

Reflections on Equality, Adjudication, and the Regulation of Sexuality at Work: A Response to Kim Yuracko

ORLY LOBEL*

TABLE OF CONTENTS

I.	INTRODUCTION	899
II.	SERVING SEX STRAIGHT-UP: BFOQ, THE COWORKER MODEL, AND STRUCTURAL DISCRIMINATION.....	902
III.	REGULATION OF SEXUAL BEHAVIOR IN THE PRIVATE MARKET.....	914
IV.	LIBERALISM IN PLAY: MACRO CONTRADICTIONS AND MICRO VALUE JUDGMENTS IN ADJUDICATION	920
V.	CONCLUSION	925

I. INTRODUCTION

Kim Yuracko's paper, *Sameness, Subordination, and Perfectionism: Toward a More Complete Theory of Employment Discrimination Law*, offers an exploration of judicial reasoning in gender discrimination cases.¹ The paper claims that distinctions developed under Title VII jurisprudence cannot be explained solely through a liberal paradigm. Rather, analyzing the motivation of judges in reaching their decisions,

* Assistant Professor of Law, University of San Diego. LL.M. 2000, Harvard University; LL.B. 1998, Tel-Aviv University. I thank Professor Larry Alexander for inviting me to the "Rights and Wrongs of Discrimination" symposium and for his extensive and invaluable comments on early drafts.

1. Kim Yuracko, *Sameness, Subordination, and Perfectionism: Toward a More Complete Theory of Employment Discrimination Law*, 43 SAN DIEGO L. REV. 857 (2006).

primarily in those cases involving the bona fide occupational qualification (BFOQ) exception and sex stereotyping, Yuracko detects a value driven, rather than value neutral, adjudicative assessment of the employment in question. She finds that a “more controversial and covert set of values” operates in the background, rendering some claims of discrimination successful while rejecting others.² Yuracko consequently argues that there is no way to understand the distinctions that have developed within BFOQ and sex stereotyping cases through liberal models of equality.³ Instead, Yuracko finds that existing case law categories are more accurately understood as shaped by perfectionist ideals, which inform judges on good life pursuits and values, such as autonomy, and other less worthy pursuits, such as the commodification of sex and sexual expression.⁴

Yuracko offers an interesting perspective in analyzing Title VII jurisprudence. The paper uncovers tensions in the case law and offers excellent insights into the types of judgments that occur in a broad range of antidiscrimination cases. Building on her previous work, Yuracko continues to influence the field of antidiscrimination law and gender equity theories.⁵ Her article helps explain the underlying normative theories that currently shape the scope of antidiscrimination protection. In the following sections, I offer a few reactions to Yuracko’s paper. Most basically, I argue that Yuracko both under-describes the power of existing liberal models and overstates the coherence of the alternative theory, perfectionism, in explaining recent developments in antidiscrimination law. I also claim that the regulation of sexuality should be understood simultaneously as presenting a unique case of regulating social relations and as merely one example of basic contradictions in contemporary legal thought.

I make three observations on Yuracko’s thesis to explain these ideas. First, in Part II, I argue that it is possible to explain the case law distinctions between various categories of BFOQ claims within the liberal model of antidiscrimination. Specifically, I turn to a more robust analysis of the antisubordination paradigm than Yuracko describes in her paper. I argue that we should consider the dangers of under-inclusion in one sector as the result of structural inequalities across the workforce.

2. *Id.* at 858.

3. *Id.* at 866-67.

4. *Id.* at 867-71.

5. See KIMBERLY A. YURACKO, PERFECTIONISM AND CONTEMPORARY FEMINIST VALUES (2003); Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167 (2004).

Because of the need to take a more macro approach in addressing the effects of discrimination on the market at large, I also argue that as a matter of policy, the courts are often not best situated institutionally to promote labor market gender equality. In particular, discrimination that stems from disparate impact, which requires a macro understanding of the current market, past wrongs, and the ongoing effects of social group hierarchies, would benefit from a more active administrative agency rather than a court-focused process. While Yuracko and many other commentators equate antidiscrimination regulation with adjudication,⁶ I argue that it is desirable to allow the Equal Employment Opportunity Commission (EEOC) a greater role than it currently plays in the administration of antidiscrimination law.

Second, in Part III, I argue that although it is true that court decisions on the regulation of sexuality are pervasively value driven, Yuracko's turn to perfectionist theories of human development oversimplifies the range of values and motivations that are in play. Here my disagreement with Yuracko is that I urge a more complex and historical look at the forces that trigger the regulation of sexuality at work. While some regulatory impulses toward desexualizing the workplace may be based on ideas of good human life and noncommodification of intimate relations, there is a range of competing sets of values that have also had a pervasive effect on the regulation of sexuality. These include the managerial values of control and hierarchy, which are generally aligned with a Taylorist scientific management theory that understands sexual expression by workers as a threat to management's power over production.⁷ Furthermore, the regulation of sexuality must be understood in the context of broader social struggles, where nonconformity with social conventions is frequently configured as a threat to order and existing class distinctions. I will further describe how this interplay between perfectionist and Taylorist ideals of human production has ironically created an alignment between judge-made decisions and voluntary practices of firms, both eager to desexualize the workplace.

6. On the focus of rights litigation in the context of antidiscrimination policy, see generally Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405 (2006); Orly Lobel, *Form and Substance in Labour Market Policies*, book chapter *forthcoming* in *THE INTERSECTION OF RIGHTS AND REGULATION* (Brownen Morgan ed., Ashgate Press).

7. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2072-73 (2003).

The unstable alliance between Taylorist and perfectionist values in the regulation of sexual behavior in the labor market relates to other deep tensions in our commitments to gender equality and, more generally, to the promotion of liberal values. Consequently, Parts III and IV provide somewhat conflicting observations. I argue that there is something unique about the regulation of sexuality that invokes value driven judgments in adjudication. At the same time, I explore how sexual regulation is merely one symptom of basic difficulties in the implementation of liberal rights in concrete cases. Because sex is deeply coded with social meaning and sexuality is always about more than just titillation, I assert that value judgments about the quality of human interaction are inevitable in Title VII's implementation. In Part IV, however, I argue that the case of antidiscrimination is merely one salient example of the ways in which liberalism in action—whether we are debating the scope of free speech or associational rights, equal opportunity or access to social services—is fraught with hard distinctions, competing commitments, and inevitable contradictions.

II. SERVING SEX STRAIGHT-UP: BFOQ, THE COWORKER MODEL, AND STRUCTURAL DISCRIMINATION

The defense of BFOQ is the most direct exception to Title VII's prohibition on discrimination in employment.⁸ Title VII allows employers to explicitly disqualify certain classes of applicants when such exclusion is “reasonably necessary to the normal operation of the particular business.”⁹ The defense exists in Title VII in the context of gender, national origin, and religion. A parallel defense also appears in the context of age under the ADEA. Race is notably excluded from the exception, expressing the legislature's belief that race can never serve as a legitimate classification that is essential to the operation of a business. In the case law, several categories of permissible BFOQ defenses have developed. The most notable categories are privacy and safety. For example, courts have accepted a BFOQ exception for hospitals hiring nurses on the basis of gender in order to accommodate the privacy interests of patients.¹⁰ Similarly, some courts have recognized a BFOQ

8. 42 U.S.C. § 2000e-2(e) (2000).

9. 29 U.S.C. § 623(f)(1) (2000).

10. *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132-35 (3d Cir. 1996); *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1352-54 (D. Del. 1978) *aff'd*, 591 F.2d 1334 (3d Cir. 1979) (finding that privacy interests of residents allowed a nursing home to assign only female nursing aids to female residents). *But see Spragg v. Shore Care*, 679 A.2d 685 (N.J. Super. Ct. App. Div. 1996) (refusing to grant BFOQ for assignment of male home health aides to male patients only, despite female residents' privacy interests).

claim in the context of prison security, where the employer argued that “[t]he employee’s very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor’s responsibility.”¹¹ Even in these contexts, courts have been split in their degree of acceptance of the privacy and security needs of third parties which justify a BFOQ exception.¹² Moreover, when the safety interests pertain to the workers themselves, courts have generally rejected a BFOQ defense as a paternalistic claim by employers. For example, in *International Union v. Johnson Controls, Inc.*, the Court rejected an employer’s refusal to employ women except those who proved their infertility where the job involved exposure to dangerous toxins that could endanger fetuses.¹³ Safety considerations are strongest when the safety objective pertains to third parties, while safety arguments about protecting the discriminated worker herself are often rejected as paternalism. For example, several courts have refused to recognize paternalistic protection of women as a BFOQ gender discrimination defense to preclude women from serving as prison guards.¹⁴ Thus, when the targets of safety are third parties, courts have been more inclined to recognize the exception than when safety is cited vis-à-vis the excluded worker herself. For prison guards and health aides, providing security and care to inmates and patients are essential job functions. In contrast, in *International Union* the protection of the employee’s fertility and her unborn fetus was not part of the essence of the job and therefore did not fit into the BFOQ exceptions.¹⁵ All of these examples demonstrate that even within the easier cases of BFOQ, there is much debate about what circumstances qualify for the exception.

In addition to privacy and safety, a third generally accepted category under BFOQ is that of authenticity. The EEOC guidelines evoke an example of a theatre producer searching for a lead actress to play the heroine.¹⁶ Under such circumstances, the role need not be open to

11. *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977) (permitting a prison to hire only men).

12. *See supra* note 10.

13. 499 U.S. 187 (1991).

14. *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980); *Bagley v. Watson*, 579 F. Supp. 1099, 1104-05 (D. Or. 1983). *But see Dothard v. Rawlinson*, 433 U.S. 321, 336-37 (1977) (finding a BFOQ exception for prison guards in inmate “contact” positions).

15. *Int’l Union*, 499 U.S. at 203-04.

16. *See* 29 C.F.R. § 1604.2(a)(2).

men.¹⁷ Likewise, for the purposes of authentic appearance as an ethnic restaurant, an owner of a sushi bar does not have to consider anyone who is not Japanese for the position of a chef, even if there are other qualified individuals who are as familiar with the art of sushi preparation.¹⁸ Even the legislative history of Title VII is concerned with the culinary experiences of the average American. In the legislative discussions preceding the enactment of Title VII, participants stressed that the Act should not be interpreted to prevent the exclusive hiring of Italian nationals for the making of pizzas or French applicants for chef positions in French restaurants.¹⁹ These examples should quite readily raise some red flags about line drawing in the seemingly uncontroversial categories of BFOQ. First, the very idea that we should care about preferences for authentic artistic, dramatic, and culinary experiences seems to be value driven. Of course, one could claim that these are customer preferences rather than court preferences. Yet it is the court that assesses what type of preferences can be endorsed as part of a firm's marketing strategy. The legislature, the EEOC guidelines, and courts have endorsed experiential consumption as valuable, above and beyond the mere quality of the food in question. In turn, they allow businesses to discriminate between job applicants on the basis of these experiential consumption preferences. Implicit in these discussions are choices about good life that include culinary satisfaction, artistic forms, and most controversially, the privileged value of cultural "preservation" and "genuine" ethnic production.

BFOQ scholarly commentary considers these three categories of safety, privacy, and authenticity as relatively unproblematic compared to other customer preferences. Nevertheless, the above examples show how these categories have required value driven judgments when applying the abstract exceptions to concrete facts. The most controversial category, and the one that is of interest to Professor Yuracko, is that of customer preferences for one sex or the other, not for privacy, safety, or authenticity reasons, but rather because of aesthetic or affective reasons. Courts have generally rejected this residual category of preferences. Thus, gender and sexuality have not been accepted as essential to the business of marketing nonsexual services such as food and transportation.²⁰ Yuracko describes the exclusion of sexual titillation marketing from

17. *See id.*

18. *See, e.g., Employers May Hire on the Basis of Religion, Gender or National Origin in Certain Circumstances*, EMPLOYMENT LAW BITS, Nov. 11, 2005, http://bwlaw.blogs.com/employment_law_bits/2005/11/index.html.

19. *See* 110 Cong. Rec. 2548-49 (1964), *reprinted in* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3179-81 (1968).

20. *See, e.g., Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

accepted BFOQ categories as presenting a puzzle to liberal models of equality.²¹ Puzzle indeed, but even within a liberal paradigm of equality, we can understand what judges are doing by adopting a more macro view of egalitarian justice. In significant ways, the rejection of sexuality-based BFOQ presents a relatively easy case under liberal theory. Allowing employers to argue a BFOQ defense when they are using only women for sexual titillation of their clients would fit precisely into the kind of behavior that coworker theory promises to prevent. As Yuracko correctly acknowledges at the outset, within the liberal paradigm, employers are prohibited from treating men and women “who are in fact different, differently, if doing so will reinforce traditional status hierarchies.”²² Yet Yuracko states:

It is difficult, however, to argue that courts’ prohibition on sex discrimination by sex-plus businesses is required by some formal conception of sex-blind equality. In a meaningful sense, plus-sex employers are treating female and male applicants equally, subjecting both to the same set of hiring requirements. It is simply the case that, depending upon whom the employer is trying to sexually arouse, individuals of one sex or the other are likely to be deemed unqualified.²³

I disagree with the characterization of the “plus-sex” requirements as fitting squarely with a formal principle of sex-blind equality.²⁴ Yuracko seems to accept a dialectic of two possible solutions promoted by the courts: desexualized workplaces and purely sexual business. “[C]ourts force these businesses to abandon sexual titillation or alternatively adopt a more pure sex focus.”²⁵ In effect, the dialectic characterizes the fact that women are hired for the sexual arousal of male clients in nonsexual contexts as simply a coincidence. Yuracko fails to consider a third alternative of more equal “plus-sex” businesses. Using perfectionism as her analytic frame, Yuracko accepts the problematic aspects of plus-sex business without advancing a counter vision of a fully integrated workforce in which sexual titillation would be equally performed. I argue that a structural lens of occupational segregation provides a better analytic framework for analyzing the context of sexual marketing strategies. The law’s concern about sex segregation—where women occupy sexy or

21. Yuracko, *supra* note 1, at 872-74.

22. *Id.* at 859.

23. *Id.* at 874.

24. I borrow the term *plus-sex* from Yuracko, referring to businesses that sell sex along with other goods and services. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, *supra* note 5.

25. Yuracko, *supra* note 1, at 874.

pink collar jobs, while men occupy higher-paid business world jobs—has guided courts to largely reject BFOQ claims in the category of sexual marketing.

Consider a non-hierarchical gender equality world in which the consumption of sexy dressing is equally distributed. In such a world, airlines, restaurants, hotel lobbies, and law firm reception halls would all include both men and women in skimpy sexy outfits to the enjoyment of diversely oriented clients. Implicit in the rejection of women having the occupational quality of attracting business people to a particular airline is that if one could envision a gender egalitarian world, both women and men would have the purchasing power to trigger the marketing strategies of high-end consumption. In the absence of gender hierarchy in social and economic relations—in a universe in which the consumption of sexy dressing were equally distributed—I predict that courts would have far less interest in scrutinizing businesses like Hooters when they claim BFOQ.²⁶ By contrast, in reality courts categorize sexual marketing as licensing gender selective hiring because of deep insights into how gender and sexuality practically interact in our contemporary landscape to produce inequality. Sexuality is not intrinsically threatening to workplace production, but rather it is the combination of unequal power and sexualization that produces discriminatory environments. This combination is salient in the world of air travel. When Pan Am presented empirical evidence that its customers preferred young female flight attendants, the court rejected this as establishing BFOQ.²⁷ Women serving up sex as flight attendants reinforce a structure where men are assumed to have the higher-paid, higher-valued jobs of the business world traveler. A major weakness in Yuracko's argument is her all-too-quick rejection of the coworker model in analyzing BFOQ distinctions:

Courts' prohibition on discrimination in these plus-sex cases is also difficult to explain by relying on a standard coworker principle. Given the far greater demand for commodification and sale of female sexuality than male sexuality, allowing employers to define businesses as including explicit sexual titillation elements would, in all likelihood, lead to a wide range of jobs from which men but not women are excluded. In other words, from a pure numbers perspective, the sexualization of mainstream jobs is likely to help rather than hurt women's job prospects.²⁸

26. Miranda McGowan usefully pointed out that, in our current social environment, even when a small fraction of businesses cater to women customers in offering sexualized men, these enterprises, like *Chippendales*, receive a very different meaning in our contemporary culture than the male-oriented majority enterprises. They are construed and understood as parodies or caricatures—unreal micro-performances imitating, without pretending to be, the real thing. This is because everyone involved in the counter performance of sexual marketing understands that it is situated in a pervasive reverse reality world.

27. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

28. Yuracko, *supra* note 1, at 874-75.

Here is the heart of the limitation in Yuracko's analysis. Yuracko neglects the danger of being disproportionately *included* in a particular position, not disproportionately excluded. Again, without a macro view of job distribution in the labor market, it is easy to underplay the meaning of the micro facts of one airline's marketing strategy. In particular, Yuracko's analysis collapses the various market perspectives, failing to account for the triangle of employer-employee-customer. Whose human flourishing are the judges advancing or not advancing when they accommodate customer preferences over an employee's identity? Part of the confusion stems from the fact that Yuracko adopts the customer's perspective when explaining the cases of privacy and autonomy, while taking the perspective of the worker in the case of sexual arousal or titillation.

In an important way, the questions posed to the court by antidiscrimination claims are always about choice and autonomy. When one side in a private economic relationship demonstrates an identity-based preference and another contests that preference, the court is authorized to adjudicate between these competing perspectives. This is further complicated when there are three sides claiming a position on discriminatory preferences. The employee-employer dichotomy shifts to a triangular set of interests, and the question becomes: Whose preferences is the firm privileging—those of its workers, or of its customers? One of the indicators of a phenomenon worth protecting must be its robustness and its connections to other aspects of the labor market. Today, numerous marketing strategies potentially fall into the plus-sex category.²⁹ The flip side of catering to the expectations of customers is the signaling effect to the market that business men are the preferred customers that make the world go round. If men fly around the world as occupiers of the higher paid, higher valued business world jobs, then women are those that occupy the role of the sexual flight attendant. My contention is that if these marketing strategies were not limited to the provision of female sexuality to male customers, the positions would become generally more valued. However, under current labor market conditions, where the market is sexualized and segregated, sexual preferences are not the same as privacy preferences by customers. This is because it is possible to make a claim for privacy in non-hierarchal

29. See, e.g., Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, *supra* note 5, at 173-75.

ways so that workers from both gender groups can be assigned each to their own gender while claims about sexual preferences by high- end male customers are likely to reinforce gender hierarchy. A thicker understanding of the coworker model that takes a broader distributive justice approach fits well with liberal theory. Put simply, the goal of employment discrimination policies is to promote women's equality in the workforce, not in a particular sector or job. Therefore, the cases of sexualizing non-sex work positions fit the coworker paradigm well. There is no need to turn to theories of perfectionism in order to explain why capabilities and choices are confined when women's work is segregated to sexual and pink collar positions and tasks.

Finally, it should be emphasized that courts have understood the risk of job segregation through gendered requirements not only in the context of sexual requirements but also in other gender codes. For example, in a case that is not mentioned in Yuracko's article, the court found gender discrimination at a hospital where women technicians were asked to wear uniforms that would associate them with nurses, while men were given uniforms that would associate them with doctors.³⁰ Upholding the lower court decision striking down sex-specific dress codes for hospital technicians, the court stated that the dress requirements "were intentionally designed to reinforce sexual stereotypes: men were dressed to look like doctors, and women were dressed to look like nurses."³¹ Requiring women technicians to wear this specific uniform "implied they were of lower status than the male lab technicians[,] increas[ing] the psychological burden on the females."³² While the case did not involve *sexy* dressing, it involved color-coded *sexed* dressing. The analysis would not be complete without the immediate understanding that doctors and nurses are not equally regarded in the contemporary labor market. Rather, there is social meaning encoded in the sex-based attire and grooming that corresponds to widespread occupational inequality.

A liberal judge must understand the use of sexual codes as proxies for job segregation, prestige, and power whether the codes are sexy dressing, femininity, or makeup requirements. Ironically, the judicial understanding that part of Hooters' essence was to sell sexuality has recently proven to be a double-edged sword. In a different context than Title VII, Hooters lost an intellectual property trade dress infringement claim in *HI Limited Partnership (Hooters) v. Winghouse*.³³ The Eleventh Circuit upheld the Florida trial court's decision that the "Hooters Girl" is

30. Dep't of Civil Rights v. Edward W. Sparrow Hosp. Ass'n, 377 N.W.2d 755, 757, 764 (Mich. 1985).

31. *Id.* at 764.

32. *Id.* at 757.

33. 451 F.3d 1300 (11th Cir. 2006).

“the very essence of Hooters’ business,” whose “predominant function is to provide vicarious sexual recreation, to titillate, entice, and arouse male customers’ fantasies.”³⁴ Therefore, the court deemed the skimpy Hooters outfit “primarily functional” and not subject to trademark protection.³⁵ Even though the court recognized that the tank tops and running shorts of Hooters waitresses were distinctive enough to raise a trade dress claim under the Lanham Act, the outfit was not primarily nonfunctional. Since the court understood the function of Hooters to be sexual titillation, it would not grant Hooters the competitive advantage of prohibiting other businesses from similarly adopting a sexual approach to the sale of hamburgers and hot wings.

Gender stereotyping is yet another example that can be analyzed in the context of coworker. Here, Yuracko’s discussion of the *PriceWaterhouse* decision is more sensitive to the richness of the antidiscrimination analysis. She recognizes that “[i]n a sexist society, nothing done by men and women has precisely the same meaning. Traits are not understood or viewed as isolated technical attributes. They are necessarily viewed in relation to all of the other traits an individual possesses and through a systematically gendered lens.”³⁶ But in the context of sex stereotyping, Yuracko’s reading of courts’ reasoning is too benign. She describes courts as valuing high paying, high status jobs that require rational reasoning and intellectual efforts, stereotypically masculine characteristics. Yuracko explores the story of Ann Hopkins, the plaintiff that was denied partnership at accounting firm PriceWaterhouse on the basis that she was too aggressive and not ladylike.³⁷ Hopkins was often praised as “an outstanding professional” with a “strong character, independence, and integrity . . . extremely competent, intelligent, strong and forthright, very productive, energetic and creative.”³⁸ Yet she was also “overly aggressive, unduly harsh, difficult to work with and impatient with staff.”³⁹

34. *HI Ltd. P’ship v. Winghouse of Fla., Inc.*, 347 F. Supp. 2d 1256, 1258-59 (M.D. Fla. 2004); see also Posting of Ann Friedman to Feministing.com, <http://feministing.com/archives/005278.html> (June 25, 2006, 20:01 EST) (describing the decision as “[t]he 11th Circuit Court of Appeals reaffirms a ruling that waitresses in tank tops and tiny track shorts are actual products, not symbols that can be trademarked.”).

35. *HI Ltd. P’ship*, 347 F. Supp. 2d at 1258-59.

36. Yuracko, *supra* note 1, at 889.

37. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231-35 (1989).

38. *Id.* at 234.

39. *Id.* at 235.

Although Yuracko acknowledges the problematic aspects of individual stereotyping that require compliance with an identity group, I believe it is also useful to connect *PriceWaterhouse* with broader recent developments in the nature of work itself. Again, a more macro and structural orientation of employment patterns and occupational inequalities is necessary. Particularly in newer industries, where production is more relational than individuated, employers seek workers that can comply with “soft skill” requirements and engage in “emotional labor.”⁴⁰ Arlie Hochschild defines emotional labor as work that “requires one to induce or suppress feeling in order to sustain the outward countenance that produces the proper state of mind in others”⁴¹ Interpersonal skills include friendliness, teamwork, sociability, likeability, and the ability to fit in. Soft skills also include motivational signals such as “enthusiasm, creativity, positive work attitude, morale, commitment, dependability, and willingness to learn.”⁴² All of these qualities demand from workers appropriate affect, grooming, and attire. Importantly, even in the most prestigious professional positions, emotional work is disproportionately delegated and expected of women. Therefore, in sex-stereotyping cases, similarly to BFOQ cases, the coding of feminine traits as part of work requirements are often held as disparate treatment prohibited by Title VII. Indeed, I would suggest that the perfectionist ideals that Yuracko describes are themselves sexualized. Ideas such as rationality, objectivity, and reason, contrasted with irrationality, subjectivity, and emotionality, have been aligned with male/female values and, in turn, receive a hierarchical inscription in legal doctrine. The commodification of certain behaviors and emotions and the exclusion of others, where gender is scripted and coded, reveals the discursive nature of sexuality. Employee and customer preferences are themselves directed and reinforced by legal categories. Thus, BFOQ and sex stereotyping cases can reinforce or eradicate preferences, according to the boundaries they draw between permitted and prohibited classifications. Again, this reveals basic tensions that underlie the type of jurisprudence that Yuracko attempts to organize in a rather neat rubric of perfectionist decisionmaking.

As a final comment, I suggest that the difficulties in delineating the BFOQ exceptions and the stereotyping contexts to prohibited discrimination underscore the general challenges of adjudicating equal opportunity

40. See Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 U. PA. J. LAB. & EMP. L. 121, 166-67 (2001).

41. ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART* 7 (1983).

42. Lobel, *supra* note 40, at 178 (citing Philip Moss & Chriss Tilly, “Soft” Skills and Race: An Investigation of Black Men’s Employment Problems, 23 WORK & OCCUPATIONS 251, 256 (1996)).

rights in the workplace without a more active administrative scheme.⁴³ I have shown elsewhere that the recent developments in the organization of work and production require a change in the ways we approach employment regulation.⁴⁴ Here, I believe the dilemmas Yuracko highlights in her paper again support a reform that would expand the regulatory tools and strategies for effective workplace policy reforms. In particular, Yuracko's exploration of adjudicative puzzles suggests the importance of enhancing the EEOC's role in enforcing Title VII.

While the first decades of antidiscrimination litigation involved some of the most intentional and overt cases of discrimination, current forms of inequality are often more subtle and complex. "As the workplace has become more dynamic and multifaceted, discriminatory practices are frequently not the result of a distinct and direct decision to discriminate but rather of complex practices, including corporate culture, informal norms, networking, training, mentoring, and evaluation."⁴⁵ These more subtle forms of gender discrimination simply require more than litigation and the declaration of a victim or perpetrator. Rather, they require problem-solving efforts that engage employers and workers in ongoing, reflexive efforts to learn about the barriers of gender equity in the workplace. Often, discrimination is the consequence of intragroup "horizontal" dynamics, rather than top-down managerial direction.⁴⁶

A governance approach to discrimination thus changes the understanding of the nature and sources of discrimination. Rather than seeing the worker as the victim and the employer as the conscious, malicious villain, it understands that discrimination is frequently the consequence of processes and structures that can be transformed through learning and mutual engagement.⁴⁷

The difficulty in discerning the coworker effects from other market practices reveals the limits of Title VII litigation, which delineates business practices as either allowed or prohibited—an on-off tool based on the configuration of clear lines between discriminators and the

43. For arguments about the limitations of rights claiming absent a more developed regulatory framework, see generally Orly Lobel, *Form and Substance in Labour Market Policies*, *supra* note 6.

44. See Orly Lobel, *Orchestrated Experimentalism in the Regulation of Work*, 101 MICH. L. REV. 2146 (2003).

45. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 420 (2004) (citing Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 469 (2001)).

46. See Lobel, *supra* note 40, at 173-74.

47. Lobel, *supra* note 45, at 421.

victims of discrimination. In recent years, many commentators have pointed out the limits of Title VII in changing the realities of gender discrimination in the contemporary workplace.⁴⁸ Because they are entrusted with merely one case at a time, courts are necessarily limited in their perspective of workplace justice. In any given case, they are observing a single workplace rather than a sector at large, regional production patterns, or developments across industries. In order to understand the market effects of segregated jobs, courts must analyze not only the particular workplace before them, but also information about the composition of clients, statistical changes in the workforce at large, and the comparative conditions of employees in various positions in the industry. In short, courts need to take a broad view of the market in order to understand patterns of gender subordination.

A richer, more nuanced understanding of the causes and effects of discrimination fits well with a more active role for the EEOC. This is particularly true in light of private market efforts in “diversity management.”⁴⁹ Increasingly, firms are adopting internal compliance structures to promote diversity in the workplace, including codes of ethics, focus groups, internal grievance procedures, and training programs.⁵⁰ I have been a cautiously optimistic commentator on the move away from a sole focus on “command-and-control” to an increased focus on ex ante cooperative prevention, mandated corporate self-regulation, and “beyond compliance” programs.⁵¹ But the caution remains simple: All compliance programs are not created equal and voluntary programs can never be the only means of preventing illegal behavior in complex organizations. The key is to distinguish between effective approaches that support the goals of the policies and those approaches that are merely cosmetic—an

48. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006); Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370 (1994); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 396 (2005); Lobel, *supra* note 45, at 419-23; Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 610-14 (2001); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

49. Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Anti-Discrimination Law 1961-1996*, 41 AM. BEHAV. SCIENTIST 960, 964-66 (1998).

50. *Id.*; see also Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 3 (2001) (criticizing the Supreme Court’s limitation of liability for employers who utilize antidiscrimination training).

51. See, e.g., Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498, 507-08 (2004).

evasion or a liability shield by means of symbolic attention.⁵² Yet the EEOC has not been significantly involved in the design or evaluation of these programs. The EEOC has only recently adopted policies that promote ongoing communication among advocacy groups, community organizations, industry representatives, and worker representatives.⁵³ By and large, the agency has not studied the effects of voluntary industry programs and remains generally passive in its practices.

Unlike other administrative agencies, the EEOC was set up as a weak regulatory agency that lacks rulemaking power. Rather than promulgate rules, the agency issues nonbinding guidelines, conducts investigations, and impacts litigation. Consequently, EEOC guidelines are afforded less deference than the rules issued by other federal agencies.⁵⁴ Taking a comparative perspective from across the Atlantic, this is a fairly limited role for the agency entrusted with the task of the promotion of workplace equality. For instance, unlike the American EEOC, the British Equal Opportunities Commission has both investigative and rulemaking powers.⁵⁵ It also received greater administrative enforcement powers and is designed to study the market, collect information, and promote industry-wide change.⁵⁶ Unlike courts that are best situated for the correction of past wrongs in individual cases, agencies are better situated to take a broader approach of distributive justice and future change. Understanding the complex ways discrimination operates supports this broader approach to law and social change and points to the advantage of a *legal process*, rather than a merely court-oriented perspective.⁵⁷

52. See generally Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

53. See Sturm, *supra* note 48, at 552-53 & n.345; see also Lobel, *supra* note 45, at 422-23.

54. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1937 (2006) (“In the area of federal antidiscrimination law, the U.S. Supreme Court often prefers to ‘chart its own course’ rather than to defer to Equal Employment Opportunity Commission . . . regulations and guidance interpreting these laws.”).

55. Sex Discrimination Act, 1975, c. 65, § 67 (Eng.); see also Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 447.

56. Sex Discrimination Act, 1975, § 67; see also Suk, *supra* note 55.

57. For further discussion, see generally Orly Lobel, *Form and Substance in Labour Market Policies*, *supra* note 6.

III. REGULATION OF SEXUAL BEHAVIOR IN THE PRIVATE MARKET

Having argued that much of the puzzle of BFOQ and stereotyping categories in Title VII cases can be settled by using the lens of liberal theories of equality, I now turn to examine other sets of values that are in play in Title VII adjudication. Here, I agree with Yuracko's claim that gender equality concerns are not all that feeds into the adjudicative process.⁵⁸ Yuracko focuses on the regulation of sexual behavior in the workplace as it unfolds in subcategories of antidiscrimination litigation. However, the regulation of workplace sexuality extends far beyond these cases to a wide array of social facts and legal doctrine. These contexts include workplace harassment, workplace dating policies, employee privacy and autonomy, speech and political activity, and even contexts outside of the workplace such as explaining consent in sexual relations. Together these contexts present a map of sex jurisprudence as a unique affair in our society. Sex is pervasively institutionalized through regulation and, in turn, the regulation of sexual behavior profoundly affects the ways we understand sexual behaviors, sexual taboos, and sexual meaning.⁵⁹ Situating the question of Title VII litigation in this broader scheme of sexuality at work, it becomes clear that the law simultaneously prohibits and allows the eroticization of the workplace. The regulation of sexuality therefore presents a unique context of social behavior codification as law and power intertwine.

Yuracko finds perfectionist ideals to be the driving force behind many of the legal impulses to restrict sexuality at work.⁶⁰ I suggest a far more complex, and often less benign, description of the non-commodification impulse of judges. I urge an analysis that includes the ways sexuality has been historically configured as a threat to private market production. Even though Yuracko describes cases where employers develop requirements to induce sexuality in commercial contexts,⁶¹ sexuality at work is frequently understood as a *threat* to order. As Yuracko describes, plus-sex commerce can be a money-making endeavor.⁶² But industry also frequently treats sexuality in the workplace as a money-losing combination.⁶³ The perception of sexuality as a threat to market production

58. Yuracko, *supra* note 1, at 862.

59. For a provocative inquiry on how legal fields, including First Amendment, broadcast regulation, sexual harassment, and education law interact with cultural taboos pertaining to the use of sexual terms, see Christopher M. Fairman, *Fuck*, Center for Interdisciplinary Law and Policy Studies, Working Paper No. 59 (2006).

60. Yuracko, *supra* note 1, at 874.

61. *Id.* at 872-80.

62. *Id.* at 873.

63. *Id.* at 880-83.

has led to strange alliances between feminist theorists, puritanical ideologists, and managerial capitalists.

Noticeably, there has been far greater public acceptance of the regulation of sexual behavior than of other aspects of the workplace. For example, sexual harassment is a far more studied and discussed topic than occupational risk regulation.⁶⁴ Human resource administrators, managers, and in-house counsel are all too enthusiastic in jumping on the wagon of desexualizing the workplace. Indeed, there is a long history of private (and more recently, public) regulation of sexual conduct in industrial relations. The idea that sexuality in the workplace should be contained, controlled, and to the extent possible, eliminated, does not simply fit certain perfectionist ideals but also fits neatly with modern managerial schools of thought. When judges reject a sexualized workplace, they are occasionally passing judgment on the ways in which cognitive labor is better than manual labor. Yuracko correctly reads some decisions as motivated by the idea that a rational, intellectual being has a better life than a sexual or physical being.⁶⁵ Surely, it is possible that some of the cases discussed by Yuracko would be endorsed by leading perfectionist theorists such as Thomas Hurka, George Sher, Martha Nussbaum, and Peggy Radin.⁶⁶ But interestingly, the model of separating sexuality from industrial production also fits well with Frederick Taylor, Henry Ford, and a line of contemporary management theorists.⁶⁷ Strikingly, from a market perspective, a majority of businesses still understand sexuality as a threat.⁶⁸ Like in other spheres of life, sex in the marketplace presents dangers. Intimacy and sexual expression at work are understood to threaten productivity and reduce efficiency. In particular, female sexuality and any form of deviant sexuality risks chaos and the unleashing of resistance and non-submissiveness.⁶⁹

Examples of corporate regulation of sexuality and intimacy include restrictions on dating,⁷⁰ dress and grooming requirements,⁷¹ and intense

64. See Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1128 (2005), for a discussion of the thinness of public debates in the context of occupational safety.

65. *Id.* at 880.

66. *Id.* at 864-66.

67. See Lobel, *supra* note 40, at 144-45; Schultz, *supra* note 7, at 2064.

68. Schultz, *supra* note 7, at 2090-92.

69. See generally MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., Pantheon Books 1978) (1976); ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (2d ed. 1993).

70. *Talley v. Wash. Inventory Serv.*, 37 F.3d 310, 312 (7th Cir. 1994) (dismissing

monitoring of “proper” sexual interaction, revealed through the mushrooming of sexual harassment training programs.⁷² Corporate headquarters have been curiously enthusiastic about implementing sexual harassment training programs, exhibiting a fetish-like eagerness to resolve sex tensions through an hour long catch-all session on how not to behave. In fact, businesses have gone above and beyond what courts have actually defined as sexual harassment.⁷³ Employee handbooks, company manuals, and sexual harassment training frequently prohibit behavior that would not be considered sexual harassment, such as interacting with a coworker in social contexts, commenting on a new blouse, or hugging a colleague. One popular commercial PowerPoint template designed for corporate sexual harassment training gives the example of a man and a woman dining.⁷⁴ The manual explains that even though inviting a woman supervisor or coworker to share a meal “is not harassment[,] . . . it’s still not a good idea.”⁷⁵ Courts, legislators and administrators have been equally enthusiastic about these programs. In several recent cases, the Supreme Court has used discrimination training and internal compliance procedures as an employer’s defense against sexual harassment claims.⁷⁶ Antidiscrimination training by corporate headquarters has also been recognized as a way of reducing damages and reaching settlements in existing cases.⁷⁷ Even more recently, the state of California passed a law that every workplace with fifty or more employees must provide two hours of sexual harassment training and education to all supervisory employees at least once every

a wrongful termination claim of an employee dating, and subsequently marrying, a coworker); *Rulon-Miller v. Int’l Bus. Mach. Corp.*, 162 Cal. App. 3d 241, 251 (Cal. Ct. App. 1984) (holding wrongful termination in the dismissal of an employee for dating an employee of a competitor); Roberto Ceinceros, *Some Employers Using Contracts to Cut Romance Risks*, 32 BUS. INS. 3 (1998), available at <http://www.businessinsurance.com/> (subscriber only) (discussing use of “love contracts” to help companies thwart sexual harassment lawsuits); Mark Hansen, *Love’s Labor Laws: Novel Ways to Deal with Office Romance After the Thrill Is Gone*, 84 A.B.A.J. 78, 79 (1998) (describing how corporations are adopting policies on dating and encouraging dating employees to sign “consensual relationship agreements”).

71. See Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992); Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN’S L.J. 73 (1982).

72. See Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 154-55 (2001).

73. See Schultz, *supra* note 7, at 2064.

74. BUSINESS AND LEGAL REPORTS, INC., CALIFORNIA GUIDE TO PREVENTING SEXUAL HARASSMENT 14.

75. *Id.*

76. See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

77. See Bisom-Rapp, *supra* note 50, at 3.

two years.⁷⁸ In turn, the multibillion dollar industry of practitioners providing compliance training is flourishing, marketing audio, video, computer, or Web-based training and seminars.⁷⁹

These developments in fact fit well with the series of cases of sex stereotyping and sexual titillation that Yuracko identifies in her paper. If corporations can control the grooming and dress codes of their employees, gender norms continue to be shaped by unequal social and market relations. Moreover, the focus on the regulation of sexuality arguably diverts attention and resources from other issues of workplace justice. In other words, the “sexiness” of the topic of sexuality overshadows other questions of fairness and justice. Vicki Schultz has been a leading commentator on the ways the focus on regulating sexual conduct at work has been at odds with the broader project of occupational gender equity. In her article, *The Sanitized Workplace*, Schultz argues that “the attempt to banish sexuality from the workplace threatens many important social interests.”⁸⁰ Schultz argues that a feminist discourse has been subsumed by the neo-Taylorist project of regulating sexuality in the workplace. Human resource managers eagerly suppress any indication of sexual energy and intimacy in their ranks:

It wasn't Victorian churchwomen, but twentieth-century organization men who took the lead in creating the asexual imperative: men like Frederick Winslow Taylor, who saw managers as rational “heads” who would control the unruly “hands” and irrational “hearts” of those who assumed their places as workers in the modern organization. Although the necessity of bureaucratic organization has come under challenge in recent years, the drive toward asexuality is not fading along with it. Today, as much as ever, sexuality is seen as something “bad”—or at least beyond the bounds of professionalism—that should be banished from organizational life. If sexuality cannot be banished entirely, then those who embody or display it must be brought under tight control and subjected to discipline.⁸¹

While Schultz envisions an integrated workplace benefiting from liberating sexual expressions, she also recognizes that in the context of job segregation sexual expression assumes a different social meaning. In a sex segregated market, all supervisors are men and all supervisees are women, or, as in our previous discussion, all high-end business

78. California Fair Employment and Housing Commission, Modified Proposed Regulations on Harassment Training and Education, http://www.fehc.ca.gov/pdf/modified_6-20-06.pdf (last visited Dec. 20, 2006).

79. See Bisom-Rapp, *supra* note 50, at 16.

80. Schultz, *supra* note 7, at 2067.

81. *Id.* at 2064.

customers are men and low-end service workers are women. Rather than simply supporting non-commodification of the ideals of love and sex, in a segregated labor market sexual regulation becomes one, but not the only, expression of gender subordination.

Most disturbingly, the focus on sexual behavior as the dominant form of gender discrimination has stunted a more robust idea of workplace justice. De-sexing the workplace allows employers control over various aspects of work and at the same time leaves intact other forms of less explicit gender hierarchy in the workplace. As in former eras, contemporary culture has internalized the idea that sexuality does not fit well with the public sphere. In turn, active separation between private and public aspects of workers contributes to the idea of separation between spheres, such as the private essence of childrearing.⁸² The creation of public/private distinctions in relation to care work, paid, and unpaid work remain the background legal rules, exacerbating the conditions of gender hierarchy in workplace without a direct or salient intervention in contractual relations. It is thus easier, or in a way *safer*, for private industry as well as for courts, to identify discrimination in sexually explicit activities, because this focus narrows the field of inquiry. It excludes deeper inquiries on distributive justice, pay equity, family responsibility rights, and firm decisionmaking structures. Again, this also reveals the limitations of turning to courts for antidiscrimination workplace reform. The anomaly of Title VII and identity based claims as the primary focus of workplace advocacy should be questioned when contrasted with a comprehensive vision of workplace equity. Currently, so much of the discourse on distributive justice is funneled into claims about workplace discrimination that discussions of workplace reform are exceedingly narrow.⁸³ It is a classic example of a statute that expected to do too much, and in turn achieves too little.

Finally, my arguments about sexual regulation relate to the question of egalitarian reform in the face of pervasive inequities. The fact that there are multiple values that affect the regulation of sexuality in the workplace offers an opportunity for a women's agency to construct the meanings of sexuality in non-egalitarian environments. When there is enough play in the social meanings of enhancing or suppressing sexuality at work, "[a] single item of clothing might evoke any of these or countless other narratives, each suggesting further plot details: the

82. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

83. See Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1551-52 (2006).

deflowered virgin, the aroused sex slave, the dominatrix.”⁸⁴ One of the greatest challenges for feminist legal theorists has been to articulate a theory of female agency in the face of pervasive male dominance. Feminist theorists like Mary Jo Frug, Kathryn Abrams, and Judith Butler have argued that patriarchy constructs both male and female sexuality from a particular male-oriented perspective, so that both men and women experience sexuality through male domination.⁸⁵ For example, dress codes that require men to wear a tuxedo and women to wear small, sexy dresses perpetuate patriarchal ideas of gender roles and hierarchy. Sexuality, as has been discussed in the preceding Parts, becomes a pervasive form of discipline.⁸⁶ Sexy dressing requirements become a script which encodes the norms of our society, and female sexy dressing requirements signify “the eroticization of domination.”⁸⁷

If patriarchy is a pervasive reality for all, it is inevitable that women internalize male aesthetics and gender-coded norms. This has led some commentators to an impasse. Duncan Kennedy has described the “conventional view” that understands sexy dressing as the trigger for sexual abuse (“the woman asked for it”) and the “radical feminist view” that understands sexual subordination as the cause for sexy dressing, since women have little impact over society’s eroticization of women’s subordination.⁸⁸ In this case, how can women resist patriarchy from within? How can they re-imagine gender roles in a way that is empowering and can create change? Within this bind, however, Kennedy describes a third possibility that emphasizes women’s agency within an unequal society: “Women, who have no choice but to dress somehow within this system of contending normativities, and their male and female audience,

84. Naomi Mezey, *Legal Radicals in Madonna’s Closet: The Influence of Identity Politics, Popular Culture, and a New Generation on Critical Legal Studies*, 46 STAN. L. REV. 1835, 1850 (1994).

85. See, e.g., JUDITH BUTLER, *GENDER TROUBLE* (1990); DUNCAN KENNEDY, *SEXY DRESSING ETC.* 127 (1993); ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN* (1988); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994); Laura T. Kessler, *Is There Agency in Dependency? Expanding the Feminist Justifications for Restructuring Wage Work*, in *FEMINISM CONFRONTS HOMO ECONOMICUS* 373-99 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

86. See generally FOUCAULT, *supra* note 69.

87. KENNEDY, *supra* note 85, at 127.

88. See *id.*

act neither as mere tools of patriarchy nor as the autonomous subjects of liberal theory.”⁸⁹

Indeed, recent feminist critiques have resisted the modernist notion that sexy dressing simply represents the end result of social patriarchy and inequality.⁹⁰ Feminist thinkers are increasingly exploring the ways sexy dressing can be transformative, empowering, and a site of action rather than simply a site of reaction. Patriarchal scripts and images may be subverted through reinterpretation.⁹¹ In the context of the regulation of sexuality at work, this may suggest the advantage of generating alternative gender norms that reject the order in which management is so invested.

IV. LIBERALISM IN PLAY: MACRO CONTRADICTIONS AND MICRO VALUE JUDGMENTS IN ADJUDICATION

While Yuracko explores the ways perfectionist ideals creep into adjudicative action in the context of Title VII claims, I suggest antidiscrimination litigation should be understood as one among many examples of an inevitable “liberalism-plus-perfectionism” impulse that guides liberal judges. Because of pervasive tensions within liberal commitments in action, judges regularly engage in value-driven judgment in implementing the high orders of liberal rights in concrete cases. Moreover, as we expand the inquiry of the internal incoherence in liberal adjudication, we again encounter the ways in which Yuracko overstates the internal coherence of alternative world views that may explain judicial decisionmaking.

Because of the competing demands that liberal rights present in concrete policy contexts, judges cannot remain neutral in evaluating various human activities that are configured through law. One of the primary functions of law is to stabilize expectations and increase certainty. The idea that our current analytic frames are unsatisfactory for line drawing in concrete cases is an uncomfortable one for many thinkers. In former eras, legal formalism protected against the salience of political choices that must be made in the application of rules to facts. Today, scholars like Yuracko turn to ideals and principles beyond those of liberalism to suggest more coherence in the adjudicative process. Importantly, liberal theorists themselves often comprehend rights only

89. *Id.* at 128-29 (referring to this next step in feminist thinking as “pro-sex feminist postmodernism”).

90. See, e.g., Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, *supra* note 85, at 339.

91. See Zipporah Wiseman et al., *Is Subversion Subversive?*, 13 *TEX. J. WOMEN & L.* 149 (2003).

by reference to normative values, such as plurality, choice, autonomy, and human flourishing.⁹²

Turning to the perspective of historical labor market reforms reveals that the creeping of perfectionist beliefs into a seemingly liberal legalistic frame of individual freedoms is not unique to the context of sex discrimination. Indeed, because of the conflicting values that liberalism itself embodies, judges regularly refer to their beliefs of good life in order to mediate these tensions. Here, I offer very briefly, and with a very broad brush, some examples of these tensions. One example is the way associational rights, freedom of speech, freedom of contract, and property rights have played out in industrial relations and labor law. Historically, the normative pull of a “right” and a “freedom” has been used both by supporters of protective labor market policies and those who resisted them. Courts have cited the constitutional freedoms of association and speech both for the purpose of prohibiting and for protecting labor organization.⁹³ Judges have cited to the idea of freedom of contract and property both to strike down protective employment legislation and to create common law employment protections.⁹⁴ Famously, in 1905, the U.S. Supreme Court struck down a New York law prohibiting bakers from working more than sixty hours per week.⁹⁵ The *Lochner* court declared: “The right to purchase or to sell labor is part of the liberty protected by [the Fourteenth] amendment, unless there are circumstances which exclude the right.”⁹⁶ *Lochner* was only one of

92. See generally Peter de Marneffe, *Liberalism and Perfectionism*, 43 AM. J. JURIS. 99 (1998) (discussing “perfectionist liberalism”).

93. See, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (holding a law prohibiting teachers belonging to certain associations unconstitutional); *Dorchy v. Kansas*, 272 U.S. 306 (1926) (holding Kansas statute rendering it a crime to induce another to commit a labor strike constitutional); *Karges Furniture Co. v. Amalgamated Woodworkers’ Local Union No. 131*, 75 N.E. 877, 879-81 (1905) (holding that workers have a right to strike as their “fundamental” right to a “free and equal chance”). For further discussion, see James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941 (1999); James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 996-1002 (1997).

94. It is instructive to compare *Lochner v. New York*, 198 U.S. 45, 64 (1905), and the 1938 enactment of the Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060. See generally Davison M. Douglas, *Contract Rights and Civil Rights*, 100 MICH. L. REV. 1541 (2002) (book review); Risa Lauren Goluboff, “Let Economic Equality Take Care of Itself”: *The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 UCLA L. REV. 1393 (2005).

95. *Lochner*, 198 U.S. at 64.

96. *Id.* at 53.

many decisions between 1905 and 1935 where contract and property rights were used to justify striking down laws pertaining to worker health and safety as well as collective bargaining and union membership. Courts granted injunctions against labor strikes and struck down laws making it a crime to fire an employee because of union membership, grounding these decisions on liberal constitutional rights.⁹⁷

The same ideas of liberties and rights served the New Deal government in adopting a very different approach to market regulation. At the same time the economy was experiencing upheaval and scarcities, the idea that a “right” mandated particular distributional results was increasingly destabilized. The legal realists showed how property rights were in effect a bundle of relationships between differently situated people with different interests, rather than a unified object.⁹⁸ In 1935, the National Labor Relations Act (NLRA) was enacted as a complete reordering of work relations.⁹⁹ During the same period, the Fair Labor Standards Act was enacted, mandating a federal minimum wage and overtime compensation even in the context of individual employment. But the debates about what liberalism mandated in the context of work relations remained ever controversial. For example, the NLRA, designed to provide associational rights for workers seeking to unionize, also protects the right of individual workers not to join unions.¹⁰⁰ The concept of a “right to work,” largely embraced in the international arena

97. See, e.g., *Adkins v. Children’s Hosp.*, 261 U.S. 525, 553-61 (1923) (employing the Fifth Amendment’s Due Process Clause to invalidate a minimum wage law for women because it was not closely related to regulating the public interest, health, or morals); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (using the Fourteenth Amendment’s Due Process Clause to invalidate a law barring employers from forbidding their employees to join unions); *State v. Legendre*, 70 So. 70, 71 (La. 1915) (invalidating a limitation on firemen’s working hours under the Louisiana Constitution and the U.S. Constitution). Moreover, from 1880 to 1930, state and federal courts issued roughly 4300 antistrike decrees. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 490 (Kermit L. Hall et al. eds., 1992).

98. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Walter Wheeler Cook, “Substance” and “Procedure” in the *Conflict of Laws*, 42 YALE L.J. 333 (1933); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Max Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141 (1938); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992); Thomas C. Grey, *The Disintegration of Property*, in PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980); J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996).

99. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 157-69 (2000)).

100. “[T]he NLRA lent itself to conflicting policy aims; on the one hand, the ends of wealth redistribution and increased consumer demand required worker solidarity, while on the other hand, the goal of individual liberty respected the workers’ decision to join a company union or no union.” Raymond L. Hogler, *The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions*, 23 HOFSTRA LAB. & EMP. L.J. 101, 107 (2005).

and numerous liberal constitutions as requiring a legal process to promote the human capacity to act in the labor market, has been interpreted in many American state laws as an anti-union law.¹⁰¹ By 1947, over a dozen states passed “right to work” laws, which outlawed union security clauses and were designed to curtail the ability of unions to expand membership through closed shop requirements for newly hired workers.¹⁰² The fact that profoundly opposing political projects appropriated the very same liberal discourse indicates some of the complexities in adjudicating rights. In all of these contexts, because rights in the abstract represent bundles of competing commitments and protections, they cannot be applied without reference to “liberalism-plus” or “plus-perfectionism” moral ordering. Without broader, richer visions of social interactions and judgment about activities worth protecting, judges have few independent variables on which they can rely when adjudicating competing claims of individuals and groups.

Other, more micro examples of a judicial turn to normative evaluation from the workplace context include the common law developed exceptions to at-will employment. These exceptions range from tort exceptions of public policy wrongful discharge, employee privacy rights, the tort of intentional infliction of emotional distress, and lastly, to the myriad of antidiscrimination and identity accommodation policies which are the focus of this symposium. Importantly, perfectionist hierarchies between body and mind capacities are pervasive in employment law in general, not simply in workplace discrimination law. An illuminating case is *Wilson v. Monarch*, in which a sixty-year-old vice president, who was an at-will employee, was demoted to an entry level warehouse supervisor with “menial and demeaning duties, including sweeping up and cleaning the warehouse cafeteria.”¹⁰³ While the employer could have legally fired the plaintiff, it was held liable for the demotion. The Fifth Circuit found the employer’s conduct “so outrageous that civilized society should not tolerate it.”¹⁰⁴ Professor Alan Hyde contemplates some obvious questions in reaction to this decision: “[W]ho swept up and cleaned the cafeteria before Wilson? Was that intentional infliction of emotional distress?”¹⁰⁵

101. See GILBERT GALL, THE POLITICS OF RIGHT TO WORK, 1943-1979, at 19 (1988).

102. See *id.* at 230-31.

103. STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW 189 (2002) (citing *Wilson v. Monarch*, 939 F.2d 1138, 1140-41 (5th Cir. 1991)).

104. *Wilson*, 939 F.2d at 1145.

105. WILLBORN ET AL., *supra* note 103, at 189.

The case law is saturated with examples where simple mistreatment is not considered emotionally abusive and would not qualify for a tort claim, like hiring a janitor to work in very difficult and unsafe conditions with extremely low pay. Yet in *Wilson*, the move from white collar to blue collar work was viewed by the court as demeaning and, thereby, illegal.¹⁰⁶ Regina Austin, writing about the tort of intentional infliction of emotional distress, invites us to imagine a different tort—a generic tort of humiliation in work relations:

Whereas the law assumes that abuse is utilized because workers are not contributing to the enterprise as they should be, workers view abuse as a calculated devaluation of themselves and their work. . . . [Interviewed employees] especially objected to being asked to do “menial” domestic chores because it meant that their employers did not take them seriously with regard to the tasks they were hired to perform.¹⁰⁷

Austin’s imagined tort is clearly not recognized in modern employment law. Rather, “[c]ourts see toughness and strength as such positive attributes that they simply assume that the capacity to tolerate abuse, and the propriety of dishing it out, vary with the nature of work, the workplace, and the characteristics of the workers.”¹⁰⁸ Moreover, the conditions of acceptable hardship vary in adjudicative decisionmaking along class and gender lines. According to Austin, “[m]ales and blue-collar workers, for example, may be subjected to harsher supervision than females or white-collar workers because of the acceptability of sex and class distinctions and the implications of group pride that underlie the disparate treatment.”¹⁰⁹ This “tolerated residuum”¹¹⁰ once again points to the unstable interpretation of decency in employment relations as they relate to our world views on human development and flourishing. In the

106. See *Wilson*, 939 F.2d at 1145. Another example involves the distinction between “high culture” and “low culture” in freedom of speech jurisprudence. See, e.g., J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1979 (1995) (book review) (discussing author Cass R. Sunstein’s divide between high culture, which supports democracy, and low culture, which erodes it). Yet another example involves the ever shifting line between professional employees and non-professional employees for the purposes of employment and labor laws, such as the FLSA and the NLRA. See generally John C. Duncan, Jr., *The Indentured Servants of Academia: The Adjunct Faculty Dilemma and Their Limited Legal Remedies*, 74 IND. L.J. 513 (1998); Allison E. McClure, Comment, *The Professional Presumption: Do Professional Employees Really Have Equal Bargaining Power When They Enter into Employment-Related Adhesion Contracts?*, 74 U. CIN. L. REV. 1497 (2006); David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689 (1990).

107. Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 22-23 (1988).

108. *Id.* at 18.

109. *Id.*

110. KENNEDY, *supra* note 85, at 137.

end, the most interesting questions are about the particular constellations resulting from the competing stances intertwined in the adjudicative process.

Finally, in the field of antidiscrimination policies, it is important to remember that Yuracko's paper tackles aspects of the most conforming standard within Title VII litigation—disparate treatment. As her paper and our discussion here clarifies, the disparate treatment model itself as developed in the case law cannot be explained solely by the liberal principle of value neutral promotion of equality. Even more challenging are those models that move beyond direct individual acts of discrimination to the prohibition on disparately impacting work qualifications and requirements of accommodation. None of these models fit neatly into the gender-blind paradigm of sameness. In deciding the reasonableness of accommodating disabilities or the relevance of certain job qualifications, for example, pervasive indeterminacy of categories of sameness or difference and freedom or coercion mandates the introduction of richer world views. As discussed above, perfectionist ideals of human development often assign privilege to emotional and intellectual endeavors over physical or menial work. However, in some contexts, there is a flip. For example, in the case of worker autonomy, privacy, and the establishment of harassment claims, workers who experience a physical invasion are much more likely to prevail in their claims than when the interference is less tangible and the intrusion is non-physical. Thus, even perfectionism gets turned on its head when it is called to service by practical dilemmas.

V. CONCLUSION

Ultimately, Yuracko's paper tries to straddle inconsistencies in the grand theory of liberalism by relying on a grand alternative theory of perfectionism. This leaves unsatisfactory answers to profound debates within liberalism and the legal system. Put crudely, Yuracko offers too neat an explanation of too few questions about liberal theory and adjudication. The last sections of Yuracko's article are the most direct retreat from the full conclusion to which her analysis should have led. Reaching the end of her essay, Yuracko contends, "[c]ertainly most antidiscrimination demands are consistent with standard liberal principle. . . ." ¹¹¹ In conclusion, she stresses, "I have focused in this paper on the areas of law in which standard equality and coworker

111. Yuracko, *supra* note 1, at 896.

arguments are at their most indeterminate and incoherent. “It is in these areas that the role of perfectionism can be seen most clearly.”¹¹² There is no doubt that in some areas the existence of value-driven judgments is more salient than in other areas. Yet the critical lesson from the exploration of the recent antidiscrimination cases is that even in those areas that are considered easy, distinctions are not fixed and conflicts do not result in a stable resolution. Judicial understandings of the core liberal circle and the outer circle of plus-perfectionism are constantly evolving.

112. *Id.*