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DEHUMANIZATION "BECAUSE OF SEX": A NEUTRAL APPROACH TO THE RIGHTS OF SEXUAL MINORITIES UNDER MULTIAXIAL ANALYSIS

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ABSTRACT

*As the Court evaluates the scope of sex under Title VII, narrowing discourse over the ends versus the means of coverage endangers the very meaning of discrimination. Absent from the scholarship is an accurate appraisal of Title VII's trait and causation requirements — in these cases, "because of sex" — that rebuts the classification rules that courts have long claimed to be familiar, fair, and inevitable. This Article first identifies, then theorizes, a historic consensus of lower courts since 2015 that adopted a viewpoint-neutral approach to "sex" as a socially defined trait (the "*post-2015 consensus*"). These decisions present a doctrinal correction only in part, however. In the most prominent argument from this Term, scholars and civil rights advocates invariably treat sex stereotyping as an all-purpose tool to detect social animus against LGBTQIA+ individuals ("*sexual minorities*"). However, this ebullient view ignores the costs of limiting Title VII to a dimorphic paradigm of sex. Other decisions such as* Zarda v. Altitude Express, Inc. *incorrectly conflate the breadth of a protected trait with the cause of the discrimination. These doctrinal gaps will only grow as the administrative state increasingly expands the scope of sex beyond a fixed binary.*

This Article argues that the evidentiary jurisprudence driving Title VII's substantive work is unnecessarily regressive, due to historic ties to constitutional classification and its identity politics. It provides an original account of the principles driving the post-2015 consensus, by highlighting juridical bias and the unworkability of the old rules. As a doctrinal correction, these courts sought to return to the statute's broader command to evaluate social context in detecting subordination. Arguments in the trio of LGBT cases this Term regressed despite courts' recent openness to recognize sex as pluralistic. If the reasoning in the trio of cases this Term crudely — and unnecessarily — equates "but-for" classification with causation, the vitality of Title VII may well be undermined even if plaintiffs prevail.

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Against this backdrop, the Article introduces "multiaxial analysis," *a framework to identify the role of Title VII's traits along the following axes — the individual self, the defendant employer, society, and the state. These axes interactively generate animus whenever harms arise because of dissonant views of one's protected trait or traits. This wholly contextual approach to subordination can convey intersectional dynamics that inhere in all discrimination. Multiaxial analysis is a theoretical model that responds to what courts have sought for decades and implemented in part in the post-2015 consensus. A civil rights framework and its public narratives, in short, must be non-formulaic to give full effect to a normative statute.*

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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 fired her the following year, claiming that she was mentally ill and unfit to fly, despite certification from the FAA to the contrary.[3] In a post-trial opinion that weighed extensive testimony, 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, and it remains so nearly four decades later. 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]

The Court then that when the airline took adverse actions against Ms. Ulane because of her "transsexual" status, addressing causation as question of fact, it engaged in discrimination. *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

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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*").

3 *Id.* at 1082.

4 *Ulane I*, Inc., 581 F. Supp. 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 the category "Spanish heritage population" in the 1970 U.S. census, and after political pressure, the 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, and agender 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 v. E. Airlines, Inc., 581 F. Supp. at 823.

9 *Id.* at 836; *see also supra* n. .

Circuit reversed. Rejecting a socially constructed view of sex, the appellate court invoked the "ordinary, common meaning" of sex by limiting Title VII to "discriminat[ion] against women because they are women and against men because they are men" and characterizing Ms. Ulane as one "discontent with the sex into which they [sic] were born."[10] But it is *Ulane I* that, thirty years later, exemplifies a modern applying a socially defined, i.e., multi-perspective analysis of sex.[11] *Ulane I* reflects an understanding that no differently from race, color, and religion, sex has meanings that are contextual. Ms. Ulane petitioned for Supreme Court review and — perhaps concerned the Justices would side with Judge Grady's pluralistic approach to sex — Eastern Airlines settled the case at a premium, mooting the appeal.[12]

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It may surprise the general public that Title VII does not define "discrimination," nor most of the enumerated traits it protects, including "race," "color," "sex," and "national origin."[13] The open-ended nature of these provisions is remarkable. At a minimum, it reflects the widescale privation and threats of violence that excluded minorities from the ballot box, public accommodations, and full economic participation.[14] A framework to identify the breadth of the five traits was perhaps unneeded because Congress believed courts would careful scrutinize how the traits, singly or simultaneously,[15] operated in each case. The Justices and lower courts traditionally interpret the reach of Title VII by acknowledging its remedial statutory purpose and construing it broadly to favor protection.[16] But many courts found it difficult to conceptualize discrimination against sexual minorities, resulting in decisions that contradict the statute's text. Increasing unpredictability in the Court's workplace discrimination rulings risk veering into statutory incoherence,[17] although state and local law increasingly innovate in this area.[18]

This Article identifies and theorizes an extraordinary consensus of federal courts since 2015 that adopt an institutionally neutral approach to sex (hereinafter, the "*post-2015 consensus*").[19] It posits the trend as part of a doctrinal correction, marking a return to the statute's broader command that courts analyze potential discrimination in context. These decisions respond to several developments. The body of early Title VII law was deeply

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

11 For further discussion of the doctrinal correction, see Part II.B *infra.*

12 *See Inside: the Judiciary, Burger Takes Hill's Advice,* WASHINGTON 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).

13 42 U.S.C. § 2000e-2(a). "Religion" is defined in Title VII's definitions section. 42 U.S.C. § 2000e(j).

14 *See infra* n. and Maria L. Ontiveros, *The Fundamental Nature of Title VII*, 75 OHIO ST. L.R. 1165, 1166-67, 1173-74 (2014).

15 *See generally* Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713 (2015).

16 *See, e.g.,* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

17 Stephen M. Rich, *A Matter of Perspective: Textualism, Stare Decisis, and Federal Employment Discrimination Law*, 97 S. CAL. L. REV. 1197, 1240 (2014).

18 *E.g.,* Shirley Lin, "LGBTQIA+ Discrimination" in EMPLOYMENT DISCRIMINATION LAW AND LITIGATION §§ 27:1, 27:12 (Thomson West 2019) (discussing state and local laws defining sex and gender discrimination pluralistically, including the New York City Human Rights Law).

19 For a full discussion of the "post-2015 consensus," *see* the discussion *supra* nn. and accompanying text.

influenced by constitutional law's focus on classification and identity essentialism since the early 1970s.[20] Also during this time, the Court fashioned narrow methodologies to define what constitutes discrimination, and has been repeatedly overridden by Congress for so doing.[21] Increasingly formalistic interpretations of the statute have become untenable once Congress insisted, in 1991, that "motive" and "factors" are appropriate frames for detecting discrimination.[22] Finally, rather than judicial legislating, the majority of courts hearing the cases of LGBTQIA-identified individuals have undertaken a deeper correction in the face of juridical bias and interpretations that ignore the plain text. Evidentiary methods that erasure LGB,[23] transgender,[24] intersex,[25] non-binary,[26] and gender-fluid[27] communities facing invidious harm because of their identities reify the problems Title VII was designed to remediate.

Trait Plus Causation: The Road from Price Waterhouse *to* Oncale

Courts generally evaluate whether harmful conduct is prohibited under Title VII by applying the following formula: (a) protected trait + (b) causation. For the majority of Title VII's history, the Court anchored its sex-discrimination jurisprudence in the statutory language, "because of . . . sex," which articulates the two elements.[28] In *Price Waterhouse v. Hopkins*, the Court affirmed sex-stereotyping evidence as a means of proving that (a) the protected trait of "sex" was met.[29] *Price Waterhouse* also made clear that whether a defendant "actually relied" on the sex-based misconduct (there, stereotyping), must also be proven to satisfy (b) causation.[30] The two steps have been treated as distinct because they serve different purposes. The scope of the trait element is a legal question, subject to common-law adjudication, and the causation element is a factual question that the statute entrusts to a jury.[31]

Oncale v. Sundowner Offshore Oil Services[32] marked the Court's almost imperceptible departure from treating the two elements as distinct. The 1998 decision cemented new

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20 *See* discussion *infra* at Parts I, II.

21 *See* discussion *infra* at Parts I.B, II, and *infra* n. [Malamud].

22 *See* discussion *infra* at Part II.

23 "LGB" refers to lesbian, gay, and bisexual, and "LGBT" will refer to situations specific to LGB and transgender individuals.

24 "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.

25 "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. Eskridge, Hunter & Joslin, 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. OF HUM. BIO. 151, 1, 159 (2000).

26 "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).

27 "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* Oxford English Dictionary, gender-fluid, (3d ed. 2004).

28 42 U.S.C. §2000e-2(a).

29 490 U.S. 228, 251 (1989) (plurality).

30 *Id.* at 288.

31 42 U.S.C. § 1981A(c), as amended by the Civil Rights Act of 1991.

32 523 U.S. 75 (1998); *see* full discussion in Parts II.A, II.B.3 *infra*.

textualism in Title VII jurisprudence. Plaintiff Joseph Oncale's allegations centered around a brutal course of sexual harassment and assault by his male supervisors and co-worker. Writing for the Court, Justice Scalia provided a few examples of discrimination under reasoning that conflated and obscured the two elements under the language of "reasonableness." *Oncale* avoided theorizing sexually derogatory harassment between two individuals of the same sex as *per se* sex-based — which would have fulfilled element (a). Instead, the Court devoted its reasoning to some illustrative evidentiary routes that would fulfill element (b), causation. But the routes Justice Scalia named only raised two subordination theories that relied on sex-based categories and gave preference to heterogenous groupings of two sexes: first, male-female sexual misconduct, which he held would provide "reasonable" inferences of sexual desire as a motive;[33] and second, comparative group favoritism, i.e., men over women or vice-versa.[34] Importantly, *Oncale* also held that sexual desire was not required to prove causation and that intra-group discrimination may also be actionable.[35] Closing its terse discussion, the Court expressed its intent that the four routes serve as non-exclusive examples of sex discrimination.[36]

However, *Oncale*'s gravest omission is that it never returned to element (a) — the sex trait in operation. The decision's conflation of trait and causation through comparative categories reflected new textualism's unwillingness to articulate the remedial goals of Title VII.[37] Otherwise, the Court would have had to expand on existing anti-subordination theories to interpret sexually explicit or dehumanizing sex-based acts as abuses of power that could be applied to all-male workplaces like Mr. Oncale's. Lower courts were thus on their own to theorize grounds of subordination that also meet the statutory language.[38]

The Post-2015 Consensus as Precursor to Multiaxial Analysis

Since 2015, a majority of federal courts sought more nuanced approaches to anti-discrimination cases brought by LGBT plaintiffs. The trend is monumental, spanning two circuit court decisions concluding that employees discriminated against based upon their transgender status may bring Title VII sex discrimination claims;[39] two circuit courts *en banc* holding the same with respect to employees discriminated against based upon their sexual orientation;[40] three circuit court decisions finding transgender students are covered under Title IX's analogous

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33 *Oncale*, 523 U.S. at 80.

34 *Id.* at 80-81.

35 *Id.* at 80 (providing four evidentiary routes as "example[s]" of sex-based harassment).

36 *Id.*

37 *See* discussions *infra* Part II.A, II.B.3.

38 *Id.* at 79-80 ("Our holding that [reasonably comparable evils] include[] sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.").

39 EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560 (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.

40 Zarda v. Altitude Express, Inc., 883 F.3d 100, 121 (2d Cir. 2018) (en banc) (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).

provisions;[41] and the vast majority of district courts adjudicating these issues nationwide.[42] 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.[43]

However, commentary around the three Title VII cases addressing transgender identity and sexual orientation this Term — *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*;[44] *Altitude Express, Inc. v. Zarda*;[45] and *Bostock v. Clayton County, Georgia*[46] has largely ignored the more

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[41] Whitaker v. Kenosha Unified Sch. Dist. No. 1, 858 F.3d 1034 (7th Cir. 2017); Dodds v. U.S. Dep't of Educ., 845 F.3d 217 (6th Cir. 2016). District court IX decisions include Gavin Grimm's action after remand from the Supreme Court, *Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-cv-00054, slip op. at 21 (E.D. Va. Aug. 9, 2019); Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty., 318 F. Supp. 3d 1293 (M.D. Fla. 2018); Grimm v. Gloucester Cty. Sch. Bd., 302 F. Supp. 3d 730 (E.D. Va. May 22, 2018); M.A.B. v. Bd. of Educ. of Talbot Cty., 286 F. Supp. 3d 704 (D. Md. 2018); A.H. v. Minersville Area Sch. Dist., 290 F. Supp. 3d 321 (M.D. Pa. 2017); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267 (W.D. Pa. 2017); Bd. of Educ. of the Highland Sch. Dist. v. Dep't of Educ., 208 F. Supp. 3d 850 (S.D. Ohio 2016).

[42] Title VII decisions include EEOC v. A & E Tire, Inc., 325 F. Supp. 3d 1129, 1136 (D. Colo. 2018); Tudor v. S.E. Okla. State Univ., No. 15–0324, Verdict Form, at 2, ECF No. 262 (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. 615CV1029ORL41GJK, 2017 WL 347582, at *10 (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 Company, 915 F.3d 328 (5th Cir. 2019) (opining that Title VII sex discrimination does not cover discrimination against transgender individuals) (Ho, J., concurring); Bostock v. Clayton Cty., Ga., No. 17-13801, 723 Fed. App'x 964 (11th Cir. May 10, 2018) (holding Title VII sex discrimination does not prohibit anti-homosexual animus*)* (summary order); Evans v. Ga. Regional Hosp., 850 F.3d 1248 (11th Cir. 2017) (holding Title VII sex discrimination does not prohibit anti-homosexual animus *in se*, and remanding for amendment of sex stereotyping claim).

[43] Doe ex rel. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018) (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), pet. for cert. denied (U.S. May 28, 2019). Katie Eyer has observed that increasingly "meaningful engagement" of federal courts' textual approach with LGBTQIA advocacy blazed the path. Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 53 WAKE FOREST L. REV. 63, 83 (2019). I argue that additionally, the EEOC's decision to interpret sex discrimination to reach bias against transgender, lesbian, gay, and bisexual employees through agency decisions and its strategic enforcement litigation since 2012, including *EEOC v. R.G. & G.R. Harris Funeral Homes*, had the greater role in bringing about the post-2015 consensus than the otherwise significant public values embodied in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *See* Equal Emp. Opp'y Comm'n, *U.S. EEOC Strategic Enforcement Plan FY 2013-2016* at 10 (2012), https://www.eeoc.gov/eeoc/plan/upload/sep.pdf; Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015) (recognizing anti-gay animus as sex discrimination under comparator, associational, and sex-stereotyping theories); Lusardi v. McHugh, EEOC Doc. No. 0120133395, 2015 WL 1607756 (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 Decision No. 0120130992, 2013 WL 2368729 (May 21, 2013) (recognizing anti-transgender animus as sex discrimination); Macy v. Holder, EEOC Appeal No. 0120120821 (Apr. 20, 2012) (same).

[44] Pet. for a Writ of Cert., No. 18-107 (U.S. July 20, 2018); granted Apr. 22, 2019.

[45] Pet. for a Writ of Cert. at i, No. 17-1623, (U.S. May 29, 2018); granted Apr. 22, 2019.

[46] Pet. for a Writ of Cert. at i, No. 17-1618, (U.S. May 25, 2018); granted Apr. 22, 2019. The author was a signatory to the Supreme Court amicus brief of Law & History Professors in Support of Respondent in *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107 (U.S. July 3, 2019); and to the Brief of Employment Discrimination Law Scholars as *Amici Curiae* in Support of the Employees in *R.G. & G.R. Harris Funeral Homes v. EEOC*; *Altitude Express, Inc. v. Zarda*; and *Bostock v. Clayton County*, Nos. 17-1618, 17-1623, 18-107 (U.S. July 3, 2019).

nuanced approaches undertaken by the courts more broadly.

Decisions within the post-2015 consensus share four characteristics in common. First, the decisions generally recognize that drawing overinclusive classifications to detect disadvantage, such as monolithic group favoritism (the "*anti-classification*" approach),[47] is not the exclusive method of defining discrimination.[48] Second, the decisions advance viewpoint neutrality. These courts respect the dignitary interest in defining one's own identity, taking care not to impose other status labels from the harassers or the court themselves on civil rights plaintiffs.[49] As a result, for plaintiffs who fall outside a fixed binary notion of sex, the decisions implicitly recognize "misperception" claims and reject employer "actuality defenses" raised in courts that would require plaintiff prove actual membership in a "protected class."[50] Finally, but not uniformly, these courts identify the link of sex-based characteristics to the protected trait through social-construction evidence. Decisions such as *Zarda* conflate trait with causation, and risk escalating Title VII causation to a stricter "but-for" standard for sexual minorities.[51]

The opportunity to frame sex as a fixed binary construct, and limit Title VII as solely an anti-classification statute, is teed up in the *Zarda-Bostock-Harris Funeral Homes* trio of cases this Term. The defendant employers and Trump Administration's Department of Justice asked the Court to impart a "1964" meaning to sex to exclude transgender and gay employees' claims from Title VII.[52] However, *all* parties arguing the trio of cases in October 2019 — including employees' counsel — equated "sex" with binary, male-or-female "biological sex" without caveat.[53] By so doing, these arguments continue *Oncale*'s conflation of trait identification with

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[47] 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. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 41 (2006); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003).

[48] *E.g., Harris Funeral Homes* 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 unit of analysis, the question is not whether discrimination is borne only by men or only by women.").

[49] *See infra* nn. .

[50] *See infra* nn. . 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, 133 (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, 1325-43.

[51] *See infra* nn. (Title VII causation requires "motive," not stricter "but-for" causation).

[52] Br. of Resp., Pet. for Writ of Cert. at i, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. Jul. 20, 2018) (arguing "1964" meaning of sex did not include gender identity); Resp.'s Br. in Opp. to Pet. for Writ of Cert., Bostock v. Clayton Cty., Ga., No. 17-1618 at 18-19 (arguing sex as commonly understood in 1964 "does not refer to sexual orientation"); Br. for the United State as Amicus Curiae Supp. Affirmance in No. 17-1618 [Bostock v. Clayton Cty., Ga.] and Reversal in No. 17-1623 [Altitude Express, Inc. v. Zarda] at 12-14, 16-20 (Aug. 23, 2019) (same and further arguing discrimination "because of sexual orientation does not involve treating members of one sex less favorably than similarly situated members of the other").

[53] Transcript of Oral Argument, Oct. 8, 2019, *Bostock v. Clayton Cty. Bd. of Comm'ners*, No. 17-1618 (U.S.) and *Zarda v. Altitude Express, Inc.*, No. 17-1623 (U.S.), 7:18-24 (employees' counsel), 44:10-23 (employers' counsel); 60:21-61:9 (U.S. Solicitor General); Transcript of Oral Argument, Oct. 8, 2019, *Equal Employment*

causation. If the Court adopts the approach, the result risks further undermining the statute's reach even if the plaintiffs in the trio of cases this Term prevail.

Inadequate theorization of discrimination permits courts to ignore the experiences of deeply marginalized communities: sexual minorities and those who raise more than one trait as a basis for discrimination.[54] This Article proposes multiaxial analysis, a contextual model for discrimination across dimensions of identity that *Ulane I* successfully applied to one trait — sex. The analysis responds to the challenge from Critical Race Theorist Darren Lenard Hutchinson that decades of scholarship have provided insightful but merely descriptive social and political critique.[55] Angela P. Harris has argued that "without categorization . . . there can be no moral responsibility or social change."[56] However, the law should not eschew categories altogether but treat them as "explicitly tentative, relational, and unstable."[57]

Multiaxial analysis is a new framework for identifying the role of a protected trait along the following axes — the individual self, the defendant employer, society, and the state.[58] The axes are analyzed interactively, so if there is evidence that if 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 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, as neutrals, do not adopt the harasser's viewpoint in deciding if discrimination occurred.[59] Unlike recent proposals to develop the role of social context within existing approaches such as expanding sex-plus doctrine[60] or stereotyping theory,[61] the blueprint I propose is a return to the statute's open-ended terms.

Sex discrimination scholarship overwhelmingly addresses sex within the male-female

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Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., No. 18-107 (U.S.), 4:3-5:1, 24:16-22 (employee's counsel), 28:10-30:22 (defendant's counsel); 46:4-13 (U.S. Solicitor General).

54 *See infra* Part III.C and nn. .

55 Darren Lenard Hutchinson, *New Complexity Theories*: *From Theoretical Innovation to Doctrinal Reform*, 71 UKMC L. REV. 431, 439-40 (2002) (urging that theorists focus analyses on legal doctrine and actors and provide actionable and "very specific points of intervention with regard to legal doctrine") (synthesizing additional commentary) (quoting Robert S. Chang & Jerrome Mccristal Culp, Jr., *After Intersectionality*, 71 UKMC L. REV. 485, 490 (2002)).

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

57 *Id.*

58 *See infra* Part III.

59 As discussed in Part III, *infra*, 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 indispensible in adjudication. 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 (1998); 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). cunningham's "wholism" model differs, however, in its proposal to eliminate intersectionality as a referent and the use of groups as a frame completely. cunningham, *The Rise of Identity Politics I* at 499-50, 500.

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

61 *See, e.g.*, Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919 (2016); Kathryn Abrams, *Title VII and The Complex Female Subject*, 92 MICH. L. REV. 2479, 2535-36, 2535 n. 208 (1994).

dyad.[62] Some scholars have lain the foundation in analyzing the role of sex within specific identities including transgender and gender-fluid status, sexuality, intersexuality, non-binary status.[63] An even smaller group of scholars have attempted to theorize the full potential scope of the sex trait. Zachary Kramer has argued for a model of sex discrimination analogous to Title VII's treatment of religion as a self-defined "status and a practice," such that sex includes gender and sexual orientation.[64] Kimberly Yuracko raised the important definitional challenge in identifying which characteristics count among the Title VII traits, proposing a "power-access" approach that would prohibit employer conduct that reinforces sex norms.[65] Most persuasively, Katherine Franke has argued that sex, when used to oppress, is not only the *actus reus* of subordination but may also effect subordination based upon, e.g., gender, race, or both, depending on the context.[66] Multiaxial analysis is the first model to expressly account for myriad intersectional, contextual dynamics of subordination that eluded courts under traditional formalist approaches.[67]

Part I explores the ideological interpretations of "sex" and provides a historical account demonstrating 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. Part III introduces multiaxial analysis as a normative framework for determining a characteristic's link to a protected trait, conceptualizing situational axes of subordination. The multiaxial approach provides a concrete theoretical way to reach additional forms of discrimination and prevent further impairment to Title VII. Finally, I raise and address counterarguments to multiaxial analysis with respect to judicial role and operability.

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62 *See, e.g.*, Catharine MacKinnon, *Symposium, Legal Feminism: Looking Back, Looking Forward*, *Introduction to Symposium on Toward a Feminist Theory of the State,* 35 LAW & INEQ. 255 (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, *Symposium, Gender and Sex Discrimination Fifty Years after the Civil Rights Act Taking Sex Discrimination Seriously*, 91 DENV. U.L. REV. 995 (2015) (providing the dominant account of male/female sex discrimination and mentioning sexuality within the context of gender and stereotyping under existing doctrine).

63 *See, e.g.,* JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW (2012); Jillian T. Weiss, *Transgender Identity, Textualism, and the Supreme Court*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 581-89 (2009); Paisley Currah & Shannon P. Minter, *Unprincipled Exclusions*: *The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37 (2000); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WISC. L. REV. 187, 188-194 (1988).

64 Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 940-41 (2014).

65 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 focused on women and dyadic sex).

66 Kaherine M. Franke, *Constructing Heterosexuality: Putting Sex to Work*, 75 DENV. U.L. REV. 1139, 1142-43 (1998).

67 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 foundational critiques by Angela Harris in gender essentialism and Kimberlé Crenshaw with respect to intersectionality theory 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"). Indeed, as 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* Section III.C *infra*.

I. "SEX" AND TITLE VII HERMENEUTICS

Interpretation of Title VII's sex provision requires an understanding of actual sexual variation in society. This Part addresses the mutually defining nature of sex-linked traits such as anatomy, sexual orientation, gender presentation, and gender identity, particularly since the 1950s.[68] Some courts, however, believe that legal meaning "cannot exist outside of formal governmental institutions," e.g., congressional debate or other *de jure* forums.[69] They insist on doing so even though such institutions have been hostile to or unrepresentative of minorities. When courts limit their interpretation accordingly, they stake their own theory of democracy to legitimize the policy outcomes of their decisions.[70] 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 this approach on the classification approach to causation, and argues that current sex-stereotyping theory is an unduly restrictive type of classification analysis.

A. Neutral Acknowledgement of the Meanings of "Sex"

Title VII's history reflects the core principle 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.[71] 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. Neither status nor conduct can be excluded from coverage, the Court concluded with respect to sex and sexual orientation.[72]

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 meaning)[73] or a concept that may

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[68] This Article emphasizes the medical and legal dimensions of sex in non-exhaustive terms to demonstrate the inconsistencies of some textualist and all originalists methods in mythologizing sex as binary. *See infra* Part I.A, Table 1 and accompanying discussion.

[69] *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 595-96 (1994).

[70] Shachter calls this approach "metademocratic." *Id.*

[71] In a similar vein, the Fifth Circuit once opined: "Congress chose not 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 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).

[72] Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (plurality opinion); *id.* at 260–61 (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).

[73] *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* n. 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) ("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.").

be "updated" to reflect contemporary social norms.[74] 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.[75] Few scholars have argued that sex has always been known to be a product of multiple characteristics, or that the government (including courts) should not have a role in declaring a party's sex.[76] This discussion's synthesis of history and social science literature in connection with statutory interpretation of the sex trait for sexual minorities more broadly is unique within legal scholarship.

Textualist and plain-meaning approaches to interpretation both prompt courts to refer to dictionary definitions to settle the question. 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 things that subserves biparental reproduction . . . and that is *typically manifested as* maleness or femaleness."[77] *Fabian*'s textual argument for sex pluralism became an opening salvo in the post-2015 consensus,[78] justifying a ruling that animus against one's transgender status *in se* is Title VII sex discrimination.

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.[79] Judge Sykes's original public meaning approach is selectively underinclusive, insisting on social majoritarian views as the reasonable "man-on the-street" standard, and erasing diversity in actual experience and opinion. It would elevate the harasser's subjectivity (i.e., I didn't at any point consider my lesbian target's sex as a woman

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[74] *Compare* Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 353 (7th Cir. 2017) (en banc) (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.").

[75] *See, e.g.*, Dru M. 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").

[76] Commentary regarding ordinary sexual complexity, 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), or the disestablishment of sex from state determination, David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997 (2002), arises only recently in constitutional discourse, and in administrative law discourse, *see* nn. *infra*.

[77] 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).

[78] *Id.* at 527 (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*); Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 205 (2d Cir. 2017) (same); Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1049 (7th Cir. 2017), *cert. dismissed sub nom.* Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker, 138 S. Ct. 1260 (2018) (same, in a Title IX case on behalf of transgender student); Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 350 (7th Cir. 2017) (en banc) (same, in a Title VII case).

[79] *Hively*, 853 F.3d at 360 (Sykes, J., dissenting) (arguing Title VII must be read "as a reasonable person would have understood it when it was adopted").

who dates women).[80] Under this approach, decades of 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.[81] Whether in the form of "public meaning" or "legislative intent" originalism, 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 the other hand, the sexual harassment of "any individual" whose identity is marginalized in public imagination.[82]

The history of sex pluralism is reflected in the definition's use of the word "typically" 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.[83] 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).[84]

Thus, for millions of individuals and the medical community, sex cannot be deemed only biologically external, immutable, or dimorphic.[85] Julie Greenberg, a renown expert on sex and the law, has observed that the notion of gender identity (or self-identified sex, one of the above crucial factors of sex determination) is based on nurture rather than nature. The idea that sex is

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80 *Id.* at 362-33.

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

82 *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*," 41 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, 742-44 (reviewing psychological studies and CRT 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 Crenshaw, *Demarginalizing the* Intersection, 1989 Chi. Legal F. at 158)).

83 *See generally* ELIZABETH REIS, BODIES IN DOUBT (2009); Joanne Meyerowitz, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES (2002); ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX (1998); Jillian T. Weiss, *Transgender Identity, Textualism, and the Supreme Court*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 581-89 (2009).

84 *See* John Money, SEX ERRORS OF THE BODY 11 (1st ed. 1968) (discussing 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) (acknowledging 37 years of research funding from the U.S. Department of Health and Human Services' Public Health Service); GREENBERG, INTERSEXUALITY AND THE LAW *infra* n. at 11 (discussing "at least" eight factors contributing to an individual's sex); Schroer v. Billington, 424 F. Supp. 2d 203, 306 n.7 (D.D.C. 2006) (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 "personal 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, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 VT. L. REV. 943, 947 (2015).

85 *See id.* at 980-85.

mutable became conventional medical advice by the 1950s.[86] Natural sexual variation by then was admittedly more 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."[87] Under the prevailing estimate, the frequency of intersexuality is between 1.728% to 2% of live births, or millions of Americans at any point in the last half-century.[88]

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.[89] Prominent stories include Christine Jorgensen, who returned from successful sex reassignment surgery in Denmark and caused a "media sensation" in 1953.[90] By the 1940s, the term "transsexual" appeared in American medical discourse, and Dr. Harry Benjamin further popularized the term transsexual during this time as the published his seminal text, *The Transsexual Phenomenon*, in 1966.[91] Although surveys did not exist then, the size of the adult U.S. transgender 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% responding that they were unsure.[92]

Medical science is prone to reflect some dominant cultural norms.[93] Even so, such

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[86] INTERSEXUALITY AND THE LAW at 16 (citing 1950s medical journals); *see also* REIS, BODIES IN DOUBT *infra* n. at 142. Contemporary medical understanding now concludes the opposite, based upon new referents. AM. PSYCH. ASS'N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION (2014), *available at* http://www.apa.org/topics/lgbt/transgender.pdf; Levasseur, *infra.* n. at 951.

[87] Blackless et al., *infra* n. at 151.

[88] *Id.* at 159. To the extent that surveys of non-binary identity are only now being introduced, 35% of Americans between ages 13 and 21 say they know someone who prefers to use gender-neutral pronouns, KIM PARKER ET AL., PEW RES. CTR., GENERATION Z LOOKS A LOT LIKE MILLENNIALS ON KEY SOCIAL AND POLITICAL ISSUES 4 (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. 2015 U.S. TRANSGENDER SURVEY.

[89] *See generally* Joanne Meyerowitz, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES (2002); Levasseur, *infra* n. at 947; WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE (7th ed. 2011); Adams ex rel. Kasper v. School Board of St. Johns Cty., --- F. Supp. 3d ----, 2018 WL 2583843 (M.D. Fla. July 26, 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).

[90] Dallas Denny, "Transgender Communities of the United States in the Late Twentieth Century," in TRANSGENDER RIGHTS 174-75 (Currah et al., eds.). *See, e.g.,* "Ex-GI Becomes Blonde Beauty: Operations Transform Bronx Youth," N.Y. DAILY NEWS 1, Dec. 1, 1952.

[91] David O. Cauldwell, "Psychopathia Transsexualis," in THE TRANSGENDER STUDIES READER 40-44 (eds. Susan Stryker & Stephen Whittle) (2006); Harry Benjamin, THE TRANSSEXUAL PHENOMENON (1966).

[92] ANDREW R. FLORES ET AL., WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3 (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); CTRS. FOR DISEASE CONTROL, 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 68 (2019) (relying upon survey instrument that provided only male, female, and transgender as options, however).

[93] *See* Ezie, *infra* n. at 154 ("[M]ale" and "female" do not describe what is inherent as much as what has been assigned --first by medicine, and then by cultural forces that inscribe meaning and hierarchies of value to a social

extensive discussion regarding determining sex and its components reflect knowledge of natural variation in human sex and a widespread discourse. Put differently, those arguing original public meaning or original legislative intent must not only overcome issues with collective attribution, which alone could end the debate. But they also must 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 consensus did was acknowledge already existing complexity and typographies that serve as functions of "sex,"[94] while rejecting a narrow biological view as dispositive and non-neutral.[95]

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.[96] This approach has been consistent with jurists conforming their interpretation of "sex" with a state-administered sex binary[97] and a dyadic, heteronormative framing of sexuality.[98] 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 *Oncale*'s presumptive equation of desire with status, nearly 25.6 million (11%) acknowledge at least some same-sex sexual attraction.[99] Greenberg cogently summarized prevailing social presumptions about sex and the related roles of sexual orientation, gender presentation, and gender identity as a cascading syllogism flowing from "biological" identification of sex:

Table 1: Assumptions Regarding Sex-linked Traits & Stigmatized Deviations

	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

construct, viewed instead as a social fact."); Halley, *Sexual Orientation and the Politics of Biology*, *infra* n. at 506 n. 5 (citing critiques of medical assumptions as cultural).

94 *Zarda*, 883 F.3d at 112 ("Title VII prohibits not just discrimination based on sex itself, but also discrimination based on traits that are a function of sex").

95 *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*).

96 Julie A. Greenberg, "The Roads Less Traveled: The Problem with Binary Sex Categories," in TRANSGENDER RIGHTS 51, 52 (Currah et al. eds., 2006); *see also* nn. - , *infra* and accompanying text.

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

98 Gary J. Gates et al., THE WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1 (Apr. 2011), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf (last visited June 20, 2019).

99 *Id.*

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, and Gender-fluid

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 entrenched animus U.S. society directs toward those whose lives disprove or contradict any of these syllogisms.[100] 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 the 1950s, raising children with intersex characteristics under heteronormative presumptions has been the predominant approach.[101] By the 1960s, assigning children and adults to only male or female sex became the paradigm of U.S. medical practice, one that continues often unchallenged.[102] The lasting influence of the ideology of binary sex is attributable to the influential guidelines promulgated by John Hopkin University psychologists John Money and Joan G. and John Hampson:

> The genitals had to look "normal," they said, or parents would not be able to do their job of rearing effectively [and t]his approach, which centered on rearing based on the physical evidence of (surgically altered) matching genitalia, had far-reaching, and [] often negative consequences. . . . The assumption that intersex people would be heterosexual went largely unexamined. In [describing] twelve women who underwent clitoridectomies, Money and the Hampsons . . . consistently linked femininity with heterosexuality and motherhood.[103]

Thus, hostility and stigma toward people because they are not heterosexual is inextricable from their "biological" sex (row 1). The Seventh and Second Circuits *en banc* concluded the same in *Hively* and *Zarda*, by merely referencing definitional understandings.[104]

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100 JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW 3 (Table 1) (2012) (modified in part to expand inclusivity).

101 ELIZABETH REIS, BODIES IN DOUBT 142 (2009). Categorizing people strictly along either-or sex lines has justified involuntary surgery in as many as 2 per 1,000 Americans. Blackless et al., *infra* n. at 161.

102 ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX (1998). *But see* United Nations Human Rights Council, "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez," A/HRC/22/53, February 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").

103 REIS, BODIES IN DOUBT *infra* n. at 141-42.

104 *Hively*, 853 F.3d at 345 (discussing comparative method testing for role of sex in bias based upon sexual orientation); *id.* at 346 (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

A dimorphic definition is, more accurately, a persistent metaphor for sex roles and sexuality[105] that some jurists take for granted as a complete identity between the law, Christianity, and science.[106] 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 heterosexuals expectations.[107] Most Americans depend on some combination of three sources of income — the labor market, family, and the government — and sexual minorities face outright exclusion or abuse from each of these sources of material support.[108]

By 1964, sex was understood to be complex and capable of change over time by individuals and society. Congress's authoritative 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.[109] The post-2015 consensus and multiaxial analysis advance neutrality when courts analyze social traits as intersubjective, rather than simply siding with the harasser's view of plaintiff's sex or other traits.

B. The Rise of Title VII Classification and Sex Stereotyping

Since Title VII's passage, courts unduly narrowed the law's reach under a reductive anti-classification paradigm from constitutional law. Relying on ideas about "biological" differences between men and women, the Supreme Court justified less searching constitutional review of government classifications by creating "intermediate" scrutiny, in comparison to race, which

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transsexuals) into account"); *Zarda*, 883 F.3d at 112 (concluding that "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination").

105 Katherine Franke made a similar observation with respect to the metaphorical relationship between biology and stigma. *Infra* n. at 3.

106 *See* Eskridge, *Sexual and Gender Variation*, *infra* n. 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).

107 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*, *infra* n. at 1336-49; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WISC. L. REV. 187, 188-194 (1988).

108 Employment, poverty, and race are inextricably linked. *See* Symposium, *Achieving Results: Lessons from Civil Rights Movements*, 19 N.Y.U. J. OF LEGIS. & PUB. POL'Y 530 (2016) (remarks of Ricky Blum, cofounder of Queers for Economic Justice and Legal Aid Society attorney); Levasseur, *supra* n. __ at 945-46; SYLVIA RIVERA LAW PROJECT, http://srlp.org/files/disproportionate_poverty.pdf (last visited Jan. 8, 2019) (diagram of multiple forces 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 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. NAT'L CENTER FOR TRANSGENDER EQUALITY, REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 6 (updated Dec. 2017) (hereinafter 2015 U.S. TRANSGENDER SURVEY).

109 Eskridge, *Title VII's Statutory History*, at 402, 402 n. 290 (describing Title VII as a statute requiring "faithful attention to the textual and legislative evolution of the law" as authoritatively amended by Congress).

received strict scrutiny.[110] Title VII's language does not assign different methodologies among the five protected traits, however. By the 1970s, the Court nonetheless treated Title VII as a classification statute despite the lack of any basis for doing so.[111] Classification neatly elided with societal prejudice against sexual variation and in favor of an isomorphic, binary view of sex.[112]

A class-based approach is the hallmark of formal equality, which rejects evidence of material, substantive inequality occurring outside of group contexts.[113] For Title VII, a substantive approach to sex discrimination arrived via legislative rebuke, in 1978.[114] Thereafter, intersectionality theorists criticized the inadequacies of a compartmentalized approaches to evidence, particularly with reference to race and sex discrimination.[115] The anti-classification paradigm nonetheless remains 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.[116] And, citing his own version of the "broader political and social history" of workplace sex discrimination, Judge Lynch's dissent in *Zarda* asserted that "actual biological and genetic differences" in sex justify treating "men and women" differently from "races" (the latter of which, he conceded, can be defined "socially.")[117]

1. Categorical Formalism

The Court's early treatment of Title VII as a formal-equality scheme led prominent scholars to under-theorize the statute and its history. William Eskridge adopts only a slightly broader view in saying that Title VII is "not simply class-based legislation" but operates as

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110 ERWIN CHEREMINSKY, CONSTITUTIONAL LAW 764 (3d ed. 2006) (discussing tension between discredited opinions such as Geduldig v. Aiello, Michael M. v. Superior Court, Rotsker v. Goldberg); *id.* 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").

111 Compare 42 U.S.C. § 2000e-2(a)(1) (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).

112 *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)).

113 *See* Serena Mayeri, REASONING FROM RACE 107, 106-143 (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).

114 Pregnancy Discrimination Act (PDA) of 1978 (Pub. L. 95–555), discussed *infra*.

115 *See* discussion in Part III.C, *infra* and *generally*, cunningham, *The Rise of Identity Politics*, *infra* n. at ; 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 (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 (2017); Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM. BUS. L.J. 789 (2015).

116 *Hively*, 853 F.3d at 360 (Sykes, J., dissenting).

117 *Zarda*, 883 F.3d at 149.

"*classification*-based legislation."[118] This theory merely describes the Court's limited 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.

The more limited meaning historically attributed to sex discrimination reveals the close, intentional development with 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 characteristic determined solely by the accident of birth."[119] 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. *U.S. v. Carolene Products*, the case that proposed representation-reinforcement theory, never actually used the term "immutable." Courts implied the exclusion of sexual minorities from representation-reinforcement theory as a political or moral choice, rather than a substantive one.[120] Yet the Courts' treatment of immutability as an element — rather than a factor[121] — in recognizing "new" rights then became hitched to Title VII doctrine.[122] 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."[123]

The Burger Court proceeded to impose an all-women versus all-men comparator approach in two opinions addressing pregnancy: *Geduldig v. Aiello*, an equal protection case,[124] and *General Electric Co. v. Gilbert*, a Title VII sex discrimination case.[125] In 1974, the *Aiello* Court held pregnancy-based distinctions did not constitute sex discrimination because the distinction was not limited to all women.[126] The Court doubled down two years later in *Gilbert*,

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118 *E.g.*, Eskridge, *Title VII's Statutory*, *supra* n. at 343 (emphasis in original).

119 Frontiero v. Richardson, 411 U.S. 677, 688 (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 (Dec. 1982) (noting complete shift in anthropological textbooks by the 1970s); D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 133 (2013); Ian Haney Lopez, *The Social Construction of Race*, 29 HARV. C.R. & C.L. L. REV. 1 (1997).

120 William N. Eskridge, *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1288-90 (2005) (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 162-64 (1980)). The turning point, of course, was Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

121 U.S. v. Carolene Products Co., 305 U.S. 144, 152 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 should be treated as a non-essential factor. *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 509-11(1994). On the evolving conceptions of legal immutability, *see* Eisenstadt, *Fluid Identity Discrimination*, *supra* n. at 803 nn. 65-66.

122 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 (5th Cir. 1971).

123 *See* Franklin, *supra* n. at 1365; Abrams, *Title VII and The Complex Female Subject*, *supra* n. at 2480-81.

124 417 U.S. 484 (1974).

125 429 U.S. 125 (1976).

126 417 U.S. at 494-97.

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 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.[127]

Gilbert's interpretive elision of the public/private actor divide was fiction. The division is politically fraught, and has distinct sources of legal authority and justification. Title VII's ability to reach private decision-making lies in the Commerce Clause and Section 5 of the Fourteenth Amendment.[128] The Constitution provides a baseline of rights where governmental policies target specific population groups for benefit or ill. Unlike private defendants in workplace law, in Equal Protection doctrine the government is afforded some presumption of deference in its actions.[129]

Title VII requires courts to root out bias against "any individual" in the labor market. Thus, the *Gilbert* Court unduly cast the statute as one that only prohibits employers from engaging in blunt pigeonholing.[130] Wide, overinclusive categorization has always been reserved for state action, subject to constitutional restraints.[131] 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

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

128 U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 5. *See, e.g.,* 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 includes 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.").

129 A helpful reprisal of deference to government, as a policy matter, appeared in Murillo v. Bambrick:

> [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, a reviewing [must] carefully to consider whether a sufficient showing has been made . . . so as to override the presumption of constitutionality ordinarily accorded to legislative pronouncements.

681 F.2d 898, 901-02 (3d Cir. 1982).

130 42 U.S.C. § 2000e-2(a), (a)(1).

131 *See* n. *infra* [*Murillo*].

the standards applicable under Title VII."[132]

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."[133] They also inscribed in the statutory definitions section an amendment that "because of sex" included "pregnancy, childbirth, or related medical conditions,"[134] 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,[135] 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*)[136] or that plaintiffs failed to prove harm tied to a "traditional binary conception of sex" (*Etsitty v. Utah Transit Authority*).[137] 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."[138] 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."[139] 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

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132 Wash. v. Davis, 426 U.S. 229, 239 (1976) (reversing 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 Equal Protection race case) (emphasis added).

133 Pregnancy Discrimination Act (PDA) of 1978 (Pub. L. 95–555); Discrimination on the Basis of Pregnancy, 1977: Hearing on S. 995 Before the Subcomm. on Labor of the S. Comm. on Labor & Human Res., 95th Cong. 1 (1977) (statement of Sen. Harrison Williams).

134 42 U.S.C. § 2000e(k). 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.

135 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.*, Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1318 (2012).

136 *Ulane II*, 742 F.2d at 1085.

137 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").

138 742 F.2d at 1085, 1086 (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 society: failure is the individual's own fault.").

139 *E.g.,* Desantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979).

receptive to their sex discrimination claims, inviting and adjudicating them.[140] Similarly, during 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.[141]

By the late 1990s, some Justices continued to resist broader substantive definitions of harm ostensibly because they suspiciously viewed Title VII as a harbinger of Equal Protection doctrine. In *Oncale v. Sundowner Offshore Oil Services*, the Court finally confirmed that male-on-male harassment can be discrimination, rejecting a pure anti-classification approach to Title VII.[142] Three Justices then balked at the same approach in *Olmstead v. L.C. ex rel Zimring*, an Equal Protection and disability discrimination action against the state of Georgia the following year.[143] The 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.[144] Concern that the state fisc would be vulnerable to contextual claims of discrimination also seemed to animate much of the dissent.[145] Under either view, the formalist Justices misguidedly presumed both doctrines must move in interpretive lockstep.

The import of this history is that the only consistent approach is to treat Equal Protection as the lower boundary of rights, and not as a ceiling, to contextual Title VII analysis.[146] A failure to extend causation analysis beyond classification would produce anomalous outcomes in discrimination claims brought by state employees. Because Title VII covers state and local governments as employers, companion Section 1983 claims may be brought on the same facts.[147] After *Obergefell*, courts are now susceptible to challenge that they, as the state, impermissibly exclude claims based upon sexual orientation by selectively denying those plaintiffs equal Title VII coverage.[148] The same has been held discriminatory state action against transgender

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140 Br. of Historians as *Amici Curiae* in Supp. of Empls., *Bostock*, *Zarda*, *R.G. & G.R. Harris Funeral Homes* 22-28, Nos. 17-1618, 17-1623, 18-107, at 23-29 (U.S. July 3, 2019) (citing primary sources).

141 *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 17-18, 163-72 (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)).

142 523 U.S. 75 (1998). *See* discussion, Part III *infra*.

143 527 U.S. 581, 598 (1999).

144 *Id.* at 567-68 (Thomas, J., dissenting).

145 *Id.*

146 Justice O'Connor expressed incredulity at any anomalous outcomes providing substantively better treatment to private discrimination than public discrimination in *Price Waterhous*e: "I simply cannot believe that Congress intended Title VII to accord *more* deference to a private employer [than to government] in the face of evidence that its decisional process has been substantially infected by discrimination." 490 U.S. 228, 300 (1989) (O'Connor, J., concurring).

147 42 U.S.C. §§ 2000e-2000e-17.

148 135 S. Ct. at 2604–05. (announcing its holding rested on both Due Process and Equal Protection grounds). *See, e.g.,* Christiansen v. Omnicom, 167 F. Supp. 3d 598, 617-22 (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 as anything but independent "classes" within binary sex classifications, often favoring cases with facts centered around effeminate appearance but rejecting those in which homosexual status is "known" (i.e., actual membership in a "class"). Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U.L. REV. 715 (2014).

plaintiffs.[149] For a state employee who could enter into a same-sex marriage, afforded under Equal Protection, but unprotected as sex discrimination when a boss disapproves of the news under a *workplace* Equal Protection claim, the two outcomes cannot 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.[150] Those within the post-2015 consensus questioned precedent for precedent's sake.

2. Sex Stereotyping as a Species of Classification

If the goal is to limit categorical formalism in Title VII analysis, a distinct question is whether stereotyping theory is a panacea to restoring the law's reach. Advocates and legal scholars alike have understandably celebrated the adoption of sex-stereotyping theory as a basis for prohibiting gender policing in workplaces. However, prevalent sex-stereotyping narratives from courts, advocates, and scholars theorize limited social roles and, through legal channels, reinforce them.

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.[151] 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."[152] 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.[153] Justice Kennedy, a seventh, agreed that sex-stereotyping evidence is "quite relevant to the question of discriminatory intent" in his dissent.[154]

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149 *See* Karnoski v. Trump, No. 18-35347, 2019 U.S. App. LEXIS 17878, at **42, 48 (9th Cir. June 14, 2019) (per curiam) (determining that defense department policy barring transgender troops from military service as gender-based classification subject to intermediate scrutiny); Glenn v. Brumby, 663 F.3d 1312 (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*, 378 F.3d 566, 574-75 (6th Cir. 2004) (holding that disqualifying claim based upon transgender status from Title VII would "superimpose classifications such as "transsexual" . . . , and then legitimize [] the non-conformity into an ostensibly unprotected classification"); *Fabian*, 172 F. Supp. 3d at 523 n. 8; *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015)).

150 Because there is no legislative history to 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, *supra* n. at . *See also* Currah & Minter, *Unprincipled Exclusions*, *supra* n. at 38-40 (2000) ("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.").

151 490 U.S. at 239 (plurality opinion).

152 *Id.* at 235 (plurality opinion).

153 *Id.*; *id.* at 258-61 (White, J., concurring); *id.* at 272-73 (O'Connor, J., concurring). *See also Nassar*, 570 U.S. at 2526 (noting same).

154 490 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 intra-categorical view of sex, that Ms. Hopkins's employer unlawfully punished her for failing to act "like a woman," was pathbreaking in recognizing sex as a socially pluralistic trait.[155] 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. This portion of its holding — that evidence of disfavoring a characteristic linked to a protected trait, such as gender linked to sex, could meet the trait element and allow a plaintiff to establish causation in defendant's decisionmaking — received Congressional approval.[156] In 1991, Congress 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.[157] As it did in the 1978 PDA, Congress reiterated the Court's legal error of relying solely on formal equality to define discrimination.

Price Waterhouse's importance as a watershed decision cannot be understated. Its 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,[158] e.g., when a person fails to conform to gender stereotype by being attracted to the "wrong gender."[159] 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.

But sex-stereotyping theory is persuasive only to the extent that binary "biological sex" simplistically describes the scope of the sex trait.[160] Current articulations of stereotyping theory tend to constrain readings of sex that acknowledge further sexual variation.[161] After the *Price Waterhouse* Court used "gender" interchangeably with "sex" without defining the term, other

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155 *Smith*, 378 F.3d at 573 (holding that prior decisions limiting sex to only anatomical or chromosomal sex were "eviscerated by *Price Waterhouse*").

156 490 U.S. at 251-52 (plurality); *see also id.* ("By focusing on Hopkin's 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.").

157 Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071. 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* n. at 375 (citing H.R. REP. NO. 102-40, pt. 1, at 48 (1991); H.R. REP. NO. 101-644, pt. 1, at 29, n.17 (1990)).

158 *See Zarda*, 883 F.3d 100, 120-23 (2d Cir. 2018) (en banc); *Hively*, 853 F.3d 339, 346-47 (7th Cir. 2017) (en banc); E.E.O.C. 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 v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004); Nichols v. Azteca Res. Enters., Inc., 256 F.3d 864, 870, 874–75 (9th Cir. 2001); Schmedding v. Tnemec Co., 187 F.3d 862, 865 (8th Cir. 1999).

159 *Zarda*, 883 F.3d at 112; *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) (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)).

160 *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"); *Smith*, 378 F.3d at 573 (in holding transgender woman stated a federally recognized sex stereotyping claim, 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." (citing *Price Waterhouse*, 490 U.S. at 251)).

161 As Halley has observed, even the terms "lesbian" and "gay" in legal contexts exclude limit non-binary sexuality, such as those who identify as bisexual, and reinscribe sexuality's link to binary identification. Halley, *supra n.* at 527.

courts have deemed Title VII to encompass both "sex" as physical differences between only men and women, and "gender" as cultural attributes self-determined and ascribed by others.[162] Legal theories that fail to reflect lived experience reinstate and legitimize dominant views of sex and gender,[163] and allow legal institutions to persist in expressive harms against minorities.[164] Judges and parties' framing of statutory "sex" as a binary "biological" classification reinscribes the problem. Indeed, the theory's origin story of a sex-gender *mismatch* led courts to misgender the transgender plaintiffs before them and reify "birth sex" as biological sex.[165] It leaves intact normative barriers for individuals who identify with communities that include intersex, non-binary, and gender-fluid.

Notably, all parties arguing the *Zarda-Bostock-Harris Funeral Homes* trio of LGBT cases during the Court's 2019-20 Term — employees' counsel, defendant employers' counsel, and the U.S. Solicitor General — narrowly focused on male-or-female "biological sex." They did so without caveat, risking a regression in Title VII's substantive work.[166] Fortunately, counsel for the employee in *Harris Funeral Homes* added a multiaxial (intersubjective) argument as a fallback to the last minute of his rebuttal, stating, "In this case, Harris Homes fired Aimee Stephens because *[it] thought she is a man* who is insufficiently masculine. That *too* must be sex discrimination."[167]

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.[168] The need to account for

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[162] *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."); Dawson v. Bumble & Bumble, 398 F.3d 211, 221 (2d Cir. 2005) (noting that generally, an individual can "fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance.").

[163] *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* n. at 1002-03.

[164] Expressive harms "result[] from the ideas or attitudes express 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 (1993); *see also* Angela Onwuach-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 Harv. C.R.-C.L. L. Rev. 231, 234-35, 234 n. 11 (2009) (describing the expressive harm of current framing of housing discrimination statutes).

[165] For example, in *Smith v. City of Salem* plaintiff Jimmie Smith, a transgender female firefighter, felt strategically obliged to identify herself as a "male with a Gender Identity Disorder" and seek sex-discrimination protection as a man facing sex stereotyping. 378 F.3d 566, 570 (6th Cir. 2004).

[166] Transcript of Oral Argument, Oct. 8, 2019, *Bostock v. Clayton Cty. Bd. of Comm'ners*, No. 17-1618 (U.S.) and *Zarda v. Altitude Express, Inc.*, No. 17-1623 (U.S.), 7:18-24 (employees' counsel), 44:10-23 (employers' counsel); 60:21-61:9 (U.S. Solicitor General); Transcript of Oral Argument, Oct. 8, 2019, *Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, No. 18-107 (U.S.), 4:3-5:1, 24:16-22 (employee's counsel), 28:10-30:22 (defendant's counsel); 46:4-13 (U.S. Solicitor General).

[167] *Id.* at 62:19-22 (emphasis added).

[168] D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 133 (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, 1325-43.

sexual diversity is no less pressing than for any other civil rights trait.[169]

To insist that sex stereotyping must be theorized beyond majoritarian viewpoints is to require more of legal advocacy than stratagem. Lesbian and gay employees' Title VII claims have generally been successful under sex-stereotyping theory.[170] *Hively* referred to stereotyping as subsidiary to the comparative argument the Seventh Circuit advanced, rather than a standalone stereotyping frame.[171] Similarly, a majority in *Zarda* did not endorse the decision's sex stereotyping theory, apart from the touchstone point that sexual orientation is a "function of sex."[172] The *en banc* majorities may 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.[173]

While sex-stereotyping theory has supported rights-positive outcomes for some, a narrow starting point for sex-based stereotypes conflicts with the dignitary interests in sexual self-determination.[174] As non-binary sex increasingly gains formal recognition among states, the question becomes: what is the stereotype associated with non-binary sex or intersex individuals who identify as non-binary?[175] Increasing use of the qualifier "birth" sex in the post-2015 cases alleviates only one problem with sex stereotyping for transgender litigants, but avoids a broader doctrinal correction capable of acknowledging actual sexual variation.[176]

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169 Only a few commentators have been willing to critique *Price Waterhouse*'s incomplete theorizing of sex-stereotyping as discrimination. *See, e.g.,* Kramer, *The New Sex Discrimination*, *supra* n. at 925-27; 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, 205, 218 (2010) (describing 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.")

170 *See* n. *infra.* 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,* 20 GEO. J. GENDER & L. 49, 87-88 (2018).

171 *Hively*, 853 F.3d 339, 346-47 (6th 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 Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011).

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

173 *Zarda*, 883 F.3d at 158 (Lynch, J., dissenting) (citing *Hively*, 853 F.3d at 370). *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") (emphasis original).

174 *See* Part III *infra.*

175 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 seventeen jurisdictions: Arkansas, California, Colorado, Connecticut, Indiana, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, Ohio, Oregon, Utah, Washington, New York City, and D.C. Resources, Intersex and Genderqueer Recognition Project, https://www.intersexrecognition.org/resources (noting initiatives under way in Arizona, Hawaii, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont) (last visited July 3, 2019).

176 *E.g.*, *Harris Funeral Homes* 884 F.3d at 36 (referring to transgender plaintiff-intervenor's "birth-assigned sex"); M.A.B. v. Bd. of Educ., 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.").

Importantly, current sex-stereotyping arguments also universalize limited gender norms to the exclusion of race, class, geography, and other determinants of social interaction before a case may be presented to a jury. Psychologists recognize that sex has always been inherently racialized, then[177] and now.[178] Questions 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 apply regardless of the occupational culture that once caused the Utah Transit Authority to worry about the "image" that its transgender female bus driver, Krystal Etsitty, created for the public after her transition?[179] 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 relational and contextual explains Title VII's impasse only in part. The embattled definitions of sex and sex discrimination over the decades ultimately turn upon Title VII's causation provision — that the harm arose "because of" a protected trait. Concurrently, interbranch dialogue between Congress and the Court over interpretation resolved that the inquiry is substantive and fact-specific in the form of several amendments.

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 against the statutory language. It discusses how hegemonic frames improperly conflate trait identification with causation for minorities whose identities are deemed less familiar or not capable of being compartmentalized.

A. An Overview of the Causation Provisions

Congress's decision to leave "discrimination" undefined allowed courts to fashion rules that ignore the statute's anti-subordination goals. In its place, a recurring definition from the Court in recent decades is that of a social "evil."[180] The *Oncale* Court famously rejected legislative intent as an interpretive method in order to conclude that Title VII may "cover reasonably comparable evils" to the "principle evils" that concerned legislators.[181] While

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

178 Cecilia L. Ridgeway & Tamar Kricheli-Katz, *Intersecting Cultural Beliefs in Social Relations: Gender, Race, and Class Binds and Freedoms*, 27 GENDER & SOC. 294 (June 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 categories 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).

179 The Tenth Circuit 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. For critiques, *see, e.g.*, Katrina Roen, "Transgender Theory and Embodiment: The Risk of Racial Marginalization," *in* THE TRANSGENDER STUDIES READER 236*,* 236 ("Despite the claims of inclusiveness of both transgender and queer writings, perspectives of whiteness continue to resonate, largely unacknowledged, through transgender and queer theorizing.").

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

181 *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 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.

powerful and imbued with morality, the invocation of "evil" is empty rhetoric, as it does no substantive work. Nearly a decade prior, Justice O'Connor provided a clearer — broader — articulation of purpose 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 stigmatic harm which comes from being evaluated by a process that treats one as inferior by reason of one's race or sex.[182]

Title VII's language reflects a prima facie case that can be made under myriad forms of discrimination. Plaintiffs generally can proceed under two theories of workplace discrimination. In an individual discrimination claim, i.e., disparate treatment, plaintiffs must prove actual motive.[183] 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.[184] This Article focuses on individual disparate treatment claims because these claims are most commonly litigated by sexual minorities. The following review of the core provisions makes clear what formal equality adherents have tried to obscure — Title VII's protections can reach everyone, if need be.

1. Section 703(a)

Causation's central role in defining "discrimination" is located in Title VII's first substantive provision, Section 703(a):[185]

> 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.[186]

The text does not specify any particular mode of proving causation. For this reason, I

It demonstrates breadth.'" Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 212 (1998) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)) (internal quotation and citation omitted).

182 *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".

183 Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)).

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

185 42 U.S.C. § 2000e-2(a)(1), (2) ("Unlawful Employment Practices").

186 *Id.* (emphasis added).

respectfully disagree with Eskridge that Title VII is only a classification-based statute.[187] Within the statutory scheme, only one subset of discrimination claims, Section 703(a)(2), is remotely akin to classification: identifying employers' adverse act of classifying, segregating, and delimiting employees arbitrarily according to a protected trait is harmful *in se*.[188] Cases alleging overt line-drawing of classes, such as group-based segregation or policies, are salient and hard-to-ignore instances of discrimination.

But Section 703(a) does not exclusively limit itself to that form of proof. Congress's bipartisan Interpretive Memorandum from the 1964 deliberations over Title VII expressly declined to define "discrimination," much less in connection with the five protected "traits," and omits any reference to "classes" or "categories":[189]

> 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.

The Court, continuing through the Roberts era, has carefully followed that lead.[190]

Rather, inferior terms or conditions at work "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. I interpret *Price Waterhouse* as a deliberate deviation from the anti-classificationist approaches to causation exemplified in *Gilbert*. Specifically, the *Price Waterhouse* plurality explained, "We take ['because of'] to mean that gender must be irrelevant to employment decisions,"[191] while Justices O'Connor, Kennedy, and Scalia insisted "because of" required "but-for" causation.[192] *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 adverse action, prompting a Congressional override in the form of the Civil Rights Act of 1991.

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187 *See* discussion *infra* at n .

188 42 U.S.C. § 2000e-2(a)(2). 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 v. Duke Power Co., 401 U.S. 424 (1971).

189 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*, 490 U.S. 228, 243 (1989) (citing *Firefighters v. Stotts*, 467 U.S. 561, 581 n. 14 (1984)).

190 Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 337, 347 (2013) (characterizing race, color, religion, sex, and national origin as "characteristics" and "personal traits" rather than as "classes"). *See also* WEBSTER 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 original).

191 490 U.S. 228, 240 (1989) (plurality) (using "sex" and "gender" interchangeably).

192 *See id.* at 263-64 (O'Connor, J., concurring), superseded by Civil Rights Act of 1991, Pub. L. No. 102-166, § 703, 105 Stat. 1075 (codified as amended at 42 U.S.C. § 2000e-2(m)); *id.* at 284 (Kennedy, J., dissenting).

2. Section 703(m)

Through the Civil Rights Act of 1991 ("1991 CRA"), Congress restored the breadth and complexity that courts had read out of Title VII.[193] 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.[194] Section 703(m) states, in relevant part: "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[195] It thus memorialized a less onerous standard for causation where discrimination was one "motivating factor" among otherwise permitted factors in response to the *Price Waterhouse* dissent and concurrence arguing exclusively for strict "but-for" causation.

Congress went even further to rebuke the courts institutionally. The 1991 CRA also provided for juries, rather than courts, to decide factual questions — including causation[196] — in disparate treatment cases because bench trials often rendered sparing outcomes for employers. Elevating "motivating factor" causation to statutory form relaxed causation and further insulated Title VII's jurisprudence from classification-only argument after 1991. In other words, "motive" is the touchstone rather than the "but-for" formalism the *Price Waterhouse* concurrence and dissent sought.[197] Shorn of ritualistic precedent, the language and purpose of Title VII are remarkably clear. The 1991 CRA's theoretical override endorsed contextually variable causation inquiries.

B. Hegemonic Evidentiary Tests and the Doctrinal Correction

Scholars have critiqued how evidentiary rules such as *McDonnell Douglas* burden-

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

194 These cases included *Price Waterhouse*, discussed *infra*, and Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (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 [1991, which] triggered the most dramatic civil rights override since the Reconstruction Amendments overrode *Dred Scott*, 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).

195 42 U.S.C. § 2000e-2(m).

196 *E.g.,* Tudor v. S.E. Okla. State Univ., No. 15–0324, Jury Instr., ECF No. 257 (D. Okla. Nov. 20, 2017) (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 person does not conform to a typical gender stereotype").

197 Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 337, 343 (2013) (holding 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)).

shifting for decades.[198] Their formulaic approaches reflect "dominant concepts of discrimination," as Kimberlé Crenshaw's work prominently demonstrated.[199] Evidentiary procedure also enervates anti-discrimination law in the following common ways: conflating evidentiary rules with defining discrimination; requiring plaintiff's membership in a "protected class" as part of the prima facie case; and burying evidence of impermissible employment decisions "literally" based on sex.[200] Courts struggle to reconcile the anti-subordination (i.e., non-classification) approach of the post-1991 statute with the old evidentiary rules that, if adapted or set aside, might be deemed legal error on appeal. In this sense, the denial of Title VII protection to sexual minorities reflect that courts are not only conservative, but 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 it to be plaintiff-friendly, a device for those who did not have strong evidence of biased motive to establish an inference of discrimination.[201]

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.[202] To survive summary judgment, an employee must ultimately be able to show that any allegedly lawful justification provided by the employer was pretextual.[203] Deborah Malamud aptly called its creation "quasi-legislative."[204] The post-2015 consensus underscores how, decades later, *McDonnell Douglas* imposes 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.[205]

Aware of its potential for misapplication, the Court cautioned "the prima facie proof required [] *is not necessarily applicable* in every respect to differing factual situations."[206] In

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198 Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2232 (1995).

199 Kimberlé Crenshaw pioneered intersectionality theory in the law in *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, 139-49 (1989).

200 *E.g., Brumby*, 663 F.3d at 1317 ("discrimination against transsexuals because they are transsexuals is literally discrimination because of sex." (quoting *Schroer*, 424 F. Supp. 2d at 211)); *Fabian*, 172 F. Supp. 3d at 525 (D. Conn. 2016) (same).

201 The employee's burden of proof in disparate treatment cases was first articulated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), which refined it in significant ways in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); and Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) (hereinafter "*McDonnell Douglas* test").

202 *See McDonnell Douglas*, 411 U.S. at 802.

203 *Swierkiewicz*, 534 U.S. at 511.

204 *The Last Minuet*, *supra* n. at 2264.

205 *See supra* Part II.A.

206 *McDonnell Douglas*, 411 U.S. at 802 n.13 (unanimous decision); *accord* U.S. Postal Serv. Bd. of Govs. v. Aikens, 460 U.S. 711, 715 (1983) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–54 n.6, 25 (1981).

Burdine, it reiterated that *McDonnell Douglas* was suitable for the "most common" cases,[207] but not when direct evidence exists at the outset or later comes to light.[208] But courts often do not heed that advice. Plaintiffs whose identities or life experiences are not familiar to judges face skepticism and paradoxical results.[209] The test prompted a sizeable wave of criticism that it has significantly impeded Title VII's reach in actually identifying discrimination.[210]

The unworkability of a protected class "element" was clear in *Fabian*, where the court implicitly modified the test at summary judgment.[211] 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 transition to presenting as female and start work using her chosen name, Deborah, the Hospital to denied her the position. Only circumstantial evidence existed for the Hospital's decision, as it didn't disclose 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, Judge Underhill 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. Judge Underhill's adaptation permitted 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.[212]

By replacing the protected class prong with a protected trait analysis, as this Article proposes, trial of the claims can focus instead on causation, a question of fact the statute reserves

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207 *Id.* at 253-54.

208 *E.g., Harris Funeral Homes*, 884 F.3d at 569 (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 himself as a man [and] wanted to dress as a woman.'"); Henderson 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.").

209 Crenshaw, *infra* n. at 145; *id.* at 140, 144 (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").

210 *E.g.,* Malamud, *infra* n. at ; SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW (2017). 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 swathe 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 1999 and 2007; 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).

211 The facts of this case are drawn from the district court opinion, 172 F. Supp. 3d 509.

212 *Id.* at 527. In a prominent post-trial appeal, the Sixth Circuit reevaluated *McDonnell Douglas* in *Barnes v. City of Salem, Ohio*, on another basis. 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. 401 F.3d 729, 737 (6th Cir. 2005). The panel upheld Barnes's favorable jury verdict, reasoning that her successful prima facia 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 v. City of Salem, Ohio*. *Id.* (citing *Smith*, 378 F.3d 566 (6th Cir. 2004)).

for juries.[213]

2. "Direct" Evidence

The distinction between binary and pluralistic definitions of sex also raise an evidentiary problem in Title VII's direct/circumstantial divide. Direct evidence of discrimination is evidence that directly ties prejudices to the defendant's harmful act such that bias motivated by a protected trait.[214] Direct evidence is extremely 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.[215]

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.[216] The College required both to use the men's room unless they provided proof of "genital correction surgery."[217] Ms. Kastl argued that her use of the men's restroom was inappropriate and also potentially dangerous to her.[218] Even with direct evidence of the College's decision 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.[219]

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 had yet had anatomical surgery, she could not make out a prima facie case.[220] 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 *McDonnell Douglas* to raise and accept the employer's argument that it had a legitimate business need to bar Ms. Kastl from the men's room for "safety reasons."[221] 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 same opinion by concluding that Ms. Kastl had

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213 *E.g.,* Reeves v. Sanderson, 530 U.S. 133 (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.")

214 *Desert Palace, Inc.*, 539 U.S. at 91; *Glenn*, 663 F.3d at 1321.

215 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.

216 Kastl v. Maricopa Cty. Comm. Coll. Dist., 325 Fed. App'x 492, at 493 n.1 (9th Cir. 2009) (summary order).

217 Kastl v. Maricopa Cty. Comm. Coll. Dist., No. 02-1531, 2004 WL 2008954, at *1 (D. Ariz. 2004).

218 *Kastl*, 325 Fed. App'x at 493.

219 Kastl v. Maricopa Cty. Comm. Coll. Dist., 2006 U.S. Dist. LEXIS 60267, at **16-20 (D. Ariz. 2006); *Kastl,* 325 Fed. App'x. at 493-94.

220 *Kastl*, 2006 U.S. Dist. LEXIS 60267, at **16-20 (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).

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

insufficient evidence to show that sex ("gender") actually motivated the bathroom policy.[222] An unwillingness to deviate from *McDonnell Douglas* where direct evidence of sex-motivated policies exists shows that it disappears, rather than detects, motive.[223]

The Court should discard the direct/circumstantial divide from Title VII entirely, since whether sex was a motivating factor remains the employee's burden of proof. After 1991, the motivating-factor theory of causation forced the Court to clarify, as recently as 2003, that direct and circumstantial evidence are equally sufficient to state a mixed-motive claim.[224] Justice Thomas observed that courts are excessively skeptical of Title VII case evidence, and held in *Costa v. Desert Palace* that both forms of evidence are adequate for mixed-motive claims under Section 703(m).[225] The same rule should be applied to so-called single-motive claims under Section 703(a). The direct/circumstantial divide is yet another reason for eliminating the *McDonnell Douglas* test.

3. Zarda*'s "But-For" Conflation*

Advocates this Term now appear to be hurrying in the wrong direction: ratcheting up the causation standard from "motive" to "but-for" in sexual minorities' disparate treatment claims.[226] The origin of the error lies in the leaky syllogism that *if* an act disadvantaged one (binary) sex class over another (binary) sex class, *then* (and formalists argue, only then) is there adequate evidence of discrimination. As discussed earlier, *Oncale* failed to provide adequate guidance for separating the trait from causation in instances of non-heterogenous conduct such as male-on-male sexual harassment. A plurality of the Second Circuit in *Zarda* deepened the conflation, calling it "but-for causation."[227] According to *Zarda*, if the comparative tool *Hively* proposed — swapping in a gay man for a hetero woman as the employee attracted to men — was determinative to the outcome, *then* "but-for" causation was met. *Zarda* imputes this framing to

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222 *Id.* at 494. By stark contrast, both the trial and appellate courts in *Harris Funeral Homes* agreed that direct evidence of discrimination existed when the 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 himself as a man [and] wanted to dress as a woman.'" *Harris Funeral Homes*, 884 F.3d at 569, 571 ("[W]hile this Court does not often seen 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)).

223 *See Intersectionality and Title VII*, *supra* n. 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 a difference, to confront difference itself and the material conditions it engenders" outside of hierarchy).

224 Desert Palace, Inc. v. Costa, 539 U.S. 90, 99-100 (2003).

225 "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 (2003) (citing *Holland v. United States,* 348 U.S. 121, 140 (1954)).

226 Employee's counsel in *Harris Funeral Homes* unfortunately chose to adopt the "but-for" framing under 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 discrimination claim in issue this Term. Br. for Resp. Aimee Stephens, *Harris Funeral Homes*, No. 18-107 at 21-22 (U.S. June 25, 2019).

227 *Zarda*, 883 F.3d at 116-199 (presenting comparative test as whether "but-for" employee's sex, gay employee's treatment would have been different).

Hively, but the Seventh Circuit *en banc* made no such linguistic escalation of the causation standard in *Hively*.[228] 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 *motivated* the firing, harassment, assault, or other harm.

Hively and *Harris Funeral Homes* took slightly more care to limit the comparative method as a tool to isolate the sex characteristic's link to the employees' protected trait (element (a) above). Respectively, the decisions located sexual orientation and transgender status within the sex trait. *Hively* and *Harris Funeral Homes* noted that "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" to "determine whether Title VII has been triggered."[229] While this language from *Hively* and *Harris Funeral Homes* does mention sex-linked status in connection with motive, the panels carefully avoided requiring a frame for its approach as "but-for" causation.

Disaggregating this hybridized trait-causation under Title VII back to the two elements of trait and causation explains the gulf between *Price Waterhouse* and *Oncale*, and why *Oncale* left the door open to a doctrinal correction.

III. MULTIAXIAL ANALYSIS

Multiaxial analysis, as introduced here, 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 fact-specific, social dynamics.[230] Ending the conflation of identity status and the harm of discrimination is the primary achievement of the doctrinal correction. Multiaxial analysis normatively expands analysis in these cases beyond trait essentialism and the most common patterns of discrimination, e.g., beyond equating women as effeminate for sex discrimination theories.[231] By so doing, the harms of stereotyping other ascribed stigma are not "legally enshrin[ed]" by attempts to define discrimination.[232]

Part III.A details the framework and how it guides jurists in evaluating whether, for example, mistreatment is because of sex even when all parties disagree as to what plaintiff's "sex" is. In Part III.B, we turn to examples of multiaxial analysis in application, and discuss its capability of adjudicating cases in which plaintiffs assert intersecting forms of discrimination

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228 *Id.* (citing *Hively*, 853 F.3d at 345)),

229 *Id.* at 575 (citing *Hively*, 853 F.3d at 345)).

230 Echoing Abrams's earlier call, arguably heeded among lower courts in recent years, Title VII is "capable of contextually variable answers." Abrams, *Title VII and The Complex Female Subject*, *supra* n. at 2533.

231 *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);

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

such as racialized sexism in Part III.C, which addresses earlier critiques from intersectionality theorists.[233] We then conclude in Part III.D by responding 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. This approach is akin to the familiar investigation and presentation of evidence to a factfinder in a civil case by the parties.[234] 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[235] 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 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, the axes may shift relative to each other depending on the workplace or point in time because discrimination based on social traits, such as identity-related status, arise relationally.[236] 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 consensus: 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."[237] 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:

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233 *See* Part III.C, *infra* and nn. (describing confluence of additional dimensions of experience in sex discrimination, including stereotypes).

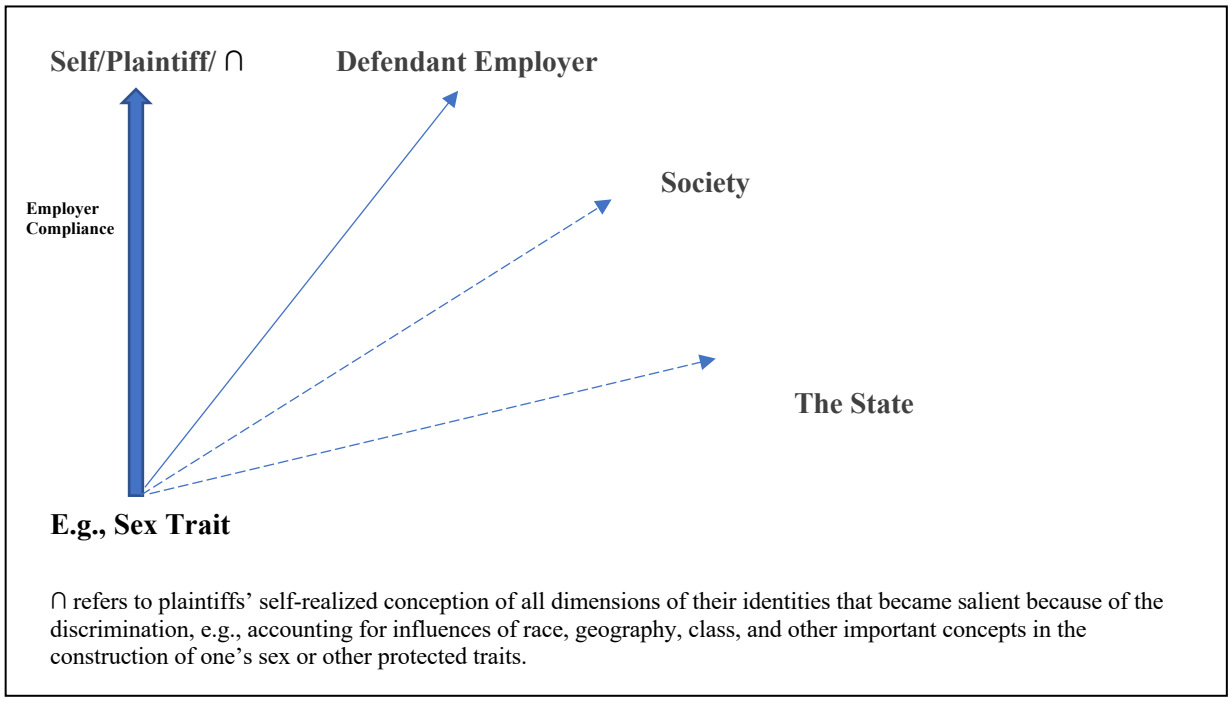
234 The conceptual model is that of three-dimensional ball-and-socket joint with axes that can pivot, rather than traditional x- and y- axes along each ray, or projected identification of the Plaintiff.

235 Singular usage of the word "their" is intentional.

236 *See* Abrams, *infra* n. at 2533 (urging new Title VII interpretation that shapes the scrutiny as "capable of contextually variable answers" given the contested social nature of characteristics).

237 *Ulane I*, Inc., 581 F. Supp. at 823.

Figure 1: Multiaxial Analysis Reflecting Situational Separability of Viewpoint Axes



The chief axis is the Plaintiffs' determination as to their own trait or traits or, in the intersectional context, multiple traits. D. Wendy Greene has observed that "perceptions or misperceptions that are observable or ascertainable characteristics signify an individual's physical and mental capability, morality, and self-worth, among other individual characteristics," making the harm of discrimination ascriptive or descriptive.[238] As our nation's history reflects, a primary tool of dehumanization is through sex,[239] 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.[240]

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

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238 *See* Greene, *supra* n. 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 (R. Moran & D. 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").

239 *See, e.g.*, City of Belleville v. Doe, 119 F.3d 5636, 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."). *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.").

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

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 it impermissibly relied on Plaintiff's sex. As Kramer previously argued, these traits encompass both status and conduct, aligning with sex discrimination doctrine.[241]

The other potential axes are Society and the State (government). Their relevance to each case depends on particular circumstances. The Society axis may reflect dictionary definitions, occupational culture, geographically specific practices, or political and historical context, with experts or *amici* as possible aids.[242] 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.

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,[243] color, religion,[244] and national origin[245] — are socially and often privately defined.[246] Indeed,

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241 Kramer, *supra* n. at 940-41 (devising framework to capture sex as both a status and a practice).

242 *Price Waterhouse v. Hopkins*, 490 U.S. at (relying upon use of social psychologist's testimony regarding sex stereotyping in plaintiff's partnership selection process); *Ulane I*, 581 F. Supp. at (relying upon competing medical expert testimony regarding how sex is medically determined); Schroer v. Billington, 577 F. Supp. 2d 293 at (D.D.C. 2008) (same); and *infra* Part III.D and nn. . *See also* Ann C. McGinley, *Masculinities at Work*, 8 OR. L. REV. 359 (2004) (addressing occupational culture).

243 Indeed, this societal realization came decades sooner for race than for sex as a social construct. *See* Greene, *supra* n. at 145-77 & 146 n. 284 (describing the ignominious race determination trials of the nineteenth century grounded "physical features" and "racial reputation" to grant or withhold political, social, legal, and economic rights); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 618-19 (1987) (in § 1982 action for right to hold property, holding that congregation of Jews were not foreclosed from claim of racial discrimination because they were distinct people that Congress intended to protect, regardless of fact society today considers them "part of the Caucasian race"); St. Francis College v. Al-Khazraraji, 481 U.S. 604, 613 (1983) (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.").

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

245 29 CFR § 1606.1 (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.").

246 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* Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131, 1131-39 (1979) (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 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

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,[247] 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.[248] As to sexual orientation, however, laws that excluded homosexuality "put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[249] Like the Defendant Employer axis, the Society and State axes are conceptually separable from the Plaintiff's self-definition as to their sex 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.[250] 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,[251] and create barriers in accessing health insurance for gender minorities.[252]

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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* A.J. (Anna James) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J. OF L. & GENDER 491, 496-97, 534-38 (2016).

247 Lin, "LGBTQIA+ Discrimination" in EMPLOYMENT DISCRIMINATION LAW AND LITIGATION §§ 27.4, 27.50, 27.75, 27.8, 27.17 (Thomson West 2019).

248 *See supra* n. [Intersex & Genderqueer Project]; MOVEMENT ADVANCEMENT PROJECT, IDENTITY DOCUMENT LAWS AND POLICIES: DRIVER'S LICENSE, www.lgbtmap.org/img/maps/citations-id-drivers-license.pdf (reflecting 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).

249 *Obergefell*, 135 S. Ct. at 2602.

250 *See, e.g.*, 2015 U.S. TRANSGENDER SURVEY (reporting only 11% of trans respondents possessed identification cards bearing their preferred name and gender); Zzyym v. Pompeo, No. 15-CV-02362-RBJ, 2019 WL 764577, at **3-4 (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 Zzymm passport with sex marker of "X").

251 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 44. In only the prior year alone, as many as 14% 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*.

252 *See, e.g.,* Third Am. Compl., Doe v. Fedcap Rehab. Servs., Inc., No. 1:17-cv-08220-JPO-OTW (Dkt. 58) at ¶¶ 9, 58-62 (S.D.N.Y. May 11, 2018) (alleging conduct as grounds for Title VII sex discrimination against plaintiff who identifies as trans-masculine genderqueer); Compl. in Interv. of Plaintiff/Intervenor Dr. Rachel Tudor, N. 5:15-cv-00324-C, Dkt. 24 at ¶¶ 67-69 (W.D. Okla. May 5, 2015) (describing employer's health insurance for professors explicitly excluded including medically necessary treatments health care benefits for transgender individuals connected with transition).

The multiaxial approach recognizes the force 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 however, this approach clarifies from a compliance perspective that the employees' self-identification of sex is to be respected. A Plaintiff may provide evidence of the Defendant Employer's disagreement with their sex trait, irrespective of whether the State recognizes it. Conversely, the policies of government agencies that do recognize, e.g., a third non-binary sex, could be evidence supportive of plaintiffs' 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.

When an employee is perceived to defy heterosexual norms, this model demonstrates that Title VII already has the ability to account for increasingly visible sexual variation with society beyond classes or "statuses." Approximately 53.6 million American adults responded that they: may identify as LGB; have engaged in same-sex sexual behavior; or acknowledged at least some same-sex sexual attraction during their lifetime.[253] They are two to three times more likely to say that they are attracted to individuals of the same sex or have had same-sex sexual experiences than they are to self-identify as LGB.[254] Furthermore, more than 35% of Americans between ages 13 and 21 know someone who prefers to use gender-neutral pronouns.[255] An intellectually honest approach to Title VII's reach does not define the *malum* of discrimination through the categorizing gaze or the identity politics of the harasser, but examines how the harassment arises.

B. Multiaxial Analysis in Application

It is important to note the components of a discrimination claim that multiaxial analysis does not replace. At all times, Plaintiffs must marshal a preponderance of the evidence that the trait motivated the mistreatment. They must also show that they were qualified for the position (except in cases of harassment).[256] Further, Plaintiffs must still show that the employer's conduct was sufficiently serious as 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, but they should be treated as fact issues for the jury.

Courts have yet to adopt aspects of this approach to trait-causation beyond iterations of formalistic categorical approaches, such as sex-stereotyping, comparator, and associational discrimination theories, to "isolate the significance of sex to the employer's decision."[257] Employers will find that the multiaxial model reflects best practices for training and prevention. Centering employee dignity and self-identification promotes preemptive compliance over discrimination remediation. Employers that are multijurisdictional or based in states or localities

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253 Gates et al., *supra n. at* 5 (Apr. 2011).

254 *Id.* at 5.

255 KIM PARKER ET AL., PEW RES. CTR., GENERATION Z LOOKS A LOT LIKE MILLENNIALS ON KEY SOCIAL AND POLITICAL ISSUES 4 (Jan. 17, 2019), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2019/01/Generations-full-report_FINAL_1.18.pdf

256 42 U.S.C. § 2000e.

257 *Hively*, 853 F.3d at 345.

with laws that extend beyond the fixed-sex binary will find that they implicitly comply with multiaxial analysis.[258]

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.[259]

1. Bostock v. Clayton County, Ga.

Bostock v. Clayton County provides a timely illustration of how courts fare without multiaxial analysis, and how the analysis would differ under the multiaxial method.[260] Gerald Lynn Bostock worked as a Child Welfare Services Coordinator for Clayton County, Georgia. During his decade-long tenure, he received good performance evaluations and the program he managed received a county program excellence award and he served on a national policy committee related to welfare services between 2011 and 2012. 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.

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. 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. 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 "grounds unbecoming one of its employees." Mr. Bostock disputes the audit and its findings as pretext for a discriminatory firing.

i. The Current Approach

Even under the post-1991 statute, the *Bostock* Court continued to invoke a "classification-first" approach to evidence in sexual orientation cases that misreads the statute. The Eleventh Circuit 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

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[258] According to one study, 55% of the adult "LGBT" population resides in states that prohibit workplace discrimination based on sexual orientation and gender identity through both descriptive group coverage and interpreting existing sex discrimination laws to include sexual orientation and gender identity. Non-Discrimination Laws, Movement Advancement Project, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited July 3, 2019).

[259] This proposal eliminates the unnecessary bifurcation between single-motive and mixed-motive cases that recently stumped the Court in *Costa*. 539 U.S. at 99-100.

[260] The facts are drawn from the district court's opinion, No. 1:16-CV-1460-ODE, 2017 U.S. Dist. LEXIS 217815 (N.D. Ga. July 21, 2017).

homosexuality" is not prohibited by Title VII.[261] 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.[262] 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 implication is that claims like Mr. Bostock's are barred from pleading any evidence of anti-gay discrimination (i.e., homophobic remarks commonly associated with bullying) and can never be 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 man and its import that he is man who is attracted to other men.[263] 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.

ii. Multiaxial Analysis

Under multiaxial analysis, sexual orientation cannot be a class-based bar to social and definitional context, but recognizes sexual variation to include socially-imposed labels inextricable from Mr. Bostock's protected sex trait. The axes serve to clarify the relevant projections 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, Plaintiff, Mr. Bostock is a man who 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) 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 employer 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 it is

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261 *Bostock*, 723 Fed. App'x at 964; 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 *Evan* decision issued, though the Eleventh Circuit noted it was a viable theory.

262 723 Fed. App'x at 964, 965 n.2 (citing *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)). The Eleventh Circuit acknowledged the bifurcated approach the year prior, in *Evans v. Georgia Regional Hospital*, 850 F.3d at 1254-55.

263 The *Bostock* court cited its *Evans* decision from the prior year, which also ducked the issue. *Supra* n. [citing *Evans* at 154]. Sonia Katyal has discussed the legal presumption of a polarized, mutual exclusivity of sex such as it "can never rest between the two or challenge the poles altogether. *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.

impossible to locate the Plaintiff's sex trait when considering his sexual orientation. For Mr. Bostock, sexual orientation became salient as his homosexuality became known. However a woman in Mr. Bostock's shoes, sexually attracted to men, would not have experienced dissonance in her sex and sex-linked traits. Dismissed prior to discovery, Mr. Bostock's pleading provided fair notice that the litigation may uncover evidence of sex-based motive for the decision to dismiss him.[264] Although Mr. Bostock had no evidence pre-discovery directly connecting his firing to anti-gay animus, the first *McDonnell Douglas* prong should be modified to examine sexual orientation as a relational trait inextricably anchored to Mr. Bostock's male sex, just as *Fabian* did with respect to transgender status.

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 single- or mixed-motive analysis, not the isolation of the protected trait that multiaxial analysis provides.[265] A Title VII court's obligation is to ensure that sex and gender were "irrelevant to the employment action."[266] 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."[267] Despite *Zarda*'s muddling of trait with causation, it articulated a standard jury instruction 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.[268]

The State axis features prominently in Mr. Bostock's case, as the Defendant Employer is

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[264] 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 id.* at 1269 n. 14 (Rosenbaum, J., 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).

[265] *See* Part II.B.3 *infra* & n. __ [*Zarda* and employee counsel's conflation of trait isolation with causation].

[266] 42 U.S.C. § 2000e-2(m); *Price Waterhouse*, 490 U.S. at 240.

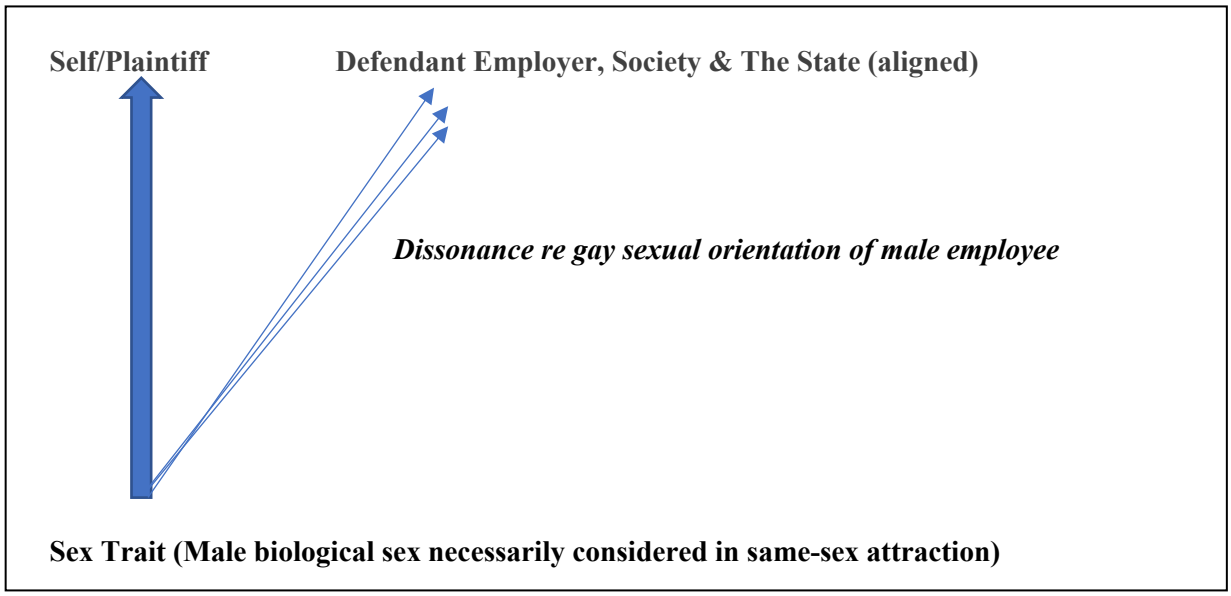
[267] *Nassar*, 570 U.S. at 346 (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)).

[268] *Zarda*, 883 F.3d at 116 & 116 n. 11(citing 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m)). The post-1991 motivating factor (i.e., "mixed motive") theory an alternative theory available in a § 2000e-2(a) single-motive 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 Phyrric victory of declaratory relief and attorneys' fees. 42 U.S.C. § 2000e-5(g) (2) (B) (i). 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 "and ha[d] an ex-husband to prove it" to put her at ease before they were strapped together. *Zarda* 883 F.3d at 107. 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.

a local government entity. That he and the agency administered Georgia's family law, including the vital areas of adoption and foster home placement,[269] 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 first having to litigate and obtain a federal court order.[270] State 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.[271]

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 under the sex-discrimination theory Mr. Bostock 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.*

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269 *See* Br. for Pet'r, Bostock v. Clayton Cty., Ga., No. 17-1618, at 5 (U.S. June 26, 2019) ("[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.").

270 *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); O.C.G.A. § 19-3-3.1 (same); O.C.G.A. § 19-3-30(b)(1) (regarding provision of marriage licenses); *e.g.,* Lambda Legal, *Marriage Equality in Georgia, Frequently Asked Questions*, https://s11863.pcdn.co/wp-content/uploads/2015/06/FAQ-Marriage-Equality-in-Georgia.pdf.

271 O.C.G.A. § 19-3-3.1 ("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; *e.g.*, Ord. & Dec., *Inniss v. Aderhold*, No. 1:14-cv-01180-WSD, Dkt. 49 (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").

Studios, multiaxial analysis addresses the sex-based harms that an employee experiences upon revealing an identity outside of fixed binary sex.[272] C.G. Studios denied Wilma Woods a promotion and terminated her employment after discovering that she underwent gender-corrective surgery for a so-called "hermaphroditic condition."[273] The contextual nature of the multiaxial approach has the capacity to account for an externally ascribed identity, as Ms. Woods now self-identifies as a binary female, prevailing against mere labels to detect socially contested sex characteristics — here, intersex — as a stigma.

i. The Current Approaches

The court rejected Wilma Woods' 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.[274] 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,"[275] and related to "transsexual" status.[276] The comparative binary approach recently advanced in *Zarda* and *Hively* is also inapt, as in its unique context it detects the role of sex in animosity against same-sex sexual orientation.[277] 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."

ii. Multiaxial Analysis

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

Ms. Woods's dignitary interest remained in being recognized in as a woman, having obtained surgery to affirm her sex and gender identity as female (the Plaintiff axis). The studio was hostile toward Ms. Woods 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, trans-sexualism) should have been treated under extant doctrine as direct evidence of the studio unlawfully considering Ms. Woods's sex (both former and current) in its

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272 660 F. Supp. 176, 177, 177-78 (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, 227 (D.N.J. 2011).

273 660 F. Supp. at 176-78. 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).

274 *Id.* at 177-78 (interpreting state statute with "because of . . . sex" provision identical to Title VII).

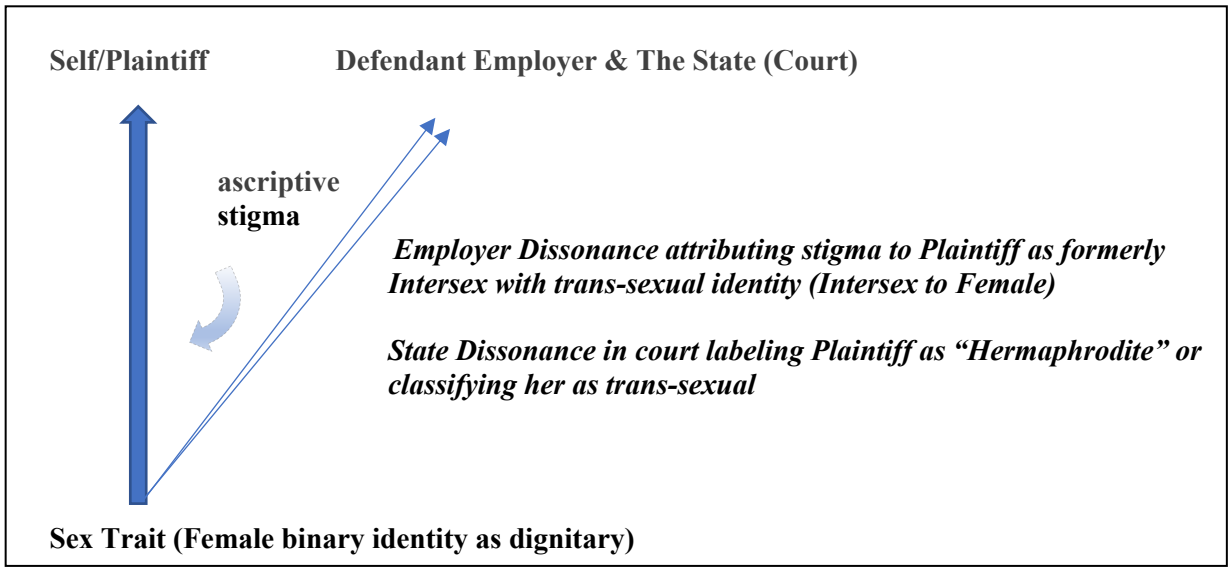
275 *Id.* at 177.

276 *Id.* at 178.

277 Nor would the substantive-equality method of associational discrimination, akin in *Loving*, apply to this situation where intimate associations are not in issue.

decisions. Summary judgment should have been granted to Ms. Woods, rather than denied.[278] Further, the court, as the State, joined the Defendant Employer in viewing her as having a "hermaphroditic condition" and being trans-sexual, rather than dignifying Ms. Woods's self-identification. The relative positions of the axes in Ms. Woods'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. Woods Studios thought its employee was a binary female with respect to sex and gender identity, but fired the employee for planning to adopt an original intersex sex and non-binary gender identity, it too would be sex-based discrimination.

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 CRT theorists Devon Carbado and Cheryl Harris identified as intersectionality critiques simply generating new forms of essentialism.[279] 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 compartmentalized evidentiary rules that drive substantive fact-finding.[280] Some judges spurn overlapping or

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[278] 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 *McDonnell Douglas* to a mixed-motive theory under Section 703(m) would produce incoherent results.

[279] *Intersectionality at 30*, *supra* n. at 2200 (disaggregating intersectionality and anti-essentialism).

[280] Empirical research in intersectionality scholarship further substantiate the problems with anti-discrimination doctrine. *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, 999 (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*

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"[281] or creating a "many-headed Hydra . . . splinter[ing] Title VII beyond use and recognition."[282] Rather than statutory overreach, what taxes 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.[283] 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 be concurrent and contextually defined.[284]

Current trends shift to theorizing plaintiffs with a sex claim to assert them under either sex alone or a sex-plus analysis.[285] However, those doctrines fail to capture the full competence of the statute or our courts, and presupposes 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.[286] A situationally variable approach understands that one's identity as a black woman does not predetermine the forms of discrimination she may face.[287]

In this way, a transgender man of color in the post-2015 era would, when relevant to the harms he faces at work, raise without exclusion the gender hostility he faced that was inextricably related to his race or color.[288] For example, a Kentucky court recently held 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.[289] Title

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at Complex Bias, 50 WM. & MARY L. REV. 1439, 1440 (2009) (reporting sampling in which employers prevailed at summary judgment in multiple-claims cases at a rate of 96%, as compared to 73% in employment discrimination claims in general). *See* Hutchinson, *Ignoring the Sexualization of Race*, *supra* n. at .

281 Degraffenfried v. Gen. Motors Assemb. Div., St. Louis, 413 F. Supp. 142, 145 (E.D. Mo. 1976).

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

283 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.

284 Hutchinson, *Identity Crisis*, *supra* n. at 312-13; *see also* Deborah King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42, 51-52 (1988).

285 *E.g.,* Elengold, *supra* n. (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 substantiate the flaws in compartmentalized theories of discrimination. *See, supra* nn. [Best; Kotkin].

286 Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416-17 (10th Cir. 1987) (citing Jefferies v. Harris Co. Community Action Ass'n, 615 F.2d 1025, 1032 (5th Cir.1980)).

287 Crenshaw called this critique the "single categorical axis." Crenshaw, *supra* n. at 140.

288 *See, e.g.* Richard Juang, "Transgendering the Politics of Recognition" *in* THE TRANSGENDER STUDIES READER 706, 711 (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).

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

VII does not require a one-size-fits-all approach to cases with multiple and 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. 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.

Unfortunately, few opinions recognize the simultaneous dimensions of identity. This leads litigants and their counsel to 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.

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.[290] 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. She stated that a promotion to a store with a higher sales volume required someone "fair-skinned." His boss made these remarks around the time that she denied Mr. Brack the position and demoted him to a lower-volume store. 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.

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. The court believed that he could, however, prove such discrimination only with respect to hostile work environment and retaliation. It did not consider whether a jury could interpret Ms. Chevalier's view of Mr. Brack was compromised as to all employment decisions. 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 meaningfully evaluate the influence of other dimensions of bias, even if they are not based on a statutory ground.[291] 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.[292] After Mr. Ash and Mr. Hithon prevailed at trial, the district and appellate courts believed that a new trial was warranted, disregarding evidence that

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[290] The facts and holdings of this case are drawn from Brack v. Shoney's, Inc., 249 F. Supp. 2d 938 (W.D. Tenn. 2003).

[291] cunningham, *The Rise of Identity Politics*, *supra* n. at 499 n. 281 ("Few courts have been willing to do the calculus for the intersection of more than two forms of oppression.").

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

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.[293] 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."[294] Certainly, the 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.[295]

D. Responses to Anticipated Counterarguments

The multiaxial approach will likely face hermeneutical counterarguments that have been put to the test in the post-2015 cases. Having addressed the inappropriateness and impracticability of original public meaning and legislative intent in Part I, I address the underlying charge of judicial legislating driving the *Zarda* and *Hively* dissents. Furthermore, 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.[296] Courts unnecessarily assert that original and public meanings in debates "cannot exist outside of formal governmental institutions."[297] This view underpins the decidedly unempirical view that failure to pass legislation adding sexual orientation and gender identity as protected traits proves democratically legitimate disfavor.[298] 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."[299] Analysis "must begin . . . with the language of the statute itself" and "[i]n this case it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"[300]

Interpreting Title VII to reach socially contested traits is a task delegable to trial courts. It is truer than the representation-reinforcement theory that engrossed constitutional jurisprudence since *Carolene Products*, beyond the argument that the task was actually delegated by statute.[301] The multiaxial, contextual approach cannot be deemed simply a project of

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293 *Id.*

294 *Id.*

295 The intersectional capacity of multiaxial analysis in the areas of race, disability, and religion is beyond the scope of one article, and will be addressed in future articles revisiting precedent and illustrating the approach.

296 Schacter, *supra* n. at 595-96.

297 *Id.* at 663.

298 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.").

299 *Manhart*, 435 U.S. at 707 n.13; *Zarda*, 883 F.3d at 115 (citing Pullman–Standard v. Swint, 456 U.S. 273, 276 (1982); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)).

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301 304 U.S. at 52-53 n.4; *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 162-64 (1980); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19-20 (1959) ("The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it."). *See also* Bruce Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 717 (1985) (discussing historic specificity of

representation reinforcement shaped by the politics of legislative exclusion.[302] 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.[303]

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. As one judge complained, courts should not be tasked with "grading competing doctoral theses in anthropology or sociology."[304] Setting aside the divide-and-conquer approach of the old rules, however, is necessary to achieve the socially informed, circumstantial approach in *Ash*. Multiaxial analysis realizes Harris's earlier principle, that the law should not eschew categories altogether but explicitly treat them as "tentative, relational, and unstable."[305] 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. As in *Price Waterhouse*, experts in occupational psychology can explain the connections to the workplace and are subject to the usual testing,[306] even if the Justices noted that they may not have found such testimony necessary in the first place as to Ms. Hopkins's partner evaluations.[307] 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. [308] Expert testimony

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Carolene Products as a repudiation of the "slavocratic constitutionalism of *Dred Scott v. Sanford* after the Civil War" that had discredited the Court).

302 *See also n. supra* [*Quasi-Constitutional Law*].

303 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 166 (OXFORD U. PRESS 2004) (noting "judicial reluctance to push court-ordered desegregation" causing schools to remain racially unintegrated by the 1980s).

304 852 F.3d at 1034.

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

306 490 U.S. at 1782-83, 1793-94 (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 for Mental Health).

307 "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." 490 U.S. at 256.

308 *See* 29 C.F.R. § 1604.10 (defining restrictions based upon pregnancy, childbirth, and related medical conditions defining as sex discrimination pursuant to Title VII) and nn. *supra* (discussing passage of the Pregnancy Discrimination Act of 1978 following *Gilbert*); 29 C.F.R. § 1604.4 (defining marriage-based restrictions in employment as sex discrimination pursuant to Title VII); U.S. Equal Emp't Oppt'y Comm'n, CCH-EPGD P 5354, *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* (2012), 2013 WL 45267, 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, 69-70 (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

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 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.[309] Raising Title IX claims analytically indistinct from Title VII doctrine, 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's 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."[310] 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,[311] and similar expert medical background assisted the constitutional challenge to the Trump Administration's ban on military service based upon gender dysphoria.[312]

Parallels may be drawn to invidious ideological discrimination with respect to colorism, where two experts were permitted to address colorism to contextualize 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.[313] As one court exhorted in a distinct context, a case alleging discrimination by darker-skinned Pakistani citizens against a lighter-skinned Pakistani citizen in the United States, "the presumption of a protected [] status on the basis of color is bound up with an entire national racial history," and thus a complete record at summary judgment required "evidence by way of expert testimony or treatise" to provide guidance.[314]

Indeed, practicability was not a barrier for the post-2015 groundswell of federal trial and appellate courts in finding unlawful discrimination because of sex-based traits. After Congress stated its preference that juries, not courts, resolve factual questions regarding the cause of discrimination in Title VII cases,[315] the statute empowers a diachronic, local assembly of peers capable of being close to social facts to detect motive. As Malamud has noted, psychological

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discrimination in a general, rather than an individual sense, by virtue of their disproportionate impact on women as victims, the surrounding social and historical context").

309 897 F.3d 518, 522-24 (3d Cir. 2018).

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

311 *See also Kasper*, 318 F. Supp. 3d 1298-99 & 1299 n. 14 (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 psychologist specializing in treating transgender children and upon similar medical *amici*).

312 *Karnoski*, 2019 U.S. App. LEXIS 17878, at *12 (citing Br. Amicus Curiae Am. Med. Ass'n et al. regarding transgender individuals with gender dysphoria and outlining the transition process).

313 Walker v. Secretary of Treasury, IRS, 742 F. Supp. 670, 675 (N.D. Ga. 1990). *Cf.* Kotkin, *supra* n. (advocating for normalizing more extensive discovery and use of experts for plaintiffs bringing multiple or overlapping claims of discrimination).

314 Ali v. Nat'l Bank of Pak., 508 F. Supp. 611, 612, 613-14 (S.D.N.Y. 1981). I credit Tanya Kateri Hernandez with discussing the *Ali* case in *Latino Inter-Ethnic Employment Discrimination and the "Diversity" Defense*, 42 HARV. C.R.-C.L. L. REV. 259, 306-307 (2007).

315 42 U.S.C. § 1981A(c), as amended by the Civil Rights Act of 1991.

studies reveal that juries make sense of complex facts better than complex law.[316] Ultimately, the problem is not a lack of broad legal authority, duly entrusted to the courts, but the courts' neutrality.

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 exhausted both theoretical legitimacy and utility under the current statute. As decisions in the post-2015 consensus demonstrated, Title VII is capable of contextually variable answers and may navigate the socially contested nature of traits, just as *Ulane I* did for sex.[317]

Multiaxial analysis is consistent with Title VII's statutory text and goals as a powerful, normatively remediating law that requires social context for enforcement. Regardless of the outcome of this Term, stakeholders including counsel, parties, and jurists must resist totalizing approaches that undermine the law's normative core and undercut equality for all individuals, without disfavor.

316 Malamud, *supra* n. at 2323 & 2323 n. 293 (citing sources).

317 Abrams, *supra* n. at 2533.