

Explanation, Vindication, and the Role of Normative Theory in Legal Scholarship

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At one level, Kim Yuracko tells us, employment discrimination law aims to oppose subordination and undermine group hierarchy.¹ It focuses, accordingly, on which groups merit social protection and which do not.² At a deeper and as yet unexplored level, however, it also concerns “a more controversial and covert set of values—one focused on promoting certain kinds of individual development, rather than undermining group hierarchy, and driven by conceptions of individual

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1. This commentary is a revised version of comments on Kimberly A. Yuracko, *Sameness, Subordination, and Perfectionism: Toward a More Complete Theory of Employment Discrimination Law*, 43 SAN DIEGO L. REV. 857 (2006). The earlier comments, which focused on Yuracko’s initial draft, were presented as a part of the *Conference on the Rights and Wrongs of Discrimination* held at the University of San Diego School of Law, April 28-29, 2006. This revised commentary develops various ideas in my earlier comments but does not reflect any changes Yuracko may have made to her article in light of the conference session. Many thanks to the conference participants, especially Michael Blake and David Brink, for helpful discussion of my commentary, and to Dana Nelkin for helpful feedback on the penultimate version.

2. Yuracko, *supra* note 1, at 858.

rather than group worth.”³ Here, “at least at the margins,” she contends, antidiscrimination law reflects judicial acceptance of peculiarly perfectionist conceptions of human flourishing.⁴ More specifically, Yuracko argues, the case law in certain areas of employment law demonstrates “the dominant commitments to intellectual and rational development and valued sexual expression of contemporary perfectionist theory.”⁵ The decisions courts reach reveal the efforts of judges to use the tools of antidiscrimination law to encourage the development of traits and attributes they consider important for a flourishing human life, while discouraging traits they consider harmful or insignificant.⁶

Yuracko’s *Sameness, Subordination, and Perfectionism: Toward a More Complete Theory of Employment Discrimination Law* figures as one part of her ongoing efforts to shed light on employment discrimination law by viewing the decisions of the courts through the lens of perfectionist moral and political philosophy.⁷ Yuracko explores some fascinating areas of sex discrimination case law in her article. She first considers cases in which employers hire based on sex either out of consideration for their customers’ personal or sexual privacy or with a regard for their customers’ preference for a particular kind of sexual stimulation. She then considers cases involving gender nonconformity in the workplace, including cases of discrimination against individuals whose physical or behavioral traits do not fit sexual stereotypes and against individuals whose mere grooming or dress is nonconforming. In the process of examining these sets of cases, Yuracko exposes a genuine puzzle about how to make an intelligible and coherent whole out of the sundry decisions courts have reached in handling a host of discrimination claims.

I find Yuracko’s inquiry quite intriguing, but I have doubts about the central thesis. My aim, in the discussion that follows, is to press Yuracko on two fronts, one methodological, the other substantive. As concerns substance, I shall say a bit as this commentary progresses about why Yuracko would need much more support to make good on her claim that an implicit perfectionism explains decisional antidiscrimination law. My chief interest, however, lies with certain questions as to what methodology she means to follow in her efforts to develop a more

3. *Id.*

4. *Id.*

5. *Id.* at 866.

6. *Id.*

7. See 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).

complete theory of employment discrimination law. Yuracko's approach is one that seems to me to be quite common in legal scholarship, at least in legal scholarship with more theoretical ambitions.⁸ For reasons that I shall offer shortly, I find the approach puzzling and problematic. I want to be clear, however, that in pressing methodological questions, my aim is not so much to pose a problem for Yuracko, who understandably adopts what seems the usual approach of scholars in her field. Rather, I mean to point out how and why, in my view, legal theorists need to pay far greater attention to methodology than they generally have. As for Yuracko, I greatly admire her efforts, in this article and elsewhere, to tackle complex questions about the theoretical unity and underpinnings of employment discrimination law. For that very reason, I want to urge her to adopt an approach better suited to exploring theoretical issues and to supporting her most central ideas.⁹

I. EXPLANATION AND VINDICATION

Yuracko's defense of her thesis turns on an initial distinction between liberal and perfectionist ideas, to which we will return. For purposes of pressing the methodological questions, we need to begin by attending to how she expresses her claims against the adequacy of appeal to liberal ideas and on behalf of perfectionism. Title VII, she observes, is typically viewed as a "paradigmatic liberal antidiscrimination statute."¹⁰ Focusing on the two aforementioned contested areas of sex discrimination case law, Yuracko observes that Title VII in fact sometimes imposes significant

8. It is so common, in fact, that I would not know where to begin citing law review articles in order to back up my claim. Rather than provide an arbitrary list of references, I will simply assume that regular readers of law review articles will recognize in Yuracko's article a familiar approach—familiar ways of talking about cases, doctrine, and the decisions of courts. For anyone who is not a regular reader of law review articles, I would simply urge them to read a sampling of articles with the words *theory* or *theoretical* in the title. With infrequent exceptions, they will see an approach like Yuracko's.

9. There may well be a number of viable approaches, and so I do not mean that I will suggest one approach in particular.

10. Yuracko, *supra* note 1, at 860. Title VII provides:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2 (2000).

accommodationist costs akin to those imposed by the Americans with Disabilities Act,¹¹ with which Title VII is often contrasted. Now it is worth examining with some care her central claim with regard to the case law. She remarks:

[T]he antidiscrimination demands imposed on employers in these areas *cannot be fully understood and explained* by resort to Title VII's core liberal commitments; but instead reflect *underlying and implicit judicial conceptions of human flourishing*. . . . In other words, at least at the margins, the scope of Title VII's antidiscrimination protection *is driven by judicial judgments about what kinds of people, with what kinds of traits and attributes, are valuable enough to be worth the costs of inclusion*.¹²

This passage well represents what seems to me a common approach among legal scholars of a more theoretical bent. It involves vague talk about “explaining” cases, judicial decisions, or the law in a given area, while invoking the need for one or another moral or justificatory theory or theoretical idea to do the requisite explaining. In so doing, it teeters precariously between the causal and the normative, without a sharp characterization of the nature of the claims being made. As I have said, I find the approach puzzling and problematic. Although I focus on Yuracko’s article, my concern lies with pointing to difficulties for this sort of approach more generally.

The approach invites a number of questions, but the core one for present purposes concerns, as already indicated, precisely how we are to understand a claim like Yuracko’s. As far as I can see, Yuracko never explains what she means when she insists that appeal to these conceptions is “necessary” to explain and understand the case law.¹³ There is, after all, more than one sort of “explanation” for which such appeal might be thought “necessary.” Appeal to perfectionist conceptions of human flourishing might be needed as part of a bare causal explanation, a rationalizing explanation, a “vindicative” explanation, or a purely normative “explanation.”¹⁴

Consider the first possibility and suppose that Yuracko means to say that appeal to perfectionist ideas is needed for a bare causal explanation. We should then understand her to be claiming that judges are *caused*, perhaps unknowingly, to reach their decisions by unconscious, in her words, “implicit” perfectionist conceptions.¹⁵ Some of her language suggests that she indeed intends something causal. She talks about a

11. 42 U.S.C. § 12101 (2000).

12. Yuracko, *supra* note 1, at 862 (emphasis added).

13. *Id.*

14. Of course, strictly speaking, a purely normative “explanation” is a *justification* rather than an explanation.

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

perfectionist ideal, for example, as “underlying and *driving* courts’ permissiveness toward discrimination” in privacy cases.¹⁶ Now, we would naturally want evidence for any such causal claim, and we would want to understand how the causation operates. Why think implicit *perfectionist* ideas drive judges’ decisions, as opposed to any number of other “implicit” ideas? And how precisely do implicit ideas “drive” decisions?

Suppose, however, that Yuracko is right. That would in one sense, the bare causal sense, enable us to explain and understand the case law; we would understand the implicit norms causing judges to reach the decisions they reach. We should here note, however, that the appeal to perfectionist ideas would be “needed” only due to the contingency that certain contemporary judges happen implicitly to accept these ideas, and that is not a very strong sense of necessity. In any event, any causal understanding achieved would not necessarily render the case law itself more coherent and intelligible; and it would not necessarily show judges’ decisions to be either rationally explicable or normatively well-grounded. Accordingly, such a causal explanation would, without more, provide us with little of real interest from the standpoint of achieving a broader theory of employment discrimination law. To put the point differently, it would just invite a question that must be raised and that parallels the question about explanation, namely, what sort of theory is a theory of employment discrimination law supposed to be? Causal? Rationalizing? Vindicative? Normative?

Perhaps, then, what Yuracko means is that the appeal to implicit perfectionist ideas provides us with something akin to a *rationalizing* explanation. In much the same way that we rationalize (or render intelligible) the behavior of a paranoid schizophrenic by appealing to what he believes he is hearing, we can rationalize (or render intelligible) the decisions of judges, and thereby the case law, by appealing to their implicit beliefs about human flourishing. Rationalizing explanations are, of course, partly causal, but they are more than that; they not only explain a person’s actions by identifying the causes of his behavior, but, in one way, “make sense of” his actions. Notice, however, that “making sense of” is not yet rendering *justifiable*.

Yuracko seems, in fact, to think that judges (perhaps unwittingly?) do something right when they decide based on implicit perfectionist norms.

16. *Id.* at 870-71 (emphasis added); *see also id.* at 862.

So although the text of the article she presented at the USD *Conference on the Rights and Wrongs of Discrimination* did not make this clear, she cannot mean to be offering a mere rationalizing explanation. Indeed, during the conference session on her article, she confirmed that she seeks a more normatively adequate theory, not merely a more causally complete theory or a rationalizing theory. Still, she might seek a more normatively adequate theory along one of two lines.

The first would retain the core, causal idea expressed in talk about explanation. She would then be engaged in the project of identifying the norms that “drive” judicial decisions in the two areas she discusses, while attempting thereby to fasten upon a *vindicative* explanation of those decisions.¹⁷ A vindicative explanation is, put roughly, an explanation that, while uncovering underlying causes or mechanisms, serves, once those are grasped, to vindicate what is going on in the domain it explains. Identifying the perfectionist ideas about human flourishing that “drive” judges’ decisions, for example, would at once causally explain how those decisions have come about and vindicate them, at least in some measure.

As I have said, Yuracko does talk as if she has a causal picture in mind. If in seeking a more normatively adequate theory she means to be offering a vindicative explanation, then various difficulties would remain to be addressed. In order to support claims about causation, she would need to confront the difficult task of developing a story about how judges are indeed moved by perfectionist ideas, perhaps unconsciously. Any such story would have to allow for and explain causal deviations—in this context, outlier or aberrant decisions. In order to show that causation by those ideas is vindicative of the case law, she would need to confront the challenge of presenting some argument for why perfectionist ideas are correct. To succeed as a vindicative explanation of the case law, the whole picture would have to show judges to be, generally, driven to their decisions by their correct, if unconscious, apprehension of true perfectionist values.¹⁸ Of course, this could not be the whole story

17. Peter Railton suggests the idea of a “vindicative explanation” in his exchange with David Wiggins concerning the defensibility of naturalistic moral realism, and I borrow the basic idea here. See Peter Railton, *What the Non-Cognitivist Helps Us to See the Naturalist Must Help Us to Explain*, in *REALITY, REPRESENTATION, AND PROJECTION* 279 (John Haldane & Crispin Wright eds., 1993); David Wiggins, *Cognitivism, Naturalism, and Normativity: A Reply to Peter Railton*, in *REALITY, REPRESENTATION, AND PROJECTION*, *supra*, at 301; Peter Railton, *Reply to David Wiggins*, in *REALITY, REPRESENTATION, AND PROJECTION*, *supra*, at 315, 323-24.

18. For an example of how this basic model has been applied in the context of moral theory, see Railton, *What the Non-Cognitivist Helps Us to See, the Naturalist Must Help Us to Explain*, in *REALITY, REPRESENTATION, AND PROJECTION*, *supra* note 17; Railton, *Reply to David Wiggins*, in *REALITY, REPRESENTATION, AND PROJECTION*, *supra*

either. For we would still need to distinguish between vindicating the decisions of judges who are, after all, supposed to be applying the law, and vindicating the area of law itself, quite apart from the role of judges or of the aims and intentions of the legislature which enacted the law. Yuracko would need to say more, then, about precisely what the vindicative explanation was vindicating.

This leads us to a second way to seek a more normatively adequate theory of employment discrimination law, one that focuses exclusively on normative adequacy.¹⁹ Like the first way, the second would seek a kind of vindication. But in adopting a purely normative approach, the theorist would dispense with talk suggesting causation in favor of talk about what theoretical underpinnings would render the decisions of judges normatively coherent and justifiable.²⁰ As in the case of a vindicative explanation, this approach would require a defense of the particular theoretical underpinnings being invoked. In taking this approach, someone like Yuracko would have to acknowledge that not all actual decisions will cohere with those which seem most defensible; not all will be justifiable within the favored theoretical framework. A version of this approach, but not the only version, is suggested by Ronald Dworkin's famous jurisprudential theory, which, in its complete statement, fully recognizes that in their efforts to fit and justify the extant law, judges will have to exclude some bits as mistaken.²¹ Part of the challenge of defending the favored framework would, then, consist in offering reasons why we should dismiss the recalcitrant cases.

I will say a bit more that bears on methodology as these comments continue, but the general shape of the worry should now be clear. Legal theorists like Yuracko should not simply talk loosely about explaining

note 17. See also Peter Railton, *Facts and Values*, 14 PHIL. TOPICS 5 (1986); Peter Railton, *Moral Realism*, 95 PHIL. REV. 163 (1986); Peter Railton, *Naturalism and Prescriptivity*, 7 SOC. PHIL. & POL'Y 151 (1989).

19. Both Michael Blake and Matt Zwolinski suggested during the conference session that perhaps Yuracko means to take such an approach, and in particular, Zwolinski suggested she could be taking an approach like Ronald Dworkin's. See *infra* note 21 and accompanying text. I think that Yuracko's claims more nearly suggest that she is offering a vindicative explanation. But as I try to explain in this commentary, whichever normative approach she were to take, she would need both to adopt explicitly one approach or another and to confront a good number of difficulties.

20. One could, of course, continue to explain some judicial decisions on the grounds that particular judges happen to hold the normatively correct view and judge accordingly.

21. See RONALD DWORKIN, *LAW'S EMPIRE* (1986).

and understanding cases or an area of law. They need to be clearer about just what methodology they mean to adopt—that is, about just what sort of “explanation” they mean to offer. Having staked out a clear position, they will also need to resolve a host of difficult questions for that particular sort of explanation, making the analytical and argumentative moves necessary to pull it off. I will offer some suggestions in closing as to how Yuracko herself might proceed. For now, however, I simply stress that, at a minimum, she needs to decide upon and be explicit regarding what sort of “explanation” she seeks—what sort of theory she has in mind—as she strives to develop a more complete theory of employment discrimination law.

II. THE STRATEGY OF VINDICATIVE EXPLANATION

Let me focus at this juncture on the idea of a vindicative explanation in order to get at some additional points I wish to make about Yuracko’s article. Doing so seems fair as an expository device given that Yuracko’s own language, like that of many other legal theorists, at least suggests something both causal and normative.

A successful vindicative explanation requires, as I have indicated, a two-part defense. One part defends the *normative*, or *vindicative*, capacity of the explanation. In the context of Yuracko’s project, in order to defend her explanation’s vindicative capacity, Yuracko would have to provide a more fully developed account of the conception of human flourishing to which judges appeal together with some reason to favor that conception. This, however, seems more a job for a moral philosopher than a law professor. Partly for this reason, I wonder whether either a strategy of vindicative explanation or a strategy involving at least some kinds of purely normative “explanation” can ordinarily be the right sort of project for a legal scholar. I want to stress *ordinarily* because some legal scholars are also very good moral philosophers, by formal training or by self teaching and inclination. Although I am inclined to endorse a rough division of labor, allowing for these and other qualifications, I mean less to insist on it than to emphasize that either a vindicative or a purely justificatory explanation would need to be undertaken with great care. The legal theorist could proceed, with the requisite caution, in more than one way. Yuracko could, for example, explain perfectionism carefully and announce her sympathies for perfectionism, while prescinding from its defense and reserving her energies for the second part of the defense required for a vindicative explanation.

That second part is a defense of the proffered vindicative explanation as an *explanation*. In the context of Yuracko’s project, we would need some defense of the seemingly causal claim that it is *necessary* to appeal

to “underlying and implicit” judicial conceptions of human flourishing to explain the case law. The idea that it is *necessary* to appeal to such conceptions is, I take it, the force of the claim that otherwise, these areas of discrimination case law “cannot” be fully understood and explained; such appeal is *necessary*, even if it does not afford the entire explanation. In order to show that the appeal is necessary, however, we would need an argument that clearly identified perfectionist ideas as a cause while ruling out alternative explanations; and this, I think, Yuracko has not provided. What is more, because the project is ultimately normative or vindicative, the necessity cannot be merely causal; Yuracko would also need to show that any alternative would leave the case law unjustified.²²

Yuracko commences her project by contrasting liberalism and perfectionism.²³ I have some worries about the contrast as she depicts it. First, the description of liberalism is too sketchy, and it is arguably not quite accurate. Liberalism need not be, and indeed cannot be, value neutral toward *all* competing conceptions of the good, and I doubt that any prominent liberal has meant to claim otherwise.²⁴ The term *liberalism* encompasses a diverse array of views and explaining what these views have in common requires a good deal of care. As for perfectionism, Yuracko notes the diversity of views among those who

22. Dana Nelkin has suggested to me that it might be enough to produce a vindicative explanation that the proffered story be one among several that would equally satisfy the explanatory and justificatory dimensions. That seems right to me, though, of course, one could no longer claim to have offered the superior account. See my remarks *supra* pp. 5-6 about overdetermination. The important point I want to make for present purposes just concerns the basic two-part structure of a vindicative explanation and the general analytical and argumentative moves that would be needed to make good on it.

23. See Yuracko, *supra* note 1, at 862-66.

24. Yuracko seems to endorse or share Michael Sandel’s depiction of (Rawlsian) liberalism. Compare *id.* at 862-63, with MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT 4 (1996); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 116-17 (1982). For Rawls’s presentation of his own views, see JOHN RAWLS, POLITICAL LIBERALISM 173-74 (1993); JOHN RAWLS, A THEORY OF JUSTICE 399-406 (1971). But I think that Sandel misconstrues Rawls on key points. In *Democracy’s Discontent*, for example, Sandel’s critique arguably mischaracterizes liberalism, and Rawlsian liberalism, on a number of counts: it construes too narrowly what liberals see as at stake when they advance a conception of public reason; it misconstrues what the ideal of public reason asks of us; it relies on a notion of reasonableness that liberals sensibly reject in the political context; and, most important for present purposes, it misconceives the liberal aim of neutrality. For some critical discussion of Sandel’s critique of liberalism, see, for example, Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFFAIRS 308 (1985).

might be classified as perfectionists.²⁵ But her discussion here and elsewhere seems to conflate a number of distinct normative notions: the notions of human perfection, of human flourishing, and of what gives meaning in a life. Although some perfectionists no doubt want to tie these notions together, they are conceptually distinct. Those who reject perfectionism may have their own conceptions of human flourishing, and it is an open question whether what makes for a flourishing human life also makes for a meaningful human life.²⁶ Finally, I think Yuracko's discussion treats liberalism and perfectionism as if they are in opposition when they need not be. Liberalism is not a class of theories about how we ought to live but about the relationship of government or society to citizens. Perfectionism is, at least in the first instance, a class of theories about how to live, not about the relationship of government or society to citizens. One can, of course, be a perfectionist in one's political philosophy—one can think it is the government's business to make us more perfect humans, through support where possible or coercion where necessary; but one need not be a perfectionist in both one's moral and political philosophy. Most important for present purposes, one can take the liberal view that, to put it too crudely, the government and the basic structure of society must be largely neutral with regard to competing conceptions of the good while nevertheless holding that individuals, to lead flourishing lives, ought to follow perfectionist norms.²⁷

Accepting for purposes of argument the distinction Yuracko draws, must we appeal to judges' underlying perfectionist ideas to explain and justify the case law in the two areas Yuracko discusses? I am not yet convinced. Consider her discussion of the courts' privacy decisions. She contends that "doctrine does not well explain courts' privacy decisions" but

25. See Yuracko, *supra* note 1, at 863-66.

26. Let me expand just a bit. The notions of human perfection and of what makes for a good or flourishing life differ, even if important overlap exists between leading lives that are good for us and developing and exercising, or "perfecting," our capacities. After all, a life spent developing one's capacities could make some individuals miserable. The notions of human perfection and of a meaningful life also differ, even if some meaningful lives involve perfecting oneself. Consider the fact that certain paradigmatically meaningful lives, such as the life of Mother Theresa, displayed marked self-sacrifice. Finally, the notions of what is good for a person and what makes her life a meaningful one differ, even if some overlap exists between what makes an individual's life go well and what makes her life meaningful. We understand very well what distressed Tolstoy when he felt that, despite his contented home life and his success as a writer, his life was meaningless. See LEO TOLSTOY, *My Confession*, in *THE MEANING OF LIFE* (E.D. Klemke, ed.).

27. Notice, however, that even when one stops short of adopting perfectionism, one can, as Rawls does, recognize that certain "primary goods" will be needed whatever one's conception of the good, and hold that the principles that govern the basic structure of society should be chosen in a way that reflects this fact. See RAWLS, *A THEORY OF JUSTICE*, *supra* note 24 at 62, 92-95.

“perfectionism does.”²⁸ Here we see a certain slippage that occurs in the article between claims about the explanatory inadequacy of *doctrine* and about the explanatory inadequacy of *liberalism* or liberal values.²⁹ Legal doctrine may not be a perfect reflection of liberal theory, and so the decisions courts reach might not be explainable in terms of doctrine, while being well explained by liberalism.

Yuracko discusses two principal cases in this context. In one of them, *Local 567, American Federation of State, County, & Municipal Employees v. Michigan Council 25*,³⁰ the district court held that the role of workers in providing patients with needed personal hygiene care could justify the state mental health care institution’s practice of sex-based hiring. Yuracko emphasizes the court’s explanation that it “cannot conceive of a more basic subject of privacy than the naked body,” and that the desire to shield one’s naked body from the view of (opposite sex) strangers “is impelled by elementary self-respect and personal dignity.”³¹ In the second case, *Michenfelder v. Sumner*,³² involving a prison facility that conducted strip searches, the Ninth Circuit found no constitutional violation because female officers were not routinely present for the strip searches of male prisoners, and visitors could not view the searches. Yuracko stresses the court’s remarks that “prisoners retain a limited right to bodily privacy,” a right connected to individuals’ “self-respect and personal dignity.”³³ Summing up, Yuracko says, “[f]or these courts, customer preferences to shield their bodies and sexuality from exposure are simply different and more valuable than other types of customer preferences, in particular those for commodified sexuality.”³⁴

Yuracko has an important insight here: courts may indeed recognize the greater importance of certain customer concerns, and rightly so. But Yuracko goes a step further, taking the courts’ decisions to reveal an underlying perfectionist ideal. Of course, she may be right even in this stronger claim about what judges really (on some level) believe or presuppose; but she has not offered the arguments needed to support it, and the courts’ decisions do not, on their face, support her conclusion.

28. Yuracko, *supra* note 1, at 869.

29. See, e.g., *id.* at 869-70.

30. 635 F. Supp. 1010 (E.D. Mich. 1986).

31. Yuracko, *supra* note 1, at 870 (citing *Local 567*, 635 F. Supp. at 1013).

32. 860 F.2d 328 (9th Cir. 1988).

33. Yuracko, *supra* note 1, at 870 (quoting *Michenfelder*, 860 F.2d at 333).

34. *Id.* at 870-71.

In fact, the explicit appeal to a right of bodily privacy is arguably a quintessentially liberal appeal.

Yuracko offers no more in the way of argument for her claim that whereas the courts' implicit perfectionism is revealed in their permissiveness toward discrimination in the privacy cases, it is revealed by their impermissiveness toward discrimination when it comes to what she calls "plus-sex" businesses.³⁵ She maintains that we would be hard pressed to argue that the courts' prohibition of sex discrimination in cases involving plus-sex businesses, such as the famous *Wilson v. Southwest Airlines Co.*³⁶ case and *Guardian Capital Corp. v. New York State Division of Human Rights*,³⁷ is required by either formal conceptions of sex-blind equality or a "standard antisubordination principle."³⁸ On the contrary, she claims that such hiring "seems to fall squarely within Title VII's BFOQ [bona fide occupational qualification] exception."³⁹ In order to reach the courts' position, judges must, she tells us, first redefine the nature of the business. Yuracko contends that perfectionism is "driving" the "initial redefinition" and is required to explain the courts' prohibition on sexual titillation in mainstream jobs.⁴⁰

Yuracko may be right about the limitations of formal principles. Again, though, as far as I can see, Yuracko provides no argument for her claims, and she too quickly concludes that a formal conception of sex-blind equality could not explain the courts' decisions. I would have liked to see her explore the explanatory powers of the idea of sex-blind equality in far more depth before moving to her perfectionist alternative.

Although she does not really argue for her claims, Yuracko does tell us something about why she thinks that the substantive ideas of perfectionism, unlike the formal conceptions of antidiscrimination legal

35. *See id.* at 871 (defining this term).

36. 517 F. Supp. 292, 301 (N.D. Tex. 1981); *see* Yuracko, *supra* note 1, at 872-73.

37. 360 N.Y.S.2d 937 (N.Y. App. Div. 1974); *see* Yuracko, *supra* note 1, at 872 n.55.

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

39. *Id.* The statute creating the BFOQ exception states:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, 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 that particular business or enterprise

42 U.S.C. § 2000e-2(e) (2000).

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

doctrine, can explain the cases involving plus-sex businesses. Elaborating on her claim that courts must first redefine the nature of the business before they can conclude that employment practices fall outside of the BFOQ exception, she remarks: “Such redefinition reveals . . . both a sense of the importance of promoting individuals’ intellectual and cognitive development and a sense of the danger that explicit sexualization poses to such development.”⁴¹ Yuracko has an important insight—if not about what actually causes judges to decide as they do, then about what might justify those decisions—when she emphasizes the importance of intellectual and rational development and notes the problem overt sexualization may pose. How this gets us to the idea that perfectionism is required to explain the courts’ decisions, however, remains unclear. Consider this alternative: the courts’ reasoning reveals a sense of the importance of protecting women’s equal rights to make career choices, pursue careers on equal terms, and develop as they see fit, as well as a sense of the danger explicit sexualization poses to women’s equality. It would have been helpful for Yuracko to say more about why she thinks the case law favors her position over an explanation like this.

But what, Yuracko might ask, should we make of the fact, for example, that the courts decline to support discrimination where customer preferences are for commodified sexuality? What causes them to treat the latter cases differently from cases of sexual or personal privacy is one thing, what would justify that different treatment is another. Though it would require more theoretical work than I can undertake here, a relatively straightforward answer from the liberal perspective seems available. After all, not all preferences are for things to which one has a moral right. So we can likely say something along the following lines from the standpoint of liberal theory, if not legal doctrine: An employer can defend a discriminatory hiring practice as a BFOQ where that discriminatory practice is reasonably necessary to support a basic right. To be sure, like any right, the right to bodily privacy has to be grounded in something—in this case, an individual’s legitimate interest (which is no mere preference) in preserving a sense of privacy, personal dignity, and self-respect. Again, though, there is nothing peculiarly perfectionist in these ideas.

Later Yuracko argues that, as in the BFOQ cases, certain sexual harassment cases reveal a judicial concern with ensuring not only that

41. *Id.* at 878.

women have access to jobs but that they have access to the sorts of jobs that promote valuable human development.⁴² This valuable development involves, in particular, the cultivation of rational and intellectual capacities, rather than sexual ones.⁴³ She elaborates:

In other words, courts' neat division of the work world into sex and nonsex jobs and their unwillingness to allow employers to sexualize mainstream jobs, seems driven, at least in part, by an implicit perfectionism that seeks to promote and protect women's ability to develop as intellectual and rational actors by carving out a space for them in the work world where they cannot be formally and explicitly sexualized.⁴⁴

These remarks follow a discussion of two cases involving, respectively, a cocktail waitress and a lobby hostess.⁴⁵ Having worked for several years as a waitress, I can confirm that it is often grueling work; I can also confirm that nothing about it particularly encourages women's ability to develop as intellectual and rational actors. Unless Yuracko means something extraordinarily weak by "intellectual and rational development," these seem odd cases to support her point. Even if the employment at issue in these cases can aid intellectual and rational development, coping with adverse working conditions of the sort these women confronted arguably can also aid such development, and sometimes even more so. Of course, I have no doubt that on balance, smooth working conditions better allow for all sorts of development than do adverse working conditions. Adverse working conditions may be most worrisome, however, not because they preclude women's development, but because they impose special burdens on women's development and, moreover, alter the process of development so that it may not take place as women would choose. These considerations point us to an alternative explanation of the case law: the courts are concerned to protect women's ability to exercise their equal rights to develop as they see fit. Again, nothing peculiarly perfectionist need be involved in such an idea.

Yuracko briefly discusses some empirical studies which may bear out what she takes to be the courts' perfectionist concerns, suggesting that judges may "indeed be right in viewing the explicit sexualization of the workplace as potentially dangerous to other more valuable forms of individual development."⁴⁶ It is unclear how reliable or telling these studies actually are, but what matters for present purposes is that they equally support an alternative explanation of the case law. The danger

42. *Id.* at 879-80.

43. *Id.* at 880.

44. *Id.*

45. *Id.* at 878-80 (discussing *Priest v. Rotary*, 634 F. Supp. 571 (N.D. Cal. 1986), and *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981)).

46. *Id.* at 883.

the courts are concerned to ward off could as well be described as a danger to full and fair exercise of equal rights; and the studies Yuracko summarizes equally bear out that concern. Let me stress that as a normative matter, I think Yuracko has an important insight when she emphasizes both the importance of preserving a realm for individual development and the dangers that sexualization of the workplace creates for women's development in particular. I merely question her claims that perfectionism is necessary to explain judicial decisions, either as (implicit) cause or as justification.

Turning to the second area of the case law, Yuracko tells us that the courts' judgments in cases concerning gender nonconformity also reveal underlying perfectionist ideals. At the same time, they appear more fractured and inconsistent, reflecting "disagreement about the value of different conceptions and expressions of gender and personal identity."⁴⁷ Yuracko acknowledges that some of the courts' decisions may be justified by antisubordination concerns and formal sex-blind equality, yet she insists that neither traditional doctrine can explain adequately the ways in which courts limit antidiscrimination protection: "Ultimately, courts' distinction between protected and unprotected forms of gender bending reflects changing and unsettled judicial judgments about the relative worth of different forms of gender identity expression."⁴⁸

Yuracko notes that subsequent courts, in extending the holding of *Price Waterhouse v. Hopkins*⁴⁹ to protect effeminate men, have substituted for the *Price Waterhouse* antisubordination rationale a formal status-blind trait equality rationale.⁵⁰ The latter, she claims, does not make conceptual sense and is difficult to reconcile with the courts' actual decisionmaking. Yuracko may be right, but it is unclear how her discussion supports her claim that it makes no conceptual sense. Even if it is true that traits and actions are viewed, as she puts it, "through a systematically gendered lens," it does not follow that men and women can never engage in precisely the same behavior or even that it is not clear whether they can. Indeed, the studies she invokes to support the "gendered lens" idea rely on having male and female candidates perform

47. *Id.* at 883.

48. *Id.* at 885.

49. 490 U.S. 228, 250 (1989) (holding that treating a female employee differently for failing to behave in a manner deemed sufficiently feminine constituted sex discrimination).

50. Yuracko, *supra* note 1, at 888.

or act in the same way—for example, by making the same suggestions and arguments.⁵¹ Were we to accept the claim that men and women can never engage in precisely the same behavior, and were we even seriously to doubt whether they can, we would have trouble making sense of the common idea that shifts can occur, and have occurred, in social attitudes toward behavior by men and women; any shift in attitude would have to signal a change of behavior.

Yuracko allows that an analytical basis for the courts' prohibition on sex stereotyping might be found in a "thick conception of sex blindness" which tells employers that they must ignore not only sex but all the ways that gender norms affect how people view various behaviors.⁵² But such a thick conception, she contends, "does not" (cannot?) explain the courts' actual decisions. Otherwise, the courts would have to extend it to men wearing high heels and lipstick or to those who otherwise violate sex-specific manners of dress and grooming. They have not, however, and she claims that this suggests that "more complicated—and contested—value judgments about worthwhile and worthless expressions of gender identity are also playing a role in the decisions. In other words, what appears on the surface to be a liberal antidiscrimination principle may in fact be perfectionism in drag."⁵³ Perhaps, but not necessarily. Judges may simply be biased, uncomfortable, or disinclined to override traditional ideas without a firmer doctrinal mooring. They may think that one's rights or equal opportunity are only violated when one cannot conform or one is being forced to conform in a larger context of discrimination.

The upshot of the foregoing substantive line of challenge is this: it seems that any judicial decision that apparently evidences a perfectionist value judgment can be redescribed, without strain, as evidencing a concern to protect the (equal) exercise of a right. My claim is not that the courts' decisions are instead "driven" by liberal ideas. Rather, it is that the courts' decisions do not appear to support the claim that judges implicitly accept and are driven by perfectionism. What judges say and do is arguably consistent with a number of larger theoretical pictures, liberalism among them.

I do not mean to suggest that what courts say and do can never preclude certain theoretical underpinnings; I simply want to stress two points. First, at a normative level, far more overlap exists between what competing theories prescribe than may be obvious just from looking at the terms of the theories. Second, judges are not moral or political philosophers, and so their decisions will largely underdetermine what we

51. *Id.* at 889.

52. *Id.* at 891.

53. *Id.* at 893.

should say at a more theoretical level. Both of these considerations suggest that legal scholars need to exercise caution when they invoke or rely on normative theory. Of course, it is always open to a legal scholar to argue that we *ought* to accept, for example, perfectionism at a theoretical level—that the virtues of perfectionism as compared with rival normative theories make it the better framework within which to view judicial decisions. But as I have already indicated, I think that, with various qualifications, we ordinarily have some reason to preserve a division of labor with respect to the elaboration and defense of broad normative theories; and not just because the latter enterprise is more the philosopher's bailiwick. Rather, an argumentative strategy of the sort just described may divert energy from developing and defending what will often be a legal scholar's most important doctrinal and normative ideas. It may also fairly invite theoretical attacks irrelevant to what is of real interest from the standpoint of our understanding and assessment of the law. Unless they are careful to spare the theory, legal scholars may spoil the insight.

III. CONCLUSION

I want to end with a general suggestion, namely that Yuracko may be able to make certain key points without all of the theoretical overlay, which I confess strikes me as idle. Adverting to an earlier observation—that even if judicial decisions cannot be explained in terms of doctrine, they might be explicable in terms of liberalism—I would encourage Professor Yuracko to decide on her real target, think about her true aims, and adapt her strategy accordingly. I have spent a good bit of time treating her article as offering a vindicative explanation because it seems to me that this comes closest to reflecting her discussion. I would encourage her, however, to distance herself from the causal claims that seem to attract her; these strike me as problematic. Having done so, she might pursue one or both of the following two projects—and, no doubt, some others besides—each of which seems to capture some of her core ideas and concerns.

Yuracko might undertake a project of conceptual analysis, attempting to show that the traditional doctrinal ideas of status blindness and antisubordination, *as a conceptual matter*, cannot encompass all that the courts have said and done. In doing so, she would need to map out very clearly the conceptual contours of the *doctrine* and then explain why, in order to reach the courts' decisions in the cases she considers, something

more would be required *analytically*. For this, she would need to offer a convincing defense of what that something more is and of how it fills the analytical gaps. As a second possibility, she might undertake a purely normative project, arguing that the courts' decisions are best justified by appealing to certain core values, such as the value of individual development, including development of intellectual and rational capacities. In doing so, she would need to allow that these core values might, at a deeper level, be encompassed by any number of larger normative theories. Of course, the latter normative project would amount to abandoning what appear to be Yuracko's present theoretical ambitions. It would, however, have her employing her important insights in a way arguably better suited to both the normative and practical character of law.