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## *ESSAY*

### *BOSTOCK’S INCLUSIVE QUEER FRAME*

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*Bostock v. Clayton County is the Supreme Court’s first major decision on gay rights written since Justice Kennedy’s retirement. It is a victory for the LGBT community—a momentous one. But this Essay argues that Bostock is even more momentous than its holding. The case’s central syllogism is hidden beneath a deceptively straightforward reading of Title VII. Bostock says, simply and clearly, that sex equality requires queer equality, and that trans rights are human rights.*

*Bostock’s logic is universal and inclusive. This Essay centers its analysis on trans identity to explain how and why that matters. It shows how Bostock arrives at its expansive frame for queer rights, and why its careful textual analysis leads it to an ostensibly progressive conclusion. This logic is unusual. Courts confronted with queer plaintiffs usually adopt more minoritarian frames. But in Bostock, inclusivity wins out. That is a good thing: an inclusive account of anti-queerness is straightforward and logical. It accurately describes the way sex-based discrimination operates. It accommodates difference well but remains robust enough to account for core instances of sex discrimination. It is promising, pragmatic, and adaptable. And finally,*

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*because it shows the deep interdependence of sex-based identities, the inclusive frame is profound.*

[Q:] How has it been for you living as a trans person during this time?

[A:] Well, you're referring to the *Bostock* . . . decision, which I think was huge for trans people, especially, because it established that [we] are protected in the workplace. And that's extraordinary because it's a protection that doesn't depend upon privacy in the way that the *Lawrence v. Texas* decision . . . depended on privacy in order to defend gay sex.

It doesn't depend on the kind of inherent dignity of the marriage form [that] *Obergefell* [did]—or the kind of redemptive qualities of love which may or may not chime with your experiences of love; they don't always chime with mine—but the fact of work and the fact of the public. And it's kind of amazing to think that that happened. I don't think any of us really saw that coming. And it was a huge deal.<sup>†</sup>

## I. INTRODUCTION

*Bostock v. Clayton County* turned a traumatic quarantine summer into a watershed year for LGBT rights. *Bostock*'s holding is crystal clear, but as 2020 comes to an end, the decision as a whole remains difficult to characterize neatly. When it was issued in late June, it immediately became a jurisprudential Rorschach test. Maybe *Bostock* was principled and textual.<sup>1</sup> Or maybe it was autocratic diktat<sup>2</sup>—or a trojan horse<sup>3</sup>—or even the death of conservative judging itself.<sup>4</sup> But no matter what the decision might augur for the Roberts Court, it remains true that an

<sup>†</sup> Steven Rascón, *Transitioning with Grace: Coming Out in Academia*, Calif. Mag. (Fall 2020), <https://alumni.berkeley.edu/california-magazine/fall-2020/transitioning-with-grace-lavery-coming-out-in-academia> [https://perma.cc/8FKF-67PJ].

<sup>1</sup> Ezra Ishmael Young, *Bostock Is a Textualist Triumph*, Jurist (June 25, 2020, 3:53 PM), <https://www.jurist.org/commentary/2020/06/ezra-young-bostock-textualist-triumph/> [https://perma.cc/R4T7-TGTV].

<sup>2</sup> See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1755–56 (2020) (Alito, J., dissenting); Ross Douthat, *Opinion, The Tempting of Neil Gorsuch*, N.Y. Times (June 20, 2020), <https://www.nytimes.com/2020/06/20/opinion/sunday/neil-gorsuch-supreme-court.html> [https://perma.cc/CMH8-SZ6S].

<sup>3</sup> Joe Patrice, *Neil Gorsuch Lays Landmines Throughout LGBTQ Discrimination Opinion, Above L.* (June 15, 2020, 1:22 PM), <https://abovethelaw.com/2020/06/neil-gorsuch-lays-landmines-throughout-lgbtq-discrimination-opinion/>.

<sup>4</sup> E.g., Josh Hawley, *Was It All for This? The Failure of the Conservative Legal Movement*, Pub. Discourse (June 16, 2020), <https://www.thepublicdiscourse.com/2020/06/65043/> [https://perma.cc/55EL-FR7L].

employer who fires a person for being gay or transgender violates Title VII of the Civil Rights Act.<sup>5</sup>

For transgender Americans, *Bostock* means even more than what it says: the decision humanizes us in a setting where we are only rarely seen.<sup>6</sup> This was the second time the Supreme Court found in a trans plaintiff's favor,<sup>7</sup> but it was the first time the Court addressed transgender status head-on. *Bostock* is historic, and that makes it especially poignant in an election year that has spurred politicians to target trans identity.<sup>8</sup>

The critical reaction has been full of sound and fury, but the *Bostock* opinion itself has little bombast and less melodrama. Even more strangely, it seems to have no frame for trans identity at all. Transness<sup>9</sup> is taken for granted and presented without a scrap of theory. Even the old standby of gender identity appears precisely once in the majority opinion.<sup>10</sup> Trans people simply have “one sex identified at birth and another today.”<sup>11</sup> Without difficulty, without philosophizing, and without a single cite to Judith Butler,<sup>12</sup> the majority isolates a straightforwardly

<sup>5</sup> *Bostock*, 140 S. Ct. at 1754.

<sup>6</sup> See, e.g., Chase Strangio, *The Trans Future I Never Dreamed Of*, Atlantic (June 24, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/trans-future-i-never-dreamed/613405/> [<https://perma.cc/2SGX-EMFH>].

<sup>7</sup> The first time the Court did so, it described the plaintiff as a “preoperative transsexual.” *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (addressing Eighth Amendment violations in prison housing).

<sup>8</sup> See, e.g., Stephanie Saul, *A Virginia House Candidate Campaigns by Attacking ‘a Man Dressed as a Woman’*, N.Y. Times (Aug. 16, 2020), <https://www.nytimes.com/2020/08/16/us/politics/lgbt-bob-good-congress-va.html> [<https://perma.cc/B2L4-3Y9R>]; Sydney Bauer, *Facebook Axes Political Ad Saying Trans Athletes Will ‘Destroy Girls Sports’*, NBC News (Sept. 16, 2020, 5:22 PM), <https://www.nbcnews.com/feature/nbc-out/facebook-axes-political-ad-saying-trans-athletes-will-destroy-girls-n1240262> [<https://perma.cc/6CF6-AQHB>].

<sup>9</sup> I.e., transgender status. Susan Stryker's glossary is recommended for those new to all these terms. Susan Stryker, *Transgender History: The Roots of Today's Revolution* ch. 1, 1–44 (2d ed. 2017).

<sup>10</sup> See *Bostock*, 140 S. Ct. at 1739. Justice Kavanaugh barely mentions transness, see *id.* at 1823 n.1 (Kavanaugh, J., dissenting), but Justice Alito frequently refers to “gender identity,” and he addresses the majority's avoidance of the term. *Id.* at 1756 n.6 (Alito, J., dissenting).

<sup>11</sup> *Id.* at 1746 (majority opinion).

<sup>12</sup> Judith Butler (they/she) is one of the world's foremost philosophers of gender. Their anti-essentialist theory of gender has been incalculably influential. See Alona Ferber, *Judith Butler on the Culture Wars, JK Rowling and Living in “Anti-intellectual Times,”* New Statesman (Sept. 22, 2020), <https://www.newstatesman.com/international/2020/09/judith-butler-culture-wars-jk-rowling-and-living-anti-intellectual-times> [<https://perma.cc/4Y34-CA8S>]. Their work, particularly 1990's *Gender Trouble*, midwived the field now known as queer theory. See *id.*; Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of*

textual (and surprisingly radical) argument: gender, identity, presentation, expression, sexuality, and physicality are ultimately inextricable from sex.<sup>13</sup> Nothing is lost by avoiding “gender dysphoria” and “gender identity”; in fact, much is gained in the omission of these terms. The trans plaintiff can just be treated like everybody else. The angst and drama and ontology and metaphysics were never truly needed.

But Judith Butler still participates in *Bostock*, though she remains a background character. *Bostock* is more in accord with her thinking than one might expect: in a feat of convergent evolution, textualism and poststructuralism<sup>14</sup> arrive at similar results. This Essay seeks to explain how. First, I will describe an inclusive, trans-centered model of sex discrimination. Second, I will show how and why *Bostock*’s reasoning fits this inclusive model well. Third, I will note that other courts and lawyers may have hesitated to adopt this line of reasoning because of a commitment to a minoritarian frame that is both incomplete and counterproductive. Ultimately, trans equality is implicit in sex equality. By acknowledging this, *Bostock* empowers an inclusive theory of queer<sup>15</sup> and trans rights.

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Queer Politics?, 3 GLQ 437, 438 (1997). It is impossible to write about gender in a theoretical sense without referring to their work.

<sup>13</sup> See *Bostock*, 140 S. Ct. at 1742 (“[H]omosexuality and transgender status are inextricably bound up with sex.”); see also Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Pa. L. Rev. 1, 8 (1995) (arguing that “[t]he wrong of sex discrimination must be understood to include all gender role stereotypes,” and that such a theory necessarily would protect transgender people); Ido Katri, Transgender Intra-sectionality: Rethinking Anti-discrimination Law and Litigation, 20 U. Pa. J.L. & Soc. Change 51, 79 (2017) (arguing that “gender performance” is the common, “epistemological basis of . . . sex, sexual orientation, gender identity, and gender expression”).

<sup>14</sup> The critical framework that undergirds much of Butler’s work; in Butler’s view, poststructuralism is generally opposed to essentialism, binarism, and presumptions of universal meaning. See Bernard E. Harcourt, An Answer to the Question: ‘What is Poststructuralism?’ 2 (U. Chi. Pub. L. & Legal Theory Working Paper, Paper No. 156, 2007), <https://ssrn.com/abstract=970348> [<https://perma.cc/A3SH-KYTD>].

<sup>15</sup> I use “queer” in its broadest sense, capturing all identities associated with the LGBT+ community. See Stryker, *supra* note 9, at 30–31.

## II. WHAT IS SEX DISCRIMINATION?

A. *Perception Theory*

Philosophers, judges, and legal thinkers have long presumed a rigid distinction between the terms “gender” and “sex.”<sup>16</sup> Gender, the story goes, is composed of social norms and activities. Since its content is an artifact of culture, it is not entirely inherent; therefore, in the long run, gender can be altered—or even reconstituted into something else.<sup>17</sup> Sex, by contrast, is understood to comprise only biological facts.<sup>18</sup>

In practice, though, the distinction is less clear. “Sex” and “gender” were confused before this framework emerged, and they remained so even after it became more dominant.<sup>19</sup> Some are understandably frustrated by this overlap.<sup>20</sup> But the elision of “gender” and “sex” is natural, especially in the context of discrimination. The terms are fuzzy because the concepts themselves are too.

In society as currently constituted, sex and gender are intimately linked. To deny this is to confuse gender theory with gender fact.<sup>21</sup> Law has no choice but to acknowledge what is present: most children labeled with an “M” at birth are expected to behave and present in one way, and most children labeled with an “F” are expected to behave and present in another. Even if “sex” is assumed to refer only to physical traits and “gender” only to social ones, the two are not separable: social norms

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<sup>16</sup> See, e.g., Judith Butler, Sex and Gender in Simone de Beauvoir's *Second Sex*, 72 *Yale French Stud.* 35, 35 (1986); *J.E.B. v. Alabama*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting); Melina C. Bell, Gender Essentialism and American Law: Why and How To Sever the Connection, 23 *Duke J. Gender L. & Pol'y* 163, 172 (2016).

<sup>17</sup> See Butler, *supra* note 16, at 35; cf. Judith Butler, Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory, 40 *Theatre J.* 519, 526 (1988) [hereinafter Butler, Performative Acts] (suggesting that gender is communicated through a performance, just as a role in a theatrical production is).

<sup>18</sup> See, e.g., Richard A. Epstein, Gender Is for Nouns, 41 *DePaul L. Rev.* 981, 982–83 (1992). But see Franke, *supra* note 13, at 5. It is possible to productively discuss sex and gender without resorting to prescriptive definitions. See, e.g., Maayan Sudai, Toward a Functional Analysis of “Sex” in Federal Antidiscrimination Law, 42 *Harv. J.L. & Gender* 421, 460–61 (2019).

<sup>19</sup> See David Haig, The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001, 33 *Archives Sexual Behav.* 87, 87 (2004).

<sup>20</sup> See, e.g., *J.E.B.*, 511 U.S. at 156 (Scalia, J., dissenting); Naomi Schoenbaum, The New Law of Gender Nonconformity, 105 *Minn. L. Rev.* (forthcoming 2020) (manuscript at 10), <https://ssrn.com/abstract=3546552> [<https://perma.cc/H4NU-KQ6P>].

<sup>21</sup> See Elizabeth Barnes, Gender and Gender Terms, 54 *Noûs* 704, 715 (2020).

connect one to the other.<sup>22</sup> And because sex and gender are connected, a person’s perceived sex will dictate which gender norms they are held to. Gendered discrimination—whomever it is applied to and whatever shape it takes—must always be “because of sex.”

### B. *Transing* Price Waterhouse

*Price Waterhouse v. Hopkins* ably illustrates that link. Here are the facts: Ann Hopkins was up for promotion at her firm, but she was denied. Male partners thought that she was “macho” and needed “a course in charm school.” Her behavior was unacceptable; at Price Waterhouse, women were expected to maintain their femininity.<sup>23</sup> Under a standard of “but-for” causation, Hopkins made out a prima facie case for recovery under Title VII.<sup>24</sup> Had Hopkins not been female, her masculinity would have been acceptable to the partnership. Therefore, she was disadvantaged “because of sex”—and Price Waterhouse violated the Civil Rights Act.<sup>25</sup>

At first glance, *Price Waterhouse* seems simple. There’s a problem, though; one link is missing in the syllogism. How did the firm know that Hopkins was female?<sup>26</sup> Presumably, it did not inspect her genitals or karyotype her blood. That is not how anyone would evaluate an employee’s sex. Instead, Hopkins probably held herself out as a woman. She marked “female” on her job application. When she showed up to work, she dressed in a way that did not undermine that presumption, and when her co-workers looked at her, they did not see any physical traits inconsistent with the femaleness they assumed was there. What mattered was her perceived sex: because Ann Hopkins was understood to be female, she was expected to behave femininely too. Gender norms applied to her “because of sex.”

Now imagine this: it is 2021, and the facts of *Price Waterhouse* repeat. This time, though, the plaintiff is a trans woman. Call her Alice. She

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<sup>22</sup> See Katri, *supra* note 13, at 69–70.

<sup>23</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231, 235–36 (1989) (plurality opinion).

<sup>24</sup> *Id.* at 262–63, 279 (O’Connor, J., concurring in the judgment); accord *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739–40 (2020).

<sup>25</sup> *Price Waterhouse*, 490 U.S. at 241, 258.

<sup>26</sup> Let us assume that sex comprises only physical traits present at birth. *Bostock*, 140 S. Ct. at 1739.

passes; she's stealth<sup>27</sup> and has been for years; and she is always perceived as a woman. Just like Ann Hopkins thirty-two years before, she becomes a senior project manager at a major accounting firm. But she curses, acts "too macho," and is denied a shot at partnership. She sues, pleading violations of Title VII. Since Alice's facts are just like Ann's, she survives her firm's motion to dismiss, and the case proceeds to discovery. One way or another, the firm discovers Alice's medical records and is simply delighted to learn that she is trans. What a boon! This woman was male all along.<sup>28</sup> *Bostock's* holding does not apply because Alice was not dismissed for being trans. In fact, the firm never even knew she was transgender while she was employed. The but-for test fails, since Alice would have been fired just the same even if she had been cisgender. And the firm argues that *Price Waterhouse* is not on point, either: Alice's dismissal could not have been "because of sex," it says, because she actually *conformed* with sex stereotypes by being a masculine male. Maybe her dismissal was irrational and capricious; maybe her employer intended to discriminate and failed. But Title VII could not have been violated.

This result seems intuitively incorrect. And it is—because what matters is how Alice is seen. Sex discrimination is a social phenomenon, and for social purposes, Alice is indisputably female. Her legal sex is "F"; she presents herself as a woman; and not a thing suggested to her firm that she might lack a woman's normative anatomy. In truth, her firm understood her as a woman. It treated her like a woman, and it fired her like one too. Title VII "prohibits certain *motives*, regardless of the state of the actor's knowledge," and so the firm's perception is what makes the difference.<sup>29</sup>

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<sup>27</sup> A trans person "passes" when they are seen as cis. They have "gone stealth" when nobody in their everyday life knows that they are trans. See Meredith Talusan, *Along with Pain, the Joy of Stealth*, *them.* (May 26, 2020), <https://www.them.us/story/along-with-pain-the-joy-of-stealth-meredith-talusan-fairest> [<https://perma.cc/WXT2-DNTY>].

<sup>28</sup> I.e., she has a penis and testes, and the firm reads these traits as proof of maleness. See *Bostock*, 140 S. Ct. at 1739.

<sup>29</sup> *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (Scalia, J.); see *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) ("What matters . . . is that in the mind of the perpetrator the discrimination is related to the sex of the victim."); Benjamin Eidelson, *Discrimination and Disrespect* 19–20 (2015).

*C. Trans Visibility*

As Alice shows us, a passing trans woman suffers precisely the same sex discrimination that a cis woman does.<sup>30</sup> But what happens if a trans woman doesn't pass? In that case, her transness is visible to a casual observer. Her "maleness" is apparent: the masculinity of her body clashes with the femininity of her presentation. This "clash" is often unpleasant for the observer, who may experience it as visceral revulsion.<sup>31</sup> It is unpleasant for the trans woman too, who may experience it as gender dysphoria.<sup>32</sup> Because of this incongruence, an identifiably trans woman cannot be treated like a cis man, no matter how "male" she looks.<sup>33</sup> Instead, she is an outlier.<sup>34</sup> Her form contradicts itself. That contradiction provokes disgust, which metastasizes into discrimination: she should not exist.

So once again, perception is what matters. A person who sees a misalignment can use it to infer transness, and that inference can motivate discrimination. It can also work the other way around: an employer can learn of a transition, interpret it as a per se misalignment, and dismiss an employee because of an ideological conviction that somebody appearing to be a man is estopped into that state forever.<sup>35</sup> This is what happened to Aimee Stephens, *Bostock*'s transgender plaintiff.<sup>36</sup> In Butlerian terms, the

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<sup>30</sup> Conversely, a closeted trans man also looks like a cis woman to an observer—and is therefore discriminated against as if he were one.

<sup>31</sup> In the movies, a straight man will often vomit when he discovers that a woman he is attracted to is trans. See *Disclosure*, at 64:00–68:00 (Netflix 2020) (collecting examples).

<sup>32</sup> See Stryker, *supra* note 9, at 17–20. Anyone can feel gender dysphoria. The discomfort a woman might feel when she's called "Sir" on the phone is gender dysphoria; so is the distress most men might feel if forced to wear a dress. Cf. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1117–18 (9th Cir. 2006) (en banc) (Kozinski, J., dissenting) ("Imagine, for example, a rule that all judges wear [makeup] while on the bench. . . I would find such a regime burdensome and demeaning . . . I suspect many of my colleagues would feel the same way.").

<sup>33</sup> See Natalie Wynn, *Gender Critical | ContraPoints*, YouTube, at 13:51 (Mar. 30, 2019), <https://youtu.be/1pTPuoGjQsI?t=831> [<https://perma.cc/BX68-H7XY>] ("When a trans woman doesn't pass, it's not like society simply treats her like a man. No, you get treated as monster gender, pronouns 'it' and 'spit.'").

<sup>34</sup> See Barnes, *supra* note 21, at 717; Katri, *supra* note 13, at 73.

<sup>35</sup> This conviction also motivated some courts to rule against trans plaintiffs. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (doubting that "a woman [could] be . . . created from what remains of a man"); Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. Chi. L. Rev. 389, 431–34 (2017).

<sup>36</sup> See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 569 (6th Cir. 2018), *aff'd sub nom. Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).



employer reads a visibly trans person as performing their gender *incorrectly*.<sup>37</sup> The “wrongness” of a non-passing trans woman is a rejection of a person perceived to be “doing gender wrong.”

*Price Waterhouse* made it far more difficult to argue that discriminating against those “doing gender wrong” is permitted under Title VII.<sup>38</sup> Because perceived sex determines how one interprets a gender performance, perceived sex is central to transness itself. Discrimination is not and could not be a mere question of semantics.

#### *D. Sex and Its Penumbrae*

With this understanding of transphobia in hand, one can extend it to other kinds of discrimination too. It is easy to begin with trans identity; it is clear how closely trans is linked to sex. That is why this Essay began there, and maybe that is also why the federal courts have been friendly to trans plaintiffs for some time.<sup>39</sup> In general terms, a discriminator assesses someone's sex, determines that their behavior or presentation is inappropriate for that sex, and metes out punishment. Discriminating against an incorrect gender performance is sex discrimination; trans people are seen as doing gender wrong; and therefore, anti-transness relies on sex discrimination too.

This discriminatory process is general, and it can be applied to many kinds of nonconformity. Imagine the archetypal woman. What characterizes her? She appears to have a female and feminine body. She presents and holds herself out as a woman. And, of course, she prefers the company of men. All of these qualities are normatively associated with one another and linked up through her sex.<sup>40</sup> And because these qualities are sex-related, they can all result in sex discrimination. *Price Waterhouse* is a perfect example: Ann Hopkins's masculine behaviors are seen as inappropriate precisely because she is seen (and holds herself out as) a

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<sup>37</sup> See Butler, *Performative Acts*, supra note 17, at 527–28; Katri, supra note 13, at 71 (citing Judith Butler, *Critically Queer*, 1 GLQ 17, 17–32 (1993)).

<sup>38</sup> See *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (“[T]he perpetrator's actions stem from the fact that he believed that the victim was a man who ‘failed to act like’ one.”). But see *Bostock*, 140 S. Ct. at 1777–78 (Alito, J., dissenting).

<sup>39</sup> See Paisley Currah, *Transgender Rights Without a Theory of Gender?*, 52 *Tulsa L. Rev.* 441, 445 (2017); Ezra Ishmael Young, *What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 *Calif. L. Rev. Online* 9, 15–16 & n.33 (2020) (collecting cases).

<sup>40</sup> Butler calls this phenomenon “the heterosexual matrix.” See David Gauntlett, *Media, Gender and Identity* 148 (2d ed. 2008).

woman. The femininity of her body clashes with the masculinity of her presentation—and so, she is punished.<sup>41</sup> Though she’s cis, she still performs her gender incorrectly. She is discriminated against in the same way and for the same reasons a trans plaintiff might be.<sup>42</sup>

Sex is at the center, and its penumbræ tend to generate identities that are often blurry, complex, ambiguous, or multivalent.<sup>43</sup> But this does not mean that sex must be a stable background. None of this must imply that trans women are simply “men in dresses”; that butch lesbians are merely inchoate trans men; or that nonbinary people are “just” nonconforming members of their sex (as assigned or perceived). Homophobia, transphobia, and sexism are not the same. But these forms of discrimination are similar—and even more importantly, they are *interrelated*. They are connected by a “complicated network of similarities.”<sup>44</sup> They intersect with, converge on, and return to sex, and focusing on sex will capture all of them at once.

Courts have struggled mightily to disentangle discrimination because of sex, gender, sexuality, and transness. But because these forms of bias are so closely linked, it is impossible to distinguish them consistently. As a consequence, the doctrine of sex equality descended into incoherence.<sup>45</sup> Some courts supposed that claims of sex discrimination were actually because of “sexual preference” and dismissed them;<sup>46</sup> others emphasized that Title VII protected gender-nonconforming conduct, but that status was outside its bounds.<sup>47</sup> Some courts elided queerness and sex;<sup>48</sup> and

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<sup>41</sup> Price Waterhouse v. Hopkins, 490 U.S. 228, 235–36 (1989).

<sup>42</sup> See Young, *supra* note 39, at 22.

<sup>43</sup> See J. Halberstam, Transgender Butch: Butch/FTM Border Wars and the Masculine Continuum, 4 GLQ 287, 293–95 (1998). Many people see these identities as inherent to them; many do not. Focusing on perception frees us from having to decide which view is right. Cf. Currah, *supra* note 39, at 444 (describing the way debates about transgender rights often descend into debates about the nature of gender).

<sup>44</sup> Ludwig Wittgenstein, Philosophical Investigations ¶ 66 (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe, P.M.S. Hacker & Joachim Schulte trans., 4th ed. 2009); see Butler, Performative Acts, *supra* note 17, at 529.

<sup>45</sup> Andrew Koppelman, *Bostock*, LGBT Discrimination, and the Subtractive Moves, 105 Minn. L. Rev. Headnotes 1, 10–11 (2020).

<sup>46</sup> E.g., Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326 (5th Cir. 1978).

<sup>47</sup> E.g., Evans v. Ga. Reg’l Hosp., 850 F.3d 1248, 1258 (11th Cir. 2017) (W. Pryor, J., concurring).

<sup>48</sup> E.g., Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App’x 492, 493 (9th Cir. 2009) (per curiam). The panel in *Kastl* included then-Judge Gorsuch, sitting by designation. *Id.*; see Young, *supra* note 39, at 31 (characterizing the decision as “pure Gorsuch”).

finally, some concluded that the distinction was untenable and quit the field entirely.<sup>49</sup> As the Eleventh Circuit put it:

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. “[T]he [sic] very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.<sup>50</sup>

*Price Waterhouse* simply made it impossible to keep every queer plaintiff out. As more and more of them brought their claims, the line drawing became impossible, the categories became confused, and their entanglement was laid bare for all to see.<sup>51</sup> Over time, it became undeniably clear that the feminine man, the gay man, and the (visibly) trans man are punished for essentially the same transgression.<sup>52</sup> As the courts saw, sex is a powerful thing—it has deep roots and manifold effects. And so, addressing sex discrimination often means attacking anti-queerness too.

### III. WHY *BOSTOCK* GOT IT RIGHT . . .

*Bostock*'s theory of sex discrimination is nothing new. It is not new to activists,<sup>53</sup> academics,<sup>54</sup> or judges.<sup>55</sup> Courts, however, have distinguished an “analytic” or *per se* theory of queer protections from one that derives

<sup>49</sup> E.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 135 (2d Cir. 2018) (en banc) (Cabranes, J., concurring in the judgment) (“Zarda’s sexual orientation is a function of his sex. . . . That should be the end of the analysis.”), *aff’d sub nom. Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

<sup>50</sup> *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (quoting Iona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Calif. L. Rev. 561, 563 (2007)). The panel, composed of Judges Barkett, W. Pryor, and Kravitch, was unanimous in its decision, suggesting that this was not a partisan finding. *Id.* at 1313; see Young, *supra* note 39, at 16 n.35.

<sup>51</sup> See Jessica A. Clarke, *How the First Forty Years of Circuit Precedent Got Title VII’s Sex Discrimination Provision Wrong*, 98 Tex. L. Rev. Online 83, 113–17 (2019).

<sup>52</sup> See Katri, *supra* note 13, at 70.

<sup>53</sup> See Cary Franklin, *The Anti-stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 115–16 (2010).

<sup>54</sup> See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 208 (1994).

<sup>55</sup> See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1750–51 (2020); *Winstead v. Lafayette Cnty. Bd. of Cnty. Comm’rs*, 197 F. Supp. 3d 1334, 1346–47 (N.D. Fla. 2016).

from the sex-stereotyping holding of *Price Waterhouse*.<sup>56</sup> *Bostock* makes clear, once and for all, that these theories are one and the same. Sex stereotyping is per se “because of sex”; anti-queer discrimination is per se sex stereotyping. No matter how you get there, anti-queer discrimination must be “because of sex.” Remember: a person’s queer status is defined by queer conduct, and queer conduct is marked only because it *transgresses gender norms*. These norms, in turn, are deeply linked to sex.

*Bostock*’s logic is textual, but it sees this fact-based argument—and that means that it acknowledges how sex discrimination truly works. The Court was not ignorant of the mechanics of sex discrimination. One amicus brief clarified just how difficult distinguishing sex-based and sexuality-based discrimination is in the world at large.<sup>57</sup> Another noted that “[t]he oppression of women and that of gay people are interdependent and spring from the same roots, though they take different forms.”<sup>58</sup>

This emphasis on the diversity, fluidity, and breadth of sex discrimination produces *Bostock*. And that universalizing push guides the opinion to a general theory of sex discrimination that supersedes the reasoning of *Price Waterhouse*. Gender nonconformity is not a separate cause of action under Title VII—it never was.<sup>59</sup> But under *Bostock*’s logic, a person fired for gender nonconformity is necessarily fired “because of sex.” Had the employee been seen as a member of a different sex, their behavior would have been normative, and no dismissal would have occurred.

The *Bostock* test is inclusive, and that makes it flexible and robust. Picture this: a lesbian lawyer holds a “same-sex commitment ceremony” and is fired. The employer claims that she was fired not for being gay but for “flaunting her homosexuality.”<sup>60</sup> But *Bostock* still provides a cause of action. After all, had the lawyer been a man, “flaunting [his] sexuality”

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<sup>56</sup> See *Winstead*, 197 F. Supp. 3d at 1343–46.

<sup>57</sup> See Brief of Serv. Emps. Int’l Union, Int’l Brotherhood of Teamsters & Jobs with Just. as Amici Curiae in Support of the Employees at 8, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623, 18-107).

<sup>58</sup> Brief of Historians as Amici Curiae in Support of Employees at 31–32, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623, 18-107) (internal quotations omitted).

<sup>59</sup> See also *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1260 (11th Cir. 2017) (W. Pryor, J., concurring) (“The doctrine of gender nonconformity is not an independent vehicle for relief.”).

<sup>60</sup> Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 776 (2002) (summarizing *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc)).

by honoring commitment to a woman would not have been offensive.<sup>61</sup> The lesbian lawyer's womanhood is a but-for cause of her dismissal. Thanks to *Bostock*, nobody needs to litigate whether the *true* cause of the dismissal was sex, gender expression, sexuality, or something else. Primary causation is irrelevant. Everything sex touches is included.

#### IV. . . . AND OTHERS GOT IT WRONG

If this approach is so natural, why did it take so long to accept it? Here is one answer: past courts were motivated by animosity to write queer people out of the law. Now that queer identity is less stigmatized, even-handedness is possible.<sup>62</sup> That is surely part of the story, but something else may also be at work.

Lawyers litigating civil rights are motivated to frame queer and trans people as a “discrete and insular minority.”<sup>63</sup> That is what the Supreme Court has said is needed to find protected status, after all.<sup>64</sup> This minoritarian move is natural in American anti-discrimination law, whose principal target is racism. But race discrimination is not a neat analogue for anti-queerness. Neither race, ethnicity, nor national origin are chosen; therefore, their immutability seems to make them wrongful bases for discrimination.<sup>65</sup> By analogy, other wrongful bases are presumed to be immutable as well. Extending anti-discrimination protections to new groups prompts lawyers to characterize those groups in terms of immutable or near-immutable traits.<sup>66</sup> That search for unchangeable qualities focuses the inquiry on status and obscures the contribution of behavior.

But immutability is not necessarily what makes a trait protected,<sup>67</sup> and relying on it is inappropriate. Transness is an identity, but when it is

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<sup>61</sup> See *Bostock*, 140 S. Ct. at 1741 (explaining that an employer who fires a man “for traits or actions it tolerates in his female colleague” violates Title VII).

<sup>62</sup> See Clarke, *supra* note 51, at 121–22. Past courts also mistakenly focused on group rather than individual rights. See Anthony M. Kreis, *Dead Hand Vogue*, 54 U. Rich. L. Rev. 705, 707–08 (2020).

<sup>63</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>64</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (describing “traditional indicia of suspectness”); *id.* at 104–05 (Marshall, J., dissenting) (citing *Carolene Products* to explain why certain classifications “call for close[r] judicial scrutiny”).

<sup>65</sup> See Jessica A. Clarke, *Against Immutability*, 125 Yale L.J. 2, 14–16 (2015).

<sup>66</sup> See *id.* at 23–26.

<sup>67</sup> Cf. Deborah Hellman, *When Is Discrimination Wrong?* 133 (2008) (suggesting that a characteristic shared between classic forms of wrongful discrimination may be mere “correlation” rather than the cause of their wrongfulness).

assumed to be stable, inherent, and immovable, the case for trans rights starts to sound like an argument for accommodation, rendered necessary by the harmful consequences of untreated gender dysphoria.<sup>68</sup> The argument starts to sound like an excuse: transness must be tolerated not because it is worthy of respect but because dysphoria cannot be treated otherwise. The poor things just can't help it.

A minoritizing emphasis on immutability is inaccurate as well. A status-first, “no-choice” analysis only really holds for vertical, heritable traits. These vertical identities are passed down generationally and therefore feel (or truly are) immutable. One is born into them. Queerness is entirely different: it is a “horizontal” trait that is usually not shared across generations.<sup>69</sup> Because it is a horizontal identity, queerness is adopted (*identified with*) more often than it is ascribed. Queerness requires coming out: first to yourself, then to others. It requires a chosen act.

And so, the behavior has pride of place because the identity is defined by its associated acts, whether they are actually performed or merely longed for. The act is inextricable: nobody can know that they are gay until they feel a gay desire. One must at least desire transition to be trans, and one must choose to manifest that status in some way: there is always a choice, even if the choice is effectively between transition and death.<sup>70</sup> Discrimination requires visibility; visibility requires being out; and being out means choosing to be out. Thus, to imagine a queer identity that can be subject to discrimination as something separable from chosen acts is to deeply, fundamentally misunderstand that identity.

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<sup>68</sup> See *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1292–93 (11th Cir. 2020); Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 *Colum. J. Gender & L.* 90, 104–10 (2006) (defending this approach).

<sup>69</sup> See Andrew Solomon, *Far from the Tree: Parents, Children, and the Search for Identity* 2–3 (2012).

<sup>70</sup> For many, dysphoria is so intense that transition truly feels like a matter of life and death. See Stephen T. Russell, Amanda M. Pollitt, Gu Li & Arnold H. Grossman, *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Behavior Among Transgender Youth*, 63 *J. Adolescent Health* 503, 505 (2018) (finding that proxies for social transition predict decreases in suicidal behavior). For others, dysphoria merely impairs one's quality of life. See Emily VanDerWerff, *The Catastrophist, or: On Coming Out as Trans* at 37, *Vox* (June 3, 2019, 10:00 AM), <https://www.vox.com/culture/2019/6/3/18647615/-coming-out-transgender-handmaids-tale-emily-todd-vanderwerff> (“I could have lived as a man for the rest of my life . . . I did not find it literally impossible, as so many trans women do. And yet to live as a man was to take such bad care of myself that ‘the rest of my life’ drastically shortened.”). I could have kept living too—but it would have been a very stunted life.

Queerness is therefore a poor fit for an anti-discrimination law focused on immutability. But its act-contingent nature makes it perfect for the conduct-focused Title VII. The Title VII analysis need not presume some stable category; it does not need to classify status to confer protection. *Bostock* acknowledges this, and it arrives at inclusivity by centering behavior: “Employers fire, single out, discriminate (against), penalize. Infants are ‘identified as’ male or female. . . . Individuals are penalized for particular ‘traits or actions.’”<sup>71</sup>

Because *Bostock* correctly centers conduct and not status, its choice of language should not be surprising. Why does the decision avoid “gender identity”? Maybe gender has little place in a law dedicated to sex; maybe gender necessarily brings sex along with it. Or maybe gender identity is the wrong way to think about transness. After all, a trans woman and a cis woman have precisely the same gender identity: woman. When gender identity becomes the key to transness, what results is language that only permits trans people to *identify*, whereas cis people are simply permitted to *be*.<sup>72</sup> Gender identity is certainly part of the puzzle, since anti-trans discrimination is “because of” gender identity just as it is “because of” sex. But gender identity is not what separates in-group from out-group. It comes as no surprise, then, that *Bostock* cautiously avoids it.

“Gender identity” has an even bigger problem. Applying the concept to transgender status not only decouples transness from sex but also renders it alien, foreign, and other.<sup>73</sup> The word “identity” sounds flimsy: it could easily be arbitrary or chosen. By comparison, “sex” feels stable, constant, and determined. When transness is asserted to hinge on gender and not sex, it seems perfectly logical to suppose that trans people are similarly situated to cis members of the sex they were assigned at birth.<sup>74</sup> “Gender identity” makes it too easy to assume that a trans man is a “biological female” who merely *identifies* as male—and that therefore he

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<sup>71</sup> Paisley Currah, *How a Conservative Legal Perspective Just Saved LGBT Rights*, *Bos. Rev.* (June 19, 2020), <https://www.bostonreview.net/gender-sexuality/paisley-currah-how-conservative-legal-perspective-just-saved-lgbt-rights> [<https://perma.cc/6Q2L-7UKH>] (internal quotations omitted).

<sup>72</sup> Florence Ashley, *The Constitutive In/visibility of the Trans Legal Subject: A Case Study*, 28 *UCLA Women's L.J.* (forthcoming 2021) (manuscript at 29–30) (on file with author).

<sup>73</sup> See *id.* (manuscript at 29); Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle To Achieve Judicial and Legislative Equality for Transgender People*, 7 *Wm. & Mary J. Women & L.* 37, 50–51 (2000).

<sup>74</sup> See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 n.10 (4th Cir. 2020), reh'g en banc denied, 2020 WL 5667294 (Sept. 22, 2020).

is more like a cis woman than a cis man.<sup>75</sup> The subjective language of identity combined with the pathologizing language of dysphoria can lead a judge to conclude that transness is no more than a delusion.<sup>76</sup> “Identifying as a man” becomes ridiculous, a flight of fancy no more reasonable than imagining oneself a helicopter.<sup>77</sup>

#### V. CONSEQUENCES AND CONCLUSIONS

*Bostock* has begun working its way into lower court opinions. As it arrives, its clarifying power seems immense. This is easiest to see in August’s “bathrooms cases,” where divided panels of the Fourth and Eleventh Circuits found that schools that ban trans men from using the men’s bathroom violate both the Equal Protection Clause and Title IX.<sup>78</sup> The cases’ Equal Protection analyses wander here and there when describing transness: they touch on gender identity, dysphoria, stereotyping, and subordination on their way to describing their plaintiffs and the differential treatment that they suffered.<sup>79</sup> By contrast, the Title IX discussions are clear as day. *Bostock* makes equivocation and justification unnecessary. The decision obviates the endless rhetoric of stereotype and permits a simple finding that the plaintiffs were harmed because of their sex.<sup>80</sup>

So maybe *Bostock*’s odd directness is its genius; maybe queerness always was this simple. Maybe we never needed identity, dysphoria, psychology, pathology, endocrinology. All we needed were judges willing to see queer and trans people as they are.<sup>81</sup> *Bostock* takes the implications of “sex” fully and seriously, and that makes sex’s implications easy to understand. Seneca Falls may not have been

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<sup>75</sup> See *id.* at 628 (Niemeyer, J., dissenting); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1311 (11th Cir. 2020) (W. Pryor, C.J., dissenting).

<sup>76</sup> This rhetorical tendency surfaces in the *Grimm* and *Adams* majorities, see *infra* note 79, and led, I believe, to the skeptical epistemic attitudes of the dissents. See *supra* note 75.

<sup>77</sup> See Harper Shalloe, “I Sexually Identify as an Attack Helicopter”, 6 TSQ 667, 667–68 (2019).

<sup>78</sup> *Grimm*, 972 F.3d at 593; *Adams*, 968 F.3d at 1292.

<sup>79</sup> See, e.g., *Grimm*, 972 F.3d at 608–10; *Adams*, 968 F.3d at 1291, 1302–04.

<sup>80</sup> See *Grimm*, 972 F.3d at 616; *Adams*, 968 F.3d at 1305. While *Grimm* cited *Bostock* for its Title IX analysis, the court also found that *Price Waterhouse* permitted a distinct “sex-stereotyping” claim. *Grimm*, 972 F.3d at 617 n.15. But see *supra* Part III.

<sup>81</sup> See Currah, *supra* note 39, at 446–47.



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Bostock's *Inclusive Queer Frame*

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Stonewall,<sup>82</sup> but it had the seeds of Stonewall in it. In the end, we are all included in *Bostock*. And trans rights always were human rights.

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<sup>82</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1828–29 (Kavanaugh, J., dissenting).