ARTICLES

DEHUMANIZATION "BECAUSE OF SEX": THE MULTIAXIAL APPROACH TO THE RIGHTS OF SEXUAL MINORITIES

by
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Although Title VII prohibits discrimination against any employee "because of such individual's . . . sex," legal commentators have not yet accurately appraised Title VII's trait and causation requirements embodied in that phrase. Since 2015, most courts assessing the sex discrimination claims of LGBT employees began to intentionally analyze "sex" as a trait using social-construction evidence, and evaluated separately whether the discriminatory motive caused the workplace harm. Responding to what this Article terms a "doctrinal correction" to causation within this groundswell of decisions, the Supreme Court recently issued an "expansive" and "sweeping" reformulation of but-for causation in Bostock v. Clayton County*, one that combined the sex-trait analysis with causation analysis in determining that Title VII protects "traits or actions" related to sexual orientation or gender identity.*

Because Bostock *did not foreclose the use of social evidence or intersectional approaches in additional subordination contexts in which sex is a factor, this Article builds on this important development by introducing "multiaxial analysis," a framework with which judges and stakeholders identify the role of Title VII's protected traits as socially*

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constructed along four axes: the aggrieved individual's self-identification, the defendant-employer, society, and the state. This context-sensitive approach to subordination has the potential to give fuller effect to Title VII's provisions and purposes as compared to sex-stereotyping theory or the Court's reformulated "but-for causation." Uncoupling causation from the sex trait analysis realizes the statute's civil rights protections within relational, structural, and institutional dynamics as the law increasingly recognizes that the scope of sex extends beyond a fixed binary.

INTRODUCTION

In 1983, Judge John F. Grady presided over a trial of the discrimination claims of Karen F. Ulane, a commercial airline pilot and a decorated Vietnam veteran with an excellent flying record.[1] Ms. Ulane revealed her transgender identity to her employer, Eastern Airlines, after undergoing sex reassignment surgery in 1980.[2] The airline then fired her, claiming that she was mentally ill and unfit to fly, despite

[1] Ulane v. E. Airlines, Inc., 581 F. Supp. 821 (N.D. Ill. 1983) [hereinafter "*Ulane I*"].

[2] Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1083 (7th Cir. 1984) [hereinafter "*Ulane II*"].

certification from the FAA to the contrary.[3] In a post-trial opinion, the court concluded without hesitation that Ms. Ulane's firing was "related to" or "because of" her sex.[4]

Ulane v. Eastern Airlines, Inc. ("*Ulane I*") advanced a pluralistic approach to sex that was profound for its time. A fair reading of sex necessarily raised "a question of one's own self-perception [and] also a social matter: How does society perceive the individual?"[5] Analogizing to recognition of a new "Hispanic" race well after Congress passed Title VII of the Civil Rights Act of 1964, Judge Grady held that discrimination includes evidence of "stereotypes, misperceptions, and other motivations" against Hispanics, even though public opinion regarding their "non-white" status remained divided.[6] The court emphasized its responsibility to interpret the plain language of the statute neutrally in applying the law in spite of, and specifically because of, hostility to sexual minorities[7] and society's extant beliefs about "sex," including his own:

> Prior to my participation in this case, I would have had no doubt that the question of sex was a very straightforward matter of whether you are male or female. . . . I had never been exposed to the arguments or to the problem. After listening to the evidence in this case, it is clear to me that there is no settled definition in the medical community as to what we mean by sex.[8]

When the airline took adverse actions against Ms. Ulane because of her "transsexual" status, it engaged in discrimination, the court concluded as to causation. *Ulane I* attracted years of press coverage, and pressure upon courts to uphold the notion of sex as a rigid binary began to mount.[9] Merely five months after Judge Grady's decision, the Seventh Circuit reversed. Rejecting a socially constructed view

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[3] *Ulane I*, 581 F. Supp. at 834–35.

[4] *Id. at* 822.

[5] *Id.* at 823 (referring to sexual identity as a component of sex).

[6] *Id.* at 823–24 (citing Carrillo v. Illinois Bell Tel. Co., 538 F. Supp. 793 (N.D. Ill. 1982)); *see* Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 128–29 (1998) (discussing introduction of category "Spanish heritage population" in 1970 U.S. census and, after political pressure, 1980 census requirement that all respondents indicate if they were of "Spanish/Hispanic" origin or descent).

[7] For the purposes of this Article, "sexual minorities" refer to the broad array of self-identified sexes, genders, and sexual orientations including, but not limited to, lesbian, gay, bisexual, transgender, queer, intersex, non-binary, gender-fluid, agender and asexual individuals. The term's meaning here is distinct from its alternative usage referring to marginalized sexualities and is not intended to imply homogeneity among all communities or permanent minority status. As this Article demonstrates, sex-linked traits are not mutually exclusive and may overlap.

[8] *Ulane I*, 581 F. Supp. at 823.

[9] *Id.* at 836. "Transgender," as used in this Article, refers to people whose gender identity (one's internal, deeply-held sense of being male, female, or a non-binary gender) and sex expressly differ from what is typically associated with the sex or gender assigned to them at birth. It should be noted that a subset of the transgender community may identify themselves by the older term "transsexual," to distinguish them from others covered by the umbrella term "transgender." However, many disfavor the term transsexual as "overly medical, scientific, and technical, or because the word's integration of the term *sex* could be taken to sexualize the person." Lisa A. Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates*, 19 MICH. J. GENDER & L. 373, 387 n.45 (2013) (emphasis in original).

of sex, the appellate court insisted that the "ordinary, common meaning" of sex limited Title VII harms to "discriminat[ion] against women because they are women and against men because they are men," and dismissively referred to Ms. Ulane as one "discontent with the sex into which they [sic] were born."[10]

But nearly four decades later, it is *Ulane I* that best models a pluralistic analysis of sex as a trait—what counts as "sex" is socially constructed.[11] Between 2015 and the Court's recent pathbreaking decision in *Bostock v. Clayton County*,[12] many courts implicitly revived the approach of *Ulane I* to at least agree that (1) "sex," as a protected trait, must be analyzed in its social context; and (2) the statute's causation provision reaches *any* serious subordinating conduct based upon a protected trait, not simply group favoritism in prefering men over women, or vice versa. In particular, most federal courts adjudicating these cases brought by LGBT plaintiffs applied pluralistic approaches to defining sex as a social trait, ruling in their favor. The trend spans two circuit court decisions concluding that employees discriminated against based upon their transgender status may bring Title VII sex discrimination claims;[13] two circuit courts *en banc* holding the same with respect to employees discriminated against based upon their sexual orientation;[14] two circuit court decisions finding transgender students are covered under Title IX's analogous provisions;[15]

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[10] *Ulane II*, 742 F.2d at 1085 (using the term "transsexual").

[11] Eastern Airlines ultimately settled the case. *See Inside: the Judiciary, Burger Takes Hill's Advice,* WASH. POST, Apr. 22, 1985 at A13 (reporting Court denied certiorari to hear appeal from reversal of trial court opinion); Associated Press, Obituary, *Karen Ulane, 48, Pilot Who Had Sex Change*, N.Y. TIMES, May 24, 1989, at 25 (noting Ms. Ulane received "substantially more" in settlement from defendant after appellate court reversal of trial court decision in her favor).

[12] Days before this Article was finalized for publication, the Supreme Court issued *Bostock*, which held 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." Bostock v. Clayton Cty., No. 17-1618, slip op. at 2 (590 U.S. __ (2020)) (emphasis added). The opinion indeed embraced the "but-for causation" argument that emerged after the Second Circuit's decision in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 121 (2d Cir. 2018) (en banc), but also re-envisioned Title VII's causation standard as "sweeping" and "expansive" for the doctrinal reasons explored in depth in this Article. *Bostock*, slip op. at 5, 6, 17.

[13] EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560, 600 (6th Cir. 2018) (holding that adverse employment action based upon a plaintiff's transgender status and transitioning status *in se*, as well as based upon sex stereotypes, are viable grounds for sex discrimination under Title VII) [hereinafter "*Harris Funeral Homes*"]; Chavez v. Credit Nation Auto Sales, LLC, 641 Fed. App'x 883, 884 (11th Cir. 2016) (per curiam). The author served as pro bono counsel to plaintiff Esther Chavez in a limited capacity on appeal.

[14] *Zarda*, 883 F.3d at 121 (holding that discrimination based upon sexual orientation is prohibited discrimination motivated by sex); Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 346–47 (7th Cir. 2017) (en banc) (same).

[15] Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1049–50 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (2018) (mem.); Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016). District court Title IX decisions include Grimm v. Gloucester Cty. Sch. Bd., 400 F. Supp. 3d 444, 451 (E.D. Va. 2019); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cty., 318 F. Supp. 3d 1293, 1325 (M.D. Fla. 2018); M.A.B. v. Bd. of Educ. of Talbot Cty., 286 F. Supp. 3d 704, 715 (D. Md. 2018); A.H. *ex rel.* Handling v. Minersville Area Sch. Dist., 290 F. Supp. 3d 321, 329 (M.D. Pa. 2017); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 297 (W.D. Pa. 2017); Bd. of Educ. of the Highland Sch. Dist. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 870–71 (S.D. Ohio 2016).

and the vast majority of district courts adjudicating these issues nationwide.[16] Four circuits overruled decades of precedent that had concluded sex discrimination does not reach anti-trans and anti-gay hostility under a narrow definition of sex, and a fifth signaled it would do the same.[17]

Legal commentary, however, has largely ignored the approaches to trait and causation these courts advanced. In short, the recent decisions share four important characteristics. First, the "anti-classification" approach[18] is not the only way to define disparate treatment under Title VII.[19] Second, the decisions advance viewpoint

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[16] *E.g.*, EEOC v. A & E Tire, Inc., 325 F. Supp. 3d 1129, 1136 (D. Colo. 2018); Verdict Form at 2, Tudor v. S.E. Okla. State Univ., No. 15-0324 (W.D. Okla. Nov. 20, 2017) (awarding a transgender plaintiff $1.165 million in damages on her claims of sex discrimination and retaliation pursuant to Title VII); Valentine Ge v. Dun & Bradstreet, Inc., No. 6:15-CV-1029-ORL-41GJK, 2017 WL 347582, at *4 (M.D. Fla. Jan. 24, 2017); Roberts v. Clark Cty. Sch. Dist., 215 F. Supp. 3d 1001, 1015 (D. Nev. 2016); Mickens v. Gen. Elec. Co., No. 3:16CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 29, 2016); Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 526 (D. Conn. 2016). *But see* Wittmer v. Phillips 66 Co., 915 F.3d 328, 333 (5th Cir. 2019) (Ho, J., concurring) (opining that Title VII sex discrimination does not cover discrimination against transgender individuals); Bostock v. Clayton Cty. Bd. of Comm'rs, 723 Fed. App'x 964, 964 (11th Cir. 2018) (holding Title VII sex discrimination does not prohibit anti-homosexual animus); Evans v. Ga. Regional Hosp., 850 F.3d 1248, 1254 (11th Cir. 2017) (same).

[17] Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 526, 533 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019) (rejecting claims based upon Title IX and constitutional privacy brought by cisgender plaintiffs challenging policy allowing transgender students to use bathrooms and locker rooms aligned with their gender identity and sex, and noting a ruling for plaintiffs would violate transgender students' Title IX rights). Katie Eyer presciently observed that increasingly "meaningful engagement" of federal courts' textual approach with LGBTQIA+ advocacy has blazed the path in reversing the "traditional judicial response." Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 53 WAKE FOREST L. REV. 63, 83 (2019). I note that additionally, the EEOC's decision to interpret sex discrimination to reach bias against LGBT employees through agency decisions and strategic enforcement litigation since 2012, including *Harris Funeral Homes*, played a broader role in bringing about the post-2015 wave than the otherwise significant public values embodied in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *See* Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5–7 (July 15, 2015) (recognizing anti-gay animus as sex discrimination under comparator, associational, and sex-stereotyping theories); Lusardi v. McHugh, EEOC Appeal No. 0120133395, 2015 WL 1607756, at *9, *12 (Apr. 1, 2015) (prohibiting severe, intentional misgendering of a transgender employee as hostile work environment and the banning use of restrooms aligned with affirmed sex as denial of a basic term and condition of employment); Jameson v. Donahoe, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) (recognizing anti-transgender animus as sex discrimination); Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012) (same); STRATEGIC ENFORCEMENT PLAN FY 2013–2016, U.S. EQUAL EMP. OPPORTUNITY COMISSION 10 (2012).

[18] The "anti-classification" approach is shorthand for formal equality principles of interpretation that generally only prohibit "classify[ing] people either overtly or surreptitiously on the basis of a forbidden category," elevating group-based rights over individual rights more commonly associated with anti-subordination approaches. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 41 (2006).

[19] *E.g.*, *Harris Funeral Homes*, 884 F.3d at 578 (holding "a trait need not be exclusive to one sex to nevertheless be a function of sex."); *Zarda*, 883 F.3d at 123 n.23 ("Taking individuals as the

neutrality: the courts respect the dignitary interest in defining one's own identity, taking care not to impose status labels from the harassers or the courts themselves on the plaintiffs.[20] Third, for plaintiffs who do not identify with a fixed binary notion of sex, the decisions—and now the Supreme Court in *Bostock*—implicitly recognize "misperception" claims and reject "actuality defenses" that had required some plaintiffs to prove membership in a "protected class."[21] Finally, but not uniformly, these courts identify the link between sexual minorities' contested status and the protected trait through social-construction evidence. Until *Bostock*, a plurality within the Second Circuit's *Zarda* decision arguing "but-for causation" analysis was an outlier in conflating trait with causation, signaling a fundamental reinterpretation of Title VII causation doctrine.[22]

This Article builds on this judicial trend by introducing multiaxial analysis, i.e., a contextual model for Title VII discrimination across dimensions of identity that *Ulane I* successfully applied to one trait, sex. Multiaxial analysis identifies the role of a protected trait along the following axes—the individual self, the defendant employer, society, and the state[23]—that courts analyze interactively, so if there is evidence that a plaintiff's status or conduct is disputed by the defendant employer, one can establish a link to the protected trait. Under this approach, a court can consider

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unit of analysis, the question is not whether discrimination is borne only by men or only by women[.]").

[20] *See infra* notes 144–48 and accompanying text.

[21] *See* Bostock v. Clayton Cty., No. 17-1618, slip op. at 10 (590 U.S. __ (2020)) (prohibiting employers from "penaliz[ing]" or "fir[ing] a transgender person who was identified male at birth but who now identifies as a female"); *infra* note 147 and accompanying text. Several scholars have termed this phenomenon as misperception claims or regarded-as claims where actual "protected class" membership became a judicially created requirement in race, color, national origin, and religion contexts. *E.g.*, D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 89–90 (2013); *see also* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1325, 1333–34, 1343 (2005).

[22] Under this analysis, the plurality argued that swapping a gay man for a heterosexual woman as the employee attracted to men as determinative to the employer's decision—a "but-for causation" that met "because of sex." *Zarda*, 883 F.3d at 116–19 (plurality). S*ee infra* Part II.B.3. At the time this Article was published, the Supreme Court's decisions in the trio of Title VII cases addressing transgender identity and sexual orientation—R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (No. 18-107); Altitude Express, Inc. v. Zarda, and Bostock v. Clayton Cty., 894 F.3d 1335 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (No. 17-1618)—had not been decided. The author was a signatory to the Brief of Law & History Professors as Amici Curiae in Support of Respondent Aimee Stephens, R.G. & G.R. Harris Funeral Homes v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107); and to the Brief of Employment Discrimination Law Scholars as Amici Curiae in Support of the Employees, R.G. & G.R. Harris Funeral Homes v. EEOC, 139 S. Ct. 1599 (2019) (No. 18–107); Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019) (No. 17–1623); Bostock v. Clayton Cty., 139 S. Ct. 15 (2019) (No. 17–1618).

[23] In *Bostock*, the Court isolated one sex trait as a binary male/female metaphor and did not foreclose defining "sex" with social-construction evidence, stating that "nothing in our approach to these [consolidated] cases turns on the outcome." *Bostock*, slip op. at 5. The *Bostock* Court also began its analysis by noting that the "only statutorily protected characteristic at issue in today's case is 'sex.'" *Id.*; *see also infra* Part III.B.1 (applying multiaxial analysis to Gerald Bostock's case).

the protected trait(s) in a multidimensional way compared to traditional methods, such as the single-dimension comparator method. Importantly, it also centers the plaintiff's self-identification so that courts do not adopt the harasser's viewpoint that contradicts a sincerely held sex-based identification.[24] Unlike recent proposals to anchor Title VII's context analysis to existing approaches such as sex-plus doctrine[25] or stereotyping theory,[26] multiaxial analysis marks a return to the statute's open-ended terms.

By presenting multiaxial analysis, this Article makes a unique contribution to the voluminous legal literature on "sex" discrimination. Sex discrimination scholarship overwhelmingly addresses sex within the male-female dyad.[27] Some scholars have provided crucial analysis of the importance of sex to a specific status, such as sexual orientation and transgender and intersex status.[28] Fewer scholars have attempted to theorize the full potential scope of the sex trait. Zachary Kramer proposed a model of sex discrimination analogous to Title VII's treatment of religion as a "status and practice," such that sex includes gender and sexual orientation.[29] Kimberly Yuracko proposed a "power-access" approach that would prohibit employer conduct that reinforces sex norms.[30] Katherine Franke persuasively argued that sex, when used to oppress, is not only the *actus reus* of subordination, but may

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[24] *See supra* note 20. As discussed *infra* Part III, the multiaxial analysis proposed in this Article shares the goals e. christi cunningham offered in her reconceptualization project for discrimination: deconstructing the identity politics driving the doctrine and dignifying self-identification as indispensable in adjudication.

[25] *See, e.g.*, Kate Sablonsky Elengold, *Clustered Bias*, 96 N.C. L. REV. 457, 498 (2018).

[26] *See, e.g.*, Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 925 (2016); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2535 n.208, 2536 (1994).

[27] *See, e.g.*, Catharine MacKinnon, *Introduction to Symposium on Toward a Feminist Theory of the State*, 35 LAW & INEQ. 255, 258 (2017) ("The sexualized animus that animates male dominance from the intimate to the institutional to the structural, analyzed as central to sex inequality . . . might also be termed misogyny."); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U.L. REV. 995, 1000 (2015) (providing the dominant account of male/female sex discrimination and mentioning sexuality within the context of gender and stereotyping under existing doctrine).

[28] *See, e.g.*, JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW (2012); Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 581–89 (2009); Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 38 (2000); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 188–94 (1988); Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People*, 11 MICH. J. GENDER & LAW 253, 297–310 (2005). "Intersex," as used in this Article, refers to the millions of Americans whose anatomy, chromosomal pattern, or other commonly designated sex characteristics do not fit clearly into the prevailing male-female binary. WILLIAM N. ESKRIDGE JR. ET AL., THEORIES OF SEXUALITY, GENDER, AND THE LAW 416–17 (2018); Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIO. 151, 159 (2000).

[29] Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 940–41 (2014).

[30] Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 225–33 (2004) (framing access with respect to protected groups, but focusing on women and dyadic sex).

also effect subordination based upon gender, race, or both, for example.[31] Finally, e. christi cunningham proposed deconstructing the identity politics driving the doctrine and dignifying self-identification as indispensable to adjudication.[32] Her "wholism" model differs, however, in its proposal to eliminate intersectionality as a referent and the use of groups as a frame completely.[33] In short, sexually-coded harm is a social process that can signify and produce multiple dimensions of inequality. As proposed here, multiaxial analysis is the first model to operationalize multidimensional, contextual dynamics of sex-related subordination that eluded courts under traditional formalist approaches.[34]

This Article proceeds in three Parts. Part I explores the ideological interpretations of "sex" and shows that sex in 1964, and through today, has been understood to be complex and capable of new social meanings. Part II situates "because of" sex within the statute's own terms, analyzing differences in its core provisions and Congress's successive reproaches to the Court for unduly restricted readings of causation. It then discusses how evidentiary and causation doctrines had been misapplied to the claims of sexual minorities. Part III introduces multiaxial analysis as a way for determining a characteristic's link to a protected trait, conceptualizing axes of subordination that can account for relational, structural, or institutional dynamics. The multiaxial approach reaches additional forms of discrimination and prevents further impairment to Title VII. Part III also raises and addresses counterarguments to multiaxial analysis with respect to judicial role and operability.

I. "SEX" AND TITLE VII HERMENEUTICS

This Part addresses the mutually defining nature of sex-linked traits such as anatomy, sexual orientation, gender presentation, and gender identity, particularly as reflected in mainstream medicine and social science since the 1950s that the Court's 2020 *Bostock* decision declined to explore.[35] Nonetheless, some courts

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31 Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U.L. REV. 1139, 1142–43 (1998).

32 e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 500 (1998) [hereinafter cunningham, *The Rise of Identity Politics I*]; e. christi cunningham, *The "Racing" Cause of Action and the Identity Formerly Known as Race:* The Road to Tamazunchale, 30 RUTGERS L.J. 707, 712 (1999).

33 cunningham, *The Rise of Identity Politics I*, *supra* note 32, at 499–500.

34 Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2202 (2019) (discussing critiques by Angela Harris and Kimberlé Crenshaw regarding the norming of anti-discrimination law along the experiences of white women for sex, and Black men for race, in "how difference had been doctrinally categorized"). As Darren Hutchinson has observed, one cannot "adequately examine or provide solutions to one form of subordination without analyzing how it is affected and shaped by other systems of domination." Darren Lenard Hutchinson, *Identity Crisis: Intersectionality, Multidimensionality, and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 308 (2001); *see also infra* Part III.C.

35 Bostock v. Clayton Cty., No. 17-1618, slip op. at 5 (590 U.S. __ (2020)) (noting that employees argued that, "even in 1964, the term sex bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation," but "concede[d]" that "'sex' in 1964 referred to 'status as either male or female [as] determined by reproductive biology' . . . for argument's sake"). This Article emphasizes the medical and legal dimensions of sex in non-exhaustive terms to demonstrate the inconsistencies of some textualist

believe that legal meaning "cannot exist outside of formal governmental institutions" or other *de jure* forums such as congressional debate.[36] They insist on it even though such institutions have been undemocratic, hostile to, and unrepresentative of minorities. When courts do so to narrow statutory interpretation, they improperly stake their own theory of democracy to legitimize the policy outcomes of their decisions.[37] Part I.A dispels the mythology conservative courts have relied upon to limit Title VII "sex" to an essentialist, binary meaning. Part I.B addresses the implications of elevating the classification approach to causation and argues that current sex-stereotyping theory often rests on an unnecessarily restrictive classification analysis.

A. Neutral Acknowledgement of the Meanings of "Sex"

The history of Title VII reflects a core belief that it is unjust to deprive anyone of a livelihood based upon traits known for centuries as bases for dehumanization: race, color, sex, national origin, and religion.[38] The meanings of sex and sex discrimination have always turned on Title VII's anti-subordination mandate, which gradually expanded to outlaw disfavoring pregnancy; sexual assault and other components of a hostile work environment; demanding sexual conduct as a condition of employment; using derogatory terms referencing the employee's sex; and sex stereotyping.[39] Neither status nor conduct could be excluded from coverage with respect to sex and sexual orientation.[40]

Legal debate over the meaning of sex in the cases brought by sexual minorities narrowly treats it as either a static concept (i.e., so-called "original public

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and all originalist methods that mythologize sex as binary. *See infra* Part I.A, Table 1 and accompanying discussion.

[36] *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 595–96 (1995).

[37] Jane Shachter has called this approach to statutory interpretation "metademocratic." *Id.*

[38] In a similar vein, the Fifth Circuit once opined: "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow." Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971).

[39] *See supra* note 31, *infra* notes 49, 102, 111, 129–31.

[40] Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (plurality opinion); *id.* at 260 (White, J., concurring); *id.* at 272–73 (O'Connor, J., concurring); Christian Legal Soc. Chapter of the Univ. of Calif., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 689 (2010).

meaning")[41] or a concept that may be "updated" to reflect contemporary social norms.[42] Such framing telegraphs the assumption that only contemporary understandings acknowledge that sex is variable and complex and that sexual minorities have a dignitary interest in living consistent with their identity.[43] The literature includes some commentaries (but perhaps not frequently enough) that sex has always been known to be a product of multiple characteristics, and that the government (including courts) should not have a role in declaring a party's sex.[44] This Part synthesizes history and social science literature in connection with statutory interpretation of the sex trait for sexual minorities more broadly.

Both textualist and plain-meaning approaches to interpretation prompt courts to refer to dictionary definitions to settle the question. The definitions reveal that sex was understood as a pluralistic trait. In *Fabian v. Hospital of Central Connecticut*, Judge Underhill demonstrated how, even under a textualist view of "sex," definitions necessarily refer to the non-exclusive process of ascription based upon multiple characteristics: "the sum of the morphological, physiological and behavioral peculiarities of living beings that subserves biparental reproduction . . . and that is

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41 *E.g.*, Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 362 (7th Cir. 2017) (en banc) (Sykes, J., dissenting); Zarda v. Altitude Express, Inc., 883 F.3d 100, 143 (2d Cir. 2018) (en banc) (Lynch, J., dissenting); Eyer, *supra* note 17 at 86–93 (discussing the ascendancy and defects in original public meaning arguments within Title VII and LGBT anti-discrimination litigation). For another approach regarding dynamic statutory interpretation, see William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 342 (2017) [hereinafter Eskridge, *Title VII's Statutory History*] ("A statute—like Title VII—that has been authoritatively interpreted, amended by Congress on several occasions, and then reinterpreted is a statute where original meaning itself is a dynamic process and involves updating."). At this Article's printing, the *Bostock* Court indeed declared that it would interpret Title VII according to "ordinary public meaning of its terms at the time of its enactment," but also extensively relied on "plain terms" and "plain meaning." Bostock v. Clayton Cty., No. 17-1618, slip op. at 4, 12, 21, 24, 26, 28 (590 U.S. __ (2020)).

42 *Compare Hively*, 853 F.3d at 353 (Posner, J., concurring) (arguing that like the Sherman Act, Title VII requires "judicial interpretive updating" to reflect current norms), *with id.* at 360 (Sykes, J., dissenting) ("We are not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions.").

43 *See, e.g.*, 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, 947 (2015) (arguing transgender individuals should not be relegated to "boundary-crossers" under the law, but recognized as "part of a natural variation of human sexual development.").

44 Legal commentary regarding pluralistic sexual complexity has emerged relatively recently in constitutional discourse. *E.g.*, Chineyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination–The Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 154 (2011); William N. Eskridge, *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 U.C.L.A. L. REV. 1333 (2010) [hereinafter Eskridge, *Sexual and Gender Variation in American Public Law*]; David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997 (2002) (discussing disestablishment of sex from state determination); *see also, e.g.*, *infra* note 237. Broader critiques raising the full breadth of sex complexity in the law include Darren Rosenblum, *Queer Legal Victories: Intersectionality Revisited*, *in* QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW 38 (Scott Barclay et. al. eds., 2009); 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 (1995); Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracking the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 170 (1996).

typically manifested as maleness or femaleness."[45] *Fabian*'s textualist and plain-meaning arguments for sex pluralism justified a ruling that animus against one's transgender status *in se* is Title VII sex discrimination, and became an opening salvo in the post-2015 doctrinal correction.[46]

Unpersuaded, a recent dissent in *Hively v. Ivy Tech Community College of Indiana* argued that sexual orientation could not be motivated by sex-based considerations if a court were to consult a "reasonable person" in 1964.[47] Arguing an "original public meaning" approach, Judge Sykes is selectively underinclusive: she insists on social majoritarian views as the reasonable "man-on-the-street" standard. Erasing diversity in actual experience and opinion, this alternative would elevate the harasser's subjectivity (e.g., "I didn't at any point consider my lesbian target's sex as a woman who dates women").[48] Under this approach, decades of settled Court precedent recognizing sexual assault (including same-sex assault), quid pro quo sexual harassment, and hostile work environment as discriminatory should also fail under this version of original public understanding.[49] Whether in the form of "public meaning" or "legislative intent" originalism,[50] this line of argument fails to draw a reasonable distinction between subordination involving, on the one hand, *Mad Men*-fantasized harassment (heteronormative, cisgendered, white, and corporate) and on

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[45] Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 526 (D. Conn. 2016) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1961)) (emphasis added). "Textualism" is a theory of statutory interpretation that contends that a statute's text is the primary source of meaning, and therefore consideration of legislative history becomes irrelevant. William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 n.11 (1990) (observing that "public choice theory, separation of powers, and ideological conservatism" animate new textualism). In its current form, "new textualism," authoritative sources of meaning are generally limited to the structure of the statute, interpretations of similar provisions, and canons of statutory construction. *Id.* at 623–24.

[46] *Fabian*, 172 F. Supp. 3d at 526–27 (citing *Ulane I*, 581 F. Supp. at 822); *see, e.g.*, Zarda v. Altitude Express, Inc., 883 F.3d 100, 121 (2d Cir. 2018) (en banc) (citing *Fabian*, 172 F. Supp. 3d at 524 n.8); Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 205–06 (2d Cir. 2017) (same); Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (2018) (mem.) (same, in a Title IX case on behalf of transgender student); *Hively*, 853 F.3d at 350 (same, in a Title VII case).

[47] *Hively*, 853 F.3d at 359–60 (Sykes, J., dissenting) (arguing Title VII must be read "as a reasonable person would have understood it when it was adopted").

[48] *Id.* at 362–63.

[49] *Id.* at 350 n.5; *see also* Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (establishing causes of action under Title VII for hostile work environment and "sexual harassment," including sexual coercion).

[50] The use of "originalism" reflects a rebranding of a longstanding method of judicial interpretation limited to constitutional interpretation, but layered on top of textualist arguments as to *statutory* interpretation. *See generally* Eyer, *Statutory Originalism and LGBT Rights*, *supra* note 17. Originalists contend that courts should "confine themselves to enforcing norms stated or clearly implicit in the written Constitution[.]" JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (13th ed. 1980). Under this approach, fundamental rights are limited to those expressly stated in the text or, as to the U.S. Constitution, clearly intended by the framers. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 12 (3d ed. 2006).

the other hand, the sexual harassment of "any individual" whose identity is marginalized in public imagination.[51]

The history of sex pluralism is reflected in the definition's use of the word "typically," per *Fabian*, and the inextricable act of typology itself. Sexual variation beyond a binary view was amply acknowledged in medical and social science literature by mid-century.[52] In reality, by the 1960s U.S. medical experts in developmental sexology considered several criteria in determining sex including: genetic or chromosomal sex, gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex/gender of rearing, and gender identity (i.e., self-identified sex).[53]

Thus, for millions of individuals and the medical community, sex cannot be deemed only biologically external, immutable, or dimorphic.[54] Julie Greenberg, a renowned expert on sex and the law, has observed that the notion of gender identity (i.e., self-identified sex, one of the medical factors for sex determination) is based on nurture rather than nature. The idea that sex is mutable became conventional medical advice by the 1950s.[55] Natural sexual variation by then was admittedly more

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[51] *Compare Zarda*, 883 F.3d at 146 (Lynch, J., dissenting) (after acknowledging "[p]erhaps it did not occur to some of those male members of Congress that sexual harassment of women in the workplace was a form of employment discrimination, or that Title VII was inconsistent with a 'Mad Men' culture in the office," nonetheless finding "sexual" exploitation as an obstacle to equal employment), *with* Jack B. Harrison, "*Because of Sex*," 51 LOY. L.A. REV. 91, 196–97 (2018) (positing that subordination based upon sexual orientation is grounded in gendered hierarchy in the enforcement of traditional sex and family roles) *and* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 744 (1997) (reviewing psychological studies and critical race theory and arguing sex-based harassment "must not be understood in static terms that allow for fixed meanings regardless of the context in which they occur" and "may mean different things depending upon the races of the perpetrator and the victim as well as context." (citing Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 158 (1989)).

[52] *See generally* ELIZABETH REIS, BODIES IN DOUBT, 11–53 (2009); JOANNE MEYEROWITZ, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 3–5 (2002); ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 168 (1998); Weiss, *supra* note 28, at 581–89.

[53] *See* JOHN MONEY, SEX ERRORS OF THE BODY 11 (1st ed. 1968) [hereinafter MONEY 1st ed.] (discussing the inaccuracy of Dr. Edwin Kleb's position that ovaries and testicles are the only criteria for sex in 1876); *see also* JOHN MONEY, SEX ERRORS OF THE BODY xvii (2d ed. 1994) [hereinafter MONEY 2d ed.] (acknowledging 37 years of research funding from the U.S. Department of Health and Human Services' Public Health Service); GREENBERG, *supra* note 28, at 11 (discussing "at least" eight factors contributing to an individual's sex); Schroer v. Billington, 577 F. Supp. 2d 293, 306 n.7 (D.D.C. 2008) (citing expert testimony on the eight factors, that parsed fetal and pubertal hormonal sex, and added hypothalamic sex); *In re* Heilig, 816 A.2d 68, 73 (Md. 2003) (listing seven medically recognized factors composing a person's gender, including "[p]ersonal sexual identity" (citing Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278 (1999))). Additional literature discusses gender identity as determinative of sex for purposes of self-identification. *See, e.g.*, Levasseur, *supra* note 43, at 947.

[54] *See, e.g.*, Levasseur, *supra* note 43, at 980–85.

[55] GREENBERG, *supra* note 28, at 16 (citing 1950s medical journals); *see also* REIS, *supra* note 52, at 142. Contemporary medical understanding now concludes the opposite, based upon new referents. Am. Psychol. Ass'n, *Answers to Your Questions About Transgender People, Gender Identity, and*

complex than male or female. A comprehensive survey of medical literature from 1955 to 2000 concluded that "[b]iologists and medical scientists recognize . . . that absolute dimorphism is a Platonic ideal not actually achieved in the natural world."[56] Under the prevailing estimate, the frequency of intersexuality is approximately 1.7% of live births, or millions of Americans at any point in the last half-century.[57] Other societies have even longer histories of viewing sex and gender more expansively.

Sex fluidity has also been documented within the United States throughout the first eight decades of the twentieth century, reflecting earlier understanding that gender identity is a major determinant of one's sex.[58] Prominent stories include Christine Jorgensen, who returned from successful sex reassignment surgery in Denmark and caused a "media sensation" in 1953.[59] By the 1940s, the term "transsexual" appeared in American medical discourse.[60] Dr. Harry Benjamin further popularized the term transsexual during this time as published in his seminal text, *The Transsexual Phenomenon*, in 1966.[61] Although surveys did not exist then, the size of the adult U.S. transgender-identified population is currently about 1.4 million, with a recent federal study estimating that approximately 1.8% of all high school students identify as transgender, and an additional 1.6% responded that they were unsure.[62]

Gender Expression 1 (2014), http://www.apa.org/topics/lgbt/transgender.pdf; Levasseur, *supra* note 43, at 951.

[56] Blackless et al., *supra* note 28, at 151.

[57] *Id.* at 159. To the extent that surveys of non-binary identity more broadly are only now being introduced, 35% of Americans between ages 13 and 21 say that they know someone who prefers to use gender-neutral pronouns. Kim Parker et al., *Generation Z Looks a Lot Like Millennials on Key Social and Political Issues* 4, PEW RES. CTR. (Jan. 17, 2019), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2019/01/Generations-full-report_FINAL_1.18.pdf. NCTE's historic survey of 27,715 transgender individuals in the U.S. reflected that 31% of respondents identified as non-binary. Sandy E. James et al., *The Report of the 2015 U.S. Transgender Study*, NAT'L CTR. FOR TRANSGENDER EQUAL. 4, 44 (updated Dec. 2016) [hereinafter *2015 U.S. Transgender Survey*].

[58] *See generally* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cty., 318 F. Supp. 3d 1293, 1299, 1325 (M.D. Fla. 2018) (citing WPATH standards and holding Title IX sex discrimination encompasses exclusion of binary transgender student from common school restrooms and locker rooms aligned with gender identity); MEYEROWITZ, *supra* note 52, at 7–9; WORLD PROF. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE (7th ed. 2011); Levasseur, *supra* note 43, at 947.

[59] Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, *in* TRANSGENDER RIGHTS 174–75 (Paisley Currah et al. eds., 2006); *see, e.g.*, Ben White, *Ex-GI Becomes Blonde Beauty: Operations Transform Bronx Youth*, N.Y. DAILY NEWS, Dec. 1, 1952, at 1.

[60] David O. Cauldwell, *Psychopathia Transsexualis*, *in* THE TRANSGENDER STUDIES READER 40, 41–43 (Susan Stryker & Stephen Whittle eds., 2006). *See supra* note 9 for a discussion of the reasons the term is now disfavored.

[61] HARRY BENJAMIN, THE TRANSSEXUAL PHENOMENON 13 (1966).

[62] Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?* 3 WILLIAMS INST. (June 2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf (estimating size of adult transgender population as 0.6% of all U.S. adults); Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017*, 68 MORBIDITY & MORTALITY

Thus, medical science's extensive discussions regarding sex determination and its components reflect knowledge of natural variation in human sex as a widespread discourse. Put differently, those arguing original public meaning or original legislative intent must not only overcome issues with collective attribution when opinions are diffuse, which alone could end the debate. They need also contend with scientific and public knowledge at the time regarding considerable sexual variation. Rather than "updating" statutory construction with twenty-first century meanings of "sex," what the post-2015 correction did was acknowledge already existing complexity and typographies that serve as functions of "sex,"[63] while rejecting a narrow biological view as dispositive and non-neutral.[64]

The notion that "sex" is a fixed binary trait arises from the medically inaccurate view that it is strictly determined by "biological" factors such as sexual and reproductive anatomy and chromosomes.[65] This approach has been consistent with jurists conforming their interpretation of "sex" with a state-administered sex binary[66] and a dyadic, heteronormative framing of sexuality.[67] Yet at least 9 million Americans (3.5%) of the population identify as lesbian, gay, or bisexual; about 19 million (8.2%) report that they have engaged in same-sex sexual behavior; and, despite some courts' strict equation of desire with identity status, nearly 25.6 million (11%) more acknowledge at least some same-sex sexual attraction.[68] Greenberg cogently summarized prevailing social presumptions about sex and the related roles of sexual orientation, gender presentation, and gender identity in the United States as a cascading syllogism flowing from "biological" identification of sex:

WKLY. REP., CTRS. FOR DISEASE CONTROL AND PREVENTION 67, 68 (2019) (relying upon survey instrument that provided only male, female, and transgender as options, however).

63 Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018) (en banc) ("Title VII prohibits not just discrimination based on sex itself, but also discrimination based on traits that are a function of sex.").

64 *See generally* Brief of Law & History Professors as Amici Curiae in Support of Respondent at 6–31, R.G. & G.R. Harris Funeral Homes v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107) (discussing how "sex" was understood to implicate transgender individuals before Title VII's passage, and understood by subsequent Congresses amending the statute); *Ulane I*, 581 F. Supp. at 825 ("[S]ex is not a cut-and-dried matter of chromosomes, and . . . 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."); Schroer v. Billington, 424 F. Supp. 2d 203, 211–13 (D.D.C. 2006) (recognizing science may not view sex as "a cut-and-dried matter of chromosomes" but rather consists of "different components of biological sexuality." (quoting *Ulane I*)).

65 Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, *in* TRANSGENDER RIGHTS 51, 52 (Paisley Currah et al. eds., 2006); *see also infra* notes 69–74 and accompanying text.

66 Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131, 1147–48 (1979).

67 Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?*, WILLIAMS INST. 2 (Apr. 2011), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf.

68 *Id.* at 1.

Table 1: Assumptions Regarding Sex-Linked Traits & Stigmatized Deviations[69]

	Males: Assumptions	*Females: Assumptions*	*Those Stigmatized for "Deviation"*
Sexual/Reproductive Anatomy	penis, scrotum, testicles, XY chromosomes	clitoris, labia, vagina, uterus, fallopian tubes, XX chromosomes	Intersex individuals
Sexual Orientation	Toward women	Toward men	Gay, lesbian, bisexual, and others not consistently heterosexual
Gender Presentation/ Gender Role	Masculine	Feminine	Individuals perceived as failing to conform to sex stereotypes
Gender Identity	Male	Female	Individuals including Transgender / Transsexual, Non-Binary, Genderfluid, and Agender

The table reflects syllogisms flowing from sexual "biology" (row 1) and all successive assumptions (within each column, rows 2 through 4). This Article has modified Column 4 to underscore the animus directed toward those whose lives disprove or contradict any of these syllogisms. Those who do not conform to the syllogisms in both directions (rows 1 through 4, or rows 4 through 1) are vulnerable to stigma in the workplace based upon these characteristics linked by definition to the protected trait of sex.

For sexual orientation, the syllogism between anatomy and sexual orientation (rows 1 to 2) was ingrained well before Title VII's enactment. Since mid-century, raising children with intersex characteristics under heteronormative presumptions has been a predominant approach.[70] By the 1960s, assigning children and adults to

[69] JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW 3 (2012) (Table 1 modified in part to expand inclusivity). "Non-binary" as used in this Article refers to people who do not exclusively identify as male or female, including those who identify as genderqueer, having a gender other than male or female, no gender, or more than one gender. *See also* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L.J. 894, 905–33 (2019) (discussing the diversity of non-binary gender identities and overlaps and divergences with other civil rights struggles). "Gender-fluid" as used in this Article refers to a person who does not identify with a single fixed gender, and who has or expresses a fluid or unfixed gender identity. *See Gender-fluid*, OXFORD ENGLISH DICTIONARY (3d ed. 2004).

[70] REIS, *supra* note 52, at 142. Categorizing people strictly along either-or sex lines has justified involuntary surgery in as many as 2 per 1,000 Americans. Blackless et al., *supra* note 28, at 161.

only male or female sex became the paradigm of U.S. medical practice, one that continues often unchallenged.[71] The persistence of binary sex ideology is attributable to the influential guidelines promulgated by Johns Hopkins University psychologists John Money and Joan G. and John Hampson that were heterocentric, consistently linking sexual and gender identity with a presumed heterosexuality.[72] Thus, hostility and stigma toward individuals because they are not heterosexual is inextricable from their "biological" sex (row 1).[73]

A dimorphic definition is, more accurately, a persistent metaphor for sex roles and sexuality,[74] which some jurists mistake as a complete identity between the law, Christianity, and science.[75] For decades, harsh governmental measures punished sexual minorities by criminalizing same-sex intimacy, and denying familial rights and other basic social recognition and benefits to those who did not conform to heterosexual expectations.[76] The importance of workplace equality is clear as most Americans depend on some combination of three sources of income—the labor market, family, and the government—and sexual minorities have faced outright exclusion or abuse from these sources of support.[77]

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[71] ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 181–82 (1998). *But see* U.N. Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, 18, 20, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013) (classifying nonconsensual genital "normalizing" surgery on intersex children as a form of ill-treatment, and declaring such surgeries "often . . . arguably meet the criteria for torture, and they are always prohibited by international law"); M. Joycelyn Elders et al., *Re-Thinking Genital Surgeries on Intersex Infants*, PALM CTR. (June 2017) (former U.S. Surgeons General Joycelyn Elders, David Satcher, and Richard Carmona conclude that genital surgeries "violate an individual's right to personal autonomy over their own future.").

[72] REIS, *supra* note 52, at 141–42.

[73] Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018) (en banc) (concluding that "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination"); Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 345–47 (7th Cir. 2017) (en banc) (discussing comparative method testing for role of sex in bias based upon sexual orientation); *id.* at 346–47 (reasoning that policy "based on assumptions about the proper behavior for someone of a given sex . . . does not exist without taking the victim's biological sex (either observed at birth or as modified, in the case of transsexuals) into account").

[74] Katherine Franke made a similar observation with respect to the metaphorical relationship between biology and stigma. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3 (1995).

[75] *See* Eskridge, *Sexual and Gender Variation in American Public Law*, *supra* note 44, at 1337 (describing how "sexual impulses and gender roles were thought to be tied *descriptively* (as a matter of nature) and *prescriptively* (as a matter of God-given natural law rules) to one's status as a man/woman, husband/wife, and father/mother[,]" particularly as of the colonial era and early nineteenth century) (emphasis in original).

[76] A full history is beyond the scope of this Article and has been covered in depth in prior scholarship. *See, e.g.*, Eskridge, *Sexual and Gender Variation in American Public Law*, *supra* note 44, at 1336–49; Law, *supra* note 28, at 188–94.

[77] Employment, poverty, and race are inextricably linked. *See* Burt Neuborne, Bebe Anderson, Peggy Cooper Davis & Richard Blum, *Achieving Results - Lessons from Civil Rights Movements: Transcript*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 509, 530 (2016) (remarks of Richard Blum, cofounder of Queers for Economic Justice and Legal Aid Society attorney); Levasseur, *supra* note 43, at 945–46; *Systems of Inequality: Poverty & Homelessness*, SYLVIA RIVERA LAW PROJECT, http://srlp.org/files/disproportionate_poverty.pdf (last visited July 12, 2020) (diagram of multiple forces

By 1964, sex was understood to be complex and capable of change over time by individuals and society. Congressional amendments in 1972, 1978, and 1991 reset normative baselines for Title VII by acknowledging its goal of eliminating inequality, reviewing the contemporaneous meaning of the statutory scheme with each amendment against that purpose.[78] Courts within the post-2015 doctrinal correction advance neutrality by analyzing social traits as socially pluralistic and intersubjective, rather than simply adopting the harasser's view of plaintiff's sex or other traits.

B. The Rise of Title VII Classification and Sex Stereotyping

After Title VII's passage, judges unduly narrowed the law's reach by applying the anti-classification paradigm from constitutional law. Relying on ideas about "biological" differences between men and women, the Supreme Court had justified less searching constitutional review of government classifications by creating "intermediate" scrutiny for sex, in comparison to race, which received strict scrutiny.[79] Title VII's language, however, does not assign different methodologies among the five protected traits. By the 1970s, the Court nevertheless treated Title VII as a class-based statute despite the lack of any basis for doing so.[80] Sorting people into limited classes neatly elided with societal prejudice against sexual variation and in favor of an isomorphic, binary view of sex.[81]

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comprising "interlocking system" that perpetuate inequality and vulnerability for many transgender and gender non-conforming individuals). For example, nearly one-third of transgender people live in poverty, more than twice the rate of the U.S. general population. The unemployment rate is three times that of the overall U.S. unemployment rate. Among transgender people of Latino, American Indian, Black, and multiracial descent, the situation is more dire, with rates of poverty three times the overall U.S. population, and unemployment rates four times as high. *2015 U.S. Transgender Survey*, *supra* note 57, at 5–6.

78 Eskridge, *Title VII's Statutory History*, *supra* note 41, at 403 (describing Title VII as a statute requiring "faithful attention to the textual and legislative evolution of the law" as authoritatively amended by Congress).

79 Holly A. Williams, *Reaching Across Difference: Extending Equality's Reach to Encompass Governmental Programs That Solely Benefit Women*, 13 UCLA WOMEN'S L.J. 375, 390–92 (2006) (discussing tension between discredited opinions such as Geduldig v. Aiello, Michael M. v. Superior Court, Rotsker v. Goldberg); CHEMERINSKY, *supra* note 50, at 766 (noting issues "whenever the Court purports to rely on biological differences as a justification for differences in treatment, are whether these differences are real or social constructs and whether they should matter").

80 *Compare* 42 U.S.C. § 2000e-2(a) (2012) (excluding reference to classification as a prohibited practice), *with* 42 U.S.C. § 2000e-2(a)(2) (referring to "classify[ing]" individuals adversely as only one of several prohibited practices).

81 *See supra* Table 1; *cf.* Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 336–37 (1987) ("Cognitivists see the process of "categorization" as one common source of racial and other stereotypes. All humans tend to categorize in order to make sense of experience. . . . When [] the category of black person or white person—correlates with [beliefs regarding] the range of human intelligence or the propensity to violence—there is a tendency to exaggerate the differences between categories on that dimension and to minimize the differences within each category." (citing studies from 1952–1977)).

Class-based analysis is the hallmark of formal equality, as it rejects evidence of material, substantive inequality occurring outside of group contexts.[82] For Title VII, a substantive approach to sex discrimination arrived in the form of a legislative rebuke in 1978.[83] Intersectionality theorists thereafter criticized such reductive and compartmentalized approaches to evidence, particularly in race and sex discrimination cases.[84] The class-based paradigm is nonetheless the most influential basis for rejecting sexual minorities' claims today. "Sexual orientation is not on the list of forbidden categories of employment discrimination," Judge Sykes contended in her *Hively* dissent.[85] And, citing his own "broader political and social history" of workplace sex discrimination, Judge Lynch's dissent in *Zarda* asserted that "actual biological or genetic differences" in sex justify treating it differently from "races" (the latter of which, he conceded, can be defined "socially").[86]

1. Categorical Formalism

Sex's belated treatment as socially defined can be attributed to categorical formalism courts imposed despite any statutory command for this approach. Early treatment of Title VII as a formal-equality scheme led prominent scholars to undertheorize the statute and its history. William Eskridge adopts a slightly broader view in saying that Title VII is "not simply class-based legislation" but operates as "*classification*-based legislation."[87] This describes the Court's more restrained common-law approaches, but does not contend with the statutory provisions as a whole, its purpose, or how trial court judges who decide workplace civil rights claims understand their capacity to analyze facts.[88]

The more limited meaning historically attributed to sex discrimination reveals the close, intentional development of constitutional jurisprudence horizontally into Title VII cases. The Court sought to remediate centuries of harmful sex-based norms by declaring, in 1973, that "sex, like race and national origin, is an immutable

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[82] *See* SERENA MAYERI, REASONING FROM RACE 106–43 (2011) (discussing initial feminist legal strategies in the 1970s that pursued formal equality and, later, more expansive contextual and structural discrimination theories of sex discrimination).

[83] Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (1978), discussed *infra* notes 102–03.

[84] *See generally* discussion *infra* Part III.C; cunningham, *The Rise of Identity Politics I*, *supra* note 32, at 501; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscriminatory Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140, 144–45 (1989) (illustrating how "dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis[]" and the norming of white women's experiences in the doctrine). More recently, scholars have critiqued courts' overreliance on classes to summarily dismiss sexual minorities' sex discrimination claims. *E.g.*, Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 104 (2017); Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM. BUS. L.J. 789, 793 (2015).

[85] Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 360 (7th Cir. 2017) (en banc) (Sykes, J., dissenting).

[86] Zarda v. Altitude Express, Inc., 883 F.3d 100, 149 (2d Cir. 2018) (en banc) (Lynch, J., dissenting).

[87] *E.g.*, Eskridge, *Title VII's Statutory History*, *supra* note 41, at 342–43 (emphasis in original).

[88] *See* discussion *infra* Part II.A.

characteristic determined solely by the accident of birth."[89] This articulation of "sex"—from *Frontiero v. Richardson*, an Equal Protection case involving the male spouse of a servicewoman receiving fewer benefits than female spouses—had an immediate and lasting hold on workplace law. Yet the case that launched representation-reinforcement theory, *U.S. v. Carolene Products*, never actually used the term "immutable."[90] Courts then inferred the exclusion of sexual minorities from representation-reinforcement theory as a political or moral choice, rather than a substantive one.[91] The Court's insistence on treating immutability as an element, rather than a factor, in recognizing "new" rights then became hitched to Title VII doctrine.[92] Essentialist definitions of sex as immutable, biological classes reflected entrenched norms of courts and litigators pursuing formal, group-based equality objectives of sameness in treatment (i.e., only as "between the sexes").[93]

Insisting on all-women versus all-men comparisons, the Burger Court proceeded to impose this anti-classificationist approach in two opinions addressing pregnancy: *Geduldig v. Aiello*, an equal protection case,[94] and *General Electric Co. v. Gilbert*, a Title VII sex discrimination case.[95] In 1974, the *Aiello* Court held pregnancy-based distinctions did not constitute sex discrimination because the distinction was not limited to all women.[96] The Court doubled down two years later in *Gilbert*, reverse-engineering a claim that Congress intended Title VII to track constitutional interpretations of sex:

> While there is no necessary inference that Congress, in choosing this language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the

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[89] Frontiero v. Richardson, 411 U.S. 677, 686 (1973). As the scholarship acknowledges, race is considered a social, rather than biological or genetic construct. Alice Littlefield et al., *Redefining Race: The Potential Demise of a Concept in Physical Anthropology*, 23 CURRENT ANTHROPOLOGY 641, 641 (1982) (noting a complete shift in anthropological textbooks by the 1970s); Greene, *supra* note 21, at 133; Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R. & C.L. L. REV. 1, 6 (1994).

[90] United States v. Carolene Products Co., 305 U.S. 144, 152–53 n.4 (1938). Janet Halley has shown that the text of footnote four of *Carolene Products* does not use the word "immutable," and argues that at best, it should be treated as a non-essential factor. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 509–10 (1994). On the evolving conceptions of legal immutability, see Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM. BUS. L.J. 789, 839 (2015).

[91] William N. Eskridge, *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1288–89 (2005) (citing ELY, *supra* note 50, at 170–72). The turning point, of course, was Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[92] In an early interpretation imagining immutability to be an element of Title VII, an appellate court held: "Equal employment *opportunity* may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin." Willingham v. Macon Telegraph Pub. Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (emphasis in original).

[93] *See* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1365 (2012) [hereinafter Franklin, *Inventing the "Traditional Concept"*]; Abrams, *supra* note 26, at 2480–81.

[94] Geduldig v. Aiello, 417 U.S. 484, 494 (1974).

[95] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 130 (1976).

[96] *Aiello*, 417 U.S. at 496 n.20.

> Fourteenth Amendment, the *similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former*.[97]

But *Gilbert*'s interpretive elision of the public/private doctrine was a fiction. The division arises from distinct sources of legal authority and justification and is politically fraught. Title VII's ability to reach private decision-making lies in the Commerce Clause and Section 5 of the Fourteenth Amendment.[98] The Constitution provides a baseline of rights where governmental policies target specific population groups for benefit or ill. In Equal Protection doctrine the government is afforded some presumption of deference in its actions, unlike private defendants in workplace law.[99]

In Title VII, Congress tasked courts with eliminating bias against "any individual" in the labor market. Thus, the *Gilbert* Court unjustifiably interpreted the statute to only prohibit employers from engaging in blunt pigeonholing.[100] Indeed, scarcely six months prior to *Gilbert*, the Court proclaimed in *Washington v. Davis* that it had "*never* held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII[.]"[101]

Congress made clear the Justices had gotten it wrong. In 1978, lawmakers passed the Pregnancy Discrimination Act ("PDA") with comments in the record that the *Gilbert* Court "disregarded the intent of Congress in enacting Title VII."[102] They also inscribed in the statutory definitions section an amendment that "because

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97 *Gilbert*, 429 U.S. at 133 (emphasis added).

98 U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 5; *see* Heart of Atlanta Motel v. United States, 379 U.S. 241, 249 (1964); *id.* at 292–93 (Goldberg., J., concurring) (noting Congress's authority to enact Title VII resides in the Fourteenth Amendment, in addition to the Commerce Clause); *cf.* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 727 (2003) (upholding constitutional authority for the Family and Medical Leave Act, interpreting "Congress' [§ 5] power 'to enforce' the [Fourteenth] Amendment [to] include[] the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.").

99 A helpful reprisal of state action deference, as a policy matter, appeared in Murillo v. Bambrick, 681 F.2d 898, 901–02 (3d Cir. 1982):

> [I]n the course of several decades of constitutional litigation, the equal protection standard has come to be thought of as primarily two-tiered: enactments that discriminate against suspect classes or trench upon fundamental rights are disfavored, and will be tolerated only if necessary to achieve a compelling governmental interest, while statutes in the economic, social welfare, or regulatory fields are subjected to far lesser scrutiny. . . . With respect to a statute challenged on equal protection grounds, therefore, [review must] carefully consider whether a sufficient showing has been made . . . so as to override the presumption of constitutionality ordinarily accorded to legislative pronouncements.

100 *See* 42 U.S.C. § 2000e-2(a)(1) (2012).

101 Washington v. Davis, 426 U.S. 229, 238 n.8, 239 (1976) (reversing the appellate court's application of the broader intent standard for disparate racial impact in Griggs v. Duke Power Co., 401 U.S. 424 (1971), to an Equal Protection race case) (emphasis added).

102 Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (1978); *Discrimination on the Basis of Pregnancy, 1977: Hearing on S. 995 Before the Subcomm. on Labor of the Comm. on Human Res.*, 95th Cong. 1 (1977) (statement of Sen. Harrison Williams, Chairman, Subcomm. on Labor).

of sex" included "pregnancy, childbirth, or related medical conditions,"[103] all of which are mutable sex-linked traits.

Appellate courts nonetheless continued to exclude sexual minorities' employment claims by reasoning that the animus they faced did not involve wholesale classification. In the absence of legislative history determinative of this issue,[104] they surmised that Title VII prohibited employers only from "discriminat[ing] against women because they are women and against men because they are men" (*Ulane II*),[105] or that plaintiffs failed to prove harm tied to a "traditional binary conception of sex" (*Etsitty v. Utah Transit Authority*).[106] Adopting the view that transgender status is blameworthy, *Ulane II* cast Ms. Ulane into an unprotected "class of people . . . discontent with the sex into which they were born."[107] Thus, outright hostility based upon a change in sex could never be discrimination because of sex.

Early rulings that rejected status-based claims by gay, lesbian plaintiffs then relied on the lines of cases that excluded transgender plaintiffs based on the grounds that only mutable conduct was at issue. Although the PDA's passage the year prior disapproved class-wide favoritism theory as the only approach to workplace discrimination, appellate courts still held that sex was a "traditional" concept that could not be "extended to include sexual preference."[108] This approach contradicted the advice that LGBT advocates sought and received from the Equal Employment Opportunity Commission during the 1960s and 70s. The Commission was receptive to their sex discrimination claims, inviting and adjudicating them.[109] Similarly, during

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103 42 U.S.C. § 2000e(k) (2012). Although the statutory definitions section does not refer to any other forms of discrimination as "because of sex"—e.g., sex stereotyping, hostile work environment, sexual assault, or sexual harassment—the foregone viability of these forms of disadvantaging individuals unfairly because of sex does not raise congressional intent questions, and circuits have held the same as to sexual minorities. *See, e.g.*, Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 526, 533 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019); Harris Funeral Homes v. EEOC, 884 F.3d 560 (6th Cir. 2018); Altitude Express, Inc. v. Zarda, 883 F.3d 100 (2d Cir. 2018).

104 As scholars have long noted, divining legislative intent for the term "sex" or "because of sex" is an unhelpful inquiry given that there were no committee reports or legislative hearings on the issue. *E.g.*, Franklin, *Inventing the "Traditional Concept*," *supra* note 93, at 1318.

105 *Ulane II*, 742 F.2d 1081, 1085 (7th Cir. 1984).

106 Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) ("such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.").

107 *Ulane II*, 742 F.2d at 1085–86 (citing Gunnison v. Comm'r, 461 F.2d 496, 499 (7th Cir. 1972)). In an early attempt to plumb the limits of employment law, Owen Fiss outlined the "attribute" of race as immutable class membership and outside of individual agency to establish the unfairness of race discrimination. *See* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 241 (1971) ("To judge an individual on the basis of his race is to judge him on the basis of his membership [that] is truly predetermined. Individual control is a value because . . . it rationalizes, and thus makes more tolerable, the unequal distribution of status and wealth among people in the society: failure is the individual's own fault.").

108 *E.g.*, DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 330 (9th Cir. 1979).

109 Brief of Historians as Amici Curiae in Support of Employees at 22–29, R.G. & G.R. Harris Funeral Homes v. EEOC, 139 S. Ct. 1599 (2019) (No. 17-1618); Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019) (No. 17-1623); Bostock v. Clayton Cty., 139 S. Ct. 1599 (2019) (No. 18-107).

this time, Phyllis Schlafly prominently argued that enacting the Equal Rights Amendment would mean that same-sex marriage would become legal and that discrimination against homosexuals would become illegal.[110]

By the late 1990s, the Court continued to struggle with broader substantive definitions of harm ostensibly because they suspiciously regarded Title VII as a harbinger of Equal Protection doctrine. In *Oncale v. Sundowner Offshore Oil Services*, the Court rejected a pure anti-classification approach to Title VII in famously holding: "We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII."[111] However, tensions between anti-classification theories and anti-subordination theories were apparent in a discussion ostensibly provided for the benefit of lower courts, since the examples discussed had little to do with the facts of Mr. Oncale's sexual abuse on an all-male oil rig.

Writing for the Court, Justice Scalia provided some examples of discrimination "because of . . . sex" in the form of hypotheticals that appear to obscure Title VII's trait and causation elements. Invoking the non-statutory language of "reasonableness," *Oncale*'s discussion begins with a view that the "inference of discrimination [is] easy to draw in most male-female sexual harassment situations [as] it is reasonable to assume" the harm would not have occurred "to someone of the same sex."[112] But, the Court said, such an inference in another situation would be reasonable "if there were credible evidence the harasser was homosexual."[113] Alternatively, noting that sexual harassment need not be motivated by sexual desire, a female who harassed another woman with "sex-specific and derogatory terms" reveals that she is "motivated by hostility to the presence of women in the workplace."[114] Finally, a same-sex harassment plaintiff "may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes[.]"[115]

In light of the facts of Mr. Oncale's particular case, the illustrative routes above restated heterogeneous groupings of two sexes without quite illustrating why "same-sex" harrassment is prohibited; rather the routes highlighted male-female sexual misconduct as providing "reasonable" inferences of sexual desire as a motive,[116] and used comparative group favoritism to prove differential treatment (i.e., men over women or vice versa).[117] But its pronouncements that sexual desire was not required for causation, and that intra-group harm may be actionable, ultimately preserved Title VII's reach as an anti-subordination statute.[118] In *Bostock*, the Court

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110 *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 140–41 (2010) (historicizing links between sex-role stereotyping arguments during the 1970s in connection with lesbian and gay activism and constitutional litigation strategies) (citing PHYLLIS SCHLAFLY, THE POWER OF THE POSITIVE WOMAN 90 (1977)).

111 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

112 *Id.* at 80.

113 *Id.*

114 *Id.*

115 *Id.* at 80–81.

116 *Id.* at 80.

117 *Id.*

118 *Id.* (providing four evidentiary routes as "example[s]" of sex-based harassment).

held true to its word in *Oncale* that the four routes were non-exclusive and new theories of sex-based subordination could be articulated.[119]

A year after *Oncale*, three Justices balked at an anti-subordination approach in *Olmstead v. L.C.*, an Equal Protection and disability discrimination action against the state of Georgia.[120] The *Olmstead* dissent rejected a substantive view of inequality and claimed "differential treatment vis-à-vis members of a different group" must always be alleged in every kind of discrimination case, *including* statutory discrimination claims.[121] Concerns that the state treasury would be vulnerable to contextual claims of discrimination also seemed to animate much of the dissent.[122] The formalist Justices misguidedly asserted that both Title VII and Equal Protection doctrines must move in interpretive lockstep.

The import of this history is that the only consistent approach is to treat constitutional rights as the lower boundary of rights, and not as a ceiling, to contextual Title VII analysis.[123] A failure to extend causation analysis beyond classification would produce anomalous outcomes in discrimination claims brought by state employees. Because Title VII applies to state and local governments as employers, companion Section 1983 claims may be brought on the same facts.[124] After *Obergefell*, courts became susceptible to the challenge that they, as the state, impermissibly exclude claims based upon sexual orientation by selectively denying those plaintiffs equal Title VII coverage.[125] The same has been held to be discriminatory state action against transgender plaintiffs.[126] For a state employee who may enter into a same-

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119 *See id.* at 81; Bostock v. Clayton Cty., No. 17-1618, slip op. at 2 (590 U.S. __ (2020)) (holding 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") (emphasis added).

120 Olmstead v. L.C., 527 U.S. 581, 598 (1999).

121 *Id.* at 616 (Thomas, J., dissenting).

122 *Id.*

123 Justice O'Connor cautioned the Court to avoid an outcome that treats private discrimination substantively better than public discrimination in *Price Waterhouse*: "I simply cannot believe that Congress intended Title VII to accord *more* deference to a private employer [than to the government] in the face of evidence that its decisional process has been substantially infected by discrimination." Price Waterhouse v. Hopkins, 490 U.S. 228, 269 (plurality opinion) (O'Connor, J., concurring). The Court rejected imposing only the constitutional standard upon Title VII, in the affirmative action context. Ricci v. DeStefano, 557 U.S. 557 (2009); United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Johnson v. Transp. Agency, Santa Clara Cty., Cal., 480 U.S. 616 (1987).

124 42 U.S.C. §§ 2000e-5–17 (2012).

125 Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (announcing its holding rested on both Due Process and Equal Protection grounds); *see, e.g.*, Christiansen v. Omnicom, 167 F. Supp. 3d 598, 619 (S.D.N.Y. 2016) (calling for reconsideration of exclusion of discrimination based upon sexual orientation as irreconcilable with Court opinion in *United States v. Windsor* and *Obergefell*). Courts may still have trouble seeing lesbians, gays, or bisexuals independently of male/female binary "classes" facing differential treatment, often granting favorable outcomes in cases with facts centered around effeminate appearance but rejecting those in which homosexual status is "known" (i.e., actual membership in a "class"). *See* Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 718 (2014).

126 *See* Karnoski v. Trump, 926 F.3d 1180, 1202 (9th Cir. 2019) (per curiam) (determining that defense department policy barring transgender troops from military service as gender-based

sex marriage under Equal Protection, but is unprotected from sex discrimination when a boss disapproves of the news under a *workplace* Equal Protection claim, a worse outcome for the latter could not be reconciled.

Categorical formalism provides the semblance of fairness, universality, and inevitability. But classification is not the *only* discrimination Title VII recognizes. Courts that disfavor the sex of sexual minorities rely on this judge-made rule through *stare decisis*, without more.[127] Those within the post-2015 wave fortunately challenged precedent for precedent's sake, and the *Bostock* Court took heed, citing precedent only sparsely in re-envisioning Title VII's reach as expansive.

2. Sex Stereotyping as a Species of Classification

Anti-stereotyping theory applied to Title VII has largely functioned as a species of classification.[128] In *Price Waterhouse v. Hopkins*, the Supreme Court expressly interpreted "sex" to encompass Congress's intent to forbid employers from "tak[ing] gender into account" in their decisions.[129] There, Ann Hopkins, a white senior accounting manager, alleged that she was denied a promotion to partner because she was considered "macho" and "overcompensated for being a woman." The firm told Ms. Hopkins that she would have to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[130] Six Justices agreed that the comments indicated discrimination based upon sex. Here, her employer penalized her for conduct and appearance defying its expectations of her sex.[131] Justice Kennedy, a seventh, agreed that sex-stereotyping evidence is "quite relevant to the question of discriminatory intent" in his dissent.[132]

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classification subject to intermediate scrutiny); Glenn v. Brumby, 663 F.3d 1312, 1319 (11th Cir. 2011) (holding, in § 1983 action, that transgender state employee proved her firing violated the Equal Protection Clause because "perceived gender-nonconformity" is sex-based discrimination reviewable under heightened scrutiny); *see also* Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) (holding that disqualifying claim based upon transgender status from Title VII would "superimpose classifications such as 'transsexual' . . . and then legitimize discrimination . . . by formalizing the non-conformity into an ostensibly unprotected classification"); Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 523 n.8 (D. Conn. 2016); Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015).

127 Because there is no legislative history for the addition of "sex" to Title VII just before passage, other than the (disputed) notion that it was a "joke" to scuttle the bill, courts must look elsewhere. Franklin, *Inventing the "Traditional Concept*," *supra* note 93, at 1319 n.42; *see also* Currah & Minter, *supra* note 28, at 39–40 ("For the most part, transgender people have not been excluded from civil rights protections because of conceptual or philosophical failures in legal reasoning, but rather because they have not been viewed as worthy of protection or, in some cases, even as human.").

128 Stephanie Bornstein, *Antidiscriminatory Algorithms*, 70 ALA. L. REV. 519, 544 (2018) (noting antistereotyping theory "requires that individuals not be held to or judged against stereotypes associated with any protected classes" and calling it a "subspecies of anticlassification"); *cf.* Eskridge, *Title VII's Statutory History*, *supra* note 41, at 343 (characterizing Title VII as "not simply class-based legislation [but] *classification*-based legislation") (emphasis in original).

129 Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion).

130 *Id.* at 235.

131 *Id.*; *id.* at 260–61 (White, J., concurring); *id.* at 272–73 (O'Connor, J., concurring).

132 *Price Waterhouse*, 490 U.S. at 294–95 (Kennedy, J., dissenting) (disagreeing instead with the conclusion in the trial record and fundamentally disagreeing that the causation standard is the tort-like "but-for" causation).

This view of sex, that Ms. Hopkins's employer unlawfully punished her for failing to act "like a woman," broke new ground in recognizing sex as a socially pluralistic trait.[133] By restoring Title VII from the hold of group-based essentialism, *Price Waterhouse* made it possible to argue that protected traits may be socially constructed. Thus, evidence of disfavoring a characteristic linked to a protected trait, here gender linked to sex, could meet the statutory trait element and allow a plaintiff to establish causation in an employment decision.[134] In 1991, lawmakers passed the Civil Rights Act to clarify Title VII's causation standard as broad, but left the substantive sex-stereotyping holding of *Price Waterhouse* intact.[135] As it did in the 1978 PDA, lawmakers underscored the Court's error in failing to provide "adequate protection" to workers.[136] Thus Congress approved of *Price Waterhouse*'s other holdings, which would include the socially pluralistic view of sex discrimination that does not hinge upon comparisons of all women "versus" all men.

Price Waterhouse's articulation of sex stereotyping evidence provided the theoretical foundation for a supermajority of appellate courts to recognize that animus against those identified as lesbian, gay, or transgender can experience sex discrimination based upon sex stereotypes[137] (e.g., when a person fails to conform to gender stereotype by being attracted to the "wrong gender").[138] Contemporary sex-stereotyping theory also reflects incipient multiaxial analysis by requiring courts to interrogate the perpetrator's conceptions of "sex" as potentially invidious stereotypes without upholding the perpetrator's classifications as valid. Read most broadly, *Price Waterhouse*'s admonition that "gender must be irrelevant" to employment decisions means that a policy that "all workers would be fired unless they adhered to traditional [binary male or female] gender roles" would no doubt be unlawful.[139]

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133 Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004) (holding that prior decisions limiting sex to only anatomical or chromosomal sex were "eviscerated by *Price Waterhouse*.").

134 *Price Waterhouse*, 490 U.S. at 251–52; *see also id.* ("By focusing on Hopkins' specific proof, however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision[.]").

135 Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071 (1991). The bill's sponsors articulated in committee reports that the bill only "overrules one aspect of the [*Price Waterhouse*] decision." Eskridge, *Title VII's Statutory History, supra* note 41, at 375 (citing H.R. REP. NO. 102-40, pt. 1, at 48 (1991)).

136 Eskridge, *Title VII's Statutory History*, *supra* note 41, at 376.

137 *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 120–23 (2d Cir. 2018) (en banc); Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 346–47 (7th Cir. 2017) (en banc); EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 457–60 (5th Cir. 2013) (en banc); Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 287–88 (3d Cir. 2009); *Smith*, 378 F.3d at 573; Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 870, 874–75 (9th Cir. 2001); Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999).

138 *Zarda*, 883 F.3d at 113–14; *Hively*, 853 F.3d at 346, 350; *see also* Bostock v. Clayton Cty. Bd. of Comm'rs, 894 F.3d 1335, 1339 (11th Cir. 2018) (mem.) (Rosenbaum, J., dissenting) (noting the "considerable calisthenics" to explain why gender nonconformity claims are cognizable except for when a person fails to conform to the "ultimate" gender stereotype by being attracted to the "wrong" gender (quoting *Hively*, 853 F.3d at 346, 350)).

139 *Price Waterhouse*, 490 U.S. at 240; Brief of Anti-Discrimination Scholars in Support of the Employees at 18–19, R.G. & G.R. Harris Funeral Homes v. EEOC, 139 S. Ct. 1599 (2019) (No. 17-1618); Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019) (No. 17-1623); Bostock v. Clayton Cty., 139 S. Ct. 1599 (2019) (No. 18-107).

However, sex-stereotyping theory and arguments are typically anchored to binary "biological" sex as a simplistic stand-in for the sex trait.[140] Current articulations of stereotyping theory tend to constrain readings of sex that acknowledge further sexual variation,[141] although law scholar amici in the *Bostock* trio of cases this Term sought to fill the gap in the scholarship.[142] After *Price Waterhouse*, courts interpreted Title VII to reach both "sex" as physical differences between only men and women, and "gender" as cultural attributes self-determined or ascribed by others.[143] Most judges and parties frame statutory "sex" as a binary "biological" classification that preserves the practice. Indeed, the theory's origin story of a sex-gender *mismatch* led many courts to misgender the transgender plaintiffs before them and reify "birth sex" as biological sex, which the *Bostock* decision provisionally did.[144] Its prevalence creates the impression that sex stereotyping and the binary are necessarily linked and leaves intact normative barriers for those who identify with communities that include intersex, non-binary, agender, and gender-fluid, and renders less deliberative the important dialogic relationships between legal institutions and society, including social justice movements that advocate for politically vulnerable communities. Legal theories that do not reflect lived experience reinstate and legitimize dominant views of sex and gender,[145] and allow institutions to persist in expressive harms against minorities.[146]

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140 *See, e.g.*, *Price Waterhouse*, 490 U.S. at 251 (holding Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978))); *Smith*, 378 F.3d at 573 (citing *Price Waterhouse*, 490 U.S. at 251) (holding transgender woman stated a sex stereotyping claim while reasoning that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms").

141 *See, e.g.*, Wood v. C.G. Studios, 660 F. Supp. 176 (E.D. Pa. 1987) (citation omitted), discussed *infra* Part III.B.2. As Janet Halley observed, even the terms "lesbian" and "gay" in legal contexts exclude non-binary sexuality, such as those who identify as bisexual, and reinscribe sexuality's link to binary identification. Halley, *supra* note 90, at 527.

142 *See generally* Brief of Law & History Professors as Amici Curiae in Support of Respondent at 6–31, R.G. & G.R. Harris Funeral Homes v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107) (discussing how "sex" was understood to implicate transgender individuals before Title VII's passage, and understood by subsequent Congresses amending the statute); Brief of Anti-Discrimination Scholars at 9, R.G. & G.R. Harris Funeral Homes v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107) ("[G]ay men and lesbians also do not adhere *to the cluster of stereotypes* that arise out of the traditional expectation of different-sex coupling." (emphasis added)).

143 *See* Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000); *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) ("The word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes.").

144 For example in *Smith*, the plaintiff, a transgender female firefighter, felt strategically obliged to identify herself as a "male with Gender Identity Disorder" and seek sex-discrimination protection as a man facing sex stereotyping. *Smith*, 378 F. 3d at 570; *see supra* note 35 (describing *Bostock*'s assumption *arguendo* of a limited "1964" definition of sex).

145 *See* Paisley Currah, *Defending Genders: Sex and Gender-Nonconformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363, 1364 (1997); Levasseur, *supra* note 43, at 1002–03.

146 Expressive harms "result[] from the ideas or attitudes expressed through a governmental action." Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07

Scholars such as D. Wendy Greene have urged courts to recognize "misperception" claims and reject employer "actuality defenses" as to race, national origin, and religion, so that actual membership in a broad protected category is not required.[147] The need to account for sexual diversity is no less pressing than for any other civil rights trait.[148] By comparison, hate crimes statutes have accounted for invidious harms based upon one or more misperceived identities.[149]

To insist that sex stereotyping must be theorized beyond majoritarian viewpoints is to require more of legal advocacy, as Darren Rosenblum's work has raised.[150] Lesbian and gay employees' Title VII claims have generally been successful under sex-stereotyping theory,[151] yet appellate courts in the post-2015 correction seemed wary of relying upon it as a catch-all theory for sex-based subordination. In *Hively*, the Seventh Circuit referred to stereotyping as subsidiary to the comparative argument the decision advanced, rather than a standalone stereotyping frame.[152] Similarly, a majority of the *Zarda* court did not endorse the decision's sex

(1993); *see also* Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231, 234–35 (2009) (describing the expressive harm of current framing of housing discrimination statutes).

147 Greene, *supra* note 21, at 165–66; *see also* Onwuachi-Willig & Barnes, *supra* note 21, at 1325, 1333–34, 1343.

148 Only a few commentators have been willing to critique *Price Waterhouse*'s incomplete theorizing of sex-stereotyping as discrimination. *See, e.g.*, Kramer, *supra* note 29, at 925–28; Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 100–01 (2008); Sharon M. McGowan, *Working With Clients to Develop Compatible Visions of What It Means to "Win" a Case: Reflections on* Schroer v. Billington, 45 HARV. C.R.-C.L. L. REV. 205, 218 (2010) (recounting client Diane Schroer's reaction to her counsel's potential sex-stereotyping argument as: "I haven't gone through all this only to have a court vindicate my rights as a gender non-conforming man."). *See generally* Clarke, *Protected Class Gatekeeping*, *supra* note 84 (describing *Price Waterhouse* as one of several cases asking whether different rules are separate but equal).

149 *E.g.*, N.Y. PENAL LAW § 485.05(1) (McKinney 2019) ("A person commits a hate crime when he or she commits a specified offense and either: (a) intentionally selects [their target] . . . or (b) intentionally commits the act or acts . . . in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability or sexual orientation of a person, *regardless of whether the belief or perception is correct*.") (emphasis added).

150 Rosenblum, *Queer Legal Victories*, *supra* note 44, at 43 (arguing that "legal victories often fail to translate into social change" because "cases that achieved their goals for the plaintiffs [still] presented complications for other queer legal goals.").

151 *See supra* note 137 and accompanying text. By one estimate, sex-stereotyping has been accepted by courts 76% of the time to support a viable sex discrimination theory. Raelynn J. Hillhouse, *Reframing the Argument: Sexual Orientation Discrimination Under Equal Protection*, 20 GEO. J. GENDER & L. 49, 87–88 (2018).

152 Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 345–47 (7th Cir. 2017) (en banc). Under this contemporary, stricter comparative theory, similarly situated men and women would not be treated differently but for their sex. Although comparator evidence has traditionally been treated as a potential form of *circumstantial* evidence by which a plaintiff can show that those similarly situated were treated differently, increasing judicial demand for comparator evidence has grown disproportionately, "sharply narrowing both the possibility of success for individual litigants and, more generally, the very meaning of discrimination." Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 734 (2011).

stereotyping theory, apart from the touchstone point that sexual orientation is a "function of sex."[153] The *en banc* majorities may also have been concerned that a selectively textualist Court would agree with the *Hively* and *Zarda* dissenters that homophobia does not disadvantage either sex as a unitary class.[154]

Although sex-stereotyping theory has supported rights-positive outcomes for some, a narrow starting point for stereotypes conflicts with the dignitary interests inherent in sexual self-determination.[155] For example, as non-binary sex increasingly gains formal recognition among states and localities, the question becomes: what is the stereotype associated with non-binary sex or intersex individuals who identify as non-binary?[156] Sex stereotyping appears to be articulated to the extent the defendant (the business firm or harasser) treats the individual's sex as only male or female. Increasing use of the qualifier "birth" sex in recent decisions alleviates only one problem with sex stereotyping for transgender litigants but sidesteps a broader doctrinal correction in which the protected trait of "sex" acknowledges actual sexual variation beyond a binary.[157]

Another concern is that sex-stereotyping analysis by courts and parties commonly universalize limited gender norms to the exclusion of race, class, geography, and other determinants of social interaction. By contrast, social psychology recognizes that sex has always been inherently racialized, then[158] and now.[159] Questions

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153 Zarda v. Altitude Express, Inc., 883 F.3d 100, 106–07, 112 (2d Cir. 2018) (en banc) (eight of twelve judges joining part II.A of majority opinion); *id.* at 119–23 (discussing sex-stereotyping theory); *see also* Table 1, *supra* Part 1.A, and accompanying text.

154 *Zarda*, 883 F.3d at 158 (Lynch, J., dissenting) (citing *Hively*, 853 F.3d at 370); *see also supra* note 19; *cf.* Brian Soucek, *Queering Sexual Harassment Law*, 128 YALE L.J.F. 67, 81 (2018) (arguing that "gay men and lesbian respectively flout *different* gender stereotypes").

155 *See infra* Parts III, III.B.

156 Non-binary gender markers are now available by law on some form of identification, or have been granted to at least one person under court order, in the following twenty-one jurisdictions: Arkansas, California, Colorado, Connecticut, Hawaii, Indiana, Maine, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, Rhode Island, Utah, Vermont, Washington, New York City, and District of Columbia. *Resources: Non-Binary Gender. Intersex.*, INTERSEX & QUEER RECOGNITION PROJECT, https://www.intersexrecognition.org/resources (last visited Feb. 7, 2020) (noting initiatives underway in Arizona, Hawaii, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont) (last visited Feb. 7, 2020); *see also* Part III.A, *infra* (defining the government axis).

157 *E.g.*, *Harris Funeral Homes*, 884 F.3d at 567 (referring to transgender plaintiff-intervenor as "assigned male at birth"); M.A.B. v. Bd. of Educ. of Talbot Cty., 286 F. Supp. 3d 704, 708 n.3 (D. Md. 2018) (in Title IX case, with respect to transgender boy, "[t]he Court uses terms such as 'birth sex' to refer to gender designations made at birth.").

158 Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 79–80 (1999) (reviewing published accounts and statistical data regarding the use of sexualized violence against LGBT individuals of color to further racial oppression).

159 Cecilia L. Ridgeway & Tamar Kricheli-Katz, *Intersecting Cultural Beliefs in Social Relations: Gender, Race, and Class Binds and Freedoms*, 27 GENDER & SOC. 294, 298 (2013) (surveying social cognition research into comparisons' powerful role in organizing social relations and evidence "that people in the United States automatically and nearly instantly categorize . . . others on sex and race on the basis of quite minimal cues[,]" with sex, race, and age as primary categories, and institutional/occupation roles or contextual identities as additional categories).

remain: How can stereotyping expressly account for the confluence of sex-based identity with race and class? Can the unsolicited advice Ms. Hopkins received to wear jewelry and talk femininely at her accounting firm translate to the occupational culture that once caused the Utah Transit Authority to worry about the "image" that its bus driver, Krystal Etsitty, presented to the public after she began to live consistent with her gender identity?[160] If not, then courts already make judgments about which kinds of harm are socially verifiable, but without transparency.

II. "BECAUSE OF" SEX: TITLE VII CAUSATION

Recognizing that sex is inherently contextual and pluralistic explains sex discrimination only in part. The embattled definitions of sex and sex discrimination over the decades also turn upon Title VII's causation provision—that the harm arose "because of" a protected trait. Part II.A provides a brief but critical overview of the core provisions for causation. Part II.B then focuses on the evidentiary tests the Court developed and how hegemonic frames improperly conflate trait identification with causation in cases brought by minorities whose identities are deemed less familiar.

A. An Overview of the Causation Provisions

For decades, Congress's decision to leave "discrimination" undefined allowed courts to fashion rules that ignore the statute's anti-subordination goals. A recurring definition from the Court since the 1980s is that of a social "evil."[161] The *Oncale* Court famously rejected legislative intent as an interpretive tool in order to conclude that Title VII may "cover reasonably comparable evils" of the "principle evil[s]" that concerned legislators.[162] While powerful and imbued with morality, the invocation of "evil" is mere rhetoric when it does no substantive work. Nearly a decade prior, Justice O'Connor provided a clearer—broader—articulation of Title VII's purposes in combatting stigma in *Price Waterhouse*:

> There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. . . . Congress certainly was not blind to the

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160 The Tenth Circuit in *Etsitty* disagreed, and thus stereotyping theory would need to make clear to all parties that specific contexts are considered relevant and cognizable in the pretrial stages of litigation. Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007). For critiques, see, e.g., Katrina Roen, *Transgender Theory and Embodiment: The Risk of Racial Marginalization*, *in* THE TRANSGENDER STUDIES READER 656, 656–66 (Susan Stryker & Stephen Whittle, eds., 2006) ("Despite the claims of inclusiveness of both transgender and queer writings, . . . perspectives of whiteness continue to resonate, largely unacknowledged, through transgender and queer theorizing[.]").

161 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998); Price Waterhouse v. Hopkins, 490 U.S. 228, 265 (1989) (plurality opinion) (O'Connor, J., concurring).

162 *Oncale*, 523 U.S. at 79. Also that Term, the Court held that that Title II of the ADA proscribed discrimination by prison benefits program as a covered "public entity," reasoning that the "fact that a statute can be 'applied in situations not expressly anticipated [or specifically referenced in-text] by Congress does not demonstrate ambiguity. It demonstrates breadth.'" Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

> stigmatic harm which comes from being evaluated by a process that treats one as inferior by reason of one's race or sex.[163]

Title VII's plain language allows a prima facie case to be made as to myriad forms of workplace discrimination. Under current interpretations, plaintiffs generally proceed under two theories. In an individual discrimination claim (i.e., disparate treatment), plaintiffs must prove actual motive.[164] In a disparate impact claim, plaintiffs must show that a facially neutral employment policy or practice, such as a personnel test, caused "discriminat[ion] in operation" without being required to prove discriminatory motive.[165] The following review of the core provisions makes clear what traditional classification analysis obscured—Title VII's protections can reach everyone, if need be.

1. Section 703(a)

Causation's central role in defining illegal Title VII discrimination is located in the statute's first substantive provision, § 703(a):[166]

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; *or*
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin.[167]

The text and structure do not specify any particular mode of proving causation. Within the statutory scheme only one subset of discrimination claims, § 703(a)(2), is remotely akin to classification, an employer's adverse act of classifying, segregating, and delimiting employees arbitrarily according to a protected trait as harmful *in se*.[168] Cases alleging overt line-drawing of classes, such as group-based segregation

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163 *Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring). And even earlier, and more clearly, its goal was to "prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . . ." Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 763 (1976) (citations omitted).

164 Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)). This Article focuses on individual disparate treatment claims because these claims are most commonly litigated by sexual minorities.

165 Griggs v. Duke Power Co., 401 U.S. 424, 430–32 (1971).

166 42 U.S.C. § 2000e-2(a) (2012) ("unlawful employment practices").

167 *Id.* (emphasis added).

168 42 U.S.C. § 2000e-2(a)(2) (2012). By 1971, the Court read subsection (2) to support a disparate impact claim that looks at trait-based classification and segregation *without* proof of intent, distinguishing such claims from the individual disparate treatment claims that are our focus here. *Griggs*, 401 U.S. at 430–32. As Sandra Sperino has demonstrated, however, courts "largely treat[] this provision as related to disparate impact claims [and] have not fully explored how it would apply to disparate treatment claims" even as the Court acknowledged disparate treatment causes arising from subsection (2) in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* SANDRA F. SPERINO ET AL., THE LAW OF EMPLOYMENT DISCRIMINATION 108 (West, 1st ed. 2019); Sandra F. Sperino, *Justice Kennedy's Big New Idea*, 96 B.U. L. REV. 1789,

or policies, are salient and hard-to-ignore instances of discrimination. But the classification modality is a provision disjunctively separate (via an "or") from § 703(a)(1)'s "because of . . . sex" prohibition.

More importantly, § 703(a) does not exclusively limit itself to any method of proof. Congress's bipartisan Interpretive Memorandum from the 1964 Title VII deliberations expressly declined to define "discrimination," much less in connection with the five protected "characteristics," in the sense of traits:

> It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is *to make a distinction, to make a difference in treatment or favor*, and those distinctions or differences in treatment or favor which are prohibited . . . are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin.[169]

The Court, continuing through the Roberts era, has carefully followed that lead in referring to five social traits and characteristics, rather than classes.[170] As it further clarified, § 703(a) claims are more correctly described as "determinative-factor" claims—rather than "single-motive" claims.[171] In *Bostock*, the Court acknowledged its prior holding in *Burrage v. United States* that Title VII but-for causation under § 703(a) can involve more than one determinative factor.[172]

Workplace harm "because of" the protected traits require plaintiffs to point to facts supporting a causal connection between the trait and the employer's decision. In 1989, however, the *Price Waterhouse* Court fractured over the outer limits of causation. A majority of the Justices rejected a holding that a plaintiff need establish "but-for" causation in a Title VII disparate treatment claim.[173] *Price Waterhouse*'s equally monumental contribution is its deliberate deviation from the anti-

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1808–14 (2016) (citing *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519 (2015)) (discussing how Title VII claims under § 2000(a)(2) are severely undertheorized and may not be limited to classification).

169 Interpretative Memorandum of Title VII of H.R. 7152, 110 Cong. Rec. 7213. The Court has repeatedly relied on the "authoritativeness" of the Interpretive Memorandum, "written by the two bipartisan 'captains' of Title VII." Price Waterhouse v. Hopkins, 490 U.S. 228, 243 n.8 (1989) (plurality opinion) (citing Firefighters v. Stotts, 467 U.S. 561, 581 n.14 (1984)).

170 Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013) (characterizing race, color, religion, sex, and national origin as "characteristics" and "personal traits" rather than as "classes"); *see also Trait*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2424 (3d ed. 1961) (defining trait to include "a characteristic of behavior or a typical artifact that distinguishes a human culture—called also *culture trait*") (emphasis added).

171 *Price Waterhouse*, 490 U.S. at 241, 241 n.7 (plurality opinion) (stating that "we know that the words 'because of' do not mean 'solely because of,'" and noting "Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'") (citation omitted).

172 Bostock v. Clayton Cty., No. 17-1618, slip op. at 5–6 (590 U.S. __ (2020)) (citing Burage v. United States, 134 S. Ct. 881, 888–89 (2014)).

173 *Price Waterhouse*, 490 U.S. at 240–41 (plurality opinion); *id.* at 262 (O'Connor, J., concurring); *see also* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 102, 200 n.46 (2017) (noting Justice O'Connor opined that in the two-step process, the plaintiff should not be required to carry the entire causation burden).

classificationist approaches to causation exemplified in *Gilbert*.[174] Specifically, the *Price Waterhouse* plurality explained, "We take ['because of'] to mean that gender must be irrelevant to employment decisions,"[175] while Justices Kennedy and Scalia insisted "because of" necessarily required more onerous proof of but-for causation.[176] *Price Waterhouse* went too far, however, in resolving the evidentiary standard in defendant-employers' favor once a protected trait was shown to have played a role amid non-discriminatory reasons for the harm, prompting a Congressional override in the form of the Civil Rights Act of 1991.

2. Section 703(m)

Through the Civil Rights Act of 1991 ("1991 CRA"), Congress restored some of the breadth and complexity that courts had read out of Title VII.[177] Throughout the 1980s, the Supreme Court fashioned onerous burdens of proof for workers over eight precedents interpreting the statute with the effect of favoring employers.[178] Section 703(m) states, in relevant part: "an unlawful employment practice is established when the complaining party demonstrates that [a protected trait] was a motivating factor for any employment practice, even though other factors also motivated the practice."[179] It thus clarified that the original statute's causation also includes a less onerous causation standard where a trait was a "motivating factor" among otherwise permitted factors, responding to the *Price Waterhouse* dissenters' argument for exclusively strict "but-for" causation.[180]

But Congress went even further to rebuke the courts institutionally. The 1991 CRA also allowed juries, rather than judges alone, to decide factual questions—including causation—in disparate treatment cases because bench trials too often

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174 *See supra* note 18 (defining the anti-classification approach drawn from formal equality principles).

175 *Price Waterhouse*, 490 U.S. at 240 (plurality opinion) (using "sex" and "gender" interchangeably).

176 *Id.* at 284 (Kennedy, J., dissenting).

177 Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071 (1991).

178 These cases included *Price Waterhouse*, discussed *supra*, and Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651–56 (1989). Eskridge provides historic context from the high court, where grouping of all "equality" cases persists in the conflation of equality principles with racial politics:

> [T]he Supreme Court of the 1980s was almost never willing to interpret statutes to effectuate the rights of African Americans and other racial minorities to be free of workplace discrimination . . . . The Court's abandonment of the *Carolene* canon protecting racial minorities took on the appearance of outright hostility in [1989, which] triggered the most dramatic civil rights override since the Reconstruction Amendments overrode *Dred Scott*, [and] reinterpreted Title VII and related job discrimination statutes in ways that made it more difficult for African Americans to challenge workplace discrimination.

William T. Eskridge, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 613 (1992) (focusing on the experiences of African American civil rights plaintiffs).

179 42 U.S.C. § 2000e-2(m) (2012).

180 SPERINO & THOMAS, *supra* note 173, at 98 ("[T]o prove a discrimination claim, the employee must show causation—that is, the harm or injury must be connected to the worker's race, sex, or other protected trait.").

rendered sparing outcomes for employers.[181] Elevating "motivating factor" causation to statutory form further insulated Title VII's jurisprudence from classification-only arguments after 1991. In other words, the employer's motive with respect to the protected trait is causation's touchstone.[182] In light of this history, the role of Title VII's causation component of analysis is remarkably clear. The 1991 override recognized that causation includes harmful reliance upon an employee's pluralistic sex trait, as Price Waterhouse did to Ms. Hopkins.

B. Hegemonic Evidentiary Tests and the Doctrinal Correction

Title VII's evidentiary procedures today reflect the Burger Court's attempts to unify anti-discrimination jurisprudence under constitutional and Title VII interpretation. These devices reflect and reinscribe "dominant concepts of discrimination," as Kimberlé Crenshaw's work in intersectionality theory prominently demonstrated.[183] For decades, a wide array of experts have critiqued rules born of the 1970s such as *McDonnell Douglas* burden-shifting.[184] The evidentiary rules enervate anti-discrimination law in the following common ways: conflating evidentiary procedure with defining discrimination; requiring plaintiff's membership in a "protected class" as part of the prima facie case; and burying evidence of harm "literally" motivated by sex.[185] Courts struggle to reconcile the anti-subordination approach of the post-1991 statute with old evidentiary rules of protected-class, direct, or circumstantial evidence which, if adapted or set aside, might be deemed legal error on

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[181] 42 U.S.C. § 1981a(c)(1) (providing any party in Title VII action the right to demand jury trial if compensatory or punitive damages are sought); Desert Palace, Inc. v. Costa, 539 U.S. 90, 102 (2003) (O'Connor, J., concurring) (noting reasonable factfinders may conclude that an employer's "discriminatory motivation 'caused' the employment decision"); *see, e.g.*, Instructions to the Jury at 10, Tudor v. Se. Okla. State Univ., No. CIV-15-324-C (D. Okla. Nov. 20, 2017), ECF No. 257 (in jury instruction number 6: "[F]or Plaintiff to prevail, you must find any wrongful action occurred because of her gender or because of a perception that that person does not conform to a typical gender stereotype.").

[182] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343 (2013) (holding that a plaintiff alleging retaliation after the 1991 Civil Rights Act had to meet "but-for" causation standard, unlike the "lessened" standard for a discrimination claim under § 703(a)).

[183] *See* discussion *supra* Part I.B; Crenshaw pioneered intersectionality theory in the law in Crenshaw, *supra* note 84, at 140, 144–45. *See also* Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 17–23 (2013) (noting that as to weathervane constitutional cases within antidiscrimination law, "[t]he aim of the Burger Court's discriminatory purpose decisions was to limit dramatically the power of federal courts to intervene in democratic decisionmaking . . . [and] repeatedly explained that it was for representative government . . . to guide the nation beyond the legacies of segregation").

[184] *See infra* notes 186–96 and accompanying text. *See generally* SPERINO & THOMAS, *supra* note 173, at 115–23; Katie Eyer, *The Return of the Technical* McDonnell Douglas *Paradigm*, 94 WASH. L. REV. 967 (2019); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2232 (1995).

[185] *E.g.*, Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) ("discrimination against transsexuals because they are transsexuals is literally discrimination because of sex." (quoting Schroer v. Billington, 424 F. Supp. 2d 203, 212 (D.D.C. 2006))); Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 525 (D. Conn. 2016) (same).

appeal. In this sense, the denial of Title VII protection to sexual minorities reflects that courts were not only conservative,[186] but are also confused or constrained.

1. "Protected Class" Evidence

Formulaic rules for detecting workplace discrimination began with the *McDonnell Douglas* test the Court created in 1973—a year before *Gedulig*. The Court intended the test to be plaintiff-friendly, a device for those who did not have strong evidence of biased motive to establish an inference of discrimination.[187]

Although it was meant to be a provisional framework, most courts strictly impose its four-part prima facie case: (1) membership in a protected class; (2) qualification for the job; (3) an adverse employment action; and (4) a causal connection between the adverse action and protected classification.[188] To survive summary judgment, an employee must ultimately be able to show that any allegedly lawful justification provided by the employer was pretextual.[189] Deborah Malamud aptly called its creation "quasi-legislative."[190] The post-2015 doctrinal correction underscores how, decades later, lower courts incorrectly interpreted *McDonnell Douglas* to impose a policy-like supposition that Congress intended Title VII to be an anti-classification statute, rather than address all manifestations of social "traits" most commonly used to disempower or devalue.[191]

Aware of its potential for misapplication, the Court cautioned that "the prima facie proof required . . . *is not necessarily applicable* in every respect to differing factual situations."[192] In *Burdine*, it reiterated that *McDonnell Douglas* was suitable for the "most common" cases,[193] but not when direct evidence exists at the outset or later comes to light.[194] But courts often do not heed that advice. Plaintiffs whose

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186 Jessica A. Clarke, *How the First Forty Years of Circuit Precedent Got Title VII's Sex Discrimination Provision Wrong*, 98 TEX. L. REV. ONLINE 83, 88–89 (2019) ("While some opinions made empty professions of abhorrence for all forms of discrimination, close examination of their reasoning, language, and sources demonstrate that appellate judges were blinded by the biases and misunderstandings of their era.").

187 The Supreme Court first articulated the employee's burden of proof in disparate treatment cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), and refined it in significant ways in Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507–508 (1993); and Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142–48 (2000) [hereinafter all three cases collectively "*McDonnell Douglas* test"].

188 *See Green*, 411 U.S. at 802. Other courts' articulations of this prima facie case may vary widely. *See generally* SANDRA F. SPERINO, MCDONNELL DOUGLAS: THE MOST IMPORTANT CASE IN DISCRIMINATION LAW (2018) (discussing the impact of the three-part burden shifting framework).

189 *See generally* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002).

190 Malamud, *supra* note 184, at 2264.

191 *See supra* Part II.A. As Sperino has noted, the Supreme Court has not tended to view the *McDonnell Douglas* Test narrowly and identified other frameworks, such as "cat's paw" proximate causation. *See* Staub v. Proctor, 562 U.S. 411, 422 (2011).

192 *Green*, 411 U.S. at 802 n.13 (unanimous decision) (emphasis added); *accord* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)); *Burdine*, 450 U.S. at 253 n.6.

193 *Burdine*, 450 U.S. at 253–54.

194 *E.g.*, EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560, 569 (6th Cir. 2018) (noting defendant owner and operator during discovery testified that his motive for firing plaintiff Aimee Stephens, a transgender woman, was "because 'he [sic] was no longer going to represent

identities or life experiences are not familiar to judges face skepticism and paradoxical results.[195] The test prompted a sizeable wave of criticism that *McDonnell Douglas* has significantly impeded Title VII's reach in actually identifying discrimination.[196]

The unworkability of a protected class "element" was clear in *Fabian*, where the court implicitly modified the test at summary judgment.[197] Deborah Fabian, an orthopedic surgeon, successfully interviewed for an opening with the Hospital of Central Connecticut, having already been told the job was hers, and signed a contract that included a start date. After she informed the Hospital that she is a transgender woman, and would present in her affirmed gender of female at work using her name Deborah, the Hospital denied her the position. Only circumstantial evidence existed for the Hospital's decision, as it did not disclose to Ms. Fabian that it did so because she revealed her transgender status. Interestingly, *Fabian* recited the protected class membership prong, but its summary judgment analysis never returned to it. Instead, *Fabian* discussed at length that disqualifying transgender plaintiffs from sex discrimination as a "class" simply because of their transgender status would raise Equal Protection problems. The court then reasoned that a literal reading of "because of sex" (reviving *Ulane I*) meant Ms. Fabian raised sufficient evidence of sex-based discrimination. *Fabian*'s adaptation recognized that a non-categorical analysis of the protected trait—hostility toward a change in sex—is sex-based discrimination, no differently than it would be for a change in religion.[198]

himself as a man [and] wanted to dress as a woman.'"); Henson v. City of Dundee, 682 F.2d 897, 905 n.11 (11th Cir. 1982) ("[T]he case of sexual harassment that creates an offensive environment does not present a factual question of intentional discrimination which is at all elusive.").

195 Crenshaw, *supra* note 84, at 140, 144–45 (illustrating how "dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis" and the centrality of white women's experiences in "the doctrinal conceptualization of sex discrimination").

196 *E.g.*, SPERINO & THOMAS, *supra* note 173, at 123; Malamud, *supra* note 184, at 2232. The *McDonnell Douglas-Burdine-Hicks-Reeves* evidentiary framework, which the Supreme Court fashioned over a series of opinions between 1973 and 2000, helped clear a wide swath in federal dockets, especially the claims of workers whose identities are excluded from dominant worldviews. Employment discrimination litigation had comprised the highest percentage of federal civil dockets but plummeted by 40% between 1979 and 2006; during that time, plaintiffs prevailed in only 15% of cases, compared with 51% of all other civil cases. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 103–04, 127 (2009).

197 The facts of this case are drawn from the district court opinion, Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 513 (D. Conn. 2016).

198 *Id.* at 527. In a prominent post-trial appeal, the Sixth Circuit reevaluated *McDonnell Douglas* on another basis in Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005). There, Philecia Barnes, a transgender female police officer, advanced a sex-stereotyping argument and defendant argued, *inter alia*, that she could not show membership in a protected class. The panel upheld Barnes's favorable jury verdict, reasoning that her successful prima facie claim included proof that "he [sic] was a member of a protected class by . . . his failure to conform to sex stereotypes" as recognized in *Price Waterhouse* and *Smith*. *Id.* (citing Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004)).

By replacing the protected class prong with a protected trait analysis, as this Article proposes, trial of a Title VII case would focus instead on causation, a question of fact reserved for juries.[199]

2. "Direct" Evidence

The distinction between binary and pluralistic definitions of sex also reveals an evidentiary wrinkle in Title VII's distinction between direct and circumstantial evidence. Direct evidence of discrimination is evidence that directly ties prejudices to the defendant's harmful act such that bias was motivated by a protected trait.[200] Direct evidence is highly persuasive under Title VII, as proof that the defendant acted directly because of the bias establishes the prima facie case and, if proven, resolves the ultimate question of discrimination.[201]

Without a new mode for analyzing traits, doctrinal problems persist in deciding what is direct versus circumstantial evidence of sex discrimination for sexual minorities. Transgender, lesbian, and gay plaintiffs who have presented direct evidence that they were mistreated because of their status routinely face judges who downgrade the evidence as circumstantial. That, in turn, triggers the *McDonnell Douglas* test. In *Kastl v. Maricopa County Community College*, a transgender female instructor, Rebecca Kastl, challenged her employer's decision to bar her and another transgender colleague from using the women's room.[202] The College required both to use the men's room unless they provided proof of "genital correction surgery."[203] Ms. Kastl argued that her use of the men's restroom was inappropriate and also potentially dangerous to her.[204] Even with direct evidence that the College decided to segregate her from the women's restroom based upon her sex, the trial and appellate courts simply applied the *McDonnell Douglas* test, but in different ways.[205]

The district court accepted the defendant's argument that "biological wom[e]n" were a "protected class," but held that because Ms. Kastl had not yet had anatomical surgery she could not establish her membership for the prima facie case.[206] The appellate court instead held that Ms. Kastl did have direct evidence (in the form of sex-stereotyping conduct by the college), but unnecessarily applied

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199 *E.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of circumstantial evidence that is probative of intentional discrimination.").

200 Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); Glenn v. Brumby, 663 F.3d 1312, 1320–21 (11th Cir. 2011).

201 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002). All an employer would be left to assert is a factual and not a legal question: that it would have taken the same action absent the illegal motive.

202 Kastl v. Maricopa Cty. Comm. Coll. Dist., 325 Fed. App'x 492, 493 (9th Cir. 2009) (summary order).

203 Kastl v. Maricopa Cty. Comm. Coll. Dist., No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *1 (D. Ariz. June 3, 2004).

204 *Kastl*, 325 Fed. App'x at 493 n.1.

205 Kastl v. Maricopa Cty. Comm. Coll. Dist., No. CV-02-1531-PHX-SRB, 2006 U.S. Dist. LEXIS 60267, at *15–20 (D. Ariz. Aug. 22, 2006); *Kastl,* 325 Fed. App'x at 493–94.

206 *Kastl*, 2006 U.S. Dist. LEXIS 60267, at *18–19 (striking plaintiff's evidence as untimely filed and accepting defendant's expert testimony that the only sex criteria were plaintiff genitalia, hormonal production capacity, and chromosomes, which all indicated male "biological" sex).

McDonnell Douglas to accept the employer's argument that it had a legitimate business need to bar Ms. Kastl from the women's room for "safety reasons."[207] It did not question the safety rationale as legitimate despite the absence of evidence, but proceeded to contradict its statement of direct evidence earlier in the opinion by concluding Ms. Kastl could not show that sex ("gender") was a motive.[208] An unwillingness to deviate from *McDonnell Douglas* where direct evidence exists shows that the test can be applied to disappear, rather than detect, motive.[209] As discussed earlier, appellate and lower courts have recently sought to avoid this result for sexual minorities.

The Court should discard the direct/circumstantial divide from Title VII entirely, since motive remains the employee's burden of proof. After 1991, the motivating-factor theory of causation forced the Court to clarify that direct and circumstantial evidence are equally sufficient to state a mixed-motive claim.[210] In *Costa v. Desert Palace*, Justice Thomas observed that courts are too skeptical of Title VII case evidence and held that both forms of evidence are adequate for mixed-motive claims under § 703(m).[211] The same rule should be applied to but-for claims under § 703(a). The direct/circumstantial divide is yet another reason for eliminating the *McDonnell Douglas* test.

3. Bostock*'s "But-For" Conflation After* Zarda v. Altitude Express, Inc.

As discussed above, *Oncale* failed to provide adequate guidance for analyzing the sex trait prior to undertaking a causation analysis. A plurality of the Second Circuit *en banc* in *Zarda* conflated the two elements, calling it "but-for causation."[212]

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207 *Kastl*, 325 Fed. App'x at 493–94. The 2009 unanimous panel included Justice Gorsuch, sitting then by designation on the Ninth Circuit.

208 *Id.* at 494. By contrast, the court in *Harris Funeral Homes* agreed that direct evidence existed when the defendant owner testified that his motive for firing plaintiff Aimee Stephens, a transgender woman, was "because 'he [sic] was no longer going to represent himself as a man [and] wanted to dress as a woman.'" EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560, 569–71 (6th Cir. 2018) ("[W]hile this Court does not often see cases where there is direct evidence to support a claim of employment discrimination, it appears to exist here." (quoting EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 850 (E.D. Mich. 2016))).

209 *See* MAYERI, *supra* note 82, at 714 ("complex discrimination" claimants "fac[e] both structural and ideological barriers to recognition and redress"); Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 92 (1999) (positing that the end of group-based subordination requires "turn[ing] away from distinctions without difference, to confront difference itself and the material conditions it engenders" outside of hierarchy).

210 Desert Palace, Inc. v. Costa, 539 U.S. 90, 99–100 (2003). On eliminating the direct/circumstantial divide, see generally William R. Corbett, *An Allegory of the Cave and the* Desert Palace, 41 HOUS. L. REV. 1549, 1557 (2005); Charles A. Sullivan, *Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 934 (2005); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1913 (2004).

211 "The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." *Id.* at 100 (citing *Holland v. United States*, 348 U.S. 121, 140 (1954)).

212 Zarda v. Altitude Express, Inc., 883 F.3d 100, 116–19 (2d Cir. 2018) (en banc) (presenting comparative test as whether "but-for" employee's sex, gay employee's treatment would have been different); Bostock v. Clayton Cty., No. 17-1618, slip op. at 2, 5, 10 (590 U.S. __ (2020)).

According to *Zarda*, if the comparative tool *Hively* proposed—swapping in a gay man for a heterosexual woman as the employee attracted to men—was determinative to the outcome, then "but-for" causation was met. *Zarda* imputes this framing to *Hively*, but the Seventh Circuit made no such linguistic escalation in *Hively*.[213] Under the *Zarda* plurality's method, there is no separation between element (a)—the process for identifying if a characteristic like sexual orientation is linked to sex as a protected trait—and element (b), causation. Recall, however, that causation is the independent jury question as to whether the sex trait or characteristic actually *motivated* the firing, harassment, assault, or other harm.

Hively and *Harris Funeral Homes* took slightly more caution in limiting the comparative method as a tool for understanding how social construction of the employees' sex characteristic is linked to the protected sex trait (element (a) above). Respectively, the decisions located sexual orientation and transgender status within the sex trait. In *Harris Funeral Homes*, the court joined *Hively* in observing that when "isolat[ing] the significance of the plaintiff's sex to the employer's decision," "it is analytically impossible to fire an employee based upon that employee's status" as a transgender person or lesbian employee "without being motivated, at least in part, by the employee's sex."[214] While this language from both Circuits mentions sex-linked status in connection with motive, the panels carefully avoided framing its approach as "but-for" *causation*. Framing it as simply one comparative tool avoided the danger of embedding a double causation analysis in these cases.

Some employee advocates within the *Bostock* trio adopted *Zarda*'s but-for causation argument before the Court, while also reserving sex stereotyping, statutory interpretation, and other arguments in their briefing.[215] Notably, at the *Zarda* and *Bostock* consolidated argument, employees' counsel summarized their causation theory as follows:

> My test says that you have treated the people differently because of sex, which is what we are asking you to hold here. When you treat a gay man who wants to date a woman differently than a woman who wants to date a woman, that – that's discrimination. Then you get to what I've said, which is you have to ask whether

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213 *Id.* at 116 (citing Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 345 (7th Cir. 2017) (en banc)).

214 EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560, 575 (6th Cir. 2018) (citing *Hively*, 853 F.3d at 345).

215 Employee's counsel in *Harris Funeral Homes* this Term cited the "but-for" framing from an ambiguous passage in EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015), in which the Court uncharacteristically failed to distinguish the Title VII "but-for" retaliation standard from *Nassar* from the more lenient standard for an underlying disparate treatment claim. Brief for Respondent at 21–22, R.G. & G.R. Harris Funeral Homes v. EEOC, 884 F.3d 560 (6th Cir. 2018) (No. 18-107). Conversely, the employee's briefs had raised a host of broader alternative arguments, including plain meaning interpretation, statutory history, sex discrimination causation precedent, statutory text and structure, sex-stereotyping, sex-plus discrimination, and textualism. Brief for Petitioner at 12–31, Bostock v. Clayton Cty., 723 Fed. App'x 964 (11th Cir. 2018) (No. 17-1618); Brief for Respondent at 19, 23, 26, Altitude Express, Inc. v. Zarda, 883 F.3d 100 (2d Cir. 2018) (No. 17-1623); Brief for Respondent at 28–45, R.G. & G.R. Harris Funeral Homes v. EEOC, 884 F.3d 560 (6th Cir. 2018) (No. 18-107).

> a reasonable person under these circumstances would be injured by the imposition of the particular sex-specific world.[216]

This strategy further embraced the approach of the older anti-classification cases at the expense of addressing the two elements of trait and causation separately, as counsel in the trio used "sex," biological sex, and binary birth sex as interchangeable concepts at argument.[217] Thus, by this time the employee advocates decided to deemphasize the social construction analyses from lower federal courts in the post-2015 wave, which had shifted the doctrine away from liberal formalism.

Another drawback in proffering "but-for" as the standard for LGBT workers is that its identification is with § 703(a) determinative-factor theories, when mixed-motive (§ 703(m)) theories typically can be raised by plaintiffs or defendants in the alternative in every case. Once a "but-for" theory becomes a *per se* rule for status-based Title VII coverage of a sexual minority, the *Bostock* Court understood that without revising but-for causation, it wouldn't leave room for analysis of cases where legitimate motives such as poor job performance are raised by the employer, which in fact happened in *Zarda* and *Bostock*. Plaintiff's counsel originally argued as much in *Bostock*: "[E]ven if sexual orientation *was* a 'legitimate consideration' for an employment decision (which it is not), an employment decision on that basis would still be "'because of" sex *and* the other, legitimate consideration[,]' . . . because sexual orientation is dependent upon the sex of the employee."[218] In other words, the *Bostock* defendant's motive or bias is not severable in the decisionmaker's mind between anti-gay bias as a "legitimate" motive, and anti-male ("sex") bias as the illegitimate motive. As a matter of statutory interpretation, a causation analysis using binary sex comparators should not be used to preclude social construction evidence in light of *Price Waterhouse* and all of the law's provisions.

III. MULTIAXIAL ANALYSIS

Multiaxial analysis is a contextual approach to defining the role of a protected trait under Title VII and other civil rights statutes. As discussed above, formalistic evidentiary rules hide the fact that the Supreme Court has limited substantive theories of discrimination. Under a contextually variable approach, multiaxial analysis theorizes animus as traceable to subordination that can account for relational, structural, or institutional dynamics.[219] By uncoupling causation from the sex trait analysis, the statute will realize the true scope of sex beyond a fixed binary and "any

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216 Transcript of Oral Argument at 15:12–23, Bostock v. Clayton Cty., 139 S. Ct. 1599 (2019) (No. 17–1618) & Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019) (No. 17-1623); *see also id.* at 48:6 (Solicitor General referring to "Plaintiff's simple but-for test").

217 *Id.* at 7:18–24 (employees' counsel); *id.* at 44:10–23 (employers' counsel); *id.* at 60:21–61:9 (U.S. Solicitor General); Transcript of Oral Argument at 4–5, R.G. & G.R. Harris Funeral Homes v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107) (employee's counsel); *id.* at 30 (defendant's counsel); *id.* at 47 (U.S. Solicitor General).

218 Brief for Petitioner, *supra* note 215, at 50.

219 Echoing earlier calls heeded among recent courts, Title VII is "capable of contextually variable answers." Abrams, *supra* note 26, at 2533; *see also* Peter Kwan, *Symposium: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673, 687 (2000) (positing that "identity categories multiply within any set of circumstances").

individual" whose sex-related traits are targeted for serious workplace harms. Multiaxial analysis normatively expands analysis in these cases beyond trait essentialism and the most common patterns of discrimination, such as essentializing of women as effeminate for sex discrimination theories[220] or other ascribed stigmas so that they are not "legally enshrin[ed]" by attempts to define discrimination.[221]

Part III.A details the framework and how it guides jurists and juries in evaluating whether, for example, mistreatment is because of sex even when all parties disagree as to what plaintiff's "sex" characteristic is. In Part III.B, we turn to examples of multiaxial analysis in application, and discuss its capacity to adjudicate cases where plaintiffs assert intersecting forms of discrimination such as racialized sexism. Part III.C discusses how multiaxial analysis addresses earlier critiques from intersectionality theorists.[222] Part III.D then responds to anticipated counterarguments regarding judicial legislating and the operability of multiaxial analysis.

A. The Axes

Under a multiaxial approach, each axis represents a distinct viewpoint regarding the protected trait, generating both evidentiary and narrative frameworks for any disagreement regarding a Plaintiff's trait.[223] This approach is akin to the familiar investigation and presentation of evidence to a factfinder in a civil case by the parties.[224] The distinct axes that could be triggered during adjudication with respect to the sex trait are as follows: (1) the Plaintiff's conception of their[225] own sex; (2) the Defendant Employer's conception of Plaintiff's sex; and to the extent relevant to the Defendant's conceptions, (3) broader Society's and (4) the State's definition of

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220 *See* 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, 76 (1995).

221 Yuracko, *supra* note 30, at 215 (citing Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1805 (2000)); *see also* cunningham, *The "Racing" Cause of Action*, *supra* note 32, at 712 ("I wish to distinguish who we are and might be from what is and has been . . . done to us.").

222 *See supra* notes 33–34 and accompanying text.

223 Reflecting on (then) nearly two decades of adjudicating employment law cases, Second Circuit Judge Denny Chin noted the high dismissal rates at summary judgment, attributable in part to diffuse evidentiary tests and in part to narrative:

> I appreciate that *McDonnell Douglas* was crafted to help plaintiffs in situations where there was a lack of direct evidence of discrimination. But given how employment law has evolved, I do not think it is helpful to anyone anymore. . . . Lawyers must help the judge care, for a judge who cares is more likely to get it right. A lawyer helps the judge care by telling a compelling story, using some passion, but relying primarily on logic. Judges do not always get it right, but judges—at least the vast majority of judges—*try* to get it right.

Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671, 681 (2013).

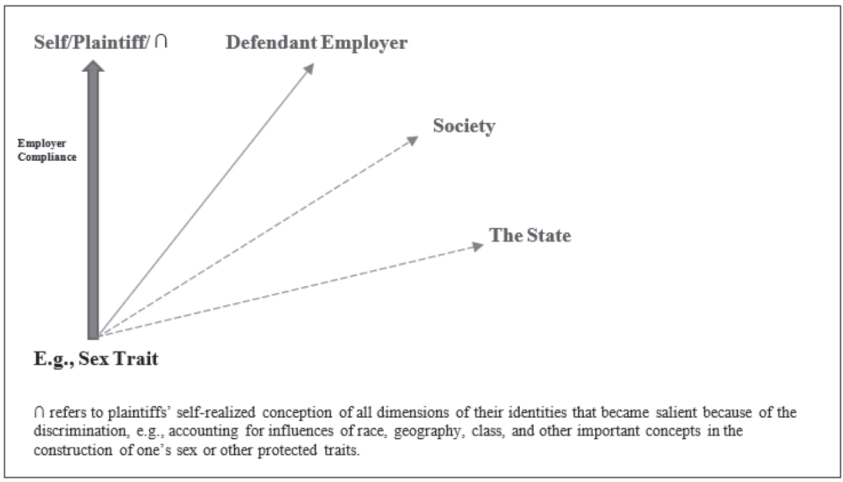
224 The conceptual model is that of three-dimensional ball-and-socket joint with axes that can pivot, rather than traditional x- and y- axes along each ray, or projected identification of the Plaintiff. *Cf.* Vade, *supra* note 28, at 261 (proposing gender "locations" within a three-dimensional "gender galaxy" to replace prevailing linear, spectrum-like conceptualization of gender between male and female).

225 The singular usage of "their" is intentional.

Plaintiff's sex (see Figure 1). If established, the court must adjudicate the claim as to the trait(s) and proceed to questions of fact as to causation.

As a situational model, multiaxial analysis describes axes that converge at the node of the legal question (here, a conception of a protected trait such as sex), but may shift relative to each other depending on the workplace or point in time because discrimination arises relationally.[226] This conceptualization realizes the "fair reading" of the sex trait and its "denotations" originally raised in *Ulane I*, and adds a core principle from the post-2015 doctrinal correction: the subjectivity of Employers and the State as social institutions. Addressing whether gender identity is comprehended by the word "sex," *Ulane I* framed the breadth of the trait's definition as "a question of one's own self-perception [and] also a social matter."[227] Indeed, that portion of *Ulane I* addressed causation as an entirely separate element. Interactively, the axes may generate evidence sufficient to answer whether the protected trait was tied to the characteristic, as reflected in Figure 1.

Figure 1: Multiaxial Analysis Reflecting Situational Separability of Viewpoint Axes



The chief axis is the Plaintiff's determination as to their own trait or traits or, in the intersectional context, multiple traits. Our dignitary interest in self-identification is consistent with Title VII's text and purpose, as imposing a conflicting definition on an employee, absent remediation, would expose us to inferior term and conditions of employment.[228] D. Wendy Greene has observed that "perceptions or misperceptions that [are] observable or ascertainable characteristics signify an

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226 Kwan earlier proposed his cosynthesis model as a "complex and unique matrix of identities that shift[s] over time, is never fixed, [and] is constantly unstable" without forcing, as intersectionality theory does, a decision "*a priori* which identities matter." Kwan, *supra* note 219, at 687 (quoting Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1277 (1997)). In this way, the identity categories are 'mutually defining, synergistic, and complicit" in capturing multiple subordinations. *Id.* at 688.

227 *Ulane I*, 581 F. Supp. 821, 823 (N.D. Ill. 1983).

228 29 U.S.C. § 703(a)(1).

individual's physical and mental capability, morality, and self-worth, among other individual characteristics," making the harm of discrimination ascriptive or descriptive.[229] As our nation's history reflects, a primary tool of dehumanization is through sex,[230] in tandem with race, color, religion, and national origin. Accordingly, where more than one trait is also prominent in the discriminatory harm, each of the axes is intersectional as to dynamics toward the (non-compartmentalized) Plaintiff.[231]

The minimum additional axis needed to articulate a claim is a Defendant Employer's axis representing its view of the Plaintiff. If significantly misaligned with the Plaintiff's axis, the separation evinces a dissonant view of the Plaintiff's trait. The subordination may manifest as a gravitational "pull" from the Defendant's axis to shift the Plaintiff's self-attestation of their trait. Or, dissonance between the axes may represent stigma that was a factor in the employer's adverse decision, even absent a prescriptive stereotype. A Defendant Employer's animosity toward both actual or perceived "biological sex" attributes, sexual orientation, gender presentation, gender identity, or other sex-linked traits can be evidence that it impermissibly relied on Plaintiff's sex. As Kramer previously argued, these traits encompass both status and conduct, aligning with sex discrimination doctrine.[232]

The other potential axes are Society and the State (government). Their relevance depends on particular circumstances that place them at issue in the case. The Society axis may reflect dictionary definitions, occupational culture, geographically specific practices, or political and historical context, with experts or amici as possible aids.[233] The axis would also encompass traditionally relevant witness viewpoints such as non-Defendant co-workers, customers, or those whose involvement in the matter as members of society may provide evidence of the Defendant's state of mind regarding the trait.

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229 *See* Greene, *supra* note 21, at 115; *see also* Paulette M. Caldwell, *Intersectional Bias and the Courts: The Story of Rogers v. American Airlines*, *in* RACE LAW STORIES 571, 572–73 (Rachel F. Moran & Devon W. Carbado eds., 2008) (discussing requirement of immutability under Title VII as blind to the "dignitary and psychological interests in . . . racial and ethnic identity," and the "message of hostility, intimidation, and inferiority communicated by workplace rules that target . . . culturally specific behaviors").

230 *See, e.g.*, Doe v. City of Belleville, 119 F.3d 563, 588 (7th Cir. 1997), *vacated and remanded for reconsideration in light of Oncale,* 523 U.S. 1001 (1998) (sex-based harassment "is often motivated by issues of power and control on the part of the harasser, issues not necessarily related to sexual preference.") (quoting Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 355 (D. Nev. 1996)); *see also id.* at 587 n.22 ("The notion that harassment is only actionable sexual harassment when it can be attributed to the harasser's sexual interest in the victim is reminiscent of the now discredited idea that rape is a sexual act, rather than an act of violence. . . . It is, in fact, quite common for a man (whatever his sexual orientation) to be raped by another man, and the rapist is frequently heterosexual.").

231 *See* Part III.C *infra* (addressing intersectional analysis).

232 Kramer, *supra* note 29, at 940–41 (devising framework to capture sex as both a status and a practice).

233 Price Waterhouse v. Hopkins, 490 U.S. 228, 255 (1989) (plurality opinion) (relying upon use of social psychologist's testimony regarding sex stereotyping in plaintiff's partnership selection process); Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 823 (N.D. Ill. 1983) (relying upon competing medical expert testimony regarding how sex is medically determined); Schroer v. Billington, 577 F. Supp. 2d 293, 306 (D.D.C. 2008) (same); and *infra* notes 286–97; *see also* Ann C. McGinley, *Masculinities at Work*, 8 OR. L. REV. 359 (2004) (addressing occupational culture).

The State's position may be relevant with respect to defining and administrating the trait or the trait-linked characteristic at issue. As an institution of the State, a court must focus on its actual task of determining the scope of the forbidden criterion and avoiding prior courts' errors in adopting their own conception of a Plaintiff's sex. Title VII's other statutory traits—race,[234] color, religion,[235] and national origin[236]—are socially and often privately defined.[237] Indeed, the State's political branches engage in variable and oppositional politics regarding sex. Currently, the Trump Administration's policies seek to rescind gender identity and sexual orientation from federal non-discrimination protections,[238] while states and localities expand their laws and policies expressly memorializing such protections, defining sex and gender broadly, and offering non-binary or third sex markers, and other policies.[239] As to sexual orientation, however, laws that excluded homosexuality "put the imprimatur of the State itself on an exclusion that soon demeans or

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234 Indeed, this societal realization came decades sooner for race than for sex as a social construct. *See* Greene, *supra* note 21, at 145–47, 146 n.284 (describing the ignominious race determination trials of the nineteenth century grounded on "physical features" and "racial reputation" to grant or withhold political, social, legal, and economic rights); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617–18 (1987) (in § 1982 action for right to hold property, holding that members of Jewish congregation were not foreclosed from claim of racial discrimination because they were distinct people that Congress intended to protect, regardless of fact society considers them "part of the Caucasian race" today); St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (in § 1981 action for race-based discrimination, holding Congress intended to protect those identifiably "subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.").

235 *See* Sue Landsittel, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1172 (2010).

236 29 C.F.R. § 1606.1 (2019) (defining national origin discrimination "broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.").

237 The original conflation of Equal Protection with workplace anti-discrimination law raises the public/private division that Mary Dunlap and Dean Spade prominently advanced. Fundamental to their critiques is that the State directly purveyed harm to sexual minorities and is inherently suspect in administering matters arising from sex with life-and-death consequences through binary sex designation, sexual orientation, and failing to recognize gender identity. *See* Dunlap, *supra* note 66, at 1131–39 (discussing implications of the "two-sex presumption" in the law and among courts and civil rights advocates); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 738 (2008) (discussing the assumption of gender cohesiveness and stability as mythical and based upon inconsistent criteria). This separability of the State axis for the purposes of Title VII adjudication is distinct from the debate over whether the State should ever track natal sex or sex, as those who rely upon updated identification of their sex to navigate institutions daily would seek an incremental approach. *See* Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J.L. & GENDER 491, 496–97, 534–39 (2016).

238 Shirley Lin, *LGBTQIA+ Discrimination*, *in* EMPLOYMENT DISCRIMINATION LAW AND LITIGATION §§ 27:4, :7.50, :7.75, :8, :17 (Merrick T. Rossein ed., 2019).

239 *See Resources: Non-Binary Gender. Intersex.*, *supra* note 156; *Identity Document Laws and Policies: Driver's License*, MOVEMENT ADVANCEMENT PROJECT, www.lgbtmap.org/img/maps/citations-id-drivers-license.pdf (last visited May 13, 2020) (reflecting that 36 states permit residents to update sex marker on driver's license without requiring proof of a medical procedure, and 11 states permit update to sex marker upon proof of a medical procedure).

stigmatizes those whose own liberty is then denied."[240] Like the Defendant Employer axis, the Society and State axes are conceptually separable from the Plaintiff's self-definition of their trait.

A fairly common State intervention in the workplace arises in employees' disclosures of government documents to their employer in order to verify identity or work authorization. Sex markers on governmental identification is a structural form of notice and commonly triggers intolerance against sexual minorities. Those who identify as non-binary or as a different sex than that assigned at birth often face challenges when attempting to amend the identity documents necessary to navigate sex-segregated spaces. Examples include schools, workplaces, and government-sanctioned modes of transportation.[241] Transitioning sexes and other sex-linked conduct have motivated employers to deny designating new, accurate names, requested pronouns, and other public markers of sex, which may precipitate workplace harassment or assault[242] and create barriers in accessing health insurance for gender minorities.[243]

The multiaxial approach recognizes the forces between the axes that function like ascriptive and prescriptive forms of discrimination. Sex is not limited to a finite set of categories such that, for example, intersex, non-binary, gender-fluid, or agender individuals may accurately self-identify with respect to their sex. Unlike sex stereotyping, the multiaxial approach clarifies from a compliance perspective that the employees' self-identification of sex must be respected. A Plaintiff may provide evidence of the Defendant's disagreement with their sex trait, irrespective of whether the State recognizes it. Conversely, government agencies that do recognize a third non-binary sex, for example, could provide additional support for plaintiffs'

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240 Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

241 *See, e.g.*, *2015 U.S. Transgender Survey*, *supra* note 57, at 56 (reporting that only 11% of transgender respondents reported that all of their identification cards and records bore their preferred name and gender); Zzyym v. Pompeo, No. 15-cv-02362-RBJ, 2019 WL 764577, at *1–2 (D. Colo. Feb. 21, 2019) (denying motion to stay order enjoining U.S. State Department from relying upon binary-only gender marker policy to deny non-binary intersex plaintiff Dana Zzyym passport with sex marker of "X").

242 In the largest survey examining the experiences of transgender people in the United States, 77% of respondents who had a job in the past year hid their gender identity at work, quit their job, or took other actions to avoid discrimination. *2015 U.S. Transgender Survey*, *supra* note 57, at 148. In 2014 alone, as many as 15% of respondents reported that they were verbally harassed, physically attacked, and/or sexually assaulted at work because of their gender identity or expression; and nearly one-quarter (23%) reported other forms of mistreatment based on the same during the past year, including (1) being forced to use a restroom that did not match their gender identity, (2) being told to present in the wrong gender in order to keep their job, or (3) having a supervisor or coworker share private information about their transgender status without their permission. *Id.* at 148, 153–54.

243 *See, e.g.*, Third Amended Complaint & Demand for Jury Trial at 2, 10–11, Newman-Scheel v. Fedcap Rehab. Servs., Inc., No. 1:17-cv-08220-JPO-OTW (S.D.N.Y. May 11, 2018), Doc. 57 (alleging conduct as grounds for Title VII sex discrimination against plaintiff who identifies as trans-masculine genderqueer); Complaint in Intervention of Plaintiff/Intervenor Dr. Rachel Tudor at 12, United States v. Se. Okla. Univ., No. 5:15-cv-00324-C (W.D. Okla. May 5, 2015), Doc. 24 (describing employer's health insurance for professors explicitly excluded medically necessary treatments and health care benefits for transgender individuals connected with sex- and gender-affirming treatment).

identification of their sex. But it is not a prerequisite that the State agree with the employee's sincerely held identity for purposes of employer compliance.

B. Multiaxial Analysis in Application

Multiaxial analysis still requires Plaintiffs to prove that the trait motivated the mistreatment. They must also show that they were qualified for the position (except in cases of harassment).[244] Further, Plaintiffs must still show that the employer's conduct was sufficiently serious to alter the terms and conditions of their employment. For the Defendant's part, the defenses of business necessity or other valid, otherwise non-discriminatory reasons remain unchanged as fact issues for the jury.

Courts have yet to adopt aspects of this approach to trait-causation beyond iterative categorical approaches, such as sex-stereotyping, comparator, and associational discrimination theories, to "isolate the significance of the plaintiff's sex to the employer's decision."[245] Employers will find that the multiaxial model reflects best practices for training and prevention, reducing litigation costs. Centering employee dignity and self-identification promotes preemptive compliance over discrimination remediation. Employers that are multijurisdictional or based in states or localities with laws that extend beyond the fixed-sex binary will find that they implicitly comply with multiaxial analysis.[246]

Finally, dissonance among the axes (viewpoints) can be supported by circumstantial or direct evidence of discriminatory motive, after which the court must proceed to questions of fact regarding whether the employee can prove factual causation and the requisite severity of harm.[247]

1. Bostock v. Clayton County

The Eleventh Circuit's opinion in *Bostock* illustrates how courts fare without multiaxial analysis, and how the analysis would differ under the multiaxial method.[248] Gerald Lynn Bostock worked as a Child Welfare Services Coordinator for Clayton County, Georgia.[249] During his decade-long tenure, he received good performance evaluations and the program he managed received a county program

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244 *See* 42 U.S.C. § 2000e-2(a)(1) (2012).

245 Hively v. Ivy Tech Comm. Coll. Of Ind., 853 F.3d 339, 345 (7th Cir. 2017) (en banc).

246 According to one study, 54% of the adult "LGBT" population resides in states that prohibit workplace discrimination based on sexual orientation and gender identity through either descriptive group coverage or interpreting existing sex discrimination laws to include sexual orientation and gender identity. *Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited April 11, 2020).

247 This proposal eliminates the unnecessary bifurcation between but-for motive and mixed-motive cases that recently stumped the Court in Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–99 (2003).

248 The facts are drawn from the district court's opinion, Bostock v. Clayton Cty., No. 1:16-CV-1460-ODE, 2017 U.S. Dist. LEXIS 217815, at *1–5 (N.D. Ga. July 21, 2017). Although the Supreme Court's *Bostock* decision looking to "traits or actions" as to sexual orientation issued just before this Article's publication, this Section's application of multiaxial analysis provides a social-construction approach to the protected trait of sex. Bostock v. Clayton Cty., No. 17-1618, slip op. at 2, 10 (590 U.S. __ (2020)).

249 *Bostock*, 2017 U.S. Dist. LEXIS 217815 at *2.

excellence award.[250] In January 2013, Mr. Bostock joined a gay recreational softball league, the Hotlanta Softball League, and publicized Clayton County's CASA (the program for which he received the awards) to fellow league members as a volunteer opportunity.[251]

In the ensuing months, Mr. Bostock's participation in the league and his sexual orientation were openly criticized by at least one individual with significant influence on his employer's decision-making.[252] Also, in May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board (at which Mr. Bostock's supervisor was present), at least one individual made disparaging comments about his sexual orientation and participation in the league.[253] The following month, the County terminated Mr. Bostock's employment, citing an audit into the CASA program funds that began in April 2013 and allegedly found "conduct unbecoming one of its employees."[254] Mr. Bostock disputes the audit and its findings as pretext for a discriminatory firing.[255]

a. The Prior Approach

Even under the post-1991 statute, the Eleventh Circuit continued to invoke a "classification-first" approach to evidence in sexual orientation cases that misreads the statute. The Eleventh Circuit *Bostock* panel rejected a per se approach that would treat animus against a gay man's sexual orientation as sex discrimination because of decades-old precedent that "discharge for homosexuality" is not prohibited by Title VII.[256] It instead offered a truncated sex-stereotyping approach, noting that Mr. Bostock could have alleged "gender nonconformity" as cognizable sex discrimination, depending on what other characteristics he could have pled.[257] But once the employee has pled that he is gay (or homosexual), evidence of any animosity motivated by his gay status is imputed completely to an "unprotected" gay class.

Although it did not state so outright, the Eleventh Circuit's holding implies that in claims like Mr. Bostock's, evidence of anti-gay discrimination (such as homophobic remarks commonly associated with bullying) can never be used as evidence of sex discrimination if the plaintiff has revealed that he is gay. Rather than analyzing group identity and conduct coextensively, the court left the door open for courts to discard any overlapping evidence between Mr. Bostock's status as a gay

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250 *Id.*

251 *Id.*

252 *Id.*

253 *Id.* at *2–3.

254 *Id.* at *3.

255 *Id.*

256 Bostock v. Clayton Cty. Bd. of Comm'rs., No. 17-13801, 723 Fed. App'x 964, 964 (11th Cir. 2018) (mem.); *Bostock*, 2017 U.S. Dist. LEXIS 217815, at *7 (citing Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)). Mr. Bostock, however, decided not to appeal the district court's dismissal of his gender-stereotyping claim before the *Evans* decision issued, though the Eleventh Circuit noted it was a viable theory. *Bostock*, 723 Fed. App'x at 965, 965 n.2.

257 *Bostock*, 723 Fed. App'x at 965, 965 n.2 (citing Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011)). The Eleventh Circuit acknowledged the bifurcated approach the year prior, in Evans v. Ga. Regional Hosp., 850 F.3d 1248, 1254–55 (11th Cir. 2017).

man and its import that he is a man who is attracted to other men.[258] This approach raises, unanswered, the question of what sex-stereotyping claim remains if a court cannot refer to or rely upon the fact of his orientation as a man attracted to other men.

b. Multiaxial Analysis

Under multiaxial analysis, sexual orientation cannot be a class-based bar to social and definitional context, but recognizes that sexual variation includes social labels based on Mr. Bostock's protected sex trait. The axes serve to clarify the relevant views of his sex-linked trait—sexual orientation—as the dissonance that will then be tested as the motive for his firing. Under the first axis, Mr. Bostock is a man who sincerely believed that he could identify as a gay man without repercussion at his work (dignified self-identification). His additional association within the community with gay sports league members (Society axis—association with others who were presumably similar to Mr. Bostock in self-identification) became grist for criticism of his sexual orientation at work (Defendant Employer axis). The Defendant Employer's view is based upon its harsh treatment of Mr. Bostock only after his sexual orientation became known to its employees, namely his supervisor and coworkers, although it had no bearing on Mr. Bostock's competence at work. His workplace nonetheless became the forum for criticism regarding his disclosed status as gay and his participation in the gay sports league (dissonance). Although the people who disparaged his sexuality to his employer are not defendants but referred to his unrelated gay softball affiliation in the community, that evidence may represent the Society axis through non-defendant witnesses and evidence of the County's perception of his sexual orientation.

Isolating sexual orientation as a sex-linked trait is possible under *Hively*'s insight that Plaintiff's sex trait cannot be ignored when considering his sexual orientation. In Mr. Bostock's particular case, sexual orientation became salient when his homosexuality became known, and a man's attraction to women would not have led to his dismissal. Dismissed prior to discovery, Mr. Bostock's pleading provided fair notice that the litigation might uncover evidence that the sex-based trait of *sexual orientation* was the motive for the decision to dismiss him.[259] Although Mr. Bostock had no evidence pre-discovery directly connecting his firing to anti-gay animus, the

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258 The Eleventh Circuit cited its *Evans* decision from the prior year, which also ducked the issue. *Bostock*, 723 Fed. App'x at 964 (citing *Evans*, 850 F.3d at 1256). Sonia Katyal has previously observed a presumption of polarized, mutual exclusivity in sex such that it can "never rest between the two or challenge the poles altogether." Sonia K. Katyal, *The Numerus* Clausus *of Sex*, 84 U. CHI. L. REV. 389, 430 (2017). The blinkers effect of classification analysis over social context was also apparent in a court's refusal to consider socially ascribed traits in a ban on all-braided hairstyles within the framework of "interacting" sex and race discrimination. Caldwell, *supra* note 229, at 570 (discussing decision dismissing Title VII challenge to no-braided-hairstyles policy based upon race-blind analysis of sex discrimination and sex-blind analysis of race discrimination).

259 As discussed above, the axes address adequacy of pleading that the employer considered his sex-linked trait, rather than sufficiency of proof of causal connection to his termination. *See Evans*, 850 F.3d at 1269 n.14 (Rosenbaum, J., concurring in part and dissenting) (noting he is not proposing mention of lesbian status in pleading is sufficient proof for a successful case: "Of course, a plaintiff who alleges that her employer discriminated against her because she failed to conform to the employer's view that women should be sexually attracted only to men must prove that, in fact, that was a motivating factor" for the adverse action).

first *McDonnell Douglas* prong should be modified to examine sexual orientation as a relational trait inextricable from Mr. Bostock's male sex, just as *Fabian* did with respect to transgender status. In other words, using *Hively's* analysis of sex of comparators as a means to isolate the link to sex, *not* to establish "but-for causation."

Only after isolating the trait, the *causation* connecting his sex-linked trait (sexual orientation) to the adverse employer decision (firing Mr. Bostock) is what is subject to but-for-motive or mixed-motive analysis, not the isolation of the protected trait that multiaxial analysis provides.[260] A Title VII court's obligation is to ensure that sex and gender were "irrelevant to employment decisions."[261] Next, as to causation, it must find that the protected trait could have "actually motivated the employer's decision" (i.e., "had a determinative influence on the outcome").[262] Despite the *Zarda* plurality's elision of trait with causation, the *en banc* decision articulated a standard jury instruction that would treat trait and causation separately:

> [A] plaintiff has the burden of proving, by a preponderance of the evidence, that the defendant intentionally discriminated against the plaintiff because of sex, meaning that the plaintiff's sex was a motivating factor in the defendant's decision to take the alleged adverse employment action against the plaintiff. In a case alleging sexual orientation discrimination under Title VII, an instruction should add that "because of sex" includes actions taken because of sexual orientation.[263]

The State axis features prominently in Mr. Bostock's case, as the Defendant Employer is a local government entity. That he and the agency administered Georgia's family law, including the vital areas of adoption and foster home placement,[264] could yield evidence related to the State's continuing *de jure* exclusion of homosexuality. After *Obergefell* legalized same-sex marriage, Georgia advocacy groups caution that some marriage license clerks may not comply with federal law without couples

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260 *See supra* Part II.B.3 and note 215 (*Zarda* and employee counsel's argument that trait and causation analyses are combined under "but for causation").

261 Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989); 42 U.S.C. § 2000e-2(m) (2012) (prohibiting use of traits as a "motivating factor" in adverse employment decisions).

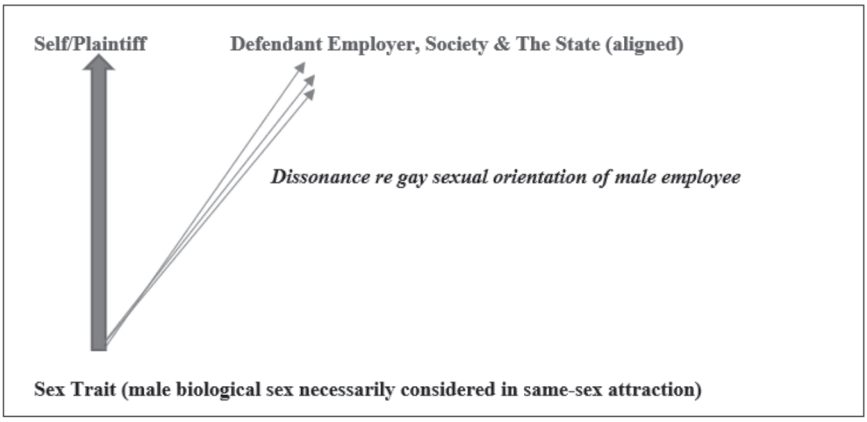
262 *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346 (2013) (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)); *see also* Burrage v. United States, 134 S. Ct. 881, 888–89 (2014).

263 Zarda v. Altitude Express, Inc., 883 F.3d 100, 116 n.11 (2d Cir. 2018) (en banc) (citing 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m)). The post-1991 motivating factor (i.e., "mixed motive") theory is an alternative theory available in a § 2000e-2(a) traditional pretext claim. If Mr. Bostock was deemed after discovery into the suspiciously timed audit still blameworthy in his expenses, sex-based discrimination in the form of anti-gay animus would not entitle him to job reinstatement or compensatory damages such as back pay or emotional distress, but the animus as a motivating factor would yield the Pyrrhic victory of declaratory relief and attorneys' fees. 42 U.S.C. § 2000e-5(g) (2012). The same would apply to Daniel Zarda, whose employer, a skydiving company, terminated him because a female customer claimed that he inappropriately made contact with her during a tandem dive and disclosed that he was gay, although he informed her he was gay "and ha[d] an ex-husband to prove it" to put her at ease before they were strapped together. *Zarda*, 883 F.3d at 108–09. It would be inappropriate for a modern court to interpret § 2000e-2(m) to deem the "biological" sex as an illegal motivating factor apart from the so-called legal "anti-gay" motive under the reasoning in *Hively* and *Zarda* that they are inextricable concepts.

264 *See* Brief for Petitioner, *supra* note 215, at 5 ("[Mr. Bostock] is a dedicated social services professional who has for many years been committed to ensuring that abused and neglected children have safe homes in which to live, grow, and thrive.").

first having to litigate and obtain a federal court order.[265] For example, the state's rejection of same-sex family structures as invalid undermined their adoption of foster children between 2011 and 2015, at the time Mr. Bostock revealed his sexual orientation and was fired.[266] Under multiaxial analysis, Mr. Bostock would be entitled to decisionmakers' communications opining on such policies in discovery. Figure 2 reflects the dissonance between Mr. Bostock's and Defendant Clayton County's axes with respect to his sex, and the relative alignment of the State and Society axes as presented.

Figure 2: Multiaxial Analysis, Sexual Orientation-Based Dissonance in *Bostock v. Clayton County*



2. Wood v. C.G. Studios

In one of the few reported workplace claims addressing intersexuality, *Wood v. C.G. Studios*, multiaxial analysis addresses the sex-based harms that an employee may face when revealing an identity outside of fixed binary sex.[267] C.G. Studios denied Wilma Wood a promotion and terminated her employment after discovering that

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265 *See* GA. CONST. art. I, § IV, para. I (prohibiting marriages between persons of same sex or recognition of same-sex marriages solemnized in other jurisdictions); GA. CODE ANN. § 19-3-3.1 (2019) (same); GA. CODE ANN. § 19-3-30(b)(1) (2019) (regarding provision of marriage licenses); *e.g.*, *Marriage Equality in Georgia, Frequently Asked Questions*, LAMBDA LEGAL, https://s11863.pcdn.co/wp-content/uploads/2015/06/FAQ-Marriage-Equality-in-Georgia.pdf (last visited Apr. 21, 2020).

266 GA. CODE ANN. § 19-3-3.1 (2019) ("the courts of this state shall have no jurisdiction whatsoever under any circumstances . . . to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage"), *superseded by implication by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *e.g.*, Inniss v. Aderhold, 80 F. Supp. 3d 1335, 1340, 1360 (N.D. Ga. 2015) (pre-*Obergefell* opinion denying motion to dismiss same-sex couples' challenge to Georgia's prohibitions on same-sex marriage, noting lesbian couple's claim that as of 2011 they "cannot jointly adopt their [foster] children because Georgia does not recognize their marriage").

267 Wood v. C.G. Studios, 660 F. Supp. 176 (E.D. Pa. 1987). In the only other workplace anti-discrimination decision involving a known intersex plaintiff, brought under analogous state law, a court recently held that plaintiff sufficiently articulated a "gender"-based hostile work environment claim. Hughes v. Home Depot, Inc., 804 F. Supp. 2d 223, 224, 227, 228 (D.N.J. 2011).

she underwent gender-corrective surgery for a so-called "hermaphroditic condition."[268] The multiaxial approach has the capacity to account for an externally ascribed identity. Because Ms. Wood now self-identifies as a binary female, the multiaxial approach allows her to prevail against mere labels to detect socially contested sex characteristics—here, prior intersex status—as a stigma.

a. The Prior Approaches

The court rejected Wilma Wood's claims by relying on *Ulane II* and its progeny, limiting the "plain meaning" of sex to encompass only discrimination against women *qua* women and men *qua* men.[269] Nor would she be recognized under the classification-first approach in *Bostock*, as the court identified her group-based animus as "individuals [who] have undergone gender-corrective surgery,"[270] and related it to "transsexual" status.[271] The comparative binary approach recently advanced in *Zarda* and *Hively* is also inapt, because in its unique context it detects the social role of sex in animosity against same-sex sexual orientation.[272] As identified in Part I, discrimination based upon the sex assigned to someone at birth must contemplate actual sexual variation through intersex or non-binary status as a subset of "sex."

b. Multiaxial Analysis

As discussed above, multiaxial analysis acknowledges that there is no single paradigm for discrimination nor essentialist experience of harassment faced by sexual minorities across all employers. Nor are certain trait-based dynamics constant over time, across work settings, or throughout one's life.

Ms. Wood's dignitary interest remained in being recognized as a woman, having obtained surgery to affirm her sex and gender identity as female (the Plaintiff axis). The studio was hostile toward Ms. Wood because of her former intersex status and subsequent change in sex, rather than her current binary-presenting identity (the Defendant Employer axis), generating dissonance between the two axes in the form of stigma. Her change in sex from intersex to female (literally, a trans-sexual change) should have been treated as direct evidence of the studio's unlawful consideration of Ms. Wood's sex (both former and current) in its decisions. Summary judgment should have been granted to Ms. Wood rather than denied.[273] Further, the court, as the State, joined the Defendant Employer in viewing her as having a

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268 *Wood*, 660 F. Supp. at 176. Employment claims by intersex plaintiffs are less common in that they may be less visible: members may publicly express their gender aligned with a sex binary and thereby avoid gender policing or other harassment based on their sex characteristics. *See* Janet Dolgin, *Discriminating Gender: Legal, Medical, and Social Presumptions About Transgender and Intersex People*, 47 SW. L. REV. 61, 96–97 (2017).

269 *Wood*, 660 F. Supp. at 177–78 (interpreting state statute with "because of . . . sex" provision identical to Title VII).

270 *Id.* at 177.

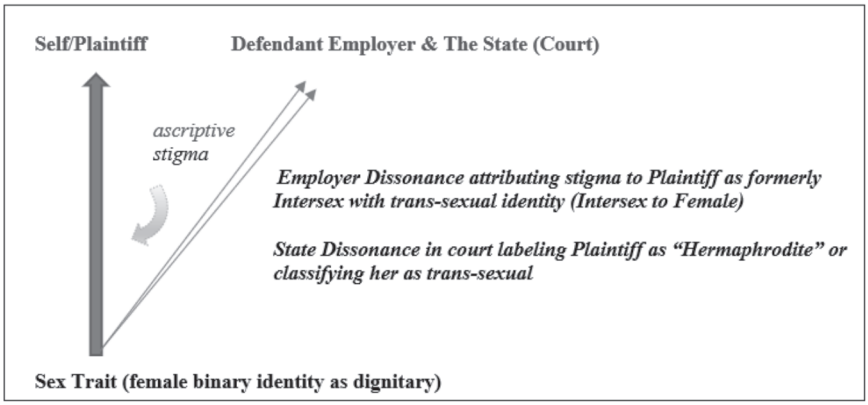
271 *Id.* at 178.

272 Nor would the associational discrimination method, akin to Loving v. Virginia, 388 U.S. 1 (1967), apply to this situation where intimate associations are not in the case.

273 Multiaxial analysis would, however, eliminate any special proof structures resulting from direct or circumstantial evidence, as in all other types of civil claims. Application of the *McDonnell Douglas* Test to a mixed-motive theory under § 703(m) would produce incoherent results.

"hermaphroditic condition" and being trans-sexual, rather than dignifying Ms. Wood's self-identification. The relative positions of the axes in Ms. Wood's case are illustrated in Figure 3:

Figure 3: Multiaxial Analysis, Trans-Sexual Dissonance in *Wood v. C.G. Studios*



Under this approach, animosity against an intersex individual with the inverse chronology of events would also be cognizable. If C.G. Studios had thought its employee was a binary female with respect to sex and gender identity, but fired its employee for planning to adopt an original intersex sex and non-binary gender identity, that firing too would be sex-based discrimination.

In this sense, *Loving v. Virginia*'s substantive-equality holding is even more powerfully illustrated under multiaxial analysis. Its invalidation of anti-miscegenation laws as violating equality recognized that trait-based "purity" is in line with the multiaxial analysis's ability to detect subordination. A defendant's ideological beliefs regarding sex as a fixed, binary category, expressed in *Wood* through economic harm toward intersex individuals, is a sex-supremacist view that violates Title VII. By contrast, looser classificationist theories such as sex stereotyping may well describe the harm in some cases, but not all.

C. Intersectionality and Multiaxial Analysis

By paying attention to the unique context of the particular parties and evidence in each case, the multiaxial framework fundamentally expands our evidentiary and narrative abilities to articulate how intersectional discrimination operates. The *sui generis* approach of multiaxial analysis avoids what critical race theorists Devon Carbado and Cheryl Harris identified as intersectionality critiques simply generating new forms of essentialism.[274]

Intersectionality research has demonstrated that employees discriminated against based upon a confluence of traits, for example, racialized sexual hostility, have an exceedingly low chance of success in the courts due to the

[274] Carbado & Harris, *supra* note 34, at 2200 (disaggregating intersectionality and anti-essentialism).

compartmentalized evidentiary rules that drive substantive fact-finding.[275] Some judges spurn overlapping or mutually-defined theories of harm "governed only by the mathematical principles of permutation and commutation, clearly rais[ing] the prospect of opening the hackneyed Pandora's box"[276] or creating a "many-headed Hydra . . . splinter[ing Title VII] beyond use and recognition."[277] Such declarations reveal that these courts are beholden to an imagined duty to apply the old rules to all forms of discrimination, particularly to forms less familiar to them.[278] A situationally variable approach, on the other hand, addresses the important critique that, for example, there is no singular Black women's experience within a static hierarchy, and that subordination and privilege can both be present but illuminated by particular contexts.[279]

Current trends shift to advising plaintiffs with a sex claim to assert it under either sex alone or a sex-plus analysis.[280] However, those doctrines fail to capture the full competence of the statute or our courts and presuppose too much about the facts of every Title VII case. Indeed, the judiciary's application of intersectionality theory reached a high-water mark in the 1980s, after the Tenth Circuit held in *Hicks v. Gates Rubber Co.* that a Title VII plaintiff who experienced hostility as a Black woman could aggregate evidence of anti-Black racial animus generally *with* evidence of sexual hostility generally in support of her sex-based hostile work environment claim.[281] A situationally variable approach understands that one's identity as a Black woman does not predetermine the forms of discrimination she may face.[282]

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275 Empirical research in intersectionality scholarship further substantiates the problems in how courts apply anti-discrimination laws. *See, e.g.*, Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 1009, 1011 (2011) (reporting sampling in which plaintiffs with multiple claims were only half as likely to win their cases as other plaintiffs); Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1459 (2009) (reporting sampling in which employers prevailed at summary judgment, in whole or in part, in multiple-claims cases at a rate of 96%, as compared to 73% in employment discrimination claims in general).

276 Degraffenreid v. Gen. Motors Assembly Div., St. Louis, 413 F. Supp. 142, 145 (E.D. Mo. 1976).

277 Judge v. Marsh, 649 F. Supp. 770, 780 (D.D.C. 1986). Rarely, if at all, do criminal opinions applying general- or specific-intent statutes bemoan the potential kaleidoscopic variation inhering in human thought.

278 This Article acknowledges that intersectionality inheres in everyone across contexts, and that sexual minorities include racial minorities, and vice versa. Where necessary to the analysis, this Article denotes distinct groups but recognizes they comprise some of the same individuals.

279 Hutchinson, *supra* note 34, at 312–13; *see also* Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42, 51–52 (1988).

280 *E.g.*, Elengold, *supra* note 25, at 479–80 (urging expansion of the "sex-plus" doctrine as overlapping "circles" of identity such as race and sex, and individuals with similar intersecting identities as individual points and collective clusters). Empirical research in intersectionality scholarship further substantiates the flaws in compartmentalized theories of discrimination. *See* Wood v. C.G. Studios, Inc., 660 F. Supp. 176 (E.D. Pa. 1987).

281 Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987) (citing Jefferies v. Harris Co. Cmty. Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980)).

282 Crenshaw called this critique the "single categorical axis." Crenshaw, *supra* note 84, at 140.

In this way, a Black transgender man could raise without exclusion any gender hostility he faced that was inextricably related to his race or color.[283] Title VII does not require a one-size-fits-all approach to cases with interlocking claims. This is not to say that aggregate comparators are never a proper mode of proving disparate treatment; they may be sufficient in some cases, but not necessary. In one example, a Kentucky court recently held under the compartmentalized comparisons that a Black transgender man, Mykel Mickens, adequately alleged race- and gender-based harassment and firing based upon General Electric's denying him use of a bathroom close to his workstation, addressing harassment targeted at a white woman but not harassment targeted at him, and harshly reprimanding him for conduct for which other employees were not reprimanded.[284] By contrast, sex-based harassment may well have been more salient than racism against the plaintiff in *Jeffries*, but to turn a blind eye to social context and exclude those workplace dynamics as irrelevant was legal error.[285]

Unfortunately, because few opinions address simultaneous dimensions of identity, litigants and their counsel in turn theorize Title VII cases in compartments and to limit characterization of the evidence at the pleading stage, as appears to have happened to Mr. Mickens's terse complaint framed around comparators rather than the interaction of his race and transgender status. Ruthann Robson and Rosenblum have raised concerns that "but-for" comparative arguments set up a one-off standard for queer communities in achieving perfect citizenship, thus failing to reach all individuals when queer-based status is centered at the exclusion of intersectional identities of class, sex, race, sexual practice, and gender performance.[286]

Consider the following atomized approach at summary judgment in a case alleging only color-based discrimination, but where sex also could have been concurrently pled. In *Brack v. Shoney's, Inc.*, a Tennessee district court concluded that Jerry Brack, a gay African American employee who is dark-skinned, would be unable to prove discrimination based upon color with respect to his demotion and termination.[287] Mr. Brack was a restaurant supervisor whose boss, Victoria Chevalier, referred to him as "the little black sheep" or "the black sheep" on several occasions.[288] She stated that a promotion to a store with a higher sales volume required someone "fair-skinned."[289] His boss made these remarks around the time that she denied Mr.

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283 *See, e.g.*, Richard Juang, *Transgendering the Politics of Recognition*, *in* THE TRANSGENDER STUDIES READER 706, 711 (Susan Stryker and Stephen Whittle, eds., 2006) (observing that skin color, age, and class, *inter alia*, also shape views of the presence of a transgender woman in the women's restroom as a "threat," where transgender individual is instead at risk).

284 *See* Mickens v. Gen. Elec. Co., No. 3:16CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 29, 2016).

285 *Jeffries*, 615 F.2d at 1035–36.

286 Darren Rosenblum, *Queer Intersectionality and the Failure of Lesbian and Gay "Victories"*, 4 LAW & SEXUALITY 83, 85–86, 93–96 (1994), https://ssrn.com/abstract=897584 (citing Ruthann Robson, Address at the Conference of the National Lesbian and Gay Lawyers Association (Oct. 24, 1992)).

287 Brack v. Shoney's, Inc., 249 F. Supp. 2d 938, 950 (W.D. Tenn. 2003).

288 *Id.* at 943, 948.

289 *Id.* at 948.

Brack the position and demoted him to a lower-volume store.[290] Ms. Chevalier, who is also Black, referred to Mr. Brack as "unusual" (which a witness took to refer to his sexual orientation) and as "Princess Diana," which Mr. Brack (or his counsel) interpreted to refer only to his sexual orientation.[291]

Although Mr. Brack was held accountable for cash shortages at closing on three occasions, the court considered the "fair-skinned" comment as direct evidence of colorism only as to one act.[292] The court believed that he could, however, prove such discrimination only with respect to hostile work environment and retaliation.[293] It did not consider whether a jury could interpret Ms. Chevalier's view of Mr. Brack as compromised as to all employment decisions.[294] The parties and court should have explored whether the "Princess Diana" comment could mock his skin tone along with his sexual orientation. Similarly, multiaxial analysis would have required the court to consider whether Ms. Chevalier pejoratively viewed Mr. Brack as "unusual" for a Black man because he is gay, as she demoted a lighter-skinned peer for the same cash-handling violations and replaced Mr. Brack with a darker-skinned employee.

In the context of race, the Court has been willing to discipline lower courts when they fail to meaningfully evaluate the influence of other dimensions of bias, even if they are not based on an additional statutory ground.[295] In 2003, the Court considered a case in which a Tyson poultry plant failed to promote two Black petitioners, Anthony Ash and John Hithon, to shift manager positions by promoting two white males instead.[296] After Mr. Ash and Mr. Hithon prevailed at trial, the district and appellate courts believed that a new trial was warranted, disregarding evidence that the plant manager referred to each of the petitioners as "boy" multiple times. A unanimous Court disagreed with the panel's holding that the "boy" comments required "modifi[cation] by a racial classification like 'black' or 'white'" before they could evidence a connection to race.[297] Rather, the *Ash* Court held that the "speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage."[298] Certainly, socio-historical usage of the word "boy" to humiliate and subordinate adult Black male peers illustrates how courts can go awry with evidentiary rules at the expense of Title VII's remedial goals.

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290 *Id.* at 944.

291 *Id.* at 943.

292 *Id.* at 948.

293 *Id.* at 952–55.

294 *See, e.g.*, Sogg v. Am. Airlines, 193 A.D.2d 153, 161 (N.Y. 1993) (upholding jury verdict finding gender, age, and disability discrimination and holding record could support inference that earlier discriminatory animus from failure-to-promote claim also permeated discriminatory termination of employment).

295 cunningham, *The Rise of Identity Politics I*, *supra* note 32, at 499 ("Few courts have been willing to do the calculus for the intersection of more than two forms of oppression.").

296 All facts are derived from Ash v. Tyson Foods, Inc., 546 U.S. 454, 455 (2006) (per curiam).

297 *Id.* at 456.

298 *Id.*

D. Responses to Anticipated Counterarguments

This Part addresses the charge of judicial legislating driving the *Bostock*, *Zarda*, and *Hively* dissents. Furthermore, this Part addresses the critique that courts cannot possibly handle detailed inquiry into the social construction of traits.

Absent dispositive legislative history on the sex provision, the judiciary has imposed its own theories of democracy to legitimize statutory interpretation.[299] Courts unnecessarily assert that original and public meanings in debates cannot exist outside of "formal governmental institutions."[300] This underpins the decidedly unempirical view that failure to pass legislation adding sexual orientation and gender identity as protected traits proves legitimate democratic disfavor.[301] Yet courts exclude sexual minorities whether or not they view the words "because of sex" to be unambiguous. The new-textualism approach yielded the admission in *Oncale* that Congress intended to strike at the entire spectrum of disparate treatment but could not anticipate the particulars, leaving courts to "give effect to the broad language that Congress used."[302] Statutory analysis "must begin . . . with the language of the statute itself" and if the statute's language is plain, "the sole function of the courts is to enforce it according to its terms."'[303]

Interpreting Title VII to reach socially contested traits is a task delegable to trial courts. A multiaxial, socially contextual approach cannot be deemed simply a project of representation reinforcement shaped by the politics of exclusion.[304] Judicial responses hostile to open contextual, non-formulaic inquiry in civil rights cases reflect the fact that some jurists do not wish to take on the anti-discrimination work that Congress delegated to them.[305]

Multiaxial analysis may also encounter resistance from both conservatives and civil rights advocates. One reason is that it does not provide a one-size-fits-all rule. Rather, it requires context to operate. A court once complained that it should not be tasked with "grading competing doctoral theses in anthropology or sociology."[306] Setting aside the divide-and-conquer approach of the old rules, however, is necessary to achieve the socially informed, circumstantial approach in *Ash*. In

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299 Schacter, *supra* note 36, at 595.

300 *Id.* at 663 (emphasis omitted).

301 Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.").

302 Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78 (1998) (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)); Zarda v. Altitude Express, Inc., 883 F.3d 100, 115 (2d Cir. 2018) (en banc) (citing Pullman-Standard v. Swint, 456 U.S. 273, 276 (1982); Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)).

303 Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 119 (2006) (Scalia, J., dissenting) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)).

304 *See also* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071 (1991).

305 I intentionally draw a parallel here between some courts' disfavor of Title VII claims and their reluctance to implement the racial desegregation of public schooling. *See* DERRICK A. BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 112 (2004) (noting "judicial reluctance to push court-ordered desegregation" causing schools to remain racially unintegrated by the 1980s).

306 EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1034 (11th Cir. 2016).

addition, litigation strategies with respect to social identities from time to time may become tailored to satisfy conservative courts rather than reflect multiplicity and fluidity.[307] Multiaxial analysis realizes Harris's earlier principle, that the law should not eschew categories altogether but explicitly treat them as "tentative, relational, and unstable."[308] It provides a concrete method of approaching social variables that does not succumb to postmodern impracticability. Rather, all legal actors must do their part to develop the doctrine, starting with counsel who draft more expansive pleadings, use multiaxial narrative in briefs, employ experts, and obtain more detailed discovery.

Whether specialized knowledge is required to adjudicate the claims depends on the nature of the case. Experts in occupational psychology can explain the connections to the workplace and are subject to the usual testing.[309] Some Justices noted that they may not have deemed such testimony necessary in the first place as to Ms. Hopkins's partner evaluations from *Price Waterhouse* that employed stereotypes.[310] But courts do not regret the assistance of experts in areas unfamiliar to most judges and juries, and should not. Where formalist judges could not understand the links between sex discrimination and pregnancy, marital status, and domestic violence, lawmakers and officials instantiated the meaning through amendment or agency guidance. [311] Expert testimony and amici have always been helpful in explaining how, for instance, traits such as sexual orientation and transgender status are inherently sex-dependent and how they may arise in work settings.

In the landmark case *Doe* ex rel. *Doe v. Boyertown Area School District*, the trial court and Third Circuit relied upon experts in a gender identity and privacy case brought to exclude transgender children from public school restrooms.[312]

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307 Rosenblum, *Queer Legal Victories*, *supra* note 44, at 50.

308 Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586 (1990).

309 Price Waterhouse v. Hopkins, 490 U.S. 228, 235–37, 255–56 (utilizing social psychologist and professor to determine disparate treatment based upon sex); Jensvold v. Shalala, 829 F. Supp. 131, 138 (D. Md. 1993) (same, with respect to behavioral science and psychology experts in case against federal government employer National Institute of Mental Health).

310 "It takes no . . . expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism." *Price Waterhouse*, 490 U.S. at 256.

311 *See* 29 C.F.R. § 1604.10(a) (2019) (defining restrictions based upon pregnancy, childbirth, and related medical conditions as sex discrimination pursuant to Title VII) and *supra* notes 102–03; 29 C.F.R. § 1604.4(a) (2019) (defining marriage-based restrictions in employment as sex discrimination pursuant to Title VII); U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking* (Oct. 12, 2012), https://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm; *see also* Julie Goldscheid, *Gender Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. 61, 69 (2008) (arguing that while "[d]omestic and sexual violence may appear to be 'gender neutral,' in that these acts may be committed by and against both women and men," in practice "they are inextricably connected to gender discrimination in a general, rather than an individual sense, by virtue of their disproportionate impact on women as victims, [and] the surrounding social and historical context").

312 Doe *ex rel.* Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 522–24 (3d Cir. 2018).

Addressing Title IX law doctrinally analogous to Title VII, the testimony provided vital background on the medical necessity of consistent treatment in one's affirmed gender. It also relied on the American Academy of Pediatrics' amicus brief reporting that policies that exclude transgender individuals exacerbate the individual's risk of "anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide," and "other adverse outcomes."[313] Even without a catch-all method like classification analysis, such testimony may be replicable across common situations. For example, a trial court in Florida accepted similar evidence in an affirmative Title IX case brought by a transgender girl,[314] and similar expert medical background assisted the constitutional challenge to the Trump Administration's ban on military service based upon gender dysphoria.[315]

Parallels may be drawn to invidious colorism. In one case, a court permitted two experts to explain how lighter-skinned Blacks may be perceived by Black employees with darker skin tone as receiving preferential treatment, within the larger social context of whiteness as a privilege.[316] Colorism in an opposite context may also be true, as in a case alleging discrimination by darker-skinned Pakistani citizens against a lighter-skinned Pakistani citizen in the United States. There, the court noted that "the presumption of a protected . . . status on the basis of color is bound up with an entire national racial history," and held that a complete record at summary judgment required "evidence by way of expert testimony or treatise" to provide guidance.[317]

The intersectional capacity of multiaxial analysis across anti-discrimination statutes, such as race and disability, or age and religion, is beyond the scope of one article, and will be addressed in upcoming research reviewing the precedent and illustrating approaches. Although legal scholars have noted the difficulties that non-identical statutory language may pose across statutes even though such claims have increased over time,[318] it is important to note that unlike their federal counterparts, state and local antidiscrimination laws often combine all protected traits under one

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313 *Id.* at 523, 523 n.17.

314 *See also* Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cty., 318 F. Supp. 3d 1293, 1298–99, 1298 n.14 (M.D. Fla. 2018) (in findings of fact for Title IX case brought by transgender student, defining possible conceptions of gender relying upon evidence of expert in developmental and clinical psychology specializing in treating transgender children and upon similar medical amici).

315 Karnoski v. Trump, 926 F.3d 1180, 1187 n.1 (9th Cir. 2019) (per curiam) (citing Brief of Amicus Curiae Am. Med. Ass'n et al. regarding transgender individuals with gender dysphoria and outlining the sex and gender affirmation process).

316 Walker v. Sec'y of Treasury, 742 F. Supp. 670, 675 (N.D. Ga. 1990); *cf.* Kotkin, *supra* note 275, at 1448–49 (advocating for normalizing more extensive discovery and use of experts for plaintiffs bringing multiple or overlapping claims of discrimination).

317 Ali v. Nat'l Bank of Pak., 508 F. Supp. 611, 612–14 (S.D.N.Y. 1981).

318 *See* Kotkin, *supra* note 275, at 1487–97 (analyzing cases raising multiple claims, including cross-statutory claims, and multiple-claim cases and observing some courts "have so constrained the universe of available proof that it is impossible for plaintiffs to tease out a culture of subtle bias against those who bring the most diversity to the workplace"); *id.* at 1457 (citing study in which multiple-claims cases comprised 58% of employment cases in dataset).

statute, and would not be preempted by federal law.[319] Ultimately, the chief challenge to multiaxial analysis is not a lack of broad legal authority, duly entrusted to the courts, but rather courts' neutrality and a respect for precedent willing to address substantive questions.

CONCLUSION

Title VII causation doctrine remains fraught with conceptual error and is statutorily inadequate. Treating "sex" as a binary, fixed, and homogenous classification misapprehends both actual sex and what an aggrieved worker may articulate and ultimately prove. Classification-only causation approaches have strained theoretical legitimacy and utility under the amended statute. As decisions within the post-2015 correction demonstrated, Title VII is capable of contextually variable answers and may navigate the socially contested nature of traits,[320] just as *Ulane I* did for sex.

Multiaxial analysis is consistent with Title VII's statutory text and goals as a powerful, remediating law that draws from social contexts for enforcement. In light of *Bostock*'s paradigm shift toward expansive causation, stakeholders including jurists, counsel, and parties must resist totalizing approaches that undermine the law's normative core.

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319 *See* Calif. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) (holding state law granting pregnant employees up to four months of unpaid leave not preempted by Title VII's sex provision).

320 Abrams, *supra* note 26, at 2533; Kwan, *supra* note 219, at 688.