

## The Shower's Return: A Serial Essay on the LGBT Title VII Sex Discrimination Cases, Part I

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*I am not the water—  
I am the wave,  
and the rage  
is the force that moves me.*

...

*In birthing my rage,  
my rage has rebirthed me.*

—Susan Stryker<sup>1</sup>

### I. INTRODUCTION

As we await word from the U.S. Supreme Court on whether Title VII of the 1964 Civil Rights Act protects lesbian, gay, and trans workers when they suffer sex discrimination at work and legally complain, it's worth essaying some of the more striking features of the LGBT Title VII cases as they were litigated before the Supreme Court.<sup>2</sup>

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<sup>1</sup> Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, in *THE TRANSGENDER STUDIES READER* 244, 252 (Susan Stryker & Stephen Whittle eds., 2006).

<sup>2</sup> See generally 42 U.S.C. § 2000e-2 (2012); *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018) (per curiam), *cert. granted*, 139 S. Ct. 1599 (2019)

The present interest in these developments involves neither a wish nor an expectation to influence the judicial process. That would likely be pointless anyway. The outcome of the LGBT Title VII sex discrimination cases is assuredly set in basic form by now. Instead, the interest here corresponds to a desire to record how anti-LGBT forces have conducted themselves at a moment when they apparently think they have a newly receptive audience in the form of a jurisprudentially and socially conservative majority of the Supreme Court.<sup>3</sup> This conduct and the probabilities it involves ought to be of immediate concern to liberals and progressives committed to sexuality, trans, sex, and other intersecting inequalities, quite aside from the legal effects that these attempts may yield in the present cases. If the near-term and longer-term futures for LGBT and sex discrimination rights and interests are uncertain, the litigation strategies developed and deployed against LGBT positions in the Title VII cases are not. They revealed anti-LGBT forces boldly articulating arguments that draw on and play to not only rule of law conventions like logic and reason, but also to elements in the U.S. cultural archive that reanimate fantasy nightmares of LGBT rights as portents of hellish gender and sexual deviance run amok, deviance that—on its surface anyway—is racially marked as white.<sup>4</sup> It has been more than a generation since fantasies like these commanded a majority of the Supreme Court in a case involving lesbian and gay rights, but that possibility—a possibility in which time flows forward to the past—currently stares the American public in the face.<sup>5</sup>

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(mem.); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.). Partly given who the plaintiffs were and are and how they identified themselves, many others from the LGBT communities were not centrally featured in the litigation. Without being exhaustive, these include those who identify as bisexual, pansexual, nonbinary, genderfluid and genderqueer. Although the “LGBT” locution in the text is thus imprecise, it is used in this setting as a serviceable way to mark the identity-based nature of the claims that the cases did place center stage and how they intersected with legal authority, both specific to Title VII’s sex discrimination ban and of the Supreme Court, more broadly. Nothing big or theoretical is meant to hang on it.

<sup>3</sup> Other efforts that move incisively in these directions include Ezra Ishmael Young, *What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC & Aimee Stephens*, 11 CALIF. L. REV. ONLINE 9, 13–14 (2020); Chase Strangio, *These Hate Groups Want the Supreme Court to Erase Trans People*, OUT (Aug. 28, 2019), <https://www.out.com/commentary/2019/8/28/these-hate-groups-want-supreme-court-erase-trans-people> [<https://perma.cc/37TB-P55G>]. See also Masha Gessen, *The Supreme Court Considers L.G.B.T. Rights, but Can’t Stop Talking About Bathrooms*, NEW YORKER (Oct. 9, 2019), <https://www.newyorker.com/news/our-columnists/the-supreme-court-considers-lgbt-rights-but-cant-stop-talking-about-bathrooms> [<https://perma.cc/63PD-BW6W>].

<sup>4</sup> More on the raciality of the cases after the decisions come down.

<sup>5</sup> For how they came up in *Bowers v. Hardwick*, 478 U.S. 186 (1986), see generally Kendall Thomas, Commentary, *The Eclipse of Reason: A Rhetorical Reading of Bowers v.*

All these dynamics—and all these actors—have become part of the context against which the LGBT Title VII sex discrimination cases will be decided. Whatever the Supreme Court’s results, the cases will be the next step in an ongoing jurisprudence of lesbian and gay rights that may continue in pro-LGBT, including expressly pro-trans, directions—or that may shift course having elsewhere exhibited signs of a legal slowdown since *Obergefell v. Hodges*, the landmark right-to-marry decision.<sup>6</sup>

If, on the distant horizon, representations of the closet can be glimpsed starting to take shape, they have in certain respects arrived herald-like in the LGBT Title VII sex discrimination litigation. Happily, the prospects that the legal system will once again reopen, repopulate, and repolice the closet in something resembling its historical forms is broadly inconceivable, but it is still time, as the Supreme Court’s next Term takes shape, for pro-LGBT forces to consider reconvening as broad-based and engaged political publics, ready to challenge the closet’s distantly reemergent strictures and the forms of inequality they intersectionally involve.<sup>7</sup>

These new cases demonstrate that the closet’s relegation to historical artifact is not to be taken for granted or assumed to be legally guaranteed by the U.S. Supreme Court. Especially not when the Supreme Court, as in these cases, silently witnessed and tolerated deceptively genteel, professional arguments that traded in cultural fantasies in which trans and gay people are variously being symbolized as social forces bent on the ruin of innocent cis-heterosexuals, both women and men, as well as the destruction of sex itself, all of which thus need the law, including measures like Title VII’s sex discrimination ban, to protect them.<sup>8</sup> Should the Supreme Court even subtly endorse these cultural fantasies

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Hardwick, 79 VA. L. REV. 1805 (1993). The qualification in the text is owing to how fantasies like these operated in certain ways in the dissenting opinions in *Obergefell v. Hodges*, 576 U.S. 644 (2015), as discussed in Marc Spindelman, *Obergefell’s Dreams*, 77 OHIO ST. L.J. 1039 (2016). Along a certain sightline, the *Obergefell* dissents prefigure aspects of the LGBT Title VII litigation that will be discussed in detail in later Parts of this work.

<sup>6</sup> See generally *Obergefell*, 576 U.S. 644. For one sign of slow-down, see *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018).

<sup>7</sup> On what’s coming next Term, see generally *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019) (dealing with whether or not a foster care agency can refuse to work with same-sex couples), *cert. granted*, 140 S. Ct. 1104 (2020) (mem.). For a few of the many engaged sources that speak to the intersectionality point, see generally ANDREA RICHIE ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (2011); DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW* (1st ed. 2011); Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579 (2010); Russell K. Robinson, *Justice Kennedy’s White Nationalism*, 53 U.C. DAVIS L. REV. 1027 (2019).

<sup>8</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1729–31 (discussing the constitutional implications of silence in the face of what the Supreme Court regarded as unconstitutional religious discrimination). For analysis of the case, see generally Lawrence G. Sager &

when ruling in the LGBT Title VII sex discrimination cases, it could indicate a wider, future path of destruction of the legal gains that lesbians and gay men have achieved under law to this point, imperiling the conditions of legal and social life for others, inside the LGBT communities, including for trans people, as well as outside of them, where the cases interface with wider protections against sex discrimination on the traditional terrain of cis-women's equal rights.<sup>9</sup> For now what there is to attend to is what happened at the Supreme Court, and what can be discerned about how these developments may construct various possible futures.

The overarching argument of this work, which will unfold across its serialized pieces, is as follows. Part II substantively begins by spotlighting the connections between the different Title VII sex discrimination cases before the Supreme Court. In addition to introducing some of the case basics, discussion here involves an account of the distinctive significance of the trans sex discrimination case. It identifies a key set of defense arguments organized around not simply bathrooms, but, specifically, ladies' showers and locker rooms, which served as a normative touchstone for the defense's case against trans sex discrimination rights under Title VII.

Next, Part III takes a closer look at the defense's renderings of the "shower and locker room" scene in the trans sex discrimination case. In detail, it traces the teachings of the defense's portrayals of ladies' showers and locker rooms which figure trans women as an invading force in order to critically expose the unmistakable and deeply transphobic and sexist suggestion that trans women, or some of them, pose an embodied, sexualized threat to cis-heterosexual women that if not criminal is crime-like. It also shows the multiple layers of transphobia and sexism working within this argument—including against cis-women and their interests.

Part IV then turns away from oral arguments to explore a policy claim advanced by the defense in briefing submitted to the Supreme Court that subtly but palpably involves a bid to re-psychologize and even re-pathologize trans identities and trans people. Problematic on its own, this bid shows what some who oppose trans rights in the case thought and hoped the Supreme Court might tolerate and possibly credit as valid, rational, non-animus-based legal reasoning that could properly drive an anti-trans outcome in the case, along with the public reasons given for it.

For its part, Part V delivers an account of the shower scene's genealogy. It examines the appearance of the shower scene in the sexuality-as-sex-

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Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171 (2019); Marc Spindelman, Masterpiece Cakeshop's *Homiletics*, 68 CLEV. ST. L. REV. 347 (2020). A number of additional sources treating the decision are collected in *id.* at 349 n.2.

<sup>9</sup> The term "cis-women" here is not meant to imply that the women who may identify or be identified in these terms have any singular relationship to the category "woman" and its social meanings. Many cis-women do, or, on reflection, may find "woman" to be what has been described as a "struggle position." The presumed agreement and comfort with gender roles that "cis" can imply is far from universally real or true, to say the least.

discrimination cases and surfaces thinking about its antecedents in ways that recover some of the shower's enduring cultural logics as well as its nonobvious stakes.

Having recovered these resonances, Part VI proceeds to leverage them to survey different ways that anxieties, sometimes panics, about gender and sexuality confusion were expressed during oral arguments in both the sexuality and the trans identity cases from both bar and bench, concerns that relate to the perceived stakes of recognizing sexuality and trans sex discrimination rights and what those forms of legal recognition are thought capable of doing to the organization of social relations and social life centered around male-female sex difference and the various hierarchies built atop and otherwise related to it. Discussion across various parts of the work develops a picture of the LGBT Title VII sex discrimination cases in which they function together through the shower scene as a larger set piece in which pro-trans, pro-lesbian, and pro-gay sex equality claims are representable and represented as functionally fungible threats—queer threats—to existing gender and sexual orders. Part VI also concludes by engaging the stakes of these cultural myths, and the imperatives of addressing them head-on, while looking to the future of LGBT rights no matter how the Supreme Court rules in the cases.

*Next time: Some preliminaries on the LGBT Title VII sex discrimination cases.*