NOTE

BOSTOCK V. CLAYTON COUNTY: THE IMPLICATIONS OF A BINARY BIAS

A. Russell†

INTRODUCTION

In June of 2020, the Supreme Court issued a landmark decision in *Bostock v. Clayton County* extending protections against sex discrimination to LGBTQIA+ people.[1] Although the

† J.D. Candidate 2022, Cornell Law School; B.A. in Theater, Film & Media Studies, and Gender & Sexuality Studies, Haverford College, 2014. I want to thank all those people who were and are a part of my personal journey with nonbinary identity, as well as those mythical figures who have become my prayer. I would also like to thank those who offered support and encouragement on this Note in particular: Professor Andrei Marmor, Professor Aziz Rana, Zachary Sporn, Will Reichard-Flynn, Itamar Haritan, the folx at the Transgender Law Center, all the Editors of Cornell Law Review who worked on it, and Clytemnestra.

[1] *See* 140 S. Ct. 1731, 1737 (2020). LGBTQIA+ is a common acronym that stands for Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual, and all other sexual orientation, sex, gender, and gender identity minorities, such as

case interprets only Title VII of the Civil Rights Act of 1964 and thus applies only to employment discrimination,[2] the decision promises to have a wide influence on a variety of other antidiscrimination laws with similar language. Indeed, Title VII has historically served as a model for antidiscrimination text and interpretation in a range of other areas, such as Title IX of the Education Amendments of 1972.[3] The language and reasoning that appears in this decision as well as in subsequent cases interpreting it will therefore play a powerful role in shaping the emerging doctrine of LGBTQIA+ antidiscrimination law.

Yet the full extent of this sweeping victory for the queer community remains unclear. Despite (or perhaps due to) the rigid analysis of Justice Neil Gorsuch's textualist opinion, the decision fails to explicitly include a range of queer identities that are less easily categorized than the gay men[4] and transgender woman[5] involved in this case.[6] Though the Court held that discrimination due to "homosexuality or transgender status" is wrongful discrimination on the basis of sex,[7] this language does not clearly include bisexual people, for instance, who are not homosexual,[8] or intersex people, who may or may

---

pansexual, gender nonbinary, genderqueer, and gender nonconforming, to name a few. *See* Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (June 21, 2018), https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html [https://perma.cc/VZQ6-FV5Q] (last updated June 7, 2019).

2 *See Bostock*, 140 S. Ct. at 1737; *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (prohibiting employment discrimination against an individual "because of such individual's race, color, religion, sex, or national origin").

3 *See, e.g.*, Derek Waller, Note, *Recognizing Transgender, Intersex, and Nonbinary People in Healthcare Antidiscrimination Law*, 103 MINN. L. REV. 467, 485 (2018) ("[C]ourts often look to case law interpreting Title VII for guidance when interpreting Title IX.").

4 The Supreme Court joined three cases in order to decide *Bostock v. Clayton County*, two of which involved gay men. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 108–09 (2d Cir. 2018) (describing plaintiff Donald Zarda as a sky-diving instructor who lost his job after disclosing that he was gay); Bostock v. Clayton Cty., No. 1:16-CV-1460-ODE, 2017 WL 4456898, at *1 (N.D. Ga. July 21, 2017) (describing plaintiff Gerald Lynn Bostock as "a gay male" who lost his job as a Child Welfare Service Coordinator when he joined a gay softball league).

5 The third case decided under *Bostock* involved a transgender woman. *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566 (6th Cir. 2018) (describing plaintiff Aimee Stephens as a funeral director "born biologically male" who was fired after informing her boss that she intended to transition and present as female).

6 *See* Nancy C. Markus, Bostock v. Clayton County *and the Problem of Bisexual Erasure*, 115 NW. U. L. REV. 223, 225 (2020) (describing how Justice Gorsuch's textualist decision fails to explicitly include bisexual people).

7 *Bostock*, 140 S. Ct. at 1741.

8 Markus, *supra* note 6, at 224–25.

not identify as either homosexual or transgender.[9] Although experts have indicated that *Bostock* will likely apply to all such identities,[10] the ambiguity of the Court's language may initially force these plaintiffs to prove their case through litigation.

This Note focuses specifically on *Bostock*'s implications for nonbinary people. Although part of the broader transgender community, nonbinary people do not directly enter into the Court's analysis.[11] Indeed, the only mention of gender identity beyond the binary spectrum appears in Justice Alito's dissent as a cautionary warning against the dangers of protecting people who do not hold stable male or female identities.[12] Furthermore, Justice Gorsuch's strict textualist logic rests on a binary framework of sex and gender, which seems to depend upon the nonexistence of nonbinary identity altogether.[13] Although experts again seem to agree that *Bostock*'s protections will reach nonbinary people,[14] the question remains how. I argue that the language and framework chosen by litigators and courts to clarify the protection of nonbinary employees under *Bostock* will impact the degree to which nonbinary plaintiffs do or do not enjoy equal antidiscrimination protection.

This Note will address the disconnect between the liberatory promise of *Bostock* and the implications of the case's constricting language for the developing legal rights of gender nonbinary people. First, I will provide background information

---

9 *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 898 (2019) (explaining that some intersex people identify as gender nonbinary, while others identify as male or female).

10 *See, e.g.*, 3 MERRICK T. ROSSEIN, *Title VII and Sexual Orientation—Generally*, in EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 27:2, Westlaw (database updated Dec. 2020) (indicating that *Bostock* establishes protections based on sexual orientation more broadly and implying that those protections reach everyone in the LGBTQIA+ community); 3 MERRICK T. ROSSEIN, *Title VII and Intersex Employees—Generally*, in EMPLOYMENT DISCRIMINATION LAW AND LITIGATION, *supra*, at § 27:14 (asserting that *Bostock* unambiguously protects intersex people, since the Court's reasoning leaves no possible way to logically exclude them).

11 Vin Gurrieri, *Questions About 'Nonbinary' Bias Linger After LGBT Ruling*, LAW 360 (June 19, 2020), https://www.law360.com/articles/1284955/questions-about-nonbinary-bias-linger-after-lgbt-ruling [https://perma.cc/CML7-V9WD].

12 *Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting) (worrying that "individuals who are 'gender fluid,' . . . who ha[ve] not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time" (citation omitted)).

13 *See id.* at 1739 (framing his analysis with a definition of "sex" expressed exclusively in terms of "male and female").

14 *See, e.g.*, 3 MERRICK T. ROSSEIN, *Title VII and Employees with Non-Binary Identity—Generally*, in EMPLOYMENT DISCRIMINATION LAW AND LITIGATION, *supra* note 10, at § 27:13 (asserting that *Bostock*'s holding "applies with equal force to nonbinary people as it does to transgender men and women").

about the wide breadth of sex and gender variance existing outside the scope of the Court's imagination in *Bostock*, with a focus on transgender and nonbinary diversity. I will then explain how the dominance of binary transgender plaintiffs in prior sex stereotyping case law has failed to adequately represent gender nonbinary needs and left them stranded between transgender and gender nonconforming rights. Next, I will explain how the Court's choice in *Bostock v. Clayton County* to extend protections to transgender people on textualist rather than sex stereotyping grounds both avoids and reproduces some of the pitfalls of prior case law while introducing new challenges for nonbinary plaintiffs. Finally, I will analyze several arguments available to litigators to secure protections for nonbinary people under *Bostock* and the relative strengths of each. I argue that unless litigators can convince courts to directly include nonbinary people in *Bostock*'s holding, nonbinary plaintiffs may still be subject to the same compromised protection afforded them under prior sex stereotyping case law. Ultimately, nonbinary people will only gain full protection under a model that recognizes them in their own right, rather than views nonbinary claims as merely weaker versions of transgender or gender nonconforming ones.

I
BACKGROUND

A. Sex and Gender Variance

Like most people, the Supreme Court in *Bostock v. Clayton County* assumed that "sex" refers to a simple distinction between male and female biology;[15] however, the reality is much more complicated. In fact, multiple different biological characteristics play into what we understand as sex, including "genetic or chromosomal sex, gonadal sex, internal morphologic sex, genitalia, hormonal sex, phenotypic sex, assigned sex/gender of rearing, and self-identified sex."[16] For some people, all of these criteria may align in one binary direction or an-

---

15 *See* 140 S. Ct. at 1739 (explaining that, although not at issue, the Court assumed for the purposes of its decision a definition of "sex" as "biological distinctions between male and female"). Note that because the Court failed to decide the definition of sex, and because its assumed definition uses language about biology, rather than anatomy, the opinion leaves transgender advocates free to argue for a definition of sex that is more closely linked to the biology of gender identity than to sex assigned at birth.

16 Waller, *supra* note 3, at 475 (quoting Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, *in* TRANSGENDER RIGHTS 51, 56 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006)).

other; for others, they may not.[17] Sex assigned at birth thus simply marks a physician's cursory examination of external genitalia, regardless of other sex characteristics.[18]

For transgender people, this initial cursory examination and subsequent sex assigned to them at birth is inconsistent with their internal sense of self.[19] According to the amicus curiae brief filed by the American Psychological Association (APA) in *Bostock*, "*[g]ender identity* 'refers to a person's basic sense of being male, female, or of indeterminate sex.'"[20] The APA further specifies that "*[t]ransgender* people have a gender identity that is not aligned with the sex assigned to them at birth."[21] "Transgender" is thus not necessarily itself a gender identity, but rather an umbrella term referring to a wide range of gender identities, including those that are nonbinary.[22] As the APA explains, "'nonbinary' . . . [is] a term 'used to describe a gender identity outside of the gender binary (man versus woman).'"[23] Another umbrella term, nonbinary gender includes people who may identify with a range of different gender identities, such as "neutrois, bigender, genderfluid, androgyne, or agender, or with a more general label, such as genderqueer or non-binary."[24]

There are consequently many different ways of being transgender and many different ways of being nonbinary, each of which may reflect widely different understandings of the relationship between sex and gender.[25] Some transgender activists and medical professionals maintain that gender identity is

---

17 *Id.*

18 *Id.* at 474.

19 *See id.* at 478.

20 Brief of The American Psychological Ass'n et al. as Amici Curiae in Support of the Employees at 8, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623, 18-107) [hereinafter Brief of the American Psychological Ass'n et al.] (quoting AM. PSYCHOLOGICAL ASS'N, REPORT ON THE APA TASK FORCE ON GENDER IDENTITY AND GENDER VARIANCE 28 (2009)).

21 *Id.* at 9–10.

22 *See* Shelby Hanssen, Note, *Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 OR. L. Rev. 283, 287–88 (2017). However, not all nonbinary people identify as transgender. Clarke, *supra* note 9, at 897–98.

23 Brief of The American Psychological Ass'n et al., *supra* note 20, at 9 n.14 (quoting Jack Drescher, Laura Weiss Roberts & Gabrielle Termuehlen, *Lesbian, Gay, Bisexual, and Transgender Patients*, *in* AMERICAN PSYCHIATRIC PUBLISHING TEXTBOOK OF PSYCHIATRY 1211 (Laura Weiss Roberts ed., 7th ed. 2019)).

24 Katie Reineck, Note, *Running from the Gender Police: Reconceptualizing Gender to Ensure Protection for Gender Non-Binary People*, 24 MICH. J. GENDER & L. 265, 266 (2017) (footnotes omitted).

25 *See id.*; Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831, 886 (2020).

influenced by biological factors in brain chemistry, and that gender identity is therefore actually another kind of sex characteristic.[26] Others may conversely view sex as culturally constructed and itself a reflection of gender.[27] Some may see themselves as seeking to align their sex and gender.[28] Others may express discomfort with the narrative of being trapped in the wrong body and see no disconnect whatsoever between their sex and gender, outside of society's understanding of it.[29] Still others may feel themselves to be gender nonconformers, whose gender expression diverges from the norms associated with their assigned sex or gender identity.[30] With such a constellation of diverse, overlapping, divergent, and shared identities and experiences within both the transgender and nonbinary communities,[31] the law's narrow understanding of transgender identity has resulted in unequal and compromised protection for each.

B. Nonbinary Antidiscrimination Protections and Sex Stereotyping Case Law

Despite making up about one third of the transgender population,[32] gender nonbinary people remain largely unrepresented in both case law and legal scholarship, often acknowledged in no more than a footnote.[33] Transgender legal doctrine has consequently developed around binary transgender plaintiffs.[34] The erasure of gender nonbinary people,

---

26 Schoenbaum, *supra* note 25,. at 866–67.

27 *See id.* at 843.

28 *See id.* at 867–68. A person may still hold this perspective, even when they never undergo surgery, as is the case for many transgender people, including binary ones. *Id.* at 868 n.174.

29 Clarke, *supra* note 9, at 922–23.

30 *See* Am. Psychological Ass'n, *A Glossary: Defining Transgender Terms*, MONITOR ON PSYCHOL., Sept. 2018, at 32, 32.

31 *See* Clarke, *supra* note 9, at 897 n.9 (recognizing the limitations of terminology to describe the complexity of gender identity).

32 BIANCA D.M. WILSON & ILAN H. MEYER, THE WILLIAMS INST., NONBINARY LGBTQ ADULTS IN THE UNITED STATES 2 tbl.1 (2021) (reporting that about 32.1% of transgender adults identify as nonbinary). Approximately 1,219,000 total adults in the United States identify as nonbinary, *id.*, about 42% of whom are also included in the approximately 1.4 million Americans who identify as transgender. *Id.* at 3 fig.1; ANDREW R. FLORES, JODY L. HERMAN, GARY J. GATES & TAYLOR N. T. BROWN, THE WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2 (2016).

33 *See* Clarke, *supra* note 9, at 900.

34 *Id.* at 901–02.

like that of bisexual people,[35] is a phenomenon not unique to the law and not confined to cisgender[36] society.[37] The experience of invisibility in fact characterizes much of the discrimination encountered by nonbinary people, who often face "disbelief, disregard, disrespect, and paternalism" by those who believe they are merely attention-seeking or politically motivated.[38] In addition to being the targets of physical violence and assault, nonbinary people feel increased pressure to hide or downplay their gender identity or allow others to misgender them, rather than attempt to explain themselves to people they anticipate will not understand.[39] Consequently, nonbinary youth in fact report higher rates of anxiety and depression than their binary transgender peers.[40] Furthermore, nonbinary employees are almost twice as likely as their binary transgender counterparts to refrain from asking their employers to refer to them by the correct pronouns out of fear of discrimination.[41]

Gender nonbinary interests thus both overlap with and diverge from those of binary transgender people and cannot be fully represented by binary transgender plaintiffs. While binary transgender rights may demand equal access to a gender category already legally recognized (i.e. male or female), "nonbinary gender is, in many ways, a misfit for legal categorization because nonbinary people defy categorization as a group."[42] Gender nonbinary legal rights may therefore require additional provisions simply not needed or demanded by binary transgender plaintiffs, such as the creation of a third-gender cate-

---

35 Michael Conklin, *Good for Thee, but Not for Me: How Bisexuals are Overlooked in Title VII Sexual Orientation Arguments*, 11 U. MIAMI RACE & SOC. JUST. L. REV. 33, 34–35 (2020).

36 Cisgender is an umbrella term for all who identify exclusively as the sex they were assigned at birth (i.e. not transgender). Gold, *supra* note 1.

37 Clarke, *supra* note 9, at 911 ("Some nonbinary people may be criticized for 'not being trans enough' and left out of networks of support for transgender people."). In the queer community, hostility towards gender identity that is not based in a stable, binary gender is called exorsexism or enbyphobia, and it can be present even in transgender spaces. *See* Beyond the MOGAI Pride Flags, TUMBLR (Nov. 2, 2017), https://beyond-mogai-pride-flags.tumblr.com/post/167039576895/hi-i-just-saw-the-term-enbyphobia-but-i-cant [https://perma.cc/96MW-8C7W].

38 Clarke, *supra* note 9, at 910–11. Hostility to nonbinary identity as associated with ideas of political correctness has risen with the increased polarization of the political landscape. *Id.* at 914.

39 *Id.* at 912.

40 Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 608–09 (2019). About 94% of nonbinary adults have thought about committing suicide and almost 40% have attempted it. WILSON & MEYER, *supra* note 32, at 15.

41 S. E. JAMES, ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 154 (2016).

42 Clarke, *supra* note 9, at 901–02.

gory, the elimination of unnecessary sex segregation, or the reasonable accommodation of nonbinary people within a binary system.[43] Due to the relative paucity of attention paid to nonbinary people within the legal field, employers are often in the position of developing workplace antidiscrimination policies regarding a growing nonbinary workforce with little guidance from the law.[44]

Yet the alternative approach taken by some scholars of treating nonbinary identity as practically synonymous with gender nonconformity does not fully represent nonbinary needs either.[45] Like their binary transgender peers, not all nonbinary people consider themselves gender nonconforming.[46] Furthermore, in being misgendered, nonbinary people often face the same need for recognition of their identity that binary transgender people do.[47] As binary transgender people have slowly won recognition within a framework largely developed around cisgender nonconforming people,[48] nonbinary plaintiffs have thus found themselves stranded between two doctrines imperfectly equipped to meet all their needs.

Leading up to *Bostock v. Clayton County*, potential recognition of nonbinary people under Title VII's antidiscrimination protections depended exclusively on sex stereotyping case law.[49] When Congress first passed Title VII of the Civil Rights Act of 1964, transgender plaintiffs were unsuccessful in claiming protection directly under sex discrimination law.[50] However, this blanket exclusion changed with the advent of sex stereotyping doctrine.[51] First gaining implicit sanction by the Supreme Court in 1989 in *Price Waterhouse v. Hopkins*, sex stereotyping case law has held that discrimination against an

---

43 *Id.* at 901. Recognition of gender nonbinary rights does not necessitate a single policy in all contexts, and such recognition is not necessarily incompatible with the continued recognition of binary genders or sex-segregated spaces. *Id.* at 901–02. I make no attempt in this note to prescribe such policies or to envision how they may operate; rather, my goal is merely to assess the ability of nonbinary people to access antidiscrimination protections at all.

44 *See* Gurrieri, *supra* note 11.

45 *See, e.g.*, Schoenbaum, *supra* note 25, at 886 ("While these persons self-identify as transgender, the relationship between their sex and gender is more similar to that of traditional gender nonconformers.").

46 *See* Clarke, *supra* note 9, at 901.

47 *See* Schoenbaum, *supra* note 25, at 866 (noting how the presentation of transgender claims under sex stereotyping doctrine often fails to adequately represent transgender plaintiffs seeking proper classification as the sex with which they identify).

48 *Id.* at 848.

49 *See* Reineck, *supra* note 24, at 266.

50 Schoenbaum, *supra* note 25, at 844–45.

51 *Id.* at 848–49.

individual because they do not conform to the gender role associated with their sex assigned at birth is discrimination on the basis of sex.[52] In *Price Waterhouse*, a cisgender nonconforming woman did not receive a promotion at the accounting firm where she worked because her gender expression and presentation were not sufficiently feminine.[53] The Supreme Court's decision in this case established that Title VII prohibits employers from expecting employees to conform their gender expression to the stereotypical gender roles associated with their assigned sex.[54]

In the early 2000s, transgender rights advocates began to win a line of cases in the lower courts by arguing that discrimination against transgender people is a form of sex stereotyping under Title VII.[55] In 2004, the Sixth Circuit ruled in *Smith v. City of Salem* that transgender people could bring sex stereotyping claims, insinuating that the Court in *Price Waterhouse* had rejected prior case law automatically denying Title VII protections to transgender people.[56] Transgender activists, scholars, and lower courts alike began to embrace this approach,[57] and by 2011, some even went so far as to treat transgender people as *per se* gender nonconformers.[58]

However, consensus among transgender rights activists is mixed as to the appropriateness of sex stereotyping case law.[59] As some have pointed out, this framework extends protections primarily on the basis of gender nonconformity (or an individual's gender expression) rather than gender identity.[60] Because not all transgender individuals (whether binary or nonbinary) express themselves in a way that does not conform

52 490 U.S. 228, 250–51 (1989).

53 *Id.* at 232–35.

54 *Id.* at 250–51.

55 Schoenbaum, *supra* note 25, at 848–49; *see also* Clarke, *supra* note 9, at 924 ("Federal courts increasingly agree that discrimination against someone for being transgender is a form of sex discrimination because it rests on sex stereotypes.").

56 378 F.3d 566, 572 (6th Cir. 2004). Additionally, the court clarified that "discrimination against a plaintiff who is transsexual—and therefore fails to act and/or identify with his or her gender—is no different than the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman." *Id.* at 575.

57 *See* Schoenbaum, *supra* note 25, at 833–34.

58 *See, e.g.*, Glenn v. Brumby 663 F.3d 1312, 1316 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.").

59 *See, e.g.*, Waller, *supra* note 3, at 482–83 ("Transgender plaintiffs have experienced mixed results when claiming Title VII protection from discrimination under a theory of sex stereotyping . . . .").

60 *See id.* at 483.

with their assigned sex or gender identity,[61] these protections may simply not reach them.

Moreover, some scholars argue that the failures of sex stereotyping case law reflect a misunderstanding and conflation of the different needs of binary transgender people and cisgender nonconformers.[62] Transgender and cisgender nonconforming people do not necessarily suffer from the same harms and do not necessarily seek the same relief.[63] Like nonbinary people, gender nonconformers seek an exception from compliance with compulsory binary sex- and gender-based rules or the removal of such rules altogether.[64] Conversely, many binary transgender individuals do not seek permission to disobey or invalidate the rules, but rather merely to obey them according to their correct categorization as male or female.[65] Indeed, binary transgender plaintiffs have sometimes pressed this argument to their advantage, effectively distancing themselves from gender nonconformers and nonbinary people alike and characterizing their case as less subversive of the existing binary gender order.[66] Courts have subsequently granted relief to binary transgender plaintiffs while maintaining many sex- and gender-based rules in the workplace harmful to both nonbinary and gender nonconforming people, such as gender-based dress codes.[67]

Additionally, even when transgender people do succeed in accessing protections under sex stereotyping case law, the protection they receive is often of the wrong kind. As some scholars argue, the portrayal of transgender people as nonconforming only, while potentially successful in cases where the employer disapproves of the plaintiff's behavior or gender expression, is not as likely to succeed in cases challenging only incorrect categorization or discrimination based solely on transgender status.[68] A transgender woman who fully conforms to the gender-based rules of her employer as a woman might therefore lose under a sex stereotyping claim because she has not actually challenged the requirement of gender con-

---

61 *See* Clarke, *supra* note 9, at 908.
62 Schoenbaum, *supra* note 25, at 878.
63 *Id.* at 876–78.
64 *Id.* at 876–77.
65 *Id.* at 877.
66 *See* Clarke, *supra* note 9, at 922.
67 *See* George, *supra* note 40, at 604–05.
68 Schoenbaum, *supra* note 25, at 857–58.

formity underlying the rules themselves.[69] Moreover, this solution comes with the problem of forcing transgender individuals to misgender themselves as nonconforming members of the sex they were assigned at birth, when many transgender people by definition do not see themselves according to that sex.[70]

Furthermore, as the success of binary transgender plaintiffs under sex stereotyping doctrine rose, the success of cisgender nonconforming plaintiffs decreased.[71] Although multiple theories explaining this trend exist, some theorize that the more courts viewed transgender plaintiffs as nonconforming, the more they began to see cisgender nonconforming claims as weak by comparison.[72] Cisgender nonconforming plaintiffs cannot introduce medical proof of harm as transgender plaintiffs may, and courts are therefore likelier to see their cases as reflecting mere personal preference rather than actual need.[73] For instance, in *Jespersen v. Harrah's Operating Co.*, the court upheld a casino's gender-based dress code requiring women to wear make-up to work because it viewed the burden to the case's cisgender, nonconforming female plaintiff as trivial.[74] The court reasoned that because it thought the make-up requirement "appropriately differentiate[d] between the genders"[75] and imposed no objective burden to women, Jespersen's "subjective reaction" as a nonconforming woman to evade compliance with the female dress code could not give rise to a sex stereotyping claim.[76]

---

69 *See id.* at 835. Indeed, this logic is precisely the reason the lower court initially rejected the sex stereotyping claim of Aimee Stephens, one of the plaintiffs whose case was later decided by *Bostock v. Clayton County*. *Id.* at 836 & n.20.

70 *See* Waller, *supra* note 3, at 483 ("This approach requires plaintiffs to introduce evidence of their sex assigned at birth and assume that it is their 'true' biological sex."). For many transgender people, the experience of being misgendered is much more than an inconvenience; in addition to communicating degradation and disrespect, misgendering can also cause the medical condition of dysphoria, which is an acute sense of "discomfort and distress related to an incongruence between an individual's gender identity and the gender assigned at birth." Am. Psychological Ass'n, *supra* note 30, at 32.

71 Schoenbaum, *supra* note 25, at 872.

72 *Id.* at 873–75.

73 George, *supra* note 40, at 606; *see* Hanssen, *supra* note 22, at 304 (discussing the ability of transgender and nonbinary people to provide a notarized doctor's note verifying their need "to live in a way that is consistent with the individual's gender identity").

74 444 F.3d 1104, 1106 (9th Cir. 2006).

75 *Id.* at 1109–10 ("While those individual requirements differ according to gender, none on its face places a greater burden on one gender than the other. Grooming standards that appropriately differentiate between the genders are not facially discriminatory.").

76 *Id.* at 1112 ("The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence

I argue that for nonbinary people, the conflict between these two interests leaves plaintiffs stranded in a catch-22. The framing of transgender protections as about mere categorization as male or female—rather than the disruption of those categories and the gendered rules based off of them—leaves nonbinary people less likely to succeed in claiming sex stereotyping protections.[77] Like cisgender nonconformers, nonbinary plaintiffs will likely be seen as "less nonconforming" than their binary transgender peers.[78] Indeed, some have theorized that nonbinary people who present as the sex they were assigned at birth may have more success bringing their claims directly as cisgender sex discrimination rather than as sex stereotyping.[79] Conversely, like binary transgender plaintiffs, portrayal of nonbinary plaintiffs as gender nonconforming only may not accurately reflect their reality or allow them to challenge incorrect categorization as male or female, rather than gender expression.[80] Finally, as with binary transgender plaintiffs, nonbinary plaintiffs' use of sex stereotyping case law to gain protections under Title VII could contribute to the overshadowing of cisgender nonconforming plaintiffs, since nonbinary people may have access to medical proof of harm that cisgender plaintiffs do not.[81]

II
ANALYSIS

A. *Bostock* and Its Failure to Account for Sex and Gender Variance

The Supreme Court's decision in *Bostock v. Clayton County* both reflects and reinvents the patterns of nonbinary erasure present in the transgender case law leading up to it. First, although *Bostock* is the first case to reach the Supreme Court that directly addresses transgender rights (itself an amazing accomplishment),[82] *Bostock* does not discuss nonbinary peo-

---

in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement.").

77 *See* George, *supra* note 40, at 604–05.

78 Nonbinary people are often seen as not "trans enough" when compared to binary transgender people, and courts who view transgender people as nonconformers may subsequently view nonbinary people as less committed to gender nonconformity. *See supra* note 37 and accompanying text.

79 *See* Reineck, *supra* note 24, at 273.

80 *See* Clarke, *supra* note 9, at 901; Schoenbaum, *supra* note 25, at 866.

81 *See supra* note 73 and accompanying text.

82 Karen Ocamb, *Williams Institute Panel Dissects 'Ministerial' and Other Problems with Landmark Bostock Jobs Ruling*, L.A. BLADE (Aug. 8, 2020), https://www.losangelesblade.com/2020/08/08/williams-institute-panel-dissects-minis-

ple. Aimee Stephens, the transgender plaintiff involved in the case, was not nonbinary; therefore, the issue was not directly before the Court.[83] Consequently, despite several amicus curiae briefs explaining the range of identities implicated by the issue,[84] the majority opinion fails to directly acknowledge any beyond the binary one before them.

Additionally, Stephens's case, although argued on sex stereotyping grounds, did not challenge the gender-based dress code that her employers imposed.[85] Instead, Stephens's litigation team emphasized that when she informed her boss that she intended to transition and would begin presenting as a woman at work, they fired her simply because she was transgender, not due to her noncompliance with the dress code.[86] Indeed, she had no intention of disobeying the dress code; she merely wished to comply with the female requirements, rather than the male ones.[87] As in prior cases on behalf of binary transgender individuals, this framing of the issue had the effect of distancing Stephens from both gender nonconformers and nonbinary individuals, whose conflict with gender-based dress codes might be seen as more subversive of the binary gender system.[88]

However, this framing also allowed litigators to avoid the pitfalls of prior sex stereotyping case law by isolating transgender status itself as the reason for the discrimination, rather than gender expression.[89] Consequently, although the Supreme Court initially accepted the case in part on the issue of

---

terial-and-other-problems-with-landmark-bostock-jobs-ruling/ [https://perma.cc/BB4D-CYDL].

83 *See* Gurrieri, *supra* note 11.

84 *See, e.g.*, Brief of The American Psychological Ass'n et al., *supra* note 20, at 8 ("*Gender identity* 'refers to a person's basic sense of being male, female, or of indeterminate sex.'" (quoting AM. PSYCHOLOGICAL ASS'N, *supra* note 20, at 28)).

85 Reply Brief for Respondent Aimee Stephens at 4, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107), 2019 WL 5079990, at *4 ("Harris Homes fired Ms. Stephens because she is transgender and did not conform to Harris Homes's other sex-based stereotypes—not because of the dress code.").

86 *Id.* at 3.

87 Schoenbaum, *supra* note 25, at 835.

88 *See* Reply Brief for Respondent Aimee Stephens, *supra* note 85, at 2 ("Finally, Petitioner's warning that ruling for Ms. Stephens would render all sex-specific rules and spaces invalid is unfounded. . . . Whether such sex-based rules impermissibly discriminate with respect to the terms and conditions of employment, or otherwise adversely affect individual workers, present different questions that are not at issue here.").

89 Schoenbaum, *supra* note 25, at 882–83.

sex stereotyping,[90] which had been the basis of the lower court's decision,[91] it did not end up deciding the case on sex stereotyping grounds at all;[92] instead, it chose to decide *Bostock* on purely textualist grounds.[93] Many in the queer community see this approach as superior, since it allows queer plaintiffs to directly claim antidiscrimination protection under Title VII, without having to inaccurately portray themselves as gender nonconformers or depend on the much less reliable sex stereotyping doctrine.[94] As a result of the decision in *Bostock*, transgender status itself is now explicitly protected under sex discrimination prohibitions, regardless of any sex stereotyping or gender nonconformity that may also be present in the case.[95] For binary transgender people, this means likelier success in cases contesting incorrect categorization as male or female, even when a plaintiff's gender expression is not nonconforming.[96]

For nonbinary people, however, the Court's language and reasoning may also present new problems. Although the Court explicitly uses the word "transgender" in its holding[97]—which, under a literal reading, should technically include nonbinary people—the reasoning the Court uses to arrive at this holding does not seem at first blush to clearly apply to nonbinary individuals.

First, the Court frames its entire analysis by assuming a definition of "sex" formulated exclusively in binary terms.[98] Although some bemoan the Court's decision in *Bostock* as redefining "sex" to include sexual orientation and gender identity,[99]

---

90 R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599, 1599 (2019), *granting cert. to* 884 F.3d 560 (6th Cir. 2018).

91 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 576 (6th Cir. 2018) ("[D]iscrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping.").

92 *See* Schoenbaum, *supra* note 25, at 881–82.

93 *Id.* at 835 n.18.

94 *See, e.g.*, *id.* at 882–83 (describing how *Bostock*'s ruling, by avoiding the reasoning of sex stereotyping doctrine, will allow transgender plaintiffs to claim protections regardless of whether they engage in gender nonconforming behavior).

95 *Id.* at 883.

96 *Id.*

97 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1741 (2020).

98 *See id.* at 1739.

99 *See, e.g.*, *id.* at 1756 (Alito, J., dissenting) (implying by his counterargument that the majority had redefined the word "sex," complaining that "[d]etermined searching has not found a single dictionary from th[e] time [Title VII was enacted] that defined 'sex' to mean sexual orientation, gender identity, or 'transgender status'"); Hans A. Spakovsky & Ryan T. Anderson, *Gorsuch Helps Transform the Supreme Court into the Supreme Legislature on LGBT Rights*, HERITAGE FOUND. (June 16, 2020), https://www.heritage.org/courts/commentary/

this characterization of the Court's opinion—unfortunately for nonbinary people—is not in fact accurate. Instead, the Court merely redefined the meaning of *sex discrimination* to encompass discrimination against "homosexual or transgender" people as well.[100] When it came to the meaning of "sex" itself, however, the Court explicitly refrained from adopting an official definition of the term, noting that the question was not at issue in this case.[101] Instead, the Court decided simply to "proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female."[102] While future litigation may challenge this definition as a way of broadening *Bostock*'s reach, the Court in *Bostock* did not itself take on this task. The resulting analysis is therefore premised in exclusively binary terms.

As a result of this binary framework, the reasoning that the Court uses to justify its opinion likewise excludes nonbinary people. To determine whether or not discrimination against a sexual minority or transgender individual is discrimination "on the basis of sex," the Court applies a but-for test.[103] Although sex need not be the only reason for the discrimination, "so long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law."[104] As Justice Gorsuch clarifies, "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause."[105] Proceeding under this logic, Justice Gorsuch then applies the test to the plaintiffs involved in the case to see "if changing the employee's sex would have yielded a different choice by the employer."[106] Regarding the case's gay male plaintiffs, Justice Gorsuch decides that if they had been female, their employers would not have objected to their attrac-

---

gorsuch-helps-transform-the-supreme-court-the-supreme-legislature-lgbt-rights [https://perma.cc/NU62-43X6] ("Justice Neil Gorsuch has rewritten Title VII of the Civil Rights Act of 1964 to include sexual orientation and gender identity in the definition of 'sex.'").

100 *Bostock*, 140 S. Ct. at 1744; *see also id.* at 1739 ("The question isn't just what 'sex' meant, but what Title VII says about it.").

101 *Id.* at 1739 ("But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that 'sex' signified what the employers suggest . . . .").

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.* at 1741.

tion to men and would not have discriminated against them.[107] Similarly, he decides that if Stephens had been assigned female at birth, her employer would likewise have had no objection to her identification as a woman and would not have subjected her to discrimination.[108] Justice Gorsuch therefore concludes that the test reveals that sexual orientation and gender identity are inextricably tied to sex, and "sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees."[109]

However, when applied to gender nonbinary individuals, this test seems to fall short. Since nonbinary people do not identify along the binary spectrum, a "change" to the individual's sex (by which Justice Gorsuch seems to mean sex assigned at birth) would not result in a change to their status as nonbinary at all, and thus the employer's choice to discriminate.[110] The Court's test in *Bostock*, then, seems dependent on the plaintiff's binary transgender status. When applied to a binary transgender person, as in *Bostock*, the test's hypothetical change in sex results in a cisgender person against whom the employer would not have discriminated. However, when applied to a nonbinary person assigned female at birth, for instance, the test produces no such result. Such a person would be just as nonbinary (and presumably just as subject to discrimination), had they been assigned male at birth instead. Other scholars have noted a similar gap in this test's logic for bisexual people, whose sexuality is likewise not dependent on their own sex at all.[111]

---

107 *Id.* ("If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.").

108 *Id.* ("If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.").

109 *Id.* at 1742.

110 However, if the employer in this hypothetical would view as cisgender an intersex person not assigned male or female at birth who also identifies as nonbinary, and would accordingly not discriminate against them under an anti-transgender policy, this test could theoretically result in a change of status as transgender and affect the employer's treatment of the individual. Such a change in transgender status, however, would still not result in a change of nonbinary identity and would not affect the individual's treatment under a specifically nonbinary-exclusionary policy, or one that treats nonbinary people as automatically transgender. Additionally, the theoretical success of the test under this narrow loophole is extremely unlikely in practical terms, as no employer motivated to discriminate against transgender people in the first place is likely to make an exception for intersex people identifying as nonbinary.

111 Conklin, *supra* note 35, at 45.

Furthermore, the Court's reasoning beyond the but-for test does not clearly apply to nonbinary people either. To demonstrate that discrimination based on transgender status inherently includes discrimination based on sex, Justice Gorsuch addresses a hypothetical situation in which an employer screens for transgender applicants in its hiring process.[112] As Justice Gorsuch points out, even if the employer never meets a particular applicant and never knows the applicant's sex or gender, the simple knowledge that the applicant is transgender inherently involves some prior assessment of sex, whether by the employer or by the applicant themselves.[113] Since one can only determine transgender status in relationship to sex assigned at birth, the fact of being transgender necessarily carries with it a prior assessment of sex, without which one could not be defined as transgender.[114]

However, this logic does not hold up as clearly for nonbinary people. Imagine that the employer has a policy of refusing to hire nonbinary applicants, but still hires binary transgender people. Unlike in Justice Gorsuch's example, the employer can take an applicant's status as nonbinary into account without any kind of prior assessment of their sex assigned at birth. Nonbinary identity, unlike transgender identity, is not defined in relationship to such assignment. Therefore, unless nonbinary identity itself can be defined as a type of sex,[115] the Court's logic here initially seems to fall short as well.

By basing its decision on a textualist framework, the Court in *Bostock* was able to avoid some of the pitfalls of prior sex stereotyping doctrine and extend direct protection to transgender status itself, without regard to gender nonconformity. However, since the Court also practiced nonbinary erasure in its decision and framed its textualist analysis in binary terms, nonbinary people may have a harder time reaping those benefits than binary transgender plaintiffs. With such ambiguity in the case's language, opponents wishing to limit the decision to its narrowest possible interpretation will likely attempt to argue that *Bostock*'s holding does not extend to nonbinary people.[116] Future nonbinary plaintiffs, though expected by experts to succeed in countering these arguments, will still likely need to justify why and how *Bostock* applies to them.[117] I argue that

112 *Bostock*, 140 S. Ct. at 1746.
113 *Id.*
114 *Id.*
115 *See supra* note 26 and accompanying text.
116 *See* Gurrieri, *supra* note 11.
117 *See id.*

the language and tactics chosen by future litigators of nonbinary and binary transgender plaintiffs alike will therefore play an important role in shaping what nonbinary protections under *Bostock* will look like.

B. How Nonbinary People Can Leverage the *Bostock* Decision to Gain Protections

Despite the case's binary language, experts indicate that the ruling in *Bostock* will in fact extend antidiscrimination protections to gender nonbinary people.[118] However, the mechanism by which the decision will do so is not yet clear.[119] Transgender advocates have already begun proposing several possible theories, each with a slightly different framing, but it remains to be seen which one courts will likely accept.[120] In this section, I will present several of these theories as well as some of my own and analyze the potential ramifications of each for nonbinary people. I argue that each of these solutions, if not framed carefully, could still result in nonbinary people having less access to antidiscrimination protections under Title VII than their binary peers.

1. *Nonbinary People Are Already Directly Included in* Bostock*'s Holding*

Some transgender advocates argue that, since the literal holding of *Bostock* extends protections to those with "transgender status," nonbinary people, as part of the transgender community, are already technically included in that holding to exactly the same extent as binary transgender individuals.[121] A literal reading of the case's holding would therefore support the extension of its protections to gender nonbinary people, even if the reasoning justifying that holding does not perfectly apply.[122]

This argument makes good sense in that it would avoid the problem of inconsistent rulings in similar cases. Since similarly situated binary and nonbinary transgender people can sometimes face exactly the same kinds of employment discrim-

---

118 ROSSEIN, *supra* note 14, at § 27:13 ("Although the opinion spoke of men and women in binary terms in light of the circumstances of the employees in the three cases, its analysis leaves no coherent way to exclude non-binary people from protections against sex discrimination.").

119 *See* Gurrieri, *supra* note 11.

120 *See id.*

121 *Id.* (explaining this theory as articulated by Ezra Young, the former director of impact litigation for the Transgender Legal Defense and Education Fund).

122 *See id.*

ination, both due to gender identity, courts would be hard-pressed to justify a decision to extend protections to binary but not nonbinary plaintiffs.[123] In such a scenario, discrimination against one can hardly be more based on sex than the other. Moreover, a literal interpretation like this has the benefit of most clearly and fully extending to nonbinary plaintiffs exactly the same rights that binary transgender people have under *Bostock* and making accessible to nonbinary people exactly the same mechanisms for invoking them.

However, the danger of this argument, if taken too literally, is that it could potentially undermine the cases of bisexual plaintiffs and other sexual minorities,[124] who, like nonbinary people, are also excluded from *Bostock*'s language and so must also justify why the case's holding should nonetheless apply to them.[125] As with nonbinary individuals, the Court's but-for analysis does not work for bisexual people, whose sexual orientation and subsequent stigmatization are unaffected by a hypothetical change of sex.[126] However, unlike nonbinary people, bisexual people are not incorporated in the case's literal holding, as "homosexual" does not technically include them.[127] If nonbinary plaintiffs were to argue for a literal interpretation of the Court's use of the word "transgender," this argument could potentially undermine the ability of bisexual people and other sexual minorities to argue against a literal interpretation of "homosexual." Such an argument would need to be made with care to avoid such a result.

I suggest that a more holistic interpretive approach to *Bostock*'s text could offer a more flexible, inclusive, and ultimately stronger way to argue that nonbinary people are directly incorporated in the decision's holding. In combination with the holding's literal words, courts should also consider the overall intention, principles, and reasoning demonstrated throughout the opinion.[128] First, much of *Bostock*'s language seems to support a generous and flexible standard for sex discrimina-

---

123 *See id.*

124 Pansexual, asexual, and intersex people are also similarly situated, for instance.

125 William N. Eskridge Jr. & Christopher R. Riano, *Bostock: A Statutory Super-Precedent for Sex and Gender Minorities*, AM. CONST. SOC'Y: EXPERT F. (July 1, 2020), https://www.acslaw.org/expertforum/bostock-a-statutory-super-precedent-for-sex-and-gender-minorities/ [https://perma.cc/W6AZ-XPNZ].

126 Conklin, *supra* note 35, at 45.

127 *Supra* note 8 and accompanying text.

128 *See* Gurrieri, *supra* note 11 (explaining that experts think "the spirit and language of the high court's ruling make it likely to cover workplace bias against people who identify as nonbinary or genderqueer").

tion, encouraging a similarly generous interpretation of the decision as applying to all queer identities, even if not explicitly named by the Court.[129] Additionally, since the Supreme Court has been slow to adopt other queer terminology in the past, such as gay and lesbian, its failure to explicitly use the word nonbinary in *Bostock* should not render the case inapplicable to this identity.[130] The LGBTQIA+ world is full of developing terminology that many people outside of it may not be aware of or understand;[131] the Court's choice of language to address only the identities before it could therefore merely have been the simplest way to articulate the decision, rather than an intentional repudiation of all other queer identities. Any expectation that the Court would or could name all affected queer identities in its decision is unreasonable, and the fact that it did not do so does not preclude the case's application to all those reasonably implicated by its ruling.

2. *If Not Explicitly Listed, Title VII Has No Exceptions*

Another theory suggests that *Bostock*'s holding prohibits courts from reading exceptions into Title VII, unless Congress explicitly included them.[132] While acknowledging that Congress may not have initially intended the word "sex" to include transgender and homosexual individuals,[133] the Court in *Bostock* insisted that Title VII has never been limited to Congress's initial vision.[134] For instance, as the Court points out, Congress never envisioned that Title VII would protect against sexual harassment or motherhood discrimination; yet courts have consistently incorporated these concepts into the statute's pro-

---

129 *See, e.g.*, Bostock v. Clayton Cty., 140 S. Ct. 1731, 1739–40 (2020) (articulating a very generous causation standard supporting broad application of Title VII's protections with the explanation that "Congress has . . . supplement[ed] Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a 'motivating factor' in a defendant's challenged employment practice. Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision." (citation omitted)).

130 *See* Gurrieri, *supra* note 11 (explaining through the perspective of LGBTQ lawyer Tracy Talbot that until very recently, terms like gay, lesbian, bisexual, and transgender were taboo to use in legal documents).

131 *See* Gold, *supra* note 1.

132 *See* Gurrieri, *supra* note 11 (explaining through the words of Ezra Young, former director of impact litigation at the Transgender Legal Defense and Education Fund, that if courts do not accept the proposition that nonbinary people are literally included in the word transgender, then they may accept that, since *Bostock* does not explicitly exclude nonbinary people, they are implicitly included in its protections).

133 *Bostock*, 140 S. Ct. at 1737.

134 *Id.* at 1747.

tections over the years, despite no textual indication that they should do so.[135] As the Court in *Bostock* explains:

> [There is not] any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exception to a broad rule, courts apply the broad rule. And that is how this Court has always approached Title VII.[136]

Therefore, since Congress included no explicit exception to Title VII for transgender people, let alone nonbinary people, courts cannot interpret the statute to exclude them.

Similarly, one could interpret the *Bostock* decision itself as creating no space for an exception to its protection of transgender people.[137] Because the Court did not explicitly exclude nonbinary people, lower courts cannot read such an exception into the case's holding.[138] This argument is especially persuasive, given the fact that the Court in fact had access to information about nonbinary individuals in some of the amicus curiae briefs that were submitted in this case.[139] If the Court was worried about including nonbinary people in its extension of protections to transgender individuals, it could have written an exception into its decision. Indeed, Justice Alito laments the absence of exactly such an exception in his dissent.[140] Since the majority chose not to comment on the issue when it was fully warned of the potential consequences, one can only as-

---

135 *Id.*

136 *Id.*

137 *See* Gurrieri, *supra* note 11.

138 *Id.*

139 *See, e.g.*, Brief of The American Psychological Ass'n et al., *supra* note 20, at 9 n.14 ("[O]ne conceptual model of gender identity 'attempts to deemphasize the rigid gender binary that characterizes conventional models of gender identity development, and instead presumes the existence of parallel gender continuums inclusive of male and female dimensions. According to this model, individuals can strongly identify with both male and female dimensions, or with neither.'" (quoting Lisa M. Diamond, Seth T. Pardo & Molly R. Butterworth, *Transgender Experience and Identity*, *in* HANDBOOK OF IDENTITY THEORY AND RESEARCH 629, 635 (Seth J. Schwartz, Koen Luyckx & Vivian L. Vignoles eds., 2011))).

140 *See Bostock*, 140 S. Ct. at 1779 (Alito, J., dissenting) (worrying that "while the Court does not define what it means by a transgender person, the term may apply to individuals who are 'gender fluid,' that is, individuals whose gender identity is mixed or changes over time. Thus, a person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time. The Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed." (citation omitted)).

sume that it never intended to exclude nonbinary individuals, and courts cannot read such an exception into its holding.[141]

However, while these arguments preclude the automatic exclusion of nonbinary people from *Bostock*'s coverage, they do not guarantee their inclusion either. After all, if the lack of explicit exclusion from Title VII's coverage were alone enough to guarantee the right to invoke sex discrimination protections under it, there would be no limit to the people who could invoke it or the purposes for which they could do so, and the very idea of sex discrimination would have no meaning at all. Yet surely the inclusion of nonbinary plaintiffs—when so similarly situated to binary transgender people who are already clearly covered under Title VII—cannot possibly run the risk of pushing sex discrimination doctrine beyond recognition. Since these groups are already so similarly positioned, the lack of mention of nonbinary people in *Bostock*'s decision likely indicates the Court's refusal to exclude them, rather than its refusal to include them.[142]

3. *Nonbinary Status Inherently Includes Consideration of Sex*

I suggest further that any arguments for the direct inclusion of nonbinary people in *Bostock*'s holding can be strengthened by an interpretation of the Court's but-for reasoning that accommodates nonbinary individuals. Although, as I pointed out above, the Court's but-for analysis does not work in all circumstances when applied to nonbinary identity,[143] it also does not preclude nonbinary people from claiming protections as transgender either.[144] Let us revisit the hypothetical in which the employer, as in Justice Gorsuch's example,[145] attempts to screen out nonbinary applicants. A nonbinary individual in this situation could claim that the employer is in fact discriminating against them because they are transgender—an identity which, as the Court already explained, inherently includes a consideration of sex.[146] Even if the employer does not discriminate against binary transgender people, its discrimina-

---

141 *See* Gurrieri, *supra* note 11.

142 *See id.*

143 *See supra* pp. 117–18.

144 *See* Gurrieri, *supra* note 11 (explaining that because, as Justice Alito points out, the Court does not exclude nonbinary people from the meaning of the word transgender, its holding in *Bostock* could apply to them).

145 *See Bostock*, 140 S. Ct. at 1746.

146 *Id.* at 1742 ("[H]omosexuality and transgender status are inextricably bound up with sex.").

tion against nonbinary applicants could still constitute discrimination against transgender individuals, if only a subcategory of them. As Justice Gorsuch in *Bostock* clearly states, discrimination on the basis of a protected category need not affect all individuals belonging to that protected category in order to be unlawful.[147] As long as membership in the protected category makes up one but-for cause of the discrimination, that discrimination is unlawful.[148] Here, two factors are arguably at play: transgender status, which necessarily includes consideration of sex, and nonbinary status, which has yet to be conclusively addressed by the courts. At the very least, transgender status (and consequently sex) makes up one but-for cause of the discrimination, rendering the employer's actions unlawful. Although not all nonbinary people identify as transgender,[149] this analysis could at least lend strength to the claims of those that do.

Most convincing, however, is the argument that nonbinary status, just like transgender status, inherently necessitates a consideration of sex; therefore, discrimination based on this trait likewise equally constitutes discrimination based on sex. This assertion finds support in part of Justice Gorsuch's own answer to his hypothetical, which includes an explanation that seems to anticipate extension to identities not strictly addressed in his example.[150] To determine if disclosure of a particular identity necessarily includes consideration of sex, Justice Gorsuch directs, "try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym)."[151] If, as for homosexuals and transgender people, "it can't be done," then discrimination based on that identity is discrimination based on sex.[152] Since nonbinary identity can only be defined in relationship to what it is

147 *Id.* at 1743 ("[A] rule that appears evenhanded at the group level can prove discriminatory at the level of individuals.").

148 *Id.* at 1739; *see also id.* at 1744 (explaining that a protected trait "need not be the sole or primary cause of the employer's adverse action"). As Justice Gorsuch explains, "Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision." *Id.* at 1742. Even if "some other, nonprotected trait . . . was the more important factor," the employer's actions can still be unlawful, as long as the protected trait played a contributing role in the adverse decision. *Id.* at 1744.

149 *Supra* note 22 and accompanying text.

150 *See Bostock*, 140 S. Ct. at 1746.

151 *Id.*

152 *Id.* (describing that both homosexual and transgender status, as identities that cannot be defined without reference to sex "or some synonym," are therefore protected under antidiscrimination law prohibiting sex discrimination).

not (i.e., strictly male or strictly female),[153] this test, at least, results in the inclusion of nonbinary individuals in Title VII's protections. By this logic, discrimination based on nonbinary status, just like that based on transgender status, must also be discrimination based on sex.

I argue that this justification for considering nonbinary identity as inherently based on sex is the strongest way for nonbinary plaintiffs to claim protections under *Bostock* on equal terms. First, the justification directly relies on Justice Gorsuch's own logic. Moreover, it would not exclude bisexual people, whose identity also cannot be defined without reference to the words "man, woman, or sex (or some synonym)."[154] Most importantly, such an argument would allow nonbinary plaintiffs to directly claim protection under *Bostock* in exactly the same way that binary transgender plaintiffs can.[155]

4. *Alternatively,* Bostock *Can Support Nonbinary Plaintiffs' Sex Stereotyping Claims*

If nonbinary plaintiffs are unsuccessful in gaining direct access to Title VII's protections under *Bostock*, some litigators have suggested that nonbinary people may still be able to indirectly do so by relying on sex stereotyping doctrine in combination with the *Bostock* ruling.[156] Indeed, even binary transgender plaintiffs may still need to rely on sex stereotyping case law when challenging an imposed gender expression—rather than incorrect classification only—or seeking protections in a business too small for Title VII to reach.[157] After the Court's ruling in *Bostock*, transgender claims under sex stereotyping case law are likely to be even more successful than in the past.[158] Transgender status has now gained formal recognition as protected under Title VII by the Supreme Court, lending increased validity to the sex stereotyping claims of transgender people.[159] Nonbinary people, even if unable to claim direct protection under Title VII, could likely use *Bostock* to bolster their sex stereotyping claims.

---

153 *See supra* note 23 and accompanying text.

154 *Bostock*, 140 S. Ct. at 1746; *see* Brief of The American Psychological Ass'n et al., *supra* note 20, at 8 (defining bisexual identity as "having a significant degree of sexual and romantic attraction to both sexes").

155 *Cf.* Schoenbaum, *supra* note 25, at 882–83 (describing how transgender status itself is now directly protected under *Bostock*, rather than gender expression only).

156 *See* Gurrieri, *supra* note 11.

157 Schoenbaum, *supra* note 25, at 885–86.

158 *See id.* at 885.

159 *See id.*

One of the first cases to address the issue of transgender discrimination after *Bostock*'s ruling actually did rely on both doctrines. In *Grimm v. Gloucester County*, the Fourth Circuit recently found that a school's refusal to allow a transgender boy to use the men's restroom constituted sex discrimination and was therefore a violation of Title IX and equal protection.[160] In reaching this holding, the court in part relied on the decision in *Bostock* as a clear signal that any disparate treatment of transgender people due to the "incongruence between [their] sex and gender" was discrimination on the basis of sex.[161] Moreover, the court read a new, transgender-specific protection into prohibitions against sex stereotyping: the court stated that barring a transgender individual from a specific restroom played into the stereotype of the "'transgender predator' myth" and thus constituted sex stereotyping.[162] Although this case applied to a binary transgender individual, it indicates a heightened awareness that discrimination against transgender people necessarily involves sex stereotyping, and that the decision in *Bostock* can be used to support sex stereotyping claims.

However, if this mechanism were the only one available to nonbinary people seeking relief from discrimination, nonbinary plaintiffs would still enjoy less access to legal protection than binary transgender people. Sex stereotyping law, even in an enhanced version, still does not completely escape the problems discussed earlier in this Note.[163] Nonbinary plaintiffs would still be forced to misrepresent themselves as nonconforming members of the sex they were assigned at birth, even when they are not,[164] and they would be less likely to win in cases having little to do with nonconforming behavior.[165] Recognition of nonbinary identity itself as protected would still be lacking.[166] Meanwhile, transgender status would have automatic recognition as protected under Title VII, according to *Bostock*'s holding.[167] This disparity would only reinforce the

---

160 *See* Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 593–94 (4th Cir. 2020).

161 *Id.* at 616.

162 *Id.* at 625.

163 *See supra* Section I.B.; *see, e.g.*, Schoenbaum, *supra* note 25, at 886–87 (suggesting some of the continued problems for transgender people invoking sex stereotyping doctrine after *Bostock* and proposing several ways to avoid them).

164 *Cf. supra* note 70 and accompanying text.

165 *Cf. supra* notes 68–69 and accompanying text.

166 *Cf. id.*

167 *See* Schoenbaum, *supra* note 25, at 882–84 (discussing how *Bostock*'s recognition of transgender status as a basis of discrimination will lead to more direct protection for transgender people).

perception of nonbinary people as somehow not "trans enough"[168] and would further weaken their ability to draw on the precedent of *Bostock*.

Additionally, if binary transgender plaintiffs continue to distance their cases from nonbinary people, thereby appearing less subversive of binary gender systems,[169] they could undermine nonbinary plaintiffs' ability to access protections under either *Bostock* or sex stereotyping doctrine. Such arguments reinforce the division between binary transgender people and nonbinary ones and imply that binary transgender people deserve protection while nonbinary people do not.[170] Ensuring that the arguments of binary transgender plaintiffs are nonbinary-inclusive, then, is just as important to shaping nonbinary access to antidiscrimination protection as the arguments made by nonbinary plaintiffs themselves.

CONCLUSION

After the Court's landmark decision in *Bostock v. Clayton County* extending Title VII antidiscrimination protections to transgender people,[171] the rights of nonbinary individuals have yet to be clearly shaped and defined. Although experts indicate that the decision will offer nonbinary people some level of protection,[172] the extent of this protection and the theory extending it to them are not yet clear. *Bostock*'s holding, like the vast majority of the sex stereotyping case law preceding it, directly addresses only the binary transgender plaintiff involved in the case and does not discuss the case's implications for nonbinary people at all.[173] Nor does the Court's strict textualist logic, expressed in exclusively binary terms, easily lend itself to incorporation of nonbinary people.[174] As such, nonbi-

---

168 *See supra* note 37 and accompanying text.

169 *See* Clarke, *supra* note 9, at 922 (postulating that some legal advocates may calculate that distancing the recognition of transgender people from recognition of nonbinary people could make transgender claims seem less disruptive and therefore likelier to succeed).

170 *See, e.g.*, Doe v. Boyertown Area Sch. Dist., 276 F. Supp. 3d 324, 366 (E.D. Pa. 2017), *aff'd*, Doe v. Boyertown Area Sch. Dist., 893 F.3d 179 (3d Cir. Pa. 2018) (explicitly claiming in a decision recognizing the right of binary transgender students to use the bathroom according to their gender identity that nonbinary individuals "generally do not discuss" a desire to use a specific bathroom, implying that the court's decision might have been less favorable if nonbinary students had been involved).

171 *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1737 (2020).

172 *See* Gurrieri, *supra* note 11.

173 Ocamb, *supra* note 82.

174 *See supra* Section II.A.

nary plaintiffs will likely need to justify *Bostock*'s application to them in court.

In this landscape of developing nonbinary jurisprudence, I argue that nonbinary people will have the most success if they can convince courts that nonbinary identity itself is directly protected under *Bostock*'s holding. To reach this result, I argue for a holistic interpretation that takes into account both *Bostock*'s literal holding recognizing "transgender status" as protected under Title VII[175] as well as the principles expressed throughout the opinion. The language in the decision, I argue, implies broad application to all those whose identities, like those involved in the case itself, are based on sex.[176] Just as recognition of an individual as transgender necessarily must rest upon some consideration of that individual's sex, a person's status as nonbinary can likewise only be determined in reference to the binary sexes with which they do not identify. Litigators should therefore demand and courts should find that the holding of *Bostock* applies no differently to nonbinary individuals than it does to binary transgender ones.

Such an interpretation would offer nonbinary people protection from discrimination based solely on their status as nonbinary, regardless of whether or not they also identify as transgender or are also gender nonconforming. This would enable nonbinary plaintiffs to avoid the catch-22 situation they may find themselves in otherwise, if viewed as not "trans enough"[177] to claim direct protection under *Bostock* and only able to access sex stereotyping protection by convincing courts to inaccurately view them as gender nonconforming.[178]

However, equal recognition of nonbinary people is not inevitable. Litigators and courts alike must first understand that nonbinary people can be fully transgender, fully nonconforming, both, or neither,[179] and subsequently decide to view each manifestation of nonbinary identity as equally worthy of protection from discrimination in its own right. Impact litigators must attempt to take on more nonbinary plaintiffs, so that nonbinary needs and identity can actually play a part in shaping the doctrine that will apply to them. Litigators, courts, and

---

175 *Bostock*, 140 S. Ct. at 1741 (holding that "[a]n individual's homosexuality or transgender status is not relevant to employment decisions").

176 *See supra* notes 150–54 and accompanying text.

177 *See supra* note 37 and accompanying text.

178 *See supra* notes 68–70 and accompanying text.

179 *See* Schoenbaum, *supra* note 25, at 886 (discussing the simultaneous inclusion of nonbinary people in the transgender community and shared interests between nonbinary people and gender nonconformers).

scholars must insist on considering nonbinary needs along with binary transgender claims and refrain from painting nonbinary people as an irreconcilable and unfortunate threat to society's binary gender systems, thus achieving increased rights for binary transgender people at the expense of their nonbinary peers.[180] The sweeping victory of *Bostock* for the queer community cannot be fully realized until all those under the LGBTQIA+ flag can taste the fruits of its promise.

180 *See* Clarke, *supra* note 9, at 922.