecting individuals from discrimination on the "basis of sex" did not extend to include protection from discrimination due to sexual orientation.[7]

The third case, *R.G. & G.R. Harris Funeral Homes*,[8] added an additional dimension to the group: rather than centering on questions of sexual orientation, this case revolved around an employer's discriminatory behavior aimed at a transgender woman, Aimee Stephens.[9] After her employment was terminated, Stephens filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that her termination was unlawful discrimination based on her gender identity.[10] The EEOC decided to sue the employer, claiming that the employer's decision to terminate Stephens' employment was motivated by sex-based considerations.[11] The Sixth Circuit determined that the employer had discriminated, not on the basis of her transgender status, but because of her lack of conformity with the male sex stereotype under the sex stereotyping theory first established by *Price Waterhouse v. Hopkins*.[12]

Therefore, when *Bostock* arrived at the Supreme Court, the question to be decided was whether Title VII's language prohibiting discrimination "against any individual . . . because of such individual's . . . sex" included a prohibition of discrimination because of an individual's sexual orientation or gender identity.[13] However, the question the Supreme Court decided to answer was somewhat different—whether Title VII's language prohibited discrimination because of an

---

5. *Id.* at 112.

6. Bostock v. Clayton Cnty., No. 16-CV-1460, 2017 WL 4456898, at *1 (N.D. Ga. July 21, 2017), *aff'd sub nom. Bostock*, 723 F. App'x 964, *rev'd sub nom. Bostock*, 140 S. Ct. 1731.

7. *Bostock*, 723 F. App'x. at 964–65.

8. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594, 598 (E.D. Mich. 2015), *rev'd*, 884 F.3d 560, *aff'd sub nom. Bostock*, 140 S. Ct. 1731.

9. *Id.* at 596–97.

10. *Id.*

11. *Id.*

12. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 574; *see* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" (alteration in original) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978))), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-owned Media, 140 S. Ct. 1009 (2020).

13. *Bostock*, 140 S. Ct. at 1738.

individual's "*homosexual*" or *transgender* status.[14] In doing so, the Court narrowed the question by taking the discussion away from broader categories and limiting it to narrower ones.

Justice Gorsuch's majority opinion states the answer to that question clearly: "An employer who fires an individual merely for being gay or transgender defies the law."[15] Justice Gorsuch rests his holding on the reasoning that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[16] The answer is clear, yet his reasoning generates weighty implications for those existing on a spectrum outside of the gender binary. The logic underpinning the *Bostock* holding, as demonstrated by the hypothetical statements used to explain the holding, assumes a binary nature to sex and gender identity. This assumption works to exclude those who do not conform to that binary.[17]

The decision goes on to establish a but-for test, stating that an employer violates Title VII when it intentionally fires an individual employee based in part on sex.[18] The Court's decision characterizes sexual orientation and transgender identity as an extension of sex, stating "homosexuality and transgender status are inextricably bound up with sex."[19] The Court illustrates its conception of the issue using the following as a primary example:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.[20]

---

14. *Id.*
15. *Id.* at 1754.
16. *Id.* at 1737.
17. *Understanding Non-Binary People: How to be Respectful and Supportive*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Oct. 5, 2018), https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive [https://perma.cc/4VZM-8F5S] ("Most people—including most transgender people—are either male or female. But some people don't neatly fit into the categories of 'man' or 'woman,' or 'male' or 'female.' For example, some people have a gender that blends elements of being a man or a woman, or a gender that is different than either male or female. Some people don't identify with any gender. Some people's gender changes over time. People whose gender is not male or female use many different terms to describe themselves, with *non-binary* being one of the most common. Other terms include *genderqueer*, *agender*, *bigender*, and more. None of these terms mean exactly the same thing—but all speak to an experience of gender that is not simply male or female.").
18. *Bostock*, 140 S. Ct. at 1741.
19. *Id.* at 1742.
20. *Id.* at 1741.

The *Bostock* decision has been legitimately viewed as a landmark success for gay and transgender individuals, securing a place within the Title VII civil rights canon. The decision was met with relief and, in many cases, surprise—after all, the author of the decision is notably one of the most conservative justices currently serving on the Court.[21] The director of the American Civil Liberties Union's LGBTQ & HIV Project responded to the decision by stating, "This is a huge victory for LGBTQ equality."[22] Anthony Kreis, an assistant professor at the Georgia State College of Law, declared, "What constitutes sex discrimination is now an open and shut case."[23] A member of the National Trans Bar Association was quoted as saying, "This ruling is every bit as significant, if not more so, than the marriage equality decision,"[24] referring to *Obergefell v. Hodges*, the landmark Supreme Court decision that affirmed the right of same-sex couples to marry.[25]

The comparison to *Obergefell* is apt. Like *Bostock*, the *Obergefell* decision was unquestionably cause for celebration because it recognized the equality and legitimacy of same-sex relationships in the legal sphere of marriage. Yet, the language of the *Obergefell* decision uplifted same-sex couples at the cost of delegitimizing nonmarital relationships in the eyes of the law.[26] Professor Melissa Murray argues that "*Obergefell* builds the case for equal access to marriage on the premise that marriage is the most profound, dignified, and fundamental institution into which individuals may enter. Alternatives to marriage, which I collectively term 'nonmarriage,' are by comparison undignified, less profound, and less valuable."[27]

Similarly, the effect of *Bostock* is progressive and uplifting in that it affirms that discrimination against gay or transgender individuals is a per se violation of Title VII, but it does so by uplifting the categories of individuals who conform to the gender binary over the categories who do not. As explored in Part I below, the idea that discrimination against these types of plaintiffs could be considered a per se Title VII violation is relatively recent in the history of Title VII "sex" jurisprudence. A Supreme Court ruling to that effect creates binding precedent on

---

21. Noah Feldman, Opinion, *Neil Gorsuch Is Channeling the Ghost of Scalia*, BLOOMBERG (Sept. 26, 2021, 5:00 AM) https://www.bloomberg.com/opinion/articles/2021-09-26/supreme-court-justice-neil-gorsuch-wants-scalia-style-conservative-leadership [https://perma.cc/52H3-C3M9].

22. Bil Browning, *Supreme Court Rules in Favor of LGBTQ Rights in Landmark Decision*, LGBTQ NATION (June 15, 2020), https://www.lgbtqnation.com/2020/06/supreme-court-rules-favor-lgbtq-rights-landmark-decision/ [https://perma.cc/RH7G-8BHP].

23. Julie Moreau, *Supreme Court's LGBTQ Ruling Could Have 'Broad Implications,' Legal Experts Say*, NBC NEWS (June 23, 2020, 1:40 AM), https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779 [https://perma.cc/AUJ7-ES5J].

24. *Id.*

25. Obergefell v. Hodges, 576 U.S. 644 (2015).

26. Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1210 (2016).

27. *Id.*

lower courts, which will give gay and transgender plaintiffs an easier path to vindicate their claims of employment discrimination. Yet, the majority explains its rationale in terms of hypotheticals and comparisons that assume the plaintiff's conformity (or attempt at conformity) to the gender binary. In focusing specifically on plaintiffs who do conform to the binary, the Court implicitly delegitimizes those who either cannot or will not conform with the Court's construction of binary gender.

It may be tempting to dismiss such dictum as insignificant. However, the language used in *Bostock* is critically important for at least two reasons: Justice Gorsuch has a reputation for being a textualist, and *Bostock*'s decision relied on statutory interpretation rather than constitutional interpretation.[28] If, as Justice Gorsuch writes in the decision, "only the words on the page constitute the law," then it is important for us to carefully consider what words Justice Gorsuch actually wrote on this page.[29] When Justice Gorsuch pens an opinion that specifically holds that "[a]n employer who fires an individual merely for being gay or transgender defies the law,"[30] it is unclear whether Justice Gorsuch intended to protect every sexual orientation and every gender identity.

Justice Gorsuch is a textualist, and he crafted the decision with an eye to the statutory terms used in Title VII.[31] Therefore, if a limitation to the *Bostock* decision exists, it was not created when the decision was written. Rather, any limitation stems from the entire line of jurisprudence born from Title VII's simple language that it is impermissible to discriminate in employment "because of . . . sex."[32]

The decision in *Bostock* suffers from two related issues, which it inherits from earlier jurisprudence concerning "sex" in the context of Title VII. The first is the flawed understanding most courts have historically held regarding "sex," "gender identity," and "sexual orientation." Courts have generally treated each of these terms as separate categories, only one of which is protected under Title VII. However, the terms cannot, in practice, be so easily distinguished from one another. The judiciary's attempts to sort plaintiffs into protected and unprotected categories have produced a Title VII "sex" jurisprudence that categorizes plaintiffs in often arbitrary and ultimately harmful ways. The second is the *Bostock* decision's implicit uplifting of conformity to the gender binary as a prerequisite for discrimination protections. The effect of this is to create a gap whereby nonbinary,

---

28. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020). For a discussion of Justice Gorsuch's textualism, see Max Alderman & Duncan Pickard, Note, *Justice Scalia's Heir Apparent?: Judge Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185 (2017).

29. *Bostock*, 140 S. Ct. at 1738.

30. *Id.* at 1754.

31. *Id.* at 1737 ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

32. 42 U.S.C. § 2000e-2(a)(1).

gender-nonconforming, bisexual, asexual, and other marginalized gender and sexual identities will have to continue to litigate for the protections that gay, lesbian, and binary transgender individuals now explicitly hold.

Part I of this Note explores the history of jurisprudence leading to the *Bostock* decision, beginning with the inclusion of "sex" in Title VII and tracing the courts' usage of the term as "sex" was slowly expanded to encompass aspects of gender identity and sexual orientation. Part II delves deeper into the idea of "sex." What do we mean when we talk about sex? What do courts mean when they talk about sex? How are the ideas of gender identity and sexual orientation bound up in the concept of sex? Part III returns to the *Bostock* decision and discusses how it falls short in key ways in protecting individuals who do not conform to the heteronormative values underpinning the decision. Part IV briefly explores remedies that could address the shortcomings of *Bostock* in the future.

I. THE ROAD TO *BOSTOCK*—EVOLUTION OF THE TREATMENT OF "SEX" IN TITLE VII JURISPRUDENCE

Title VII of the Civil Rights Act of 1964 states that it is an "unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . . ."[33] In order to understand how the jurisprudence around the simple phrase, "because of . . . sex," has shifted so radically over the nearly sixty years since Title VII's enactment, it is necessary to consider the phrase's near complete lack of legislative history.

A. Early History of Title VII "Sex" Cases: The Traditional View of Sex

The now almost apocryphal tale of the inclusion of "sex" in Title VII is that Representative Howard Smith, a notably conservative southern Democrat, introduced an amendment to include "sex" among the other protected classes (race, color, national origin, and religion) at the eleventh hour in an attempt to scuttle the bill.[34] Scholars have since cast doubt on the veracity of that account,[35] but regardless, the last-minute addition of the term "sex" means there is a distinct lack of legislative guidance on how Congress meant to interpret the term.[36] Courts

33. *Id.*

34. *See* Olivia Szwalbnest, Note, *Discriminating Because of "Pizzazz": Why Discrimination Based on Sexual Orientation Evidences Sexual Discrimination Under the Sex-Stereotyping Doctrine of Title VII*, 20 TEX. J. WOMEN & L. 75, 79–80 (2010); Arianne Renan Barzilay, *Parenting Title VII: Rethinking the History of the Sex Discrimination Prohibition*, 28 YALE J.L. & FEMINISM 55, 59 (2016).

35. *See* Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 164–65 (1991); Barzilay, *supra* note 34.

36. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) ("[Title VII] quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'").

were left to their own devices to parse out what Congress meant by the deceptively simple phrase, "because of sex."

A guiding tenet of statutory analysis holds that statutory terms should be construed according to their plain meaning.[37] Following this principle, courts deciding pre-*Price Waterhouse* Title VII cases decided to construe the plain meaning of the term "sex" to include only what they considered the "traditional concept of sex," by which they meant the binary categories of "male" and "female" as assigned at birth.[38] For example, the following three cases construed the term "sex" according to its "traditional meaning" and are illustrative of the early evolution of Title VII jurisprudence surrounding lesbian, gay, and transgender individuals: *Holloway v. Arthur Andersen & Co.*; *Ulane v. Eastern Airlines, Inc.*; and *DeSantis v. Pacific Telephone & Telegraph Co.*

In *Holloway*, the plaintiff presented as a man when she began working at Arthur Andersen & Co.[39] She began receiving hormone treatments and informed her supervisor of her treatment in preparation for gender affirmation surgery.[40] Shortly after the plaintiff requested to have her employee records changed to reflect her name change to Ramona, she was fired.[41] In rendering its decision, the Ninth Circuit Court of Appeals relied heavily on the lack of legislative history on the "sex" provision in Title VII and the court's construction of the plain meaning of the statute to refer only to the "traditional notions of sex."[42] The Ninth Circuit ultimately refused to consider discrimination against transgender individuals as being prohibited by Title VII.[43]

---

37. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

38. Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) ("Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind."), *overruled by* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *and* Schwenk v. Hartford, 204 F.3d 1187 (2000); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) ("The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men."); Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) ("Because the term 'sex' in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation."), *overruled by Bostock*, 140 S. Ct. 1731. Even some of the more recent cases continued to rely on the precedent established by *Simonton v. Runyon*. *See, e.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) ("[T]he law is well-settled in this circuit and in all others to have reached the question that . . . Title VII does not prohibit harassment or discrimination because of sexual orientation." (quoting *Simonton*, 232 F.3d at 35)).

39. *Holloway*, 566 F.2d at 661.

40. *Id.*

41. *Id.*

42. *Id.* at 662 ("There is a dearth of legislative history on Section 2000e-2(a)(1) . . . . Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate . . . . Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind.").

43. *Id.* at 664.

The Seventh Circuit Court of Appeals relied on nearly identical reasoning in its decision in *Ulane*. Plaintiff Karen Ulane presented as a man when she was hired as a pilot by defendant Eastern Airlines, Inc.[44] Ms. Ulane was privately "diagnosed a transsexual" in 1979.[45] In 1980, she underwent gender affirmation surgery. Upon her return to work, her employer became aware of Ms. Ulane's transgender identity and subsequently fired her.[46] Following the lead of the *Holloway* court, the Seventh Circuit decided that "to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation."[47] The *Ulane* court stated its definition of sex even more plainly than the Ninth Circuit, holding that "discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men."[48] The Seventh Circuit additionally justified its decision based on the lack of legislative history and the fact that members of Congress had previously tried and failed to amend Title VII to include a prohibition of discrimination based on sexual orientation.[49]

Shortly after its decision in *Holloway*, the Ninth Circuit issued its ruling in *DeSantis v. Pacific Telephone & Telegraph Co*. This decision consolidated six cases, in which four gay men and two lesbian women alleged that their employers had discriminated against them due to their sexual orientations.[50] The court held that "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."[51] The Ninth Circuit followed its reasoning in *Holloway*, basing its decision on the lack of legislative history indicating that Congress had contemplated homosexuality when it added "sex" to Title VII, the "traditional" notion of sex, and the failure of Congress to successfully amend Title VII to include sexual orientation.[52]

However, even as these cases were being decided, other courts were already expanding the extremely narrow definition of "sex" that the courts discussed above seemed to take for granted. During the 1970s and 1980s, a number of courts "had already extended Title VII to cover sexual harassment and 'disparate impact' cases that were arguably quite attenuated from the prototypical sex discrimination cases that the *Holloway*, *Sommers*, and *Ulane* courts seemed to view

44. Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1082–83 (7th Cir. 1984).
45. *Id.* at 1083.
46. *Id.* at 1083–84.
47. *Id.* at 1086.
48. *Id.* at 1085.
49. *Id.*
50. DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 328–29 (9th Cir. 1979), *abrogated by* Nichols v. Azteca Restaurant Enters., Inc., 256 F.3d 864 (9th Cir. 2001).
51. *Id.* at 329–30.
52. *Id.* at 329.

as the only legitimate focus of Title VII."[53] It is important to note, however, that even the expanded theories of "because of sex" represented by sexual harassment and disparate impact cases were still held to not protect employees based on their sexual orientation. In *Hopkins v. Baltimore Gas & Electric Co.*, the Fourth Circuit Court of Appeals held that "sexual harassment of a male employee, whether by another male or by a female, may be actionable under Title VII if the basis for the harassment is because the employee is a man."[54] However, the court made clear that "Title VII does not prohibit conduct based on the employee's sexual orientation, whether homosexual, bisexual, or heterosexual."[55]

B. Expansion of the Definition of Sex: Price Waterhouse *"Sex Stereotyping" Theory and* Oncale *Same-Sex Sexual Harassment*

A watershed moment for the expansion of "sex" in Title VII jurisprudence occurred in 1989 when the Supreme Court decided the case of *Price Waterhouse v. Hopkins*.[56] The plaintiff in that case was a woman who was refused a promotion to partner in the prominent accounting firm, Price Waterhouse.[57] She had excellent qualifications: according to the Court, a statement by Price Waterhouse partners in support of Hopkins' candidacy for partnership "showcased her successful 2-year effort to secure a $25 million contract with the Department of State, labeling it 'an outstanding performance' and one that Hopkins carried out 'virtually at the partner level.'"[58] The lower court judge found that "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership."[59] Not all reviews of Hopkins were glowing, however. Partners who did not support her candidacy labeled her "macho," suggested that she "overcompensated for being a woman," and advised that she "take a course at charm school."[60]

The partners refused to repropose Hopkins for partnership consideration, and, in turn, Hopkins was not selected to become a partner.[61] The male partner who explained the decision advised her to "'walk more femininely, talk more

---

53. Ilona M. Turner, Comment, *Sex Stereotyping* Per Se*: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 570 (2007).

54. Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 752 (4th Cir. 1996), *abrogated by* McIver v. Bridgestone Ams., Inc., 42 F.4th 398 (4th Cir. 2022).

55. *Id.* at 751–52.

56. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2022).

57. *Id.* at 231–32.

58. *Id.* at 233.

59. *Id.* at 235 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.D.C. 1985)).

60. *Id.*

61. *Id.* at 231–32.

femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[62] The Supreme Court declared that

> we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"[63]

Price Waterhouse did not involve a gay or transgender plaintiff; regardless, the opinion revolutionized the ability of gay and transgender plaintiffs to seek justice from the courts in Title VII cases. The effect broadened the definition of "because of sex" by including not just anatomical or "traditional" notions of sex but also physical appearance and behavioral characteristics that are coded as "masculine" or "feminine."[64]

Nine years after the *Price Waterhouse* decision, the Supreme Court handed down another key Title VII decision: *Oncale v. Sundowner Offshore Services, Inc.*[65] In this case, the plaintiff endured ongoing instances of sex-related harassment perpetrated by male coworkers employed by the defendant corporation. The harassment included being physically assaulted, threatened with rape, and forced to perform sex-related and humiliating actions.[66] The plaintiff eventually resigned from his position, asking for a notation on his pink slip stating that he "voluntarily left due to sexual harassment and verbal abuse."[67]

In the opinion written by Justice Scalia, the Court held, "[N]othing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[68] The Court's opinion went further to note that, although male-on-male sexual harassment was not the "principal evil" Congress was concerned with when it passed Title VII, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[69]

Oncale's reasoning has proven to be a key element of Title VII jurisprudence for lesbian, gay, and transgender individuals because, while *Oncale* did not

---

62. *Id.*
63. *Id.* at 251 (citation omitted).
64. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 46 (1995).
65. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).
66. *Id.* at 77.
67. *Id.*
68. *Id.* at 79.
69. *Id.*

specifically reference the *Price Waterhouse* sex stereotyping theory, *Oncale*'s decision paved the way for later courts to extend the sex stereotyping doctrine to sexual harassment claims. The logical result of the holdings of *Price Waterhouse* and *Oncale* is as follows: if discrimination on the basis of gender nonconformity is discrimination because of sex, and same-sex harassment not motivated by sexual desire is actionable, then it must follow that same-sex harassment motivated by the harassee's nonconforming gender traits is also actionable under Title VII.

C. Application of Price Waterhouse *Sex Stereotyping Theory to Subsequent Gay and Transgender Title VII "Sex" Cases*

Following the *Price Waterhouse* and *Oncale* decisions, courts continued to hold that Title VII provided for no protection per se on the basis of sexual orientation or transgender identity. However, there was a marked increase in the number of gay and transgender plaintiffs who could successfully state a claim using the *Price Waterhouse* sex stereotyping theory. This Subsection will first discuss the claims of gay individuals in the post-*Price Waterhouse* era, then will proceed to discuss the claims brought by transgender individuals in this era.

In *Higgins v. New Balance Athletic Shoe, Inc.*, the First Circuit Court of Appeals affirmed summary judgment against a gay man's Title VII sexual harassment claims because the plaintiff "attribute[d] the harassment that he had experienced to his sexual preference."[70] The plaintiff attempted to raise the sex stereotyping theory on appeal, but the court precluded the argument because the plaintiff had not originally argued the sex stereotyping theory. Previously, the plaintiff had rested upon a theory of sexual orientation discrimination per se, so the sex stereotyping theory was not available on appeal.[71] The court stated that

> [w]e hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment—and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation.[72]

Two years later, the Ninth Circuit was called upon to decide the case of *Rene v. MGM Grand Hotel, Inc.* The Ninth Circuit concurred with the First Circuit's reasoning in *Higgins*,[73] heavily emphasizing the plaintiff's assertions in deposition

---

70. Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 260 (1st Cir. 1999), *overruled by* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

71. *Id.*

72. *Id.* at 259.

73. Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001), *overruled by Bostock*, 140 S. Ct. 1731.

testimony that the harassment leveled at him was due to his sexual orientation.[74] Less than a month later, the Third Circuit in *Bibby v. Philadelphia Coca Cola Bottling Co.* held that a gay man had no cause of action under Title VII because "[h]is claim was, pure and simple, that he was discriminated against because of his sexual orientation."[75]

One of the few cases in which a gay man successfully used the sex stereotyping theory was that of *Prowel v. Wise Business Forms, Inc.* Resting on both *Price Waterhouse* and *Oncale*, the Third Circuit Court of Appeals ruled that "[t]here is no basis in the statutory or case law to support the notion that an effeminate heterosexual man can bring a gender stereotyping claim while an effeminate homosexual man may not."[76] Both parties in that case sought to use *Bibby*, with the court recognizing that a significant difference in *Prowel* was the plaintiff's explicit assertion of sex stereotyping rather than discrimination against his sexual orientation per se.[77]

Transgender plaintiffs appear to have fared somewhat better than gay and lesbian plaintiffs in the post-*Price Waterhouse* era. In *Smith v. City of Salem*, the plaintiff alleged that her employers retaliated against her after she informed them of her gender identity disorder (GID) diagnosis and treatment. She stated a prima facie case of sex discrimination under the *Price Waterhouse* theory.[78] Previous courts denying claims of sex discrimination to transgender plaintiffs rested on the line of jurisprudence deriving from *Ulane*.[79] However, the Sixth Circuit specifically refuted the applicability of those cases—going so far as to state, "the approach in *Holloway*, *Sommers*, and *Ulane*—and by the district court in this case—has been eviscerated by *Price Waterhouse*."[80] The Sixth Circuit followed *Smith* one year later in the case of *Barnes v. City of Cincinnati* when it held that a transgender woman,

74. *Id.* at 1210.

75. Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001), *overruled by Bostock*, 140 S. Ct. 1731. Additional cases concerning the denial of a cause of action under Title VII for per se sexual orientation discrimination include *Kalich v. AT&T Mobility, L.L.C.*, 679 F.3d 464 (6th Cir. 2012), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), *overruled by* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018). The Court in *Dawson* complained when describing the plaintiff's case that "Dawson has significantly conflated her claims. As a result, it is often difficult to discern when Dawson is alleging that the various adverse employment actions allegedly visited upon her by Bumble & Bumble were motivated by animus toward her gender, her appearance, her sexual orientation, or some combination of these." *Id.* at 217. This court is not alone in noting the difficulty in distinguishing between harassing or discriminatory conduct that is based on sexual orientation per se or conformity (or lack thereof) to gender stereotype. I will address this difficulty in Part II below, where I explore the law's mistake in attempting to disaggregate gender and sex.

76. Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292 (3d Cir. 2009).

77. *Id.* at 290.

78. Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004).

79. *See supra* Section I.A.

80. *Smith*, 378 F.3d at 573.

who was failed during her probationary period in training to become a police sergeant, had stated a claim for sex discrimination based on sex stereotyping.[81]

The U.S. District Court for the District of Columbia went even further than the Sixth Circuit when it decided *Schroer v. Billington*.[82] In examining the transgender plaintiff's claims of sex stereotyping, the *Schroer* court expressed that the overturned ruling for the plaintiff in *Ulane* might have had the right idea: "[I]t may be time to revisit Judge Grady's conclusion in *Ulane I* that discrimination against transsexuals because they are transsexuals is 'literally' discrimination 'because of . . . sex.'"[83] This statement runs counter to previous jurisprudence, which held that there could not be a cause of action for sex discrimination based on transgender identity per se.

While transgender plaintiffs did attain successes after *Price Waterhouse*, it is important to note that the rationales underpinning many of these decisions limit recognition of the transgender identity to plaintiffs with clinical histories and insist upon plaintiff conformity with binary gender norms. As such, this reasoning fails to capture all or even a majority of the lived experiences of most transgender people. The result is a vastly underinclusive Title VII protection for transgender individuals.[84] For instance, in the *Smith* decision, the court lends great weight to the plaintiff's diagnosis of GID. Sue Landsittel describes the *Smith* court's characterization of Smith's claims.

> Reference to the GID diagnosis here demonstrated that Smith's claim was based on his medically certified status, not merely on his conduct, and was therefore a tenable discrimination claim under Title VII. The court's discussion of GID "treatment," in turn, legitimized Smith's nonmasculine conduct as merely an incident of this medically certified status.[85]

Additionally, the court emphasized the plaintiff's intention to make a "complete transformation from male to female,"[86] language which reinforces the requirement that a plaintiff conform to a gender binary in order to receive the benefit of the sex stereotyping theory of discrimination.

Similarly, in *Schroer*, the court's reasoning emphasized plaintiff's conformity to the gender binary. In support of the court's contemplation of discrimination on the basis of transgender identity per se, Judge Robertson stated, "Schroer is not seeking acceptance as a man with feminine traits. She seeks to express her female

---

81. Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005).

82. Schroer v. Billington, 424 F. Supp. 2d 203 (D.D.C. 2006).

83. *Id.* at 212.

84. Sue Landsittel, Comment, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1150 (2010).

85. *Id.* at 1165.

86. Smith v. City of Salem, 378 F.3d 566, 568 (6th Cir. 2004).

identity, not as an effeminate male, but as a woman. She does not wish to go against the gender grain, but with it."[87]

Landsittel points out the danger in relying heavily on medical diagnosis and conformity to the gender binary:

> Among the multiplicity of persons who might find a place under the transgender umbrella are butch females, effeminate males, androgynous and intersex persons, and others who in some way occupy the terrain between 'man' and 'woman.' These identities are likely to be left out if transgender protection under Title VII depends on GID diagnosis and conformance with male or female binary gender norms.[88]

Therefore, while *Price Waterhouse* and *Oncale* made it possible for lesbian, gay, and transgender plaintiffs to state Title VII discrimination claims based on their outward non-conformity with their assigned gender roles, use of those theories implicitly relies on a factfinder being able to slot them into one of two categories: male or female. That implicit condition of using those theories in turn creates gaps for those who do not neatly present as belonging to either category. This concept started to gain recognition in the early 2000s, when the EEOC and some district courts began to treat the concept of per se discrimination against transgender, gay, and lesbian plaintiffs as a legitimate interpretation of Title VII.

D. Modern Era of Title VII "Sex" Cases: Immediate Forerunners to Bostock *Set Stage for Recognition of Per Se Discrimination Claims*

In the period immediately following the adoption of "sex" as a protected basis under Title VII, the EEOC expressed skepticism and resistance to the amendment's enforcement. [89] However, in the intervening time since, the EEOC has begun to consistently take progressive positions in interpretations of discrimination "because of sex." In 2012, the EEOC issued its decision in the case of *Macy v. Holder.*[90] In that case, the complainant was a transgender woman employed as a police detective.[91] She presented as a man when she applied to a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives.[92] She was offered the position pending the results of a background check.[93] Shortly thereafter, she informed the contractor conducting her background check that she was in the process of transitioning from male to female.[94] Five days later, her offer

87. *Schroer*, 424 F. Supp. 2d at 210–11.
88. Landsittel, *supra* note 84, at 1169.
89. Freeman, *supra* note 35, at 163–64.
90. Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012).
91. *Id.* at *1.
92. *Id.*
93. *Id.*
94. *Id.*

of employment was withdrawn.[95] Macy filed a formal EEOC complaint alleging discrimination based on her sex, gender identity, and sex stereotyping.[96]

In deciding the case, the EEOC made a novel ruling.

> [T]he Agency mistakenly separated Complainant's complaint into separate claims: one described as discrimination based on "sex" (which the Agency accepted for processing under Title VII) and others that were alternatively described by Complainant as "sex stereotyping," "gender transition/change of sex," and "gender identity"; by the Agency as "gender identity stereotyping"; and finally by Complainant as "gender identity, change of sex and/or transgender status" . . . *Each of the formulations of Complainant's claims are simply different ways of stating the same claim of discrimination "based on . . . sex,"* a claim cognizable under Title VII.[97]

Though this EEOC decision is not a binding precedent on courts, it created a per se prohibition on discrimination against transgender individuals, which is binding on federal agencies. The EEOC has remained consistent in this view and followed the *Macy* decision with *Baldwin v. Foxx* in 2015.[98] In *Foxx*, a gay man employed as an air traffic controller by the Federal Aviation Administration sued his employer, alleging acts of discrimination.[99] In deciding that complaint, the EEOC ruled that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."[100]

The EEOC further stated that

> "[s]exual orientation" as a concept cannot be defined or understood without reference to sex . . . . Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action

95. *Id.*
96. *Id.* at *2.
97. *Id.* at *5 (emphasis added) (citation omitted).
98. Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015).
99. *Id.* at *1.
100. *Id.* at *5.

> against her that the employer would not have taken had she been male.[101]

The first court to echo the EEOC's recognition of a cause of action for discrimination based on sexual orientation or gender identity per se was the Seventh Circuit Court of Appeals in *Hively v. Ivy Tech Community College of Indiana*. The court simply stated its view: "Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all."[102]

This lengthy history of the courts' uneven and incremental approach to broadening the understanding of "because of sex" culminates with the cases that underpin the *Bostock* decision. Justice Gorsuch summarizes the outcomes of each of the cases at the Circuit level.

In Mr. Bostock's case, the Eleventh Circuit held that the law does not prohibit employers from firing employees for being gay and so his suit could be dismissed as a matter of law. Meanwhile, in Mr. Zarda's case, the Second Circuit concluded that sexual orientation discrimination does violate Title VII and allowed his case to proceed. Ms. Stephens's case has a more complex procedural history, but in the end the Sixth Circuit reached a decision along the same lines as the Second Circuit's, holding that Title VII bars employers from firing employees because of their transgender status.[103]

The Supreme Court accepted these cases to resolve the split between the Eleventh Circuit, which adhered to the tradition exemplified by *Ulane* in refusing to allow a cause of action under Title VII for discrimination based on sexual orientation, and the Sixth and Second Circuits, both of which recognized a prohibition in Title VII against sexual orientation and transgender discrimination per se.[104]

The winding history of "sex" in Title VII jurisprudence is instructive in a number of ways. First, it demonstrates an unfaltering commitment to the gender binary, either in terms of "traditional" gender norms or in terms of what it means to fail to conform to a "sex stereotype." Second, up until the most recent decade, the majority of the jurisprudence surrounding this issue took for granted that "sex" and "gender" were differentiable concepts—that somehow, discrimination

---

101. *Id.* This reasoning is echoed strongly in Justice Gorsuch's characterization of sex in the Supreme Court's *Bostock* decision. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) ("Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.").

102. Hively v. Ivy Tech Cmty, Coll. of Ind., 853 F.3d 339, 346 (7th Cir. 2017).

103. *Bostock*, 140 S. Ct. at 1738 (citation omitted).

104. *Id.*

in employment could be based solely on one's anatomy or biology irrespective of that person's outward performance of their gender, or vice versa. Even up until the *Bostock* decision in 2020, courts still adhered to the idea that a plaintiff who pleaded discrimination based only upon their sexual orientation or gender identity had failed to state a claim under Title VII. Finally, it is instructive to take heed of the courts' repeated protestations that Congress had failed to include sexual orientation and gender identity under Title VII. Although the Supreme Court has now ruled that Title VII does include lesbian, gay, and transgender individuals, these cases rightly suggest that Congress has the capacity to definitively speak on the issue to provide a surer way to protect individuals not obviously covered by the language of Title VII.

II. SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION AS RELATED CONCEPTS THAT THE JUDICIARY IMPROPERLY DISAGGREGATES

To understand the judiciary's struggle with the terms "sex," "gender identity," and "sexual orientation," it is important to answer what facially appears to be a simple question: What do these terms mean?

A. "Sex" and "Gender"

The accepted definition of sex, one endorsed by none other than Justice Scalia, posits that sex describes immutable physical and biological traits, whereas gender is composed of culture, behavior, and attitude and is therefore mutable by comparison.[105] Justice Scalia is not alone in favoring this method of distinguishing between sex and gender, which has been expressed by physiologists and political scientists as well as Justices.[106] Professor Mary Anne C. Case echoes the same idea behind Justice Scalia's words from *J.E.B. v. Alabama ex rel. T.B.* Professor Case describes gender as the adjective and sex as the noun, exemplified in the

105. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1436 n.1 (1994) (Scalia J., dissenting) ("Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male.").

106. *See* Britta N. Torgrimson & Christopher T. Minson, *Sex and Gender: What Is the Difference?*, 99 J. APPLIED PHYSIOLOGY 785, 785–86 (2005) ("In the most basic sense, sex is biologically determined and gender is culturally determined. The noun sex includes the structural, functional, and behavioral characteristics of living things determined by sex chromosomes . . . . Gender can be thought of as the behavioral, cultural, or psychological traits typically associated with one sex."); *see also* Rose McDermott & Peter K. Hatemi, *Distinguishing Sex and Gender*, 44 PS: POL. SCI. & POL. 89, 89–90 (2011) ("The first component encompasses biological sex, which, short of surgical and hormonal intervention, remains constant for most individuals across their life span. While there are some individuals who undergo sex changes and a not-trivial number who are born intersex, most people possess biological organs of reproduction that distinguish them as male or female. The second aspect of categorization incorporates the notion of gender and relates to traits of masculinity or femininity, including such characteristics as sex-typed interests and occupations, appearance, mannerisms, and nonverbal behavior . . . .").

relationship between "masculine" and "male" or "feminine" and "female."[107] Encoded in this idea of gender as descriptive, changeable, and based on external expression is the influential feminist idea of gender as performance—as something that one *does* rather than *is*.[108]

The courts in *Ulane*, *Simonton*, and *Holloway* followed the "traditional" definition of sex, which described sex as being biologically fixed. However, casting the distinction between sexes at the feet of biology does not produce the uncomplicated picture that those courts appear to think it does.

Some research indicates that gender identity is not so easily divorced from sex as courts have assumed. Levasseur summarizes the argument that the American Academy of Pediatrics argued in their amicus brief in the case of *Doe v. Clenchy*: "gender identity refers to every 'person's basic sense of [gender],' and is a 'deeply felt, core component of a person's identity.' Gender identity 'has a strong biological and genetic component,' and 'is the most important determinant of a person's sex.'"[109]

The plaintiff's litigation team in *Schroer*, which succeeded in obtaining a judgment that transgender discrimination is a per se Title VII violation,[110] presented evidence that "gender identity was, in fact, part of one's biological sex, and that a definitive biological etiology was not necessary in order for gender identity to be part of 'sex' as a matter of law."[111] The litigation team submitted expert testimony indicating that the scientific community recognizes nine different determinants of biological sex, one of which is gender identity.[112] This testimony refutes the common idea that gender is merely a "cultural overlay"[113] on top of biologically dimorphic physical characteristics. The court appeared to accept this

---

107. Case, *supra* note 64, at 1–2.

108. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 24–25 (L1990) ("In this sense, *gender* is not a noun, but neither is it a set of free-floating attributes, for we have seen that the substantive effect of gender is performatively produced and compelled by the regulatory practices of gender coherence. Hence, within the inherited discourse of the metaphysics of substance, gender proves to be performative—that is, constituting the identity it is purported to be. In this sense, gender is always a doing, though not a doing by a subject who might be said to preexist the deed.").

109. M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 951 (2015) (quoting Amici Brief of the Me. Chapter of the Am. Acad. of Pediatrics et al. at 5–6, 8, Doe v. Regional Sch. Unit 26, 86 A.3d 600 (Me. 2014) (No. PEN-12-582), 2013 WL 8349676)).

110. Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) ("In refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and *in response to Schroer's decision to transition*, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination." (emphasis added)).

111. Levasseur, *supra* note 109, at 981.

112. *Id.*

113. Case, *supra* note 64, at 10.

logic, as implied by the statement which takes the plaintiff's expression of feminine identity as an indication of her female sex.[114]

This logic is persuasive but has not overcome the mainstream understanding that sex is a biological property while gender is an intangible personal and cultural property. It is important to understand the view promoted by the *Schroer* litigation team, however, as a reminder that our understanding of these terms as a culture is still evolving. It also makes clear that although biology can explain certain physical dimorphic differences, what it means for a person to belong to one sex is determined not by some fixed "natural law" but, instead, by the legal system a person exists within.

For example, within the marriage context, courts have utilized an essentialist approach in which sex is immutable and fixed at birth.[115] In the English case of *Corbett v. Corbett*, a divorce case between a man and a transgender woman, the court was called upon to determine Ms. Corbett's "true sex," which it did based almost exclusively on medical evidence. Professor Katherine Franke summarized the court's conclusion:

> i) prior to her surgery, Ashley had possessed male gonads and male genitals, ii) after her surgery she registered female hormonal levels and "remarkably good" female genitals, and iii) at all times she possessed male chromosomes, a transsexual psychology, and *passed* easily as a woman; indeed, "the pastiche of femininity was convincing."[116]

As a result, Franke recounts, the court made the key determinations that

> [f]irst, the correct criteria for "womanness" should be "the chromosomal, gonadal and genital tests . . . . [But] the greater weight would probably be given to the genital criteria than to the other two." Second, an individual's sex is permanently fixed at birth and cannot be later changed either naturally or through the intervention of science.[117]

While *Corbett* was an English case and therefore not binding on U.S. courts, this legacy took hold in the United States, particularly in the higher courts.[118] M. Dru Levasseur, Director of Diversity, Equity, and Inclusion for the National LGBTQ+ Bar Association, notes multiple occasions in which lower courts, after conducting a thorough review of modern medical science, determined that the

---

114. *Schroer*, 424 F. Supp. 2d at 210–11.

115. *See* Levasseur, *supra* note 109, at 967; *see also* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 46 (1995).

116. Franke, *supra* note 115, at 45 (quoting Corbett v. Corbett [1970] 1971 P. 83, 96, 104 (Eng.)).

117. *Id.* at 46.

118. Levasseur, *supra* note 109, at 969.

plaintiffs were legally entitled to be categorized as a different sex than they were assigned but were overturned by higher courts of appeal.[119]

As an example, the district court in *Ulane* held that

> sex is not a cut-and-dried matter of chromosomes, and . . . the term, 'sex,' as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII.[120]

As discussed above in Part I, that reasoning was repudiated by the Seventh Circuit, which instead reinforced the "traditional" "biological" notion of fixed, dimorphic sexes—that Title VII only prohibits discrimination "against women because they are women and against men because they are men."[121] In doing so, the court did not make a mere observation about what sex is, but rather exercised its power to decide that the district court in *Ulane* was wrong and that the traditional view was right. As Professor Katherine Franke states, "A person's sex becomes fixed by operation of a court order, not by virtue of an ambiguous natural order. Consequently, courts pronounce a fact of the matter and then justify that act of declarative power by resort to the myth of essentialism."[122]

B. "Sexual Orientation"

Thus far, this Note has addressed courts' various legal constructions of sex and the difficulties inherent in the courts' attempts to draw a line between sex and gender identity. Sexual orientation, in comparison, is easier to define. For example, Professor Francisco Valdes describes how "legal culture, like society at large, oftentimes projects a core understanding of 'sexual orientation' as simply an erotic feeling or desire that is oriented toward particular sex-defined directions, and that typically is accompanied by verbal or behavioral expressions of such feelings."[123] Sexual orientation is inherently relational—it is "linked to (both actual and contemplated) relationships with other bodies. That is, sexual orientation is defined in terms of the sex of the object of desire."[124] Although under this understanding sex cannot be disentangled from the definition of sexual orientation, scholars continue to treat sexual orientation as a distinct analytical category.[125]

---

119. *Id.* at 970.

120. Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 825 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984).

121. *Ulane*, 742 F.2d at 1085.

122. Franke, *supra* note 115, at 52.

123. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 135 (1995).

124. Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1198 (2012).

125. McDermott & Hatemi, *supra* note 106, at 90.

C. Disaggregation of "Sex," "Gender," and "Sexual Orientation" Creates Conditions for Injustice When Some Categories are Unprotected

Discussion of sex, gender identity, and sexual orientation reveals that the terms are linked at an elemental level. This is hardly a surprising or novel observation, but it does get to the root of the judiciary's difficulty in interpreting these terms. The judiciary set itself an essentially impossible task when it attempted to disaggregate sex, gender identity, and sexual orientation in its Title VII jurisprudence. Nevertheless, the judiciary *has* made the attempt to pull the terms apart, and it is this flawed and inconsistent disaggregation that has contributed greatly to the slow, incremental process of broadening the term "sex" to include these conceptually distinct yet necessarily intertwined terms. In the meantime, adherence to that flawed line of thinking perpetuates injustice against those who fall through the cracks in the separations created by the judiciary.

Valdes characterizes the linkages between the concepts as a triangle, with sex serving as a base and gender identity and sexual orientation deriving meaning from their relationship with it.[126] Valdes joins Scalia, Case, and others in observing that both law and popular society tend to conflate sex with gender linguistically, which has the effect of conflating them substantively.[127] To illustrate this point, Valdes explores the way this conflation interacts with the judiciary's insistence on separating sex from sexual orientation to produce injustice in several cases.[128] Valdes's discussion of the case of *Smith v. Liberty Mutual Insurance Co.* is illustrative here.[129]

In *Smith*, a heterosexual man was denied employment at the defendant company based on the hiring manager's assessment of the hobbies listed on his resume.[130] The manager believed that "[p]laying musical instruments, singing, dancing and sewing" were too effeminate, so he suspected that the plaintiff was gay.[131] The district court ruled in favor of the employer, stating that Title VII did not protect against discrimination on the basis of sexual orientation, despite the fact that the evidence presented indicated that the plaintiff was actually discriminated against based upon his gender performance (i.e., his "effeminate" hobbies).[132] In this way, the court accepted that gender and sexual orientation could be conflated, as it perceived their outward indicators to be the same. At the

126. Valdes, *supra* note 123, at 134.

127. *Id.*; *see also* Franke, *supra* note 115, at 9 (quoting J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1436 n.1 (1994) (Scalia, J., dissenting)); Case, *supra* note 64, at 6; McDermott & Hatemi, *supra* note 106, at 90 ("Scholars typically do not link this aspect of identity [sexual orientation] to sex and gender, but in reality, these notions are often conflated in the public discourse, ...").

128. *See* Valdes, *supra* note 123.

129. Valdes, *supra* note 123, at 138 (discussing Smith v. Liberty Mut. Ins. Co., 395 F. Supp. 1098 (N.D. Ga. 1975)).

130. *Id.* at 139–40.

131. *Id.*

132. *Id.* at 140.

same time, the court used that conflation to move the plaintiff out of a protected category (someone discriminated against *because of sex*) and into a separate, unprotected category (someone discriminated against *because of sexual orientation*).

On appeal, the Fifth Circuit upheld the ruling against the plaintiff, but for a different reason: it asserted that sex is irrelevant to gender.[133] Where the district court conflated gender and sexual orientation, the appellate court instead disaggregated sex and gender to deny the plaintiff his claim, even though, as Valdes states, "the discrimination here arose precisely because Smith's sex was male, yet he did not sufficiently affect the masculine gender."[134]

The conflation that arises between sex, gender, and sexual orientation is understandable because of the terms' interrelatedness. In practice, differentiating between these terms becomes an exercise of splitting arbitrary hairs. Franke responds to this exercise by rejecting the "deterministic, biological" understanding of sex on the basis that "there is no principled way to distinguish sex from gender, and concomitantly, sexual differentiation from sexual discrimination."[135] Under her formulation, there is little practical use for the term "sex" (or, at least, "biological" sex) in discrimination jurisprudence because "[e]xcept at that special moment when the birth attendant exclaims, 'It's a boy' or 'It's a girl,' real, physical body parts play an insignificant role in both gender attribution and sex discrimination."[136] Instead, it is the outward performance of a person's gender and the assumptions employers make about a person's sex that contribute in practical ways to discrimination.[137]

III. RETURNING TO *BOSTOCK*: WHO DOES THE DECISION LEAVE BEHIND?

Having spent considerable time tracing the history of "sex" in Title VII jurisprudence and dissecting the jurisprudential impulse to separate terms which, at their core, are so interrelated as to be practically inseparable, it is necessary now to return to the decision which prompted this Note. How does *Bostock* respond to the legacy left by its predecessors? Where does the application of *Bostock* fall short of offering the protections it purports to provide?

The holding in *Bostock* reads as follows: "An employer who fires an individual for being *homosexual* or *transgender* fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary

133. *Id.* at 143.
134. *Id.* at 144.
135. Franke, *supra* note 115, at 3, 5.
136. *Id.* at 39.
137. *Id.* ("The cultural genital is a metaphor for both the physical genital that is not presently in view but which the person is assumed to have and the gendered schema that constructs women as certain kinds of beings and men as their opposite. This schema is made manifest in a system of gendered cues that communicates the signs of gender, signs that we regard as reliable signifiers of one's 'true sex.'" (citing HAROLD GARFINKEL, STUDIES IN ETHNOMETHODOLOGY 116–85 (1967))).

and undisguisable role in the decision, exactly what Title VII forbids."[138] This language, emphasizing the decision's application to "homosexual" (or gay[139]) and transgender individuals, is repeated twice more in the decision.[140]

It should be noted here that the decision in *Bostock* represents a definite step forward in Title VII "sex" jurisprudence, both in its reasoning and its result. Sections of the majority opinion echo the points made in Part II, particularly where Justice Gorsuch states, "We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."[141] By identifying their interrelatedness, this statement recognizes almost exactly the dilemma surrounding the attempt to disaggregate sex, sexual orientation, and gender identity. Further, in holding that discrimination against gay and transgender individuals is now a per se violation of Title VII, the decision represents a legitimate advancement of equal protection in Title VII jurisprudence.

However, the narrowness of focusing specifically on gay and transgender plaintiffs forms the core of *Bostock*'s shortfall. The decision carries on in accord with the lower courts in elevating the gender binary as the foundation of Title VII's conception of "sex." The hypotheticals outlined in the decision, which are essential to explaining its meaning, are grounded in this binary.[142] The careful use of "homosexual" and "transsexual" as categories bolsters this interpretation, as those categories are clearly meant to evoke individuals who conform to the gender binary by presenting as either masculine or feminine, despite falling outside of the "traditional" gender roles of *Bostock*'s predecessors. It is no defense to say that the issue before the Court was narrowly defined by the gender identities and sexual orientations of the plaintiffs in the three consolidated cases, as the majority actively chose to redefine the issue to avoid deciding the application of Title VII to sexual orientation and gender identity in general.[143]

---

138. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) (emphasis added).

139. *Id.* at 1754.

140. *Id.* at 1741, 1754.

141. *Id.* at 1746–47; *see also id.* at 1742 ("[H]omosexuality and transgender status are *inextricably bound up with sex*. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex." (emphasis added)).

142. *Id.* at 1741 ("Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman . . . . Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.").

143. Nancy C. Marcus, Bostock v. Clayton County *and the Problem of Bisexual Erasure*, 115 NW. U. L. REV. ONLINE 223, 235 (2020) ("In the opening paragraph of *Bostock*, the Court similarly

This refusal to recognize identities that fall outside of binary expressions of gender leaves gaps that are not merely conceptual or theoretical. Though rarely, the judiciary has been called upon to decide the case of at least one intersex[144] individual in the context of employment discrimination. In *Wood v. C.G. Studios*, an employee who underwent surgery to modify her intersex appearance was fired shortly after her employer learned of the surgery.[145] The court in that case interpreted the Pennsylvania Human Relations Act rather than Title VII but made its decision to grant summary judgment against the plaintiff on grounds that were clearly reminiscent of the reasoning used in *Ulane* and *Holloway*.[146]

The *Wood* case predated *Price Waterhouse*, yet it is unlikely the plaintiff would have been able to state a claim under the sex stereotyping theory based on the facts of her case even if the theory had been available to her. Nor could she necessarily state a claim under *Bostock* as written because her status as intersex does not make her transgender—her body did not conform to the binary physical indicators of "male" or "female" so endorsed by "traditionalist" courts. This case also has broader implications beyond the plaintiff's inability to state a claim under the doctrines we now have—namely, that the law's failure to recognize bodies of alterity has normative implications, whether the law intends it to or not. As Professor Julie Greenberg states, "The law, by clinging to a binary system that blindly ignores the existence of intersexuals and the importance of self-identity, reinforces the perception that intersexuality is unacceptable."[147]

---

misrepresents the question at issue in the sexual orientation cases as 'whether an employer can fire someone simply for being homosexual or transgender.' However, the actual question presented in *Bostock* and *Zarda* was '[w]hether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964.'" (alteration in original) (first citing *Bostock*, 140 S. Ct. at 1737; then citing QUESTION PRESENTED BY *BOSTOCK V. CLAYTON COUNTY* (2019), https://www.supremecourt.gov/qp/17-01618qp.pdf [https://perma.cc/C7WD-N4Y2]; and then citing QUESTION PRESENTED BY *ALTITUDE EXPRESS, INC. V. ZARDA* (2019), https://www.supremecourt.gov/qp/17-01623qp.pdf [https://perma.cc/QTM4-5WZW])).

144. *What Is Intersex?*, INTERSEX SOC'Y N. AM. (2008), https://isna.org/faq/what_is_intersex/ [https://perma.cc/JE9F-GRY6] ("Intersex is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male. For example, a person might be born appearing to be female on the outside, but having mostly male-typical anatomy on the inside. Or a person may be born with genitals that seem to be in-between the usual male and female types—for example, a girl may be born with a noticeably large clitoris, or lacking a vaginal opening, or a boy may be born with a notably small penis, or with a scrotum that is divided so that it has formed more like labia. Or a person may be born with mosaic genetics, so that some of her cells have XX chromosomes and some of them have XY.").

145. Wood v. C.G. Studios, Inc., 660 F. Supp. 176, 176 (E.D. Pa. 1987), *abrogated by Bostock*, 140 S. Ct. 1731.

146. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 323 (1999). Note especially the court's reasoning in *Wood*, 660 F. Supp. at 178 ("The Title VII cases unanimously hold that Title VII does not extend to transsexuals nor to those undergoing sexual conversion surgery, and that the term 'sex' should be given its traditional meaning.").

147. Greenberg, *supra* note 146, at 326–27.

This narrow focus on reinforcing the gender binary is harmful beyond the fact that it excludes those with gender identities or sexual orientations not specifically named in the decision from stating claims under *Bostock*. Although, as Marcus points out, there is a degree of irony in arguing that a decision rooted in textualism that specifically excluded certain groups was meant to apply to them, there are reasons to believe that courts will extend *Bostock*'s holding to bisexual individuals, for example.[148] Rather, the harm comes from prolonging the fight by refusing to speak definitely on the issue of whether gender identity and sexual orientation should be broadly protected.

Marcus focuses her analysis specifically on "bi-erasure" within the law. She argues that because of *Bostock*'s bisexual erasure, bisexual individuals bringing a Title VII claim must justify their non-inclusion differently than gay and transgender individuals.[149] She further points out that this erasure has tangible consequences for the groups who must continue to seek explicit recognition of their protected status, describing a negative feedback loop in which "the more courts do not explicitly acknowledge the existence of bisexuals the less willing attorneys may be to bring discrimination cases on their behalf. Reciprocally, the fewer cases are brought on behalf of bisexuals, the less likely court opinions are to be bi-inclusive."[150] Though this analysis is specific to bisexual individuals, these effects are no less poignantly felt by other groups whose identities are habitually erased by the law and who have been left out of the decision in *Bostock*: intersex individuals, asexual individuals, pansexual individuals, genderqueer individuals, Two-Spirit individuals, and the myriad other expressions of gender identity and sexual orientation that exist within human nature.[151]

---

148. *See* Marcus, *supra* note 143, at 226–30. However, despite the reasons to believe the Court would extend its reasoning in *Bostock* to cases involving other sexual minorities, the decision as written does leave open the possibility that individuals belonging to categories outside of "homosexual" and "transgender" could have difficulty stating a claim. For example, a cisgender, feminine-presenting bisexual woman in a relationship with a man could face discrimination based on her bisexual orientation and fail to state a claim because she is neither transgender nor "homosexual" (necessary to state a per se claim under the holding in *Bostock*) and has not been stereotyped (necessary to state a claim under *Price Waterhouse*).

149. *Id.* at 230.

150. *Id.* at 232.

151. *See LGBTQ Terms and Definitions*, U. FLA.: LGBTQ+ AFFS. (Jan. 26, 2017), https://lgbtq.multicultural.ufl.edu/programs/speakersbureau/lgbtq-terms-definitions/ [https://perma.cc/RC63-V7G4] ("INTERSEX Term to describe a person whose sex assigned at birth does not neatly fit into the socially accepted binary of 'male' or 'female,' because they have genitalia, hormone production levels and/or chromosomal makeups that are ambiguous or non-binary . . . . ASEXUAL An identity label sometimes claimed by people who do not experience sexual attraction. This differs from celibacy or abstinence, which are behaviors. Often used as an umbrella term to encompass identities such as aromantic, demisexual, grey-A, heteroromantic, homoromantic, etc . . . . PANSEXUAL An identity label sometimes claimed by people who experience sexual attraction across the spectrums of gender identity, biological sex and sexual orientation . . . . GENDERQUEER An identity label sometimes claimed by people whose gender identity does not fit into the culturally accepted man/woman binary. May be characterized by the

IV. AMENDING THE LEGACY OF *BOSTOCK*

Thus far, this Note has discussed key problems within Title VII "sex" jurisprudence: the judicial impulse to treat sex, gender identity, and sexual orientation as essentially separable categories and the judiciary's overriding commitment to enforcing the gender binary (even when it is acting at its most progressive). This Section suggests possible reforms or evolutions in the law that may address these issues.

The simplest way to remedy the immediate issue in *Bostock* might be for the Supreme Court to grant *certiorari* to a similar case or class of cases to address the very issue the Court chose to avoid in *Bostock*: whether the Title VII prohibition against sex discrimination includes discrimination on the basis of sexual orientation and gender identity. Certainly, this approach would remedy the under-inclusivity of the *Bostock* decision and ameliorate the ambiguous position of those whose identities were not explicitly protected by the decision. However, the Court may be unlikely to revise its decision in this case so soon after it was handed down. Further, the judiciary is by nature conservative. Consider the pattern explored in Part I, in which courts expanded the definition of sex incrementally and with great resistance to change. It is likely that future cases heard by the Supreme Court would only add more identities to the list, rather than create broad, sweeping protections for gender identity and sexual orientation.

Rather than look to the courts, we may instead turn to the legislature. After all, it is the legislature's silence on the issue of the meaning of "sex" in Title VII that permitted the defendants to argue in *Bostock* that the congressional silence on the issue of gender identity and sexual orientation in Title VII (particularly where it had included such language in other statutes)[152] was evidence of legislative intent not to protect those categories.[153] Valdes argues fervently that this approach is

---

desire to challenge norms of gender roles and expression, to 'play' with gender and/or to express a fluid gender identity . . . . TWO-SPIRIT Identity label used within many American Indian and Canadian First Nations indigenous groups to describe an individual that possesses both 'masculine' and 'feminine' spirits. Coined by contemporary LGBT Native Americans to describe themselves and the traditional roles they are reclaiming.").

152. *See* Brief for Respondent at 56–57, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1618), 2019 WL 3942896, at *56–57 ("In contrast, Congress has included sexual orientation as a protected class in addition to sex or gender in various other civil rights statutes and other statutes enacted between 1998 and 2013. *See, e.g.*, 34 U.S.C. § 12291(b)(13)(A) (prohibiting funded programs and activities from discriminating on numerous grounds, including sex and sexual orientation, under Violence Against Women Act); 34 U.S.C. § 30503(a)(1)(C) (providing federal assistance to local law enforcement for investigation of certain crimes motivated by (among other traits) gender and sexual orientation); 18 U.S.C. § 249(a)(2)(A) (imposing heightened punishment for causing or attempting to cause bodily injury to any person because of (among other traits) the person's gender and sexual orientation); 20 U.S.C. § 1092(f)(1)(F)(ii) (requiring colleges and universities to collect and report information regarding crimes on campus, including crimes where victim is selected because of (among other traits) gender and sexual orientation).")

153. *Bostock*, 140 S. Ct. at 1747 ("Since 1964, [defendants] observe, Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but no such

necessary, stating that understanding the law's tendency to conflate sex, gender, and sexual orientation "places a premium on legal reform because it reveals that current (mis)conceptions and (mis)applications of sex/gender anti-discrimination law are inevitably, inexorably, and fatally underinclusive."[154] He further argues that without a legislative voice on this issue, defendants and courts will continue to conflate these terms and shift plaintiffs out of protected categories and into unprotected ones, thus ensuring that gender and sexual orientation discrimination may be practiced with *de facto* legality.[155]

The legislative avenue is promising. As of this writing, the House of Representatives has passed the Equality Act of 2021, which was passed into the Senate and referred to the Senate Judiciary Committee in February 2021. This Act "would amend the Civil Rights Act of 1964 and other key federal nondiscrimination laws to provide clear, explicit protections clarifying that the prohibitions against sex discrimination include discrimination based on sexual orientation and gender identity."[156] If this Act is passed, it will join the growing number of state laws that affirm it is unlawful to discriminate against individuals based upon their gender identity or sexual orientation.[157] More importantly, it would regulate the prohibition against such discrimination across the nation. A legislative solution would be preferable to a judicial solution, as legislation would eliminate the ambiguity of the *Bostock* decision and foreclose further confusion based on the limited legislative history created by the last-minute addition of "sex" to Title VII. The legislative solution would have the further positive effect of providing visibility and a normative endorsement of diverse gender identities and sexual orientations, which could begin to shift the attitudes that have so entrenched the gender binary in American culture.

A far more radical and less immediately practicable response to *Bostock*'s shortcomings could be a re-evaluation of the concept of civil rights, or at least the primary role they currently occupy in the United States's framework for mediating the power and protections afforded to the nation's disparate groups. Professor

---

amendment has become law. Meanwhile, Congress has enacted other statutes addressing other topics that do discuss sexual orientation. This post enactment legislative history, they urge, should tell us something.").

154. Valdes, *supra* note 123, at 204.

155. *Id.*

156. NAT'L WOMEN'S L. CTR., THE EQUALITY ACT OF 2021: EXPANDING ANTIDISCRIMINATION PROTECTIONS FOR LGBTQ PEOPLE AND WOMEN, NAT'L WOMEN'S L. CTR., 1 (Jan. 22, 2021), https://nwlc.org/wp-content/uploads/2021/01/Equality-Act-2021-1.28.21.pdf [https://perma.cc/G778-HFMZ], https://nwlc.org/resource/the-equality-act/ [https://perma.cc/6DYZ-87DV].

157. Levasseur, *supra* note 109, at 995 ("In 2013, California passed Assembly Bill 1266, the School Success and Opportunities Act, which further clarified the already existing protections on the basis of gender identity to ensure that transgender students have access to single-sex facilities and can participate in sports regardless of their gender identity. Additionally, a number of jurisdictions have clarified, through guidance or regulation, that 'sex' refers to gender identity for purposes of single-sex spaces, like school restrooms, and in places of public accommodation.").

Kapur has been critical of the Western liberal quest for human rights, asserting that "human rights are universal and necessary tools that we cannot *not* want . . . even though they cannot give us what we *do* want—that is, freedom."[158] Professor Fineman also critiques the concept of "formal equality," exemplified by our current civil rights framework. She states,

> "[E]quality," reduced to sameness of treatment or a prohibition on discrimination, has proven an inadequate tool to resist or upset persistent forms of subordination and domination. While this model might be used to successfully address some situations of discrimination, it fails to protect against others. Nor does our equal protection doctrine provide much protection against discrimination on the basis of categories not recognized as receiving heightened judicial scrutiny, such as disability and sexual orientation.[159]

Fineman proposes that, instead, we might organize our understanding of discrimination under the "Vulnerability Theory," which understands individuals and societal institutions as inherently vulnerable to harm, and individuals are organized not by identity group but by the privilege (or lack thereof) they enjoy.[160] Under this analysis, the task of courts would move "away from assessing the individual characteristics of designated groups within society to see if they are the subjects of animus" and instead focus on remedying the way society acts to privilege some but not others.[161] As an example of how this theoretical shift can work, Fineman references a decision from the Supreme Court of Vermont, which endorses same-sex marriage without engaging in an equal protection or civil rights analysis.

The Vermont Constitution's Common Benefits Clause predated the Fourteenth Amendment and was not based on a concept of discrimination, nor was it focused only on protection for a specific category of persons. The Common Benefits Clause states, in part, '[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . . '[162]

In this way, Fineman shows that by centering all individuals' shared vulnerability and creating legal structures that protect every citizen without reference to specific identity, the United States can achieve outcomes that

158. RATNA KAPUR, GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL 9–10 (2018).

159. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 3 (2008).

160. *Id.* at 10–15.

161. *Id.* at 3.

162. *Id.* at 22.

expansively protect the rights of all without according any category of people a particular advantage.[163]

CONCLUSION

Of the three plaintiffs folded into the *Bostock* case, only Gerald Bostock survived to see the Supreme Court hand down its decision. For Mr. Bostock, the consequences of a legal system which denied his rights to equal treatment in employment were steep, even though he eventually prevailed at the Supreme Court. For the simple transgression of joining a gay softball league, Mr. Bostock was fired from a position within the Clayton County School Board in which he was an exceptional advocate for children in the juvenile justice system and coordinator for the county's Court Appointed Special Advocates program.[164] When asked about the case in 2019, Mr. Bostock stated,

> I lost my livelihood, and my source of income. I even lost my medical insurance, and at a time I was just recovering from prostate cancer. It's been a long six-year journey not only to clear my name, but also help make it so no one has to go to work in fear of being fired for who they are, how they identify, and who they love.[165]

After the Supreme Court's decision was announced on June 15, 2020, Mr. Bostock reflected on the result and the two other plaintiffs who had passed away before ever hearing the Court's ruling. He concluded, "we still have more work to do."[166]

The history of Title VII jurisprudence outlined in this Note and the issues that are enshrined in and carried through those decisions lend truth to Mr. Bostock's statement. Legislators and the legal profession have the ongoing responsibility to create the conditions for freedom from discrimination in employment for all individuals, regardless of their gender identity or sexual orientation. A good place to start? The judicial system's (mis)treatment of "sex."

---

163. *See id.* at 23.

164. Bostock v. Clayton Cnty., No. 16-CV-1460, 2017 WL 4456898, at *1 (N.D. Ga. July 21, 2017), *aff'd sub nom.* Bostock v. Clayton Cnty. Bd. of Commissioners, 723 F. App'x 964 (11th Cir. 2018), *rev'd*, Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731 (2020).

165. Tim Teeman, *Gerald Bostock Was Fired. He Wants His Supreme Court Case to Help Change LGBTQ Rights in America*, DAILY BEAST (Sept. 20, 2019, 5:57 AM), https://www.thedailybeast.com/gerald-bostock-was-fired-he-wants-his-supreme-court-case-to-help-change-lgbtq-rights-in-america [https://perma.cc/U3WF-YKLA].

166. Tim Fitzsimons, *Supreme Court Sent 'Clear Message' with LGBTQ Ruling, Plaintiff Gerald Bostock Says*, NBC: NEWS (June 16, 2020, 12:35 PM), https://www.nbcnews.com/feature/nbc-out/supreme-court-sent-clear-message-lgbtq-ruling-plaintiff-gerald-bostock-n1231190 [https://perma.cc/QS9W-CP2C].