BLACK CULTURE IS "PROFESSIONAL": CAUSATION AFTER *BOSTOCK* & RACIAL STEREOTYPES

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Abstract

Employment discrimination has progressed past the days of overt prejudices. In today's society, employment discrimination manifests as stereotypes that perpetuate negative results. Those who suffer from stereotypic discrimination have long been denied redress for these wrongs. The U.S. Supreme Court's decision in *Bostock*, this Note argues, is a way forward. This Note argues that case law has developed, and should continue to develop, in a way that recognizes racial stereotyping as discriminatory. This Note explores the history of this case law and examines how the theory of causation from *Bostock* can be used to better the jurisprudence on racial stereotyping.

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> It is not our differences that divide us. It is our inability to recognize, accept, and celebrate those differences.[1]

INTRODUCTION

Imagine Kayla, a Black woman, decides to wear locs to work. She is reprimanded by her employer for an "unprofessional appearance." Undeterred by this reprimand, Kayla continues to wear her locs to work. Kayla's employer eventually terminates her for not conforming with the reprimand she received, finding her lack of assimilation to the "professional appearance" requirement to be a detriment to the work environment.

At first glance, Kayla was fired because of the appearance of her hairstyle and not because of any of the protected categories enumerated in Title VII of the Civil Rights Act of 1964: race, color, religion, sex, and national origin.[2] Workplace grooming policies generally require that hair be groomed in a manner that is professional, businesslike, conservative, not "too excessive," "eye-catching or different," or that employees cover hairstyles that are "unconventional," and so on. These policies are neutral on their face and purport no relationship to the race of the person being disciplined for noncompliance. However, a deeper examination reveals the perverse motive of the employment action. Kayla was fired because of the stereotype that her hair, in its natural state, is unprofessional.

Kayla's decision to wear her hair in its unaltered state is inextricably tied to her race. The delicate relationship between a Black woman and her physical expression of her culture as it relates to her hair has been

1. Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, *in* SISTER OUTSIDER 104, 105 (1984).

2. 42 U.S.C.A. § 2000e-2(a)(1) (West 2022).

discussed ad nauseam.[3] The language used in workplace grooming policies is often interpreted by employers to ban African American women's natural hairstyles, including protective styles, from the workplace. Grooming policies excluding Black women's neatly groomed, natural hairstyles are based on stereotypes rooted in race and gender and operate to illegally exclude them from the workplace. Such policies can lead to African American women not being hired, or being fired, simply for wearing their hair in its natural state. This is a form of racial stereotyping and should constitute a violation of Title VII. However, U.S. Supreme Court jurisprudence has so far failed to consistently recognize racial stereotypes as discrimination on the basis of race in violation of Title VII.

This Note will argue that the U.S. Supreme Court decision in *Bostock v. Clayton County*[4] should be a path for recognizing that racial stereotyping is a form of race discrimination. In *Bostock*, the definition of sex discrimination was expanded to include discrimination on the basis of sexual orientation and gender identity.[5] Importantly, the Court extrapolated a definition of "but-for" causation within Title VII that allows for multiple but-for causes to be present in the employment decision, but if a protected classification played some role in the adverse employment decision, then the employer violates Title VII.[6] This Note will argue that applying *Bostock*'s theory of causation to racial stereotyping will allow the wrongful nature of such racial discrimination to be fully understood.

Part I tracks the development of causation standards in other antidiscrimination statutes and provisions as defined by Congress and the U.S. Supreme Court through mixed motive discrimination. Part II proceeds by defining single motive discrimination and its requisite legal standard. Part III will discuss the holding of *Bostock* and the causation standard that the majority opinion extrapolated for status-based discrimination claims brought under Title VII. Part IV attempts to define racial stereotyping through social science and jurisprudence—placing it in the context of *Bostock*—and explains how the *Bostock* causation standard can assist courts in examining racial stereotyping cases. This Note concludes by emphasizing the necessity of developing racial stereotype jurisprudence as a clear form of actionable discrimination.

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3. Dawn D. Bennett-Alexander & Linda F. Harrison, *My Hair Is Not Like Yours: Workplace Hair Grooming Policies for African American Women as Racial Stereotyping in Violation of Title VII*, 22 CARDOZO J.L. & GENDER 437, 438–48 (2016); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1385–89 (2008).

4. 140 S. Ct. 1731, 1731 (2020).

5. *Id.* at 1738.

6. *Id.* at 1739–41.

I. DEFINING "BECAUSE OF": CAUSATION IN ANTIDISCRIMINATION CASES BEFORE *BOSTOCK*

Part I explores how the U.S. Supreme Court and Congress have defined the phrase "because of" in various discrimination statutes over time. Part I highlights the Court's inconsistency in applying the requirements for causation in discrimination cases. In some instances, a plaintiff must prove their protected classification was *the* reason for the employment or discriminatory decision; in other contexts, the protected classification must only have been a motivating factor. The Court has offered various reasons for its various approaches to different types of discrimination cases, but none of these reasons, this Note argues, are sufficient.

Section A discusses motivating factor causation and *Price Waterhouse*. Section B explains *Gross* and the causation standard in the Age Discrimination in Employment Act of 1967. Section C explores *Nassar* and the heightened standard for causation in antiretaliation discrimination claims filed under 42 U.S.C. § 2000e-3. Finally, Section D examines the causation requirement in 42 U.S.C. § 1981 as discussed in *Comcast Corp.*

A. *Mixed Motive Discrimination and Motivating Factor Causation*

Mixed-motive discrimination occurs when an employer relies on both lawful and discriminatory motives in making an adverse employment decision. The first time the U.S. Supreme Court recognized that mixed motive discrimination was actionable under Title VII was in *Price Waterhouse v. Hopkins*.[7] In that case, Ann Hopkins sued under Title VII for sex discrimination after she was denied a promotion.[8] Although no opinion garnered a majority, six Justices agreed that a plaintiff can prevail on a claim of status-based discrimination based on mixed-motives if one of the prohibited traits is a "motivating," "substantial," or "illegitimate" factor in the employer's decision.[9] In deciding that the "because of" language in Title VII created a burden-shifting framework, the plurality explained that if the plaintiff makes a showing that a protected category is a motivating or substantial factor in the adverse employment action, the burden of persuasion shifts to the employer, who can escape liability by proving through objective evidence that "its legitimate reason, standing alone, would have induced it to make the same decision."[10]

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7. 490 U.S. 228, 244–47 (1989).

8. *Id.* at 232.

9. *Id.* at 258 (plurality opinion); *Id.* at 259 (White, J., concurring); *Id.* at 276 (O'Connor, J., concurring).

10. *Id.* at 258.

1. Congress's Response to *Price Waterhouse* and the Civil Rights Act of 1991

Two years after the Supreme Court handed down the decision in *Price Waterhouse*, Congress partly rejected the case's burden-shifting framework and lessened its causation standard.[11] The legislature added a subsection to the end of Title VII, which stated that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice."[12] It was later added that a protected classification being a motivating factor could be proven by either direct or circumstantial evidence.[13]

Title VII itself does not define what constitutes a motivating factor. The courts have attempted to define it, but only by using metaphors that are difficult to understand.[14] Legal scholars have also attempted to define the phrase. The most convincing interpretation is that "motivating factor" is best understood "as a conscious reason, something the decisionmaker(s) considered, or took into account, in coming to the challenged decision."[15] This interpretation would require plaintiffs to show that "being of a certain race, color, gender, religion or national origin was not only a reason for the challenged action, but also one of the considerations taken into account in the deliberations that preceded it."[16] Other scholars have attempted to define "motivating factor" in relation to the but-for causation requirement, claiming that doing so creates a lower standard of causation known as the concept of minimal causation.[17] This alternative interpretation would mean that impermissible factors such as race or sex have some causal influence but do not rise to the level of necessity or sufficiency.[18] Such a formulation is essentially the middle ground between a stronger form of causation (but-for) and no causation.[19]

Through the Civil Rights Act of 1991, Congress also rejected the portion of the *Price Waterhouse* framework that allowed an employer to escape liability once a plaintiff proved the existence of an impermissible

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11. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 348–49 (2013); 42 U.S.C. § 2000e-2(m).

12. 42 U.S.C. § 2000e-2(m) (emphasis added).

13. Desert Palace, Inc. v. Costa, 539 U.S. 90, 102 (2003).

14. Costa v. Desert Palace, Inc., 299 F.3d 838, 849 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003); Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 893 (7th Cir. 1996).

15. Michael Starr, *The Muddle of Motivating Factor: Using the Logic of Human Action to Inform Employment Discrimination Law*, 35 HOFSTRA LAB. & EMP. L.J. 89, 130 (2017).

16. *Id.*

17. Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 505 (2006).

18. *Id.*

19. *Id.*

motivating factor.[20] Congress found the framework to be inadequate because it allowed employers who had definitively engaged in discrimination to avoid liability in certain circumstances.[21] Under the congressional framework,

> A plaintiff could obtain declaratory relief, attorney's fees and costs, and some forms of injunctive relief based solely on proof that race, color, religion, sex, or nationality was a motivating factor in the employment action; but the employer's proof that it would still have taken the same employment action would save it from monetary damages and a reinstatement order.[22]

In amending Title VII, the Civil Rights Act of 1991 allowed an employee to satisfy a lesser burden of causation for establishing discrimination on the basis of mixed motives than exists in other discrimination statutes.[23] Plaintiffs noted this distinction and attempted to bring discrimination claims in different contexts under other antidiscrimination statutes, seeking to transplant the reasoning from both *Price Waterhouse* and the 1991 Act, but the Supreme Court was not receptive.[24]

B. *Mixed Motives and the ADEA:* Gross v. FBL Financial Services

In *Gross v. FBL Financial Services*, the Supreme Court approached the issue of "whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the Age Discrimination in Employment Act of 1967 (ADEA)."[25] The ADEA provides that "[i]t shall be unlawful for an

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20. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 349 (2013); Gross v. FBL Fin. Servs., 557 U.S. 167, 178 (2009).

21. *See, e.g.*, H.R. REP. NO. 102-40 (Part I), at 45 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 583 (criticizing the *Price Waterhouse* case for "undercut[ting]" the goal of assuring Title VII liability "for all invidious consideration" of protected categories).

22. *Id.*

23. *See Gross*, 557 U.S. at 174–75 (holding that neither the motivating factor causation analysis nor the burden-shifting framework is relevant in claims brought under the ADEA, 29 U.S.C. § 623(a)(1)); *Nassar*, 570 U.S. at 351–52 (finding that the motivating factor causation analysis is only available in status-based discrimination cases under Title VII and not antidiscrimination retaliation cases filed under a different provision of Title VII); Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1017 (2020) (holding that the motivating factor analysis from Title VII does not extend to claims alleging racial discrimination in failing to transact or conduct business with a party).

24. *See supra* note 23.

25. *Gross*, 557 U.S. at 169–70. Petitioner Jack Gross, a 54-year-old man, was reassigned to a different position at FBL Financial Group and cited his age as the reason for reassignment. *Id.* Gross filed suit, claiming age discrimination in violation of the statute. *Id.* at 170. At trial, Gross introduced evidence "suggesting that his assignment was based at least in part on his age." *Id.* The

employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age."[26] The Court read "because of" in this statute to take its ordinary meaning of "by reason of" or "on account of."[27] Therefore, the causation standard in the ADEA was determined to be but-for causation, meaning that the plaintiff retained the burden of persuasion to establish that age was the but-for cause of the adverse employment action.[28] In other words, the age of the plaintiff must be the sole reason for the adverse employment action, and the ADEA does not recognize an exception to its causation standard in mixed-motive age discrimination claims.[29]

C. *Mixed Motives and Title VII Retaliation:* University of Texas Southwestern Medical Center v. Nassar

The Supreme Court has also held that mixed-motive discrimination—and with it the lessened causation standard in Title VII—only applies to the status-based discrimination claims found in 42 U.S.C. § 2000e-2(a) and not the antiretaliation discrimination claims filed under 42 U.S.C. § 2000e-3.[30] Although the language of both provisions are similar and share similar goals, the Court held that the antiretaliation provision imposes a heightened standard of proof for causation.[31] This means that the motivating factor analysis that Congress incorporated into the status-

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district court instructed the jury that they must rule for the plaintiff if he proved, by a preponderance of the evidence, "that his 'age was a motivating factor' in FBL's decision to demote him." *Id.* at 170–71. After a finding for Gross, FBL appealed. *Id.* at 171.

26. 29 U.S.C. § 623(a)(1) (emphasis added).

27. *Gross*, 557 U.S. at 176.

28. *Id.* at 177–78.

29. *Id.* at 179–80. The *Gross* decision was a staunch departure from previous cases that found that Title VII and ADEA claims could be analyzed in the same manner. A federal court case from Illinois stated that "[g]iven the similarities in text and purpose between Title VII and ADEA, as well as the consistent trend of transferring the various proof methods and their accompanying rules from one statute to the other, this Court considers it likely that whatever doctrinal changes emerge as a result of *Desert Palace* in the Title VII context will be found equally applicable in the ADEA arena." Strauch v. Am. Coll. of Surgeons, 301 F. Supp. 2d 839, 844 n.10 (N.D. Ill. 2004).

30. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 351–52 (2013). Title VII prohibits discrimination on seven total specified criteria. The first five are found in 42 U.S.C. § 2000e-2(a), which prohibits discrimination "because of" an employee's protected status: race, color, sex, religion, or national origin. The final two are found in Section 2000e-3, which prohibits an employer from retaliating "because of" an employee's participation in legal proceedings or opposition to illegal employment practices.

31. *Nassar*, 570 U.S. at 362–63; August T. Johannsen, *Mitigating the Impact of Title VII's New Retaliation Standard: the Americans with Disabilities Act After University of Texas Southwestern Medical Center v. Nassar*, 56 WM. & MARY L. REV. 303, 315 (2014).

based discrimination provision does not extend to Section 2000e-3.[32] In antiretaliation claims, the Court has found that the "because of" language in Section 2000e-3 requires the application of a but-for causation standard, even though the "because of" language in Section 2000e-2(a) requires the motivating factor standard.[33] The Court reasoned that Congress enacted Title VII with tort law as the background and that tort law was the default rule absent an indication to the contrary in the statute itself.[34] The Court embraced a fragmented application of tort law in the context of Section 2000e-3 despite the absence of factors traditionally present in other tort law applications.

D. *Mixed Motives and Section 1981:* Comcast Corp. v. National Association of African American-Owned Media

Mere months before *Bostock*, in an unanimous opinion also authored by Justice Gorsuch, the causation standard throughout the life of a Section 1981 lawsuit was found to be but-for causation, which required the plaintiff to show that race was *the* reason for the failure to contract.[35] In *Comcast Corp.*, Entertainment Studios Network (ESN)—owned by an African American man—sought to have Comcast carry its channels.[36] However, "Comcast refused, citing lack of demand for ESN's programming, bandwidth constraints, and its preference for news and sports programming that ESN didn't offer."[37] When negotiations halted, ESN sued, claiming Comcast disfavored contracting with media companies owned by African Americans in violation of 42 U.S.C. § 1981.[38] The district court dismissed the complaint for ESN's failure to show that, but for racial animus, Comcast would have contracted with them.[39] The Ninth Circuit reversed, determining that "[a] § 1981 plaintiff doesn't have to point to facts plausibly showing that racial animus was a 'but for' cause of the defendant's conduct. Instead, . . . a plaintiff must only plead facts plausibly showing that race played 'some role' in the defendant's decisionmaking [sic] process."[40] Finding a circuit split over the correct causation standard for Section 1981 claims, the Supreme Court granted certiorari to resolve the disagreement.[41]

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32. *Nassar*, 570 U.S. at 352.

33. *Id.*

34. *Id.*

35. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1015 (2020).

36. *Id.* at 1013.

37. *Id.*

38. *Id.* The statute provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981.

39. *Comcast Corp.*, 140 S. Ct. at 1013.

40. *Id.*

41. *Id.* at 1014. The noted split was between the Seventh and the Ninth Circuits. *Id.*; *see* Bachman v. St. Monica's Congregation, 902 F.2d 1259, 1262–63 (7th Cir. 1990) ("[T]o be

Despite the plaintiff's argument that the causation standard in Section 1981 should be informed by the motivating factor test applied to Title VII, the Court held that the correct standard for violations of Section 1981 was the "textbook tort law" standard of but-for causation.[42] Exploring the differences between Section 1981 and Title VII, Justice Gorsuch noted that the statutes have "two distinct histories, and not a shred of evidence that Congress meant them to incorporate the same causation standard."[43] The *Comcast Corp.* case further illustrates how the Court has failed to provide consistency in defining causation in discrimination cases.[44]

II. SINGLE MOTIVE DISCRIMINATION AND BUT-FOR CAUSATION

Single motive discrimination occurs when an employer makes an employment action based solely on the protected classification and can be established by either direct or circumstantial evidence.[45] When the plaintiff presents direct evidence, the burden automatically shifts to the employer to show that the discrimination was not the motive for the adverse employment action.[46] When the plaintiff presents circumstantial evidence, she must proceed through the *McDonnell Douglas* test.[47] Under the *McDonnell Douglas* burden-shifting framework: (1) the plaintiff must establish a prima facie case of intentional discrimination; (2) upon such a showing by the plaintiff, the burden shifts to the defendant-employer to show a legitimate, nondiscriminatory motive; and (3) if defendant succeeds, the burden shifts back to the plaintiff to prove that the nondiscriminatory motive was pretextual.[48] This framework is "used primarily in cases litigated under the disparate treatment theory of discrimination."[49]

The Supreme Court first recognized the requirement of but-for causation in single motive discrimination cases in *Gross*.[50] The *Gross* case incorporated the common law tort doctrine of causation into

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actionable, racial prejudice must be a but-for cause . . . of the refusal to transact."); Nat'l Ass'n of Afr. Am.-Owned Media v. Charter Commc'ns, Inc., 915 F.3d 617, 626 (9th Cir. 2019) (holding that the test for causation is whether discriminatory intent played any role in the decision by a defendant to refuse contracting with the plaintiff), *vacated*, 804 F. App'x 710 (9th Cir. 2020).

42. *Comcast Corp.*, 140 S. Ct. at 1014.

43. *Id.* at 1017.

44. *Id.* at 1017–18.

45. Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 49 (1991).

46. *Id.* at 25.

47. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

48. *Id.*; Gudel, *supra* note 45, at 24.

49. Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 652 (2000).

50. *See supra* Part I, Section B.

employment discrimination.[51] In tort law, but-for causation means that "an act (omission, condition, etc.) was a cause of an injury if and only if, but for the act, the injury would not have occurred."[52] According to the Restatement (Third) on Torts, "an actor's tortious conduct need only be *a* factual cause of the other's harm."[53] This definition intimates the theory that the act must have been a necessary condition for the occurrence of the injury.[54] However, other causes being present does not affect whether specified tortious conduct was a necessary condition for the harm to occur.[55] Those other causes may be "innocent or tortious, known or unknown, influenced by the tortious conduct or independent of it, but so long as the harm would not have occurred absent the tortious conduct, the tortious conduct is a factual cause."[56]

In the employment discrimination context, this means that an employee must identify a determinative reason or the driving force behind the adverse action.[57] The Court in *Gross* applied this principle differently, stating that, "the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was *the* 'reason' that the employer decided to act."[58] Although the *Gross* Court appeared to be using tort law as a background for enforcing employment discrimination,[59] the Court only incorporated a fragmented definition of but-for causation. If the Court were to utilize the basic tort law concept of but-for causation, it would instruct that there can be several reasons for a single act and, when that occurs, causation is not quite so clear.[60]

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51. *Id.*

52. Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1775 (1985).

53. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 26 cmt. c (AM. L. INST. 2010) (emphasis added).

54. *Id.*

55. *Id.*

56. *Id.*

57. Kelly S. Hughes, *'But-For' Causation Under Bostock*, NAT'L L. REV. (June 24, 2020), https://www.natlawreview.com/article/causation-under-bostock [https://perma.cc/6KGF-RL RK]; Sandra Sperino, *Comcast and Bostock Offer Clarity on Causation Standard*, AM. BAR ASS'N (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/comcast-and-bostock-offer-clarity-on-causation-standard/ [https://perma.cc/9WCT-6VMQ].

58. Gross v. FBL Fin. Servs., 557 U.S. 167, 176 (2009) (emphasis added).

59. *Id.* at 176–77.

60. Starr, *supra* note 15, at 96 n.31.

III. *BOSTOCK V. CLAYTON COUNTY*: TITLE VII PROHIBITS DISCRIMINATION "BECAUSE OF" AN INDIVIDUAL'S SEXUAL ORIENTATION AND GENDER IDENTITY

In a 6-3 decision, the Supreme Court held that sex discrimination in Title VII includes when an employer discriminates against an employee based on their sexual orientation or gender identity.[61] In an opinion written by Justice Gorsuch, joined by all the Court's liberal justices and Chief Justice Roberts, the definition of sex discrimination—at least within the confines of Title VII—was expanded yet again.[62]

Bostock involved three consolidated cases from the Eleventh, Second, and Sixth Circuits.[63] The first case concerned Gerald Bostock, who was employed by Clayton County, Georgia, as a child welfare advocate.[64] After a decade of working with the county, Bostock began participating in a gay recreational softball league, leading community members to make disparaging comments about Bostock's sexual orientation and participation in the league.[65] Soon after joining the league, Bostock was fired for exhibiting conduct "unbecoming" of a county employee.[66] The second case arose from the experience of Donald Zarda, who had worked as a skydiving instructor at Altitude Express in New York.[67] After several seasons with the company, Zarda mentioned that he was gay to a woman during a skydiving jump in an effort to minimize her concern about being closely strapped to an unfamiliar man.[68] The woman alleged to her boyfriend that Zarda had inappropriately touched her during the jump, which Zarda denied. Days later, he was fired.[69] In the third case, Aimee Stephens worked at a funeral home in Garden City, Michigan.[70] When Stephens first started the job, Stephens presented as a male.[71] During Stephens's sixth year with the company, however, Stephens wrote a letter to the funeral home explaining that, after returning from vacation, Stephens planned to "live and work full-time as a woman."[72] Stephens's

61. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1754 (2020).

62. *Id.*; *see, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (holding that sex discrimination arising from same-sex sexual harassment is actionable under Title VII).

63. *Bostock*, 140 S. Ct. at 1737–38.

64. *Id.* at 1737.

65. *Id.* at 1738.

66. *Id.*

67. *Id.*

68. *Id.*; Zarda v. Altitude Express, Inc., 883 F.3d 100, 109 (2d Cir. 2018), *aff'd sub nom.* Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1738 (2020).

69. *Zarda*, 883 F.3d at 109.

70. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1738 (2020).

71. *Id.*

72. *Id.* (internal quotations omitted).

employer responded by saying, "this is not going to work out," and terminated her before she left."[73]

Each of the three employees filed suit under Title VII of the Civil Rights Act of 1964, alleging violations of Title VII's prohibition on sex discrimination.[74] Bostock and Zarda's claims were based on sexual orientation, while Stephens's claim was based on gender identity.[75] Achieving varying results in the appellate courts, certiorari was granted, and the cases were heard by the U.S. Supreme Court.[76]

The Court sought to address the issue of whether the term "sex" in Title VII includes sexual orientation and gender identity.[77] The majority opinion held:

> An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. [78]

The Court acknowledged that the question was not only what "sex" means but also what Title VII says about it.[79] Essentially, Title VII provides that an employer cannot take adverse employment actions "because of" sex.[80] The ordinary meaning of "because of" is "by reason of" or "on account of."[81] The Court characterized the causation standard in Title VII as "simple" or "traditional" but-for causation.[82] The standard requires changing one variable at a time to see if the outcome changes.[83] Relying on this standard, the Court reasoned that if each employee's sex were changed (for example, if Bostock or Zarda were instead women attracted to men), then the employer would not have taken the adverse employment action of firing them.[84] Thus, an employer's decision to fire

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73. *Id.* (internal quotations omitted).
74. *Id.*
75. *Id.*
76. *Bostock*, 140 S. Ct. at 1738.
77. *Id.* at 1739.
78. *Id.* at 1741.
79. *Id.* at 1739.
80. *Id.*
81. *Id.* (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S 338, 350 (2013)) (internal quotations omitted).
82. *Bostock*, 140 S. Ct. at 1739.
83. *Id.*
84. *Id.* at 1740.

a man for what the employer would not have fired a woman for constitutes a violation of Title VII.[85] The Court wrote:

> When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.[86]

Here, the causation standard for status-based discrimination claims asserted under Title VII was set forth in no uncertain terms. The protected classification need not be the *sole* reason for the adverse employment action, so long as the classification played "some role" in the action.[87]

The previously-discussed line of cases reveals the inconsistent application of causation in the area of antidiscrimination law prior to *Bostock*. Absent a clear showing that Congress has added the "motivating factor" language to a particular statute, the Supreme Court resorted to purported tort law concepts and but-for causation.[88] But-for causation was read to mean that the protected classification is *the* reason—instead of *a* reason—for the employer's actions.[89] Therefore, an employer could escape liability by showing that there was *some* nondiscriminatory motive for the adverse action. The use of but-for causation in antidiscrimination statutes presumes two things: (1) it is appropriate to apply common law to federal statutes; and (2) common law requires the plaintiff to establish but-for causation.[90]

The majority opinion in *Bostock* was the first time that the Court explicitly acknowledged the broader interpretation of causation in tort

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85. *Id.*

86. *Id.* at 1742 (emphasis in original).

87. *Id.* at 1743.

88. *See* Gross v. FBL Fin. Servs., 557 U.S. 167, 174–75 (2009) (explaining that the motivating factor causation analysis and the burden-shifting framework are inapplicable to claims brought under the ADEA); *see also* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 351–52 (2013) (holding that the motivating factor analysis is not available in antidiscrimination retaliation cases); Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1017 (2020) (finding that the motivating factor analysis does not extend to claims alleging racial discrimination in failing to transact or conduct business).

89. Sperino, *supra* note 57.

90. *Id.* The dissent in *Nassar* rejected the idea that it was appropriate to import this tort concept into discrimination law. *Nassar*, 570 U.S. at 385 (Ginsburg, J., dissenting). The dissent noted that but-for causation was developed to explain the causal connections between physical forces and that it was difficult to use this concept to explain discrimination cases, which often rely on motive, intent, or animus. *Id.*

law and its relation to antidiscrimination law.[91] The Court incorporated the idea that there can be multiple but-for causes, but the presence of multiple causes does not completely absolve the employer of liability.[92] This raises two points for consideration: (1) whether *Bostock*'s textual interpretation of but-for causation is correct; and (2) what that interpretation means for racial stereotyping and its recognition as race discrimination. Regarding the first question, the causation standard described in *Bostock* is the correct textual reading of "because of" in Title VII. To the second point, this textualist reading should provide the backdrop for recognizing the full panoply of racial stereotypes as discrimination.

Bostock's understanding of causation requires courts to change one condition at a time and see if the result would change.[93] Returning to the story of Kayla,[94] to be able to succeed under the *Bostock* standard for a single motive discrimination claim, Kayla would have to prove that if her race was changed, then she would not have suffered the adverse employment action.[95] Thus, if Kayla could prove that her race was inextricably tied to her termination because of underlying stereotypes related to grooming policies, the burden would shift to the employer to prove that it acted without a discriminatory motive.[96] In current practice, the employer would simply point out that Kayla's failure to adhere to grooming policies, not racial stereotypes, was the reason for her termination.

Such a result is inequitable and does not align with the spirit and purpose of Title VII. Accordingly, the current method of analyzing racial stereotyping cases under Title VII needs to change. The *Bostock* standard of causation, in conjunction with a more expansive understanding of race, should be applied to racial stereotyping. Under this approach, even supposing that the adverse action taken by the employer was based in part on the grooming policies, Kayla could prove her hairstyle was inextricably linked to her race or that the policies were based on stereotyping directly connected to race, making race a but-for cause of the termination and establishing that the employer violated Title VII.

91. *Bostock*, 140 S. Ct. at 1739.
92. *Id.*
93. *Id.*
94. *See supra* INTRODUCTION.
95. *Bostock*, 140 S. Ct. at 1739–40.
96. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

IV. DEFINING STEREOTYPE THEORY AND RACIAL STEREOTYPES

Stereotypes are cognitive schemes that social perceivers use to process information about others.[97] Stereotypes not only reflect beliefs about the traits that characterize typical group members but also consist of information about "social roles[] [as well as] the degree to which members of the group share specific qualities," and "influence emotional reactions to group members."[98] Stereotypes are ubiquitous. Among other things, they cover racial groups ("white people do not season their food"), political groups ("Republicans are rich"), genders ("women are bad drivers"), demographic groups ("Southern hospitality"), and activities ("flying is dangerous"). Indeed, some stereotyping is necessary and does not harbor invidious motives.[99] A considerable amount of commonly-held stereotypes are not products of explicit discrimination or conscious attitudes but of "implicit beliefs that are 'automatically activated by the mere presence (actual or symbolic) of the attitude object,' and that 'commonly function in an unconscious and unintentional fashion.'"[100]

Stereotyping as a form of actionable discrimination was first extrapolated as violative of the constitutional protection against sex discrimination through the Equal Protection Clause.[101] Sex stereotyping was recognized as actionable under Title VII in *Price Waterhouse*.[102] Hopkins, criticized for being "macho" and "masculine," argued that she had to conform to traditional ideals of femininity to be eligible for partnership at the company.[103] The U.S. Supreme Court recognized that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[104] The remarks by the partners and other employees at the accounting firm were characterized as sex stereotyping that contributed to Hopkins not being promoted to partner and therefore supported a claim of sex discrimination.[105]

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97. JOHN F. DOVIDIO, THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 7 (2010).

98. *Id.*

99. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1163–64 (1995) (pointing out the ways that parents teach their children to "stereotype" about potentially dangerous animals or interactions with strangers in order to guide children to safe choices).

100. Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 746 (2005).

101. Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 965 (2016).

102. *See supra* Part I, Section A.

103. Bornstein, *supra* note 101, at 955.

104. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

105. *Id.* at 251.

Although the employer attempted to claim sex stereotypes were not legally relevant, the Court disagreed, stating, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[106] In acknowledging the truly broad nature of Title VII, the Court further acknowledged that Congress "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[107] Thus, *Price Waterhouse* formulated stereotyping as a legal theory to frame disparate treatment, addressing more subtle or structural discrimination by exposing how workplace structures rely on stereotypes associated with protected class status to disadvantage members of that class.

Stereotyping cases have generally taken one of two forms. The first, known as descriptive stereotyping, is characterized by an employee being penalized and discriminated against based on the assumption that she will conform to the negative stereotype associated with her group.[108] The second, known as prescriptive stereotyping, occurs when an employee is penalized and discriminated against for failing to conform to a stereotype associated with the group that she is a part of.[109]

A. *Defining Racial Stereotypes*

How has sex stereotyping theory transplanted to race discrimination? The holding of *Price Waterhouse* was not limited to the context of sex discrimination. Sex and race stereotypes are based on the same social science of conscious and unconscious biases, and these stereotypes manifest in workplace structures and culture the same way. The difference is that sex stereotyping theory has not been fully transplanted.[110] To understand the issue, it is important to first understand what racial stereotypes are, how racial stereotypes relate to race discrimination, and how such stereotypes come to influence employment decisions.

Racial stereotypes, as with all stereotypes, arise from deeply-held, historical beliefs about how certain groups of people function in

106. *Id.*

107. *Id.* (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)) (internal quotations omitted).

108. Bornstein, *supra* note 101, at 962 (describing the use of descriptive stereotyping in caregiver cases where a mother is discriminated against because of the stereotype she is less competent or less committed to work).

109. *Id.* at 962–63 (describing the use of prescriptive stereotypes in transgender cases where an employee is discriminated against for not conforming to the stereotypical notions of how a man or woman is supposed to dress or act).

110. *Id.* at 963–64; Katie Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L.J. 1002, 1065 (2019).

society.[111] There is a historical and cultural heritage in which racism has played and still plays a dominant role.[112] Due to this shared historical and cultural experience, humans "attach significance to an individual's race and induce negative feelings and opinions about nonwhites."[113] The failure to recognize racial stereotyping as actionable under Title VII begins with society not recognizing the ways that cultural experiences have influenced people's beliefs about race or the occasions in which those beliefs affect human actions.[114] Due to this lack of recognition, racial stereotyping jurisprudence has been slow to develop.[115] Some legal scholars trace the dearth of jurisprudence to the failure to define what it means to stereotype because of race.[116]

In both the statutory and constitutional contexts, there are readily accessible ideas regarding what gender stereotypes are.[117] The same is not true for racial stereotypes.[118] However, this does not indicate that racial stereotypes do not exist. Both cognitive and social psychologists have recognized the various racial stereotypes that contribute to racial inequality in America.[119] No matter the framing of racist stereotypes, the core set of beliefs in the United States is that African Americans are "dangerous, lazy, less competent, less refined, and lacking in moral values."[120] Terry Smith stated that "modern culture feeds and reinforces black stereotypes of incompetence, occupational instability, primitive morality, and similar derogatory perceptions."[121]

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111. Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 537 (2003).

112. *Id.*

113. Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

114. *Id.*

115. Bornstein, *supra* note 101, at 964–76.

116. *See id.* at 957 (discussing how the stray remark doctrine has had a disproportionate impact on the growth of the racial stereotyping doctrine).

117. For the statutory context, *see* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) ("Price Waterhouse appears to think that we cannot affirm the factual findings of the trial court without deciding that, instead of being overbearing and aggressive and curt, Hopkins is, in fact, kind and considerate and patient. If this is indeed its impression, petitioner misunderstands the theory on which Hopkins prevailed . . . . It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman."); Bornstein, *supra* note 101, at 925 ("Doctrinal and theoretical advances in cutting-edge sex stereotyping cases [under Title VII] have broad application that can reinvigorate employment discrimination litigation as a whole."). For the constitutional context, *see* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 *passim* (2010).

118. Eyer, *supra* note 110.

119. *Id.* at 1066.

120. *Id.*

121. Smith, *supra* note 111.

B. *Racial Stereotypes in the Courts*

Although racial stereotypes should be commonly understood as growing out of the history of American segregation and Jim Crow laws, courts have largely failed to perceive how such stereotypes manifest in everyday workplace structures.[122] Cases that have been brought under the racial stereotype theory have been subject to the disproportionate effect of the "stray remark doctrine."[123] This doctrine exists because an employee must present evidence that her protected status was a motivating factor in the employment decision.[124] One way an employee can do that is by showing that comments made by others in the workplace are discriminatory. Stray remarks are comments that are discriminatory but "do not truly show that discrimination was a motivating factor in the relevant employment decision."[125]

Under the stray remarks doctrine, when the statements are made by non-decisionmakers or by decisionmakers who did not participate in the decision process, those statements are seen as neutral and nondiscriminatory.[126] Because statements that would otherwise be discriminatory are characterized as stray remarks, such statements are often discounted by courts for proving direct evidence of protected classification discrimination.[127] The stray remarks doctrine has faced much criticism because it does not account for the impact of workplace culture on employment decisions or acknowledge that biased decision-

122. Eyer, *supra* note 110, at 1053, 1064.

123. Bornstein, *supra* note 101, at 957.

124. 42 U.S.C. § 2000e-2(m).

125. David M. Litman, *What Is the Stray Remarks Doctrine? An Explanation and a Defense*, 65 CASE W. RES. L. REV. 823, 835 (2015).

126. Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring). There are also many factors that courts weigh in determining whether statements qualify as "stray remarks," such as "whether the comments were made by a decision maker or by an agent within the scope of his employment; whether they were related to the decision-making process; whether they were more than merely vague, ambiguous, or isolated remarks; and whether they were proximate in time to the act of termination." Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325, 1330 (6th Cir. 1994).

127. *See* Wallace v. Methodist Hosp. Sys., 85 F. Supp. 2d 699, 711 (S.D. Texas 2000) ("[A] workplace remark may be so deficient under one or more . . . criteria—for example, remote in time from the challenged action or not made by a relevant decisionmaker—as to be a stray remark wholly lacking in probative value even as 'indirect' evidence of discrimination."). Under antidiscrimination law, cases can be proved through direct or circumstantial evidence. When the plaintiff presents direct evidence, the burden automatically shifts to the defendant to show the discrimination was not the motive for the adverse employment action. When the plaintiff presents circumstantial evidence, she must proceed through the three-part *McDonnell Douglas* test. Bornstein, *supra* note 101, at 942; *see supra* Part II.

making is present long before the "moment of decision."[128] The doctrine also allows judges to "usurp the role of the jury by making improper determinations regarding questions of fact related to discriminatory remarks."[129] Courts should not use the stray remarks doctrine to discount racial discrimination that is shown through comments that exhibit manifest racial stereotypes.

Plaintiffs have attempted to attack adverse employment actions on the basis of racial stereotypes that operate as discrimination.[130] However, courts have largely maintained that racial discrimination is only actionable under Title VII when tied to the immutable characteristics of an individual and not the cultural characteristics that emanate from the individual's race.[131] Case law has drawn a harsh line between wearing Black hair in a natural state (such as an Afro), which is immutable,[132] from wearing Black hair in a protective style (such as braids), which is mutable.[133]

The approach by the Equal Employment Opportunity Commission (EEOC) could assist in the development of a racial stereotype jurisprudence. The EEOC has sued employers who perpetuate racial harassment through coded language. In *EEOC v. Gonnella Baking Co.*,[134] a bread manufacturer agreed to pay $30,000 to settle a lawsuit brought by the EEOC alleging racial harassment at one of the manufacturer's facilities.[135] The manufacturer failed to adequately respond to complaints

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128. Laina Rose Reinsmith, *Proving an Employer's Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine After Reeves v. Sanderson Plumbing Products*, 55 VAND. L. REV. 219, 248 (2002).

129. Litman, *supra* note 125, at 842.

130. *E.g.*, EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1020–21 (11th Cir. 2016) (holding that, when the plaintiff refused to cut her dreadlocks pursuant to her future employer's grooming policy and the employer rescinded her job offer, the plaintiff had no Title VII claim against the employer).

131. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1030. "[A]s a general matter, Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices . . . . We recognize that the distinction between immutable and mutable characteristics of race can sometimes be a fine (and difficult) one, but it is a line that courts have drawn. So, for example, discrimination on the basis of black hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hairstyle (a mutable choice) is not." *Id.*

132. *See* Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 168 (7th Cir. 1976) (finding a Title VII claim for racial discrimination where plaintiff was denied a promotion because she wore her hair in a natural Afro).

133. *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (holding that an employer does not violate Title VII for having a grooming policy prohibiting all-braided hairstyles, since braids are not an immutable characteristic).

134. No. 08 C 5240, 2009 WL 307509, at *1 (N.D. Ill. Feb. 5, 2009).

135. *EEOC Sues Gonnella Baking Company for Race Harassment*, EEOC (June 3, 2015), https://www.eeoc.gov/newsroom/eeoc-sues-gonnella-baking-company-race-harassment [https://perma.cc/53LA-8RVV].

of pervasive racial harassment.[136] Examples of the harassment included persistent coded references to Black employees as "you people," as well as offensive statements such as, "you people are lazy," and "I better watch my wallet around you."[137] While this case suggests that using coded racist language is a violation of Title VII, it did not expressly characterize such behavior as racial stereotyping, classifying it instead as racial harassment.[138]

Racist stereotypes infiltrate all parts of society. The most notable is the dangerousness stereotype, which leads to over-policing of areas where the majority of the population is Black.[139] Other racist stereotypes (that Black people are "lazy, less competent, less refined, lacking moral values," lacking in occupational instability, and unprofessional) all seep into the employment context and function to limit or eliminate access to certain employment opportunities.[140] During the hiring process, even before having any interaction with an individual seeking employment, decisionmakers make background assumptions that influence how they perceive a job candidate.[141] These background assumptions can be about the candidate's name, their neighborhood based on their address, where they went to school, and many other criteria.[142] It is common knowledge that in some employment decisions, a white candidate may be viewed as "more charismatic, thoughtful, collegial, or articulate than a Black candidate, not because the white candidate in fact possesses those higher qualifications, but because of the decisionmaker's preexisting assumptions."[143] When racial stereotypes are deeply held by employers in the workplace, "disparate treatment may occur precisely because the sincerity of those beliefs makes those who hold them genuinely perceive individual African Americans (or the communities they are a part of) as more dangerous, lazier, or less committed to academic or workplace achievement."[144]

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136. *Id.*

137. *Id.* (internal quotations omitted).

138. *See id.* ("Such alleged conduct violates Title VII of the Civil Rights Act of 1964, which prohibits workplace discrimination (including harassment) on the basis of race."). However, an attorney for the EEOC stated, "Racial comments and stereotypes have no place in a modern workplace, and the EEOC will hold employers accountable for that misconduct," perhaps indicating that racial stereotyping violates Title VII in the EEOC's view. *See id.* (internal quotations omitted).

139. Eyer, *supra* note 110, at 1068.

140. *Id.* at 1067.

141. Hart, *supra* note 100, at 746.

142. *Id.*

143. *Id.*

144. Eyer, *supra* note 110, at 1061.

C. *Bostock's Causation and Racial Stereotypes*

Returning to *Bostock*, Justice Gorsuch detailed a causation standard that can and should be instructive in how courts evaluate claims of racial stereotyping that resulted in an adverse employment action. In the context of sex discrimination, Justice Gorsuch characterized the causation standard in Title VII as "simple" or "traditional" but-for causation.[145] This test mandates that whenever a particular outcome would not have happened "but for" the purported cause, then a but-for cause has been found.[146]

Justice Gorsuch acknowledged that the test is a sweeping standard but argued that Congress had already moved in this direction by adding the "motivating factor" language to Title VII.[147] The *Bostock* causation standard "afford[s] a viable, if no longer exclusive, path to relief under Title VII."[148] The *Bostock* Court established that there are two ways to achieve relief under Title VII: (1) proving that the employer was impermissibly motivated by a protected category in making an employment decision or (2) establishing that a protected category was a but-for cause and played some role in the employment decision.[149]

The *Bostock* understanding of causation may cause confusion as to the difference between mixed motive or motivating factor discrimination and single motive or but-for discrimination cases. It is instructive to think of the *Bostock* standard as akin to the multiple sufficient causes concept in tort law. Section 27 of the Restatement (Third) of Torts states that "[i]f multiple acts occur, each of which . . . alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm."[150] Similarly, in *Bostock*, Justice Gorsuch articulated that even if an employer had another legitimate, non-discriminatory reason that, standing alone, would have resulted in the adverse employment action, the employer still cannot defeat liability if the protected classification was a but-for cause.[151]

If *Bostock*'s interpretation is the proper meaning of "because of" in Title VII, then it should be the meaning of "because of" in all antidiscrimination statutes.[152] However, the Supreme Court has not

145. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1739 (2020).

146. *Id.*

147. *Id.*

148. *Id.* at 1740.

149. This rationale may seem to conflate the two standards, but an important distinction is that with the motivating factor analysis, the protected category does not have to be a but-for cause, while in the traditional or simple but-for causation analysis, the protected category must be a but-for cause, though there may be multiple but-for causes.

150. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 27 (AM. L. INST. 2010).

151. *Bostock*, 140 S. Ct. at 1739.

152. *Id.*

followed this approach, as evidenced by Justice Gorsuch's decision in *Comcast Corp.*[153] In *Comcast Corp.*, ESN alleged that race played a role in Comcast's decision not to contract with it.[154] Comcast provided non-discriminatory motives for their failure to contract, and the Court stated that the inquiry ended there.[155] Nevertheless, a few months later in *Bostock*, Justice Gorsuch wrote that "the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision."[156]

It has been opined that race is different than the other protected categories in Title VII, in a way that would appear to lend to more protection against racial discrimination, not less.[157] Race, unlike sex, national origin, or religion, can never be used as a bona fide occupational qualification in the selection of employees.[158] Further, when race is impermissibly used in an adverse employment practice, an employee is entitled to unlimited compensatory and punitive damages, whereas such damages are capped at $300,000 in sex discrimination cases.[159] Race discrimination in violation of the Fourteenth Amendment is subject to strict scrutiny review,[160] while sex discrimination is only subject to intermediate scrutiny review.[161]

The following Subsection will argue that the *Bostock* causation standard is the correct one and that the standard should operate to allow courts to more readily recognize adverse employment actions that occur "because of" racial stereotypes under Title VII.

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153. *See supra* Part I, Section D.

154. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013 (2020).

155. *Id.*

156. *Bostock*, 140 S. Ct. at 1739.

157. Smith, *supra* note 111, at 529.

158. *See* 42 U.S.C. § 2000-2(e) (2020) (allowing consideration of sex, religion, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise").

159. *Compare* 42 U.S.C. § 1981 (2000) (providing a cause of action for race and national origin claims), *with* 42 U.S.C. § 1981a(b)(3) (2000) (capping damages in Title VII cases, including gender discrimination cases). *See generally* Kim v. Nash Finch Co., 123 F.3d 1046, 1062 (8th Cir. 1997) (noting the absence of caps on punitive and compensatory damages under Section 1981); Kolstad v. Am. Dental Ass'n, 108 F.3d 1431, 1445 n.2 (D.C. Cir. 1997) (noting that Title VII encompasses sex discrimination claims in the employment context while Section 1981 does not).

160. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").

161. *See* United States v. Virginia, 518 U.S. 515, 532 (1996) (reviewing a male-only admissions policy at a state military institution under intermediate scrutiny).

1. The Correct Causation Standard

Although this Note mostly concerns but-for causation, which is usually associated with the burden shifting framework of *McDonnell Douglas*,[162] causation has taken on many iterations in the disparate treatment land of employment discrimination.[163] As discussed, the basic tort law understanding of but-for causation is one that accounts for multiple but-for causes.[164] In the cases before *Bostock*, the Supreme Court indicated that tort law was in the background of civil rights statutes and that basic tort law causation was to be applied.[165] The main issue with this causation standard pre-*Bostock* is that the protected classification was found to have to be the *sole* reason for the adverse employment action or failure to contract.[166] To be said another way, pre-*Bostock* cases adopted an incomplete version of but-for causation. In *Bostock*, the Court adopted a more complete picture of factual causation, where there can be multiple causes without defeating an employer's liability.[167] The holding in *Bostock* is more consistent with "textbook tort law"[168] than any of the holdings in prior Supreme Court decisions. Legal commentators have agreed that this new understanding of but-for causation can be transplanted to the other antidiscrimination statutes.[169]

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162. *See supra* Part II.

163. The most common iterations include: motivating factor causation; same action or same decision; but-for causation, commonly associated with *McDonnell Douglas*; the determinative influence formulation and similar determinative factor formulation, often used in cases under the ADEA; the role, cause, and factor formulation, urged by the plurality in *Price Waterhouse*; and the substantial factor formulation from Justice O'Connor's concurrence in *Price Waterhouse*. Katz, *supra* note 17, at 501.

164. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 27 (AM. L. INST. 2010).

165. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013) ("It is thus textbook tort law that an action 'is not regarded as a cause of an event if the particular event would have occurred without it.' This, then, is the background against which Congress legislated in enacting Title VII."); *see also* Gross v. FBL Fin. Servs., 557 U.S. 167, 176 (2009) ("[T]he ordinary meaning of the ADEA's requirement that an employer took an adverse action 'because of' age is that age was the 'reason' that the employer decided to act.").

166. *Nassar*, 570 U.S. at 352; *Gross*, 557 U.S. at 176; *see* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020) ("It is 'textbook tort law' that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation. Under this standard, a plaintiff must demonstrate that, but for defendant's unlawful conduct, its alleged injury would not have occurred.").

167. *Bostock*, 140 S. Ct. at 1739.

168. *Comcast Corp.*, 140 S. Ct. at 1014 (internal quotations omitted).

169. Kelly S. Hughes, '*But-For' Causation Under Bostock*, OGLETREE DEAKINS (June 24, 2020), https://ogletree.com/insights/but-for-causation-under-bostock/ [https://perma.cc/4XRX-76P4] ("In disparate treatment (or 'status discrimination') cases under Title VII, an individual can use either the traditional 'but-for' causation standard or the lesser mixed-motive standard. In Title VII retaliation cases, ADEA cases, § 1981 cases, and others that currently utilize only the 'but-

2. Racial Stereotyping Is "Because of" Race

The Supreme Court has been able to acknowledge that racial stereotypes exist and have harmful effects in other situations.[170] Yet, the jurisprudence regarding racial stereotypes in discrimination law has not been as forthcoming.[171] Courts have rejected Title VII race or national origin claims which could be premised on stereotypes involving hair,[172] hair color,[173] language,[174] dialect,[175] and accent.[176] Some scholars opine that courts do not want to give meaning to the presence of racial stereotypes.[177]

Viewing racial stereotypes as a means of race discrimination ultimately depends on how one defines race. Title VII, even with all of the impact it has had on remedying the effects of past discrimination, fails to define "race."[178] The EEOC has promulgated guidelines for race discrimination, but even as the agency tasked with enforcing all

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for' causation standard, it is worth noting that the standard does not require that the protected characteristic (e.g., age) be the one and only cause of the adverse action.").

170. *See* Buck v. Davis, 137 S. Ct. 759, 776 (2017) ("[The testimony of the doctor] appealed to a powerful racial stereotype—that of black men as 'violence prone.'").

171. *See, e.g.*, EEOC v. Catastrophe Mgmt. Sol., 852 F.3d 1018, 1020–21, 1030 (11th Cir. 2016) (rejecting the racial stereotyping argument and finding the employer's requirement that the prospective employee cut off her dreadlocks to be nondiscriminatory); Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 262–63 (S.D.N.Y. 2002) (rejecting a *Price Waterhouse*-based argument and finding that an employer's policy deeming dreadlocked hair "unbusinesslike" was not discriminatory).

172. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

173. *See* Santee v. Windsor Ct. Hotel Ltd. P'ship, No. 99-3891, 2000 WL 1610775, at *3–4 (E.D. La. Oct. 26, 2000) (holding that a Black woman with dyed blonde hair, who was denied employment because her blonde hair violated the hotel's grooming policy banning "extreme" hairstyles, could not establish a prima facie case of race discrimination under Title VII because hair color was not an immutable characteristic and not a protected category under Title VII).

174. *See, e.g.*, Garcia v. Gloor, 618 F.2d 264, 272 (5th Cir. 1980) (holding language was not an immutable characteristic and did not constitute ethnic identity; therefore, an employer's policy prohibiting use of Spanish language did not violate Title VII prohibition against national origin discrimination).

175. *See, e.g.*, Kahakua v. Friday, No. 88-1668, 1989 WL 61762, at *3 (9th Cir. June 2, 1989) (declining to decide whether an employer discriminated against plaintiffs who were allegedly denied positions as broadcasters because of their Hawaiian Creole accent or dialect). *See generally* Jill Gaulding, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. MICH. J.L. REFORM 637, 637 (1998) ("Black English is actually a distinct but equally valid dialect of English, which for historical reasons is largely limited to the African American community.")

176. *See, e.g.*, Kahakua, 1989 WL 61762, at *3 ("We need not decide the specific question of whether . . . [a plaintiff's] accent is a function of . . . race or national origin within the meaning of Title VII.").

177. Eyer, *supra* note 110, at 1066.

178. U.S. EQUAL EMP. OPPORTUNITY COMM'N, DIRECTIVES TRANSMITTAL NO. 915.003, TRANSMITTAL ON THE ISSUANCE OF SECTION 15 OF THE EEOC COMPLIANCE MANUAL 3 (Apr. 19, 2006).

employment discrimination statutes, the EEOC does not explicitly define race either.[179] The agency does use personal characteristics—such as hair, skin color, or facial features—to assist in characterizing what race means, but still without an express definition.[180] Many scholars have attempted to define race, but they all seem to end up at different definitions.[181] One academic in particular, Wendy Greene, said that "historically and contemporarily in America, how one dresses, speaks, behaves, and thinks is also constitutive of race."[182] Even with this background knowledge, when the Eleventh Circuit was tasked with defining race, it maintained that race was only tied to the immutable characteristics of an individual and not the cultural characteristics that emanate from an individual's race.[183]

The Eleventh Circuit's definition has been challenged by state legislatures,[184] the EEOC itself,[185] and scholars.[186] Its restrictive definition only tends to perpetuate the racism that Title VII was drafted to remedy. The interpretation assumes that discrimination should only be actionable when it can be tied to discrete acts which are directly tied to the use of impermissible motives. It does not account for the vastness of

179. *Id.*

180. *Id.*

181. *Compare* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (defining "race" as "a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry"), *and* Camille Gear Rich, *Performing Racial and Ethnic Identity*, 79 N.Y.U. L. REV. 1134, 1142 (2004) ("There is an urgent need to redefine Title VII's definition of race and ethnicity to include both biological, visible racial/ethnic features and performed features associated with racial and ethnic identity."), *with* Greene, *supra* note 3, at 1385 ("Race includes physical appearances and behaviors that society, historically and presently, commonly associates with a particular racial group, even when the physical appearances and behavior are not 'uniquely' or 'exclusively performed' by, or attributed to a particular racial group."), *and* Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2012 (1995) (suggesting that discrimination on the basis of race might include "personal characteristics that . . . intersect seamlessly with [one's racial] self-definition"). However, there seems to be a general consensus that race is a socio-political classification which is not linked to biological differences.

182. Greene, *supra* note 3, at 1358.

183. EEOC v. Catastrophe Mgmt. Sol., 852 F.3d 1018, 1030 (11th Cir. 2016).

184. CAL. EDUC. CODE § 212.1(a) (2021).

185. *Catastrophe Mgmt. Sols.*, 852 F.3d at 1030.

186. Kenneth Nunn argued that the restrictive definition of race is a function of the state and society to attempt to limit the discussion of racism. Kenneth B. Nunn, *The R-Word: A Tribute to Derrick Bell*, 22 U. FLA. J.L. & PUB. POL'Y 431, 438 (2011). He further stated that the framing of racism as taboo leads to society avoiding discussions about race, racism, and discrimination. *Id.* at 434. This avoidance cannot "advance the interests of people who believe racism still exists, or who believe they are, or have been, victims of racism." *Id.* at 439. Therefore, a restrictive definition of race only further perpetuates the racism that antidiscrimination law is supposed to remedy.

racial identity and its various social meanings.[187] It is hard to rationalize how Title VII strikes out the entire spectrum of employment discrimination based on harmful stereotypes that emanate from *sex*,[188] but the broad spectrum of stereotypes that emanate from *race* are allowed to continue.

A more inclusive definition of race is one that acknowledges shared cultural experiences which manifest themselves as mannerisms, dialect, hairstyles, and many other types of expression that can be tied to one's shared history and ancestry.[189] Defining race in this way makes clear that racial stereotypes associated with race can function to stand in for race. Racial stereotypes can provide social context for adverse employment actions that would otherwise be dismissed as race-neutral decisions. This conception is especially important since the days of explicit racial animus are (mostly) behind us. If society defines race in this way, then it becomes quite clear that discrimination against an individual for manifest stereotypes which inextricably emanate from their racial classification and how they choose to express it is discrimination "because of" race under Title VII.

CONCLUSION

Returning to Kayla, she was fired because of her failure to conform to the office grooming policies relating to her locs. On its face, the employment decision against Kayla appears to be race-neutral, but as this Note argues, such a decision was not simply made based on Kayla's hairstyle. Underlying the decision is the stereotype that an individual wearing locs has an unprofessional appearance. Under a more expansive understanding of race, locs would function to stand in for race, and therefore the stereotype that locs are unprofessional constitutes racial discrimination. If an employer takes an adverse employment action based on racial stereotypes, then any stereotype-laden statements should function as direct evidence of race discrimination within Title VII. The burden should then automatically shift to the employer to prove that race was not the reason for the action.

Under the *Bostock* causation standard, an employer should no longer be able to defeat liability simply by providing evidence that the plaintiff did not conform to the workplace culture. The *Bostock* standard requires

187. INTRODUCTION TO CRITICAL RACE THEORY: THE KEY WRITING THAT FORMED THE MOVEMENT xv (Kimberlé Crenshaw et al. eds., 1995).

188. *See* Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1754 (2020) (expanding sex discrimination to protect discrimination on the basis of sexual orientation and gender identity).

189. Megan Gannon, *Race Is a Social Construct, Scientists Argue*, SCI. AM. (Feb. 5, 2016), https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue/ [https://perma.cc/SA7J-TKKX]; W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 1 (Candace Press 1996) (1903).

changing one thing at a time to determine whether the protected classification was a but-for cause. In Kayla's situation, the employer had at least two factors at play when it made its decision to terminate Kayla: (1) nonconformance to office grooming policies and (2) the racial stereotype that locs are unprofessional. If Kayla's race was instead white, then the assumptions and stereotypes associated with her would change. Locs and other protective hairstyles are fundamentally linked to the African American race. Even if other races wear protective hairstyles, such a choice is not fundamentally tied to those races in the same way as Black individuals. If Kayla's race was different, the underlying stereotype about the professionalism of her hairstyle would change, and there would be no need for Kayla to conform to the workplace culture. Thus, the employment decision changes based on Kayla's race. The fact that a racial stereotype played a role in the decision to terminate Kayla's employment should make the employment decision violative of Title VII.

Racial stereotyping jurisprudence needs to continue to be developed because stereotypes are the most common way that discrimination manifests itself in today's workplaces. The courts should not look at victims of impermissible discrimination and claim that they cannot recover because the employer discriminated against their culture or based on stereotypes rather than discriminating purely on the basis of race. Racial classifications are indistinguishable, and they all have the same detrimental impact on the employee experiencing the discrimination.