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## Frontiers of Sex Discrimination Law

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## REVIEWS

### FRONTIERS OF SEX DISCRIMINATION LAW

Jessica A. Clarke\*

GENDER NONCONFORMITY AND THE LAW. By Kimberly A. Yuracko.  
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\$85.

#### INTRODUCTION

A short time ago, the argument that discrimination on the basis of sexual orientation is a type of sex discrimination was considered a “risky” tactic that had achieved “little traction” in litigation.<sup>1</sup> One reason was the fear of backlash from those worried that expanding sex discrimination law so far would upset all sex classifications, even those on restroom doors.<sup>2</sup>

The terrain of this debate is shifting rapidly.<sup>3</sup> In 2015, the Equal Employment Opportunity Commission (EEOC) interpreted Title VII’s ban on sex discrimination to prohibit sexual orientation discrimination, for reasons

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1. See Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2089, 2121 (2014) (discussing inattention to the argument that bans on same-sex marriage are discrimination on the basis of sex).

2. See *id.* at 2133–34, 2133 n.170; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 958 (2002) (“Just as the law of race discrimination removed ‘white’ and ‘colored’ signs from schools and water fountains, so, too, the law of sex discrimination would remove ‘men’ and ‘women’ signs from a variety of social practices.”).

3. See Mary Anne Case, *Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1337–54 (2014) (discussing “recent favorable progress in the direction of protection against employment discrimination on grounds of sexual orientation and gender identity in the courts and the EEOC under Title VII”). Federal statutes forbid discrimination because of “sex” in employment and education. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1) (2012); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2012). At present, only twenty states have laws expressly forbidding employment discrimination based on both sexual orientation and gender identity. *State-wide Employment Laws & Policies*, HUM. RTS. CAMPAIGN (Aug. 25, 2016), <http://www.hrc.org/map/pdf?tid=15> [<https://perma.cc/9NMK-2VMU>].

including its assessment that sexual orientation discrimination and harassment “[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms.”<sup>4</sup> Although the EEOC’s opinion does not bind federal courts, it has prompted several to reconsider whether sexual orientation discrimination is a species of sex discrimination.<sup>5</sup> In July 2016, the Seventh Circuit observed that district courts were “beginning to question the doctrinaire distinction between gender nonconformity discrimination and sexual orientation discrimination and coming up short on rational answers.”<sup>6</sup> While it too came up short on rational reasons for the distinction, the Seventh Circuit was unwilling to disturb its pre-*Lawrence v. Texas*<sup>7</sup> precedents holding that sex and sexual orientation discrimination must be distinguished.<sup>8</sup> That circuit is now reconsidering the issue en banc.<sup>9</sup> Other circuits may soon revisit the question as well.<sup>10</sup>

On the restroom front, in March 2016, North Carolina passed a law commonly known as “HB2” requiring that multiple-occupancy restrooms in schools and public agencies be “designated for and only used by persons based on their biological sex.”<sup>11</sup> In response, the Department of Justice sued North Carolina to enforce the Obama Administration’s position that federal laws prohibiting sex discrimination require that individuals be permitted to

4. *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*8 (E.E.O.C. July 15, 2015) (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)).

5. At the time of this writing, four district courts have followed the EEOC’s lead in holding that sexual orientation discrimination is a form of sex discrimination. *EEOC v. Scott Med. Health Ctr.*, No. CV 16-225, 2016 WL 6569233, at \*5 (W.D. Pa. Nov. 4, 2016); *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334, 1346–47 (N.D. Fla. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159–60 (C.D. Cal. 2015); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015).

6. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 703 (7th Cir. 2016), *vacated and reh’g en banc granted*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016).

7. 539 U.S. 558 (2003) (holding that a state may not criminalize private same-sex sexual relationships between consenting adults).

8. *Hively*, 830 F.3d at 718 (“Perhaps the writing is on the wall. . . . But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent.”).

9. *Hively v. Ivy Tech Cmty. Coll.*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016) (granting rehearing en banc).

10. *See, e.g., Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598 (S.D.N.Y. 2016), *appeal docketed*, No. 16-748 (2d Cir. Mar. 9, 2016).

11. Public Facilities Privacy & Security Act, Pub. L. No. 2016-3 § 1.3, 2016 N.C. Sess. Law 3. The statute defines “biological sex” as the designation of male or female on a person’s birth certificate. *Id.* Whether an individual can change the sex designation on her birth certificate depends on the state that issued that birth certificate. *See* Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 381 (2013). Not all states allow changes. *Id.* at 381–82. Most states that do allow changes require surgeries that are cost prohibitive or unnecessary for many transgender people. *See id.* at 400–02, 405–10.

use restrooms in accord with their gender identities.<sup>12</sup> Attorney General Loretta Lynch delivered public remarks condemning North Carolina's action. Addressing the transgender community, she said, "[N]o matter how isolated or scared you may feel today, the Department of Justice and the entire Obama Administration wants you to know that we see you; we stand with you; and we will do everything we can to protect you going forward."<sup>13</sup> Soon after, eleven states brought suit against various federal agencies in a Texas federal court, seeking to preempt any action to enforce the administration's policy.<sup>14</sup> This past year also saw important developments in *G.G. v. Gloucester*, a case challenging a Virginia school board's refusal to allow a transgender boy known by his initials "G.G." to use the boys' restroom at school.<sup>15</sup> Last April, the Fourth Circuit Court of Appeals issued an opinion deferring to the Department of Education's position that its regulations require that schools allow students to use restrooms consistent with their gender identities.<sup>16</sup> As a result of that decision, the school board was ordered to permit G.G. to use the boys' restroom.<sup>17</sup> But the Supreme Court stayed that order and granted the school board's petition for certiorari.<sup>18</sup> Before the Supreme Court could decide the case, the Trump Administration withdrew the Obama Administration's position on restroom use by transgender students.<sup>19</sup> Accordingly, the Supreme Court remanded G.G.'s case to the Fourth

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12. Complaint, *United States v. North Carolina*, 192 F. Supp. 3d 620 (M.D.N.C. 2016) (No. 1:16-cv-00425), 2016 WL 2730796. A number of other parties brought related cases challenging and defending HB2. *Carcaño v. McCrory*, No. 1:16cv236, 2016 WL 4508192, at \*7 (M.D.N.C. Aug. 26, 2016). In August 2016, a district court entered a preliminary injunction preventing the University of North Carolina from enforcing HB2's restroom provisions against certain transgender plaintiffs. *Id.* at \*28–29.

13. Loretta E. Lynch, Attorney General, Remarks at Press Conference Announcing Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals (May 9, 2016) [hereinafter Lynch Remarks], <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint> [<https://perma.cc/3K65-Q7XL>].

14. See *Texas v. United States*, No. 7:16-CV-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016) (granting a nationwide preliminary injunction to block enforcement of the Obama Administration policy).

15. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017).

16. *Id.* at 723.

17. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15CV54, 2016 WL 3581852, at \*1 (E.D. Va. June 23, 2016) (awarding preliminary injunctive relief to G.G. on remand).

18. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (staying the preliminary injunction that would have allowed G.G. to use the boys' restroom); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) (mem.) (granting certiorari).

19. Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Sandra Battle*, U.S. DEPT EDUC. 1 (Feb. 22, 2017), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx> [<https://perma.cc/T33F-6CDW>] (withdrawing the Obama Administration's guidance documents on access to sex-segregated facilities based on gender identity "in order to further and more completely consider the legal issues involved"). As a result, the plaintiffs voluntarily dismissed their claims in *Texas v. United States*. Plaintiffs' Notice of Voluntary Dismissal Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), *Texas v. United States*, No. 7:16-CV-00054-O (N.D. Tex. Mar. 3, 2017).

Circuit so that circuit could reconsider the issues in light of the change in administration policy.<sup>20</sup> It remains uncertain how these recent developments will affect other pending cases on the restroom question.

Courts, advocates, and commentators grappling with these issues would do well to consider Kimberly Yuracko's new book, *Gender Nonconformity and the Law*.<sup>21</sup> This impressive book offers a rigorous and careful survey of developments in sex discrimination law over the past three decades, identifying the principles that explain the law's expansion to protect gender-nonconforming workers. The book's starting point is the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, in which the Court held: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>22</sup> Title VII forbids an employer from acting on gender stereotypes, whether "by assuming or insisting that [employees] match [ ] the stereotype associated with their group."<sup>23</sup> Thus, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."<sup>24</sup>

Yuracko's book is concerned with a puzzle. Courts have been willing to extend *Price Waterhouse's* reasoning to men who face discrimination because they are regarded as effeminate (pp. 18–20), and to individuals who are targets of bias on account of transgender identities (pp. 21–23). But courts have stopped short of protecting the "garden-variety gender bender[ ]" in a series of cases on sex-specific grooming requirements (p. 24). The most notable of these is the Ninth Circuit's 2006 decision in *Jespersen v. Harrah's Operating Co.*<sup>25</sup> In that case, Darlene Jespersen, a female bartender at Harrah's casino, sued after the casino implemented a new grooming code requiring that women, but not men, wear makeup.<sup>26</sup> Jespersen, by all accounts a successful bartender, "did not wear makeup on or off the job" because "it

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20. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017) (mem.). In *G.G.*, the Supreme Court had granted certiorari on two questions: (1) whether the letter setting out the agency's position was owed deference as a matter of administrative law, and (2) whether, even without deference to the agency's interpretation, the school board policy was in violation of Title IX and its implementing regulations. *G.G.*, 137 S. Ct. at 369; Petition for a Writ of Certiorari, at i, Gloucester Cty. Sch. Bd. v. G. G. *ex rel.* Grimm, No. 16-273 (Aug. 29, 2016), 2016 WL 4610979. The Fourth Circuit opinion did not decide the second question; it rested on deference to the agency. *G.G.*, 822 F.3d at 718–24.

21. Kimberly Yuracko is the Judd and Mary Morris Leighton Professor of Law, Northwestern University Pritzker School of Law.

22. 490 U.S. 228, 251 (1989) (plurality opinion) (alteration in original) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

23. *Id.*

24. *Id.* at 250.

25. 444 F.3d 1104, 1109 (9th Cir. 2006) (en banc) ("Our settled law in this circuit, . . . does not support Jespersen's position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a prima facie case [of sex discrimination.]").

26. *Jespersen*, 444 F.3d at 1107.

would conflict with her self-image.”<sup>27</sup> She argued that the new policy would make her feel demeaned and interfere with her ability to do her work.<sup>28</sup> The court did not see this as sex discrimination.<sup>29</sup>

Makeup requirements for women might seem to violate the most basic principle of nondiscrimination—the idea that men and women should be treated the same. But Yuracko’s book explains how courts reject this neutrality principle when it might disrupt conventional gender norms (pp. 44–46). Courts refuse to take the thin, formal concept of sex equality to its logical ends, looking instead to thicker, more socially grounded principles—such as “antidiscrimination,” meaning a commitment to dismantling caste-like systems of hierarchy; “status” protection, meaning the idea that individuals should not be punished for those aspects of their gender identities that are immutable; and “perfectionism,”<sup>30</sup> meaning, for Yuracko’s purposes, the promotion of intellectual flourishing and human development (pp. 9–10). Courts regard makeup requirements as trivial requests for workplace conformity, not as affronts to any deeper principle. By contrast, transgender individuals are more likely to win their cases because courts regard gender identity as immutable—a medical condition that an individual cannot change (pp. 92–95). The same goes for those effeminate men who are penalized for their “way of being in the world” in terms of mannerisms and behavior—aspects of personality that cannot be changed in the same way a worker might change clothes (p. 99).

*Gender Nonconformity and the Law*’s primary contribution is to map out the principles underlying sex discrimination doctrine. Not only does this map lead to solutions to doctrinal puzzles,<sup>31</sup> it also allows readers to undertake their own normative assessments of the “often inexplicit values and beliefs” that might guide the expansion of sex discrimination law to new frontiers (p. 174). Although there is a voluminous literature on the law of sex stereotyping, no other work offers a comparable level of comprehension in explaining the principles that run through the law of gender nonconformity. Yuracko’s book is to be commended for embracing the complexity of this area of law while offering readers clarity and insight.

While description, rather than normative analysis, is the book’s main goal, it sounds a cautionary note about status-protection arguments (pp. 7–8). The premise that sex equality means the right to live in accord with

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27. *Id.* at 1107–08.

28. *Id.* at 1108.

29. *Id.* at 1112.

30. Yuracko refers to “perfectionism” not in the ordinary sense of that term, but as it is used in political philosophy. *See infra* notes 45–46 and accompanying text.

31. This Review will focus on Yuracko’s analysis of the puzzle presented by *Jespersen*. But readers may also wish to consult this book for its insightful answers to two other vexing questions in sex discrimination law: (1) why the law of sex discrimination has expanded while the law of race discrimination remains stagnant, pp. 150–169, and (2) why courts extend the bona fide occupational qualification defense to jobs that involve, as their main task, sexual titillation or privacy, but not to employer efforts to sexualize jobs that entail some other main task, such as waiting tables or working as a flight attendant, pp. 71–87, 115–36.

one's immutable masculine or feminine identity imperils the legal claims of those who, like Darlene Jespersen, seek to defy some of the expectations for feminine behavior without transitioning to a masculine gender identity (pp. 104–05). Worse still, it reinforces the idea that traditional gender identities are innate and natural, the inevitable causes of social practices of gender segregation rather than their effects (pp. 108–09). Yuracko argues that, as courts increasingly require plaintiffs to prove that their gender identities are “fixed, stable, and legally meaningful” to achieve protection, they shut down a “wider range of gender possibilities that might lead to more personally fulfilling lives for individuals and more creative and adaptable environments in the workplace” (p. 174).

This Review will make use of the principles skillfully mapped out in *Gender Nonconformity and the Law* to chart the course of legal developments for LGBT plaintiffs occurring after the book was written. It will ask whether these developments should worry those who seek to expand the social space for gender creativity beyond conventional masculinity and femininity. Part I summarizes Yuracko's typology of theories of gender nondiscrimination, discusses her argument that this body of law is on a trajectory toward protecting status, and explains why the status-protection theory is troubling. Part II examines how these theories have played out in recent cases expanding sex discrimination law to protect against more forms of anti-LGBT discrimination. Yuracko's prescient book offers tools that help explain why sex discrimination arguments have gone from nonstarters to front runners for LGBT rights.

Part II also asks whether the recent cases have continued on the precarious trajectory of status protection. It concludes that status-protection arguments are receding into the background while recent cases emphasize ideas based on neutrality and antisubordination instead. In the transgender rights cases, courts and advocates are foregrounding neutrality arguments bolstered with claims about social stigma that sound in antisubordination theories. These arguments take aim at sex-based classifications that stigmatize transgender people as unworthy of equal concern or respect. Status-based arguments about the immutability of gender identity still appear, generally in response to restroom privacy concerns, but they receive less emphasis. In the cases brought by lesbian and gay plaintiffs, courts are growing increasingly dissatisfied with what they perceive as unfair asymmetries in protection. These courts are turning to neutrality arguments combined with the understanding that systems of subordination based on sex and sexual orientation intersect. These new arguments do not rest on the premise that gender identity or sexual orientation should be protected because it is an immutable status. But it remains to be seen whether these developments will pave the way toward a more gender-creative future.

## I. MAPPING OUT PRINCIPLES OF GENDER NONDISCRIMINATION

Explaining puzzling cases such as *Jespersen* is the primary task of Yuracko's book. It does so by identifying five principles—neutrality, antistatutoryism, status, perfectionism, and expressive freedom—and tracing them through the doctrine. While legal scholarship has long emphasized that sex-stereotyping doctrine protects equality and autonomy,<sup>32</sup> no other work has so carefully explicated the many variations on these principles that have guided judicial decisions over the past three decades. One of this book's many virtues is that it is decidedly uninterested in devising a unified field theory of sex discrimination to neatly explain every legal result. Recognizing the impossibility of such a task, the book embraces the theoretical pluralism that makes patterns difficult to discern in this area of the law, and then carefully reveals the theories at work in creating those patterns. It subjects each potential theory to the test of how it might explain the case law, revealing each explanation's analytical power and limits. In the course of this project, Yuracko demonstrates an enviable ability to select illustrative facts—both real and hypothetical. Although normative analysis is not the book's main purpose, it assesses the normative potential of each of the theories vis-à-vis one another and our instincts about what sort of treatment is fair. This Part will offer a brief summary of Yuracko's explanation of these five principles.

*Neutrality.* The most obvious principle to explain the law of gender nonconformity is neutrality: that likes should be treated alike, or in other words, similarly situated women and men should be treated the same (p. 28). Yuracko argues persuasively that this principle's reach is limited in certain trait-based discrimination cases: those in which “a woman [is] penalized for possessing a trait that a man is not penalized for possessing, and vice versa” (p. 33). In such circumstances, the principle of neutrality yields indeterminate results, because its outcome “depends on how one names the relevant trait at issue and frames the cross-sex comparison” (p. 33). For example, consider a woman fired due to physical limitations resulting from her pregnancy. No male trait is precisely the same as pregnancy, so courts must draw analogies to find similarly situated men. But what sort of conditions that might disable men are comparable to pregnancy? (p. 36). On-the-job or off-the-job injuries?<sup>33</sup> These questions are “conceptually ambiguous, politically loaded, and outcome determinative” (p. 37). This indeterminacy is not limited to biological conditions, because “[i]n a sexist society, virtually

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32. See, e.g., Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2580–82 (1994) (“[I]t is clear that on both an individual level and with respect to women as a whole, dress and appearance have important, albeit complicated, autonomy and equality implications.”); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2 (1995) (“Were [the] distinct meaning of gender to be recaptured in the law, great gains both in analytic clarity and in human liberty and equality might well result.”).

33. See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1348–49 (2015).



nothing done by men and women has precisely the same meaning” (p. 42). Consider a female newscaster fired for failing to meet her network’s standards of attractiveness.<sup>34</sup> How is she to prove that a man with the same level of attractiveness received preferential treatment, if the concept of attractiveness is distorted by gendered social meanings, such that comparisons are apples to oranges? (p. 42).

Sometimes the principle of neutrality takes another form—not insisting on apples-to-apples comparisons, but rather, disapproving of explicit sex-based classifications (p. 44). In the years following the enactment of Title VII, courts relied on this anticlassification principle to invalidate rules expressly excluding women from difficult or dangerous jobs (pp. 31–32). But courts do not pursue the anticlassification theory to its logical ends. A long series of cases accept sex-based grooming rules such as those at issue in *Jespersen*. The burdens of such requirements are viewed as insignificant in comparison to “the perceived value of protecting comfortable gender conventions” (p. 45). As a normative matter, Yuracko questions neutrality as a guiding principle of equality law (p. 47). She tells the story of Shannon Faulkner, the first female cadet at the Citadel, who received the buzz haircut required of all recruits (pp. 48–50). Yuracko sympathizes with the argument that, “while the meaning of the buzz cut on a man is an acceptable masculinity, on a woman it denotes an unacceptable and strange masculinity at odds with appropriate gender norms.”<sup>35</sup> She also argues that if employers are not permitted to implement sex-specific grooming codes, they may narrow the options available to both sexes to those considered professionally acceptable for either sex, with the result of a coerced androgyny that comes at the cost of individual liberty.<sup>36</sup>

*Antisubordination.* The antisubordination theory posits that the aim of equality law is to dismantle caste-like social hierarchies (p. 54). Antisubordination goes far to explain cases such as *Jespersen*. On an antisubordination theory, courts are not troubled by the fact that grooming policies may formally differentiate between men and women. Rather, they ask whether those grooming policies perpetuate patterns of social stratification that give men systematic advantages over women. Thus, courts are likely to disturb sex-specific grooming codes if they impose unequal burdens

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34. *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1209 (8th Cir. 1985).

35. P. 48. The Faulkner case was in the 1990s, and it is important to note that the social meaning of a buzz cut on a woman is dependent on time, place, and context. *See, e.g.*, Marlen Komar, *43 Women With Super Short & Buzzed Hair Who Define Their Own Femininity*, BUSTLE (Mar. 10, 2016), <https://www.bustle.com/articles/142730-43-women-with-super-short-buzzed-hair-who-define-their-own-femininity-photos> [<https://perma.cc/NBJ9-G4VF>] (collecting testimonials from social media regarding women’s varied experiences of having short haircuts).

36. P. 52. For example, rather than allowing all workers to choose whether to have short or long hair, employers who are uncomfortable with male employees with long hair might require both men and women to have short hair. *See* p. 52. Which result is more likely is an empirical question. It is also debatable whether the harm to those who would protest androgyny (such as women who prefer long hair) outweighs the harm to those who would protest gender conformity (such as women who prefer short hair).

by stigmatizing women (pp. 62–63). For example, a requirement that women, but not men, wear special uniforms might give the impression that women are of “lesser professional status than their male colleagues.”<sup>37</sup> By contrast, courts see no stigmatic harm in requirements that reflect conventional gender norms such as the makeup rule in *Jespersen*, because the idea that women should wear makeup is regarded as mundane and benign.<sup>38</sup> Courts may also invalidate gender performance demands that place women in a “double bind” in which conformity with feminine standards is at odds with the demands of the professional role (p. 64). For example, “[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch–22: out of a job if they behave aggressively and out of a job if they do not.”<sup>39</sup> But there’s no catch–22 for female bartenders asked to wear makeup, because judges believe that makeup will help bartenders better appeal to customers (p. 65). Despite the limits of the antisubordination approach, Yuracko regards the theory’s impact as “sweeping” in “gaining women access to jobs throughout the economy and encouraging a critical take on social gender norms” (p. 88).

*Expressive Freedom.* Yuracko devotes a short chapter to the principle of freedom to express one’s gender identity, which she argues has not been, and should not be, accepted by courts. This is because “[t]rue gender freedom is both conceptually complex and practically costly” (pp. 143–44). What if a bartender claimed that the requirement that she smile at customers was inconsistent with her surly masculine gender identity?<sup>40</sup> Based on what principles would a court determine whether smiling is an aspect of gender? As Yuracko explains, “It is impossible to structure protection in a way that both relies on the category of gender and simultaneously transcends any conventional understanding of it” (p. 146). If this principle were to require that employers accommodate all employees’ gender expressions, it would cause major economic disruption, because a wide variety of jobs require attributes considered masculine or feminine, such as being tough or having a nurturing demeanor (p. 146).

*Status.* A status-based principle would protect individuals from discrimination based on immutable traits, defined as those an individual cannot control (pp. 89, 92). A status theory would not protect an individual’s liberty to express her gender in any way that she would prefer; rather, it would save her from demands that she alter aspects of her identity that she cannot control. This theory explains why courts have been particularly solicitous of

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37. P. 62 (quoting *Carroll v. Talman Fed. Sav. & Loan Ass’n of Chi.*, 604 F.2d 1028, 1033 (7th Cir. 1979)).

38. See p. 63.

39. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

40. Pp. 145–46. This hypothetical assumes that the female bartender did not argue that her employer fired female but not male bartenders for failing to smile at customers. Such disparate treatment would offend the neutrality and antisubordination principles, among others.

the claims of plaintiffs who present medical evidence that they experience gender identity disorder (GID), or gender dysphoria.<sup>41</sup> Courts imagine that gender dysphoria means that the plaintiff “has the soul of a female in the body of a male,” or vice versa.<sup>42</sup> On this theory, gender is the new sex. The biological, binary, and fixed concept of sex determined by genitalia or genetics is being eclipsed by the biological, binary, and fixed concept of gender identity, determined by the psyche or soul.

While Yuracko favors the expansion of Title VII to cover transgender plaintiffs (p. 174), she is concerned about the dangerous normative implications of the status-protection theory.<sup>43</sup> “The danger flows from courts’ willingness to entrench and essentialize traditional concepts of gender in the course of providing new protection for nontraditional plaintiffs” (p. 90). The principle gives workers incentives to perform their gender dysphoria by convincing courts that their personalities, aspirations, and behaviors are entirely masculine or feminine (p. 105). Those individuals constructing hybrid, androgynous, or other creatively gendered selves have no chance at legal recognition. “If . . . courts believe that women have female souls and that such souls require women to wear stereotypically feminine clothing, then the pain of women like Jespersen, who seek to challenge some but not all feminine gender conventions, will always be invisible” (p. 108). Moreover, if the law imagines each person has a masculine or feminine soul, it will not see the role of the workplace in producing gender norms. Courts will accept arguments that women are underrepresented in traditionally male-dominated jobs because women are inherently uninterested in masculine work. They will not imagine that workplaces might engage in discrimination that limits women’s expectations and aspirations.<sup>44</sup>

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41. See pp. 93, 201 n.13. The American Psychiatric Association’s Diagnostic Statistical Manual has reclassified “gender identity disorder” as “gender dysphoria,” to “reflect[ ] a change in conceptualization of the disorder’s defining features by emphasizing the phenomenon of ‘gender incongruence’ rather than cross-gender identification per se.” See AM. PSYCHIATRIC ASS’N, HIGHLIGHTS OF CHANGES FROM DSM-IV-TR TO DSM-5, at 14 (2013), <http://www.dsm5.org/documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf> [https://perma.cc/9D4C-KFDW]. This change is meant to clarify that “[t]he experienced gender incongruence and resulting gender dysphoria may take many forms.” *Id.*

42. P. 106 (quoting *Doe ex rel. Doe v. Yunits*, No. 00-1060A, 2001 WL 36648072, at \*1 (Mass. Super. Ct. Feb. 26, 2001)).

43. P. 102. I share this concern, and have written elsewhere against immutability as a theory of discrimination law, arguing that, in addition to essentializing identity, it “often rests on untenable, harsh, intrusive, and stigmatizing judgments about the traits for which individuals should receive blame.” Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 33 (2015). Moreover, discussions of immutability inappropriately focus attention on whether victims of discrimination should be shamed, rather than whether their mistreatment is a practice that perpetuates systematic inequality on the basis of traits such as race, sex, or disability. *Id.* at 85.

44. P. 108 (discussing Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990)). This argument might point to another principle at work: an antiessentialist idea that challenges the assumption that women and men are fundamentally different as workers. See Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1109–10 (2015). This principle understands sex stereotypes as self-fulfilling

*Perfectionism.* Yuracko describes one additional theory that may have some explanatory force in the law of gender nonconformity: a theory of perfectionism, as that term is used in political philosophy (pp. 112–15). At a general level, perfectionism “is the view that some ways of life are intrinsically better than others, and that the state may appropriately act to promote these better ways of life.”<sup>45</sup> Importantly for Yuracko’s account, perfectionism would entail “a belief in the importance for human flourishing of one’s self-development and social treatment as an intellectual, rational actor.”<sup>46</sup> Human flourishing is threatened when workers, particularly women, are treated as sexual objects rather than intellectual subjects. Yuracko argues, based on empirical evidence, that sexualization of women impedes their workplace opportunities and intellectual development (pp. 128–36). This principle explains why, apart from work that is exclusively related to sex, such as pornography, courts balk at efforts by employers to use women’s sexuality to sell goods and services (pp. 118–28). This principle also helps to explain why courts do not extend sex discrimination law to override, for example, a female patient’s desire to have a female healthcare provider in the interests of sexual privacy (pp. 117–18). Yuracko’s perfectionism chapter has more of a normative bent than the others. But, perhaps recognizing the divergence of feminist views on the harms of commodified sexuality, she clarifies that her goal is not a full-throated defense of a perfectionist principle (or any other principle). Rather, she seeks “to uncover the values at work so that they can be subjected to broader social analysis, review, and debate” (p. 136). In this regard, the book is certainly a success.

## II. THE PATH OF RECENT LGBT RIGHTS DEVELOPMENTS

Yuracko’s prescient book offers essential tools for understanding and critiquing recent developments in sex discrimination doctrine. As the legislative movement to clarify the law has stalled, courts and administrative agencies have been pushing the boundaries of the law of gender nonconformity to prohibit all anti-LGBT discrimination. These courts and agencies almost invariably point out that, while anti-LGBT discrimination may not have been the “principal evil” envisioned by Title VII, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable

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prophecies that limit all workers’ aspirations and opportunities. *Id.* at 1106. Yuracko might understand this idea as a variation on neutrality or perfectionist ideas. In any event, her book does not purport to identify every principle at work in this complex area of the law.

45. Pp. 112–13 (quoting Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POL. 633, 634 (2004)).

46. P. 126. Perfectionism might entail other directions for antidiscrimination law as well. See, e.g., KIMBERLY A. YURACKO, *PERFECTIONISM AND CONTEMPORARY FEMINIST VALUES* (2003); Kimberly A. Yuracko, *Perfectionism, Pies and the Politics of Job Qualifications*, 12 REV. J. POL. PHIL. 15 (2016) (reviewing JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (2014)). *Gender Nonconformity and the Law* focuses on the threat sexualization poses to intellectual development and opportunity.

evils.”<sup>47</sup> In the spirit of Yuracko’s careful reading of case law, this Part will examine these most recent cases and ask whether they have continued on a troubling trajectory of status protection. It will discuss, in turn, how these cases reflect and refract commitments to neutrality, status protection, and antisubordination.<sup>48</sup>

### A. Neutrality

The EEOC and other federal agencies have advanced neutrality-based arguments that anti-LGBT discrimination is *per se* sex discrimination, and courts have increasingly accepted these arguments. Yet, as a reader of Yuracko’s book might predict, neutrality arguments sometimes prove indeterminate and run up against entrenched gender norms.

The EEOC regards anti-LGBT bias as sex discrimination *per se*, because it violates the principle of formal equality. In a case involving discrimination against Mia Macy, a transgender woman, the EEOC reasoned:

[I]f [Macy] can prove that the reason that she did not get the job . . . is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex.<sup>49</sup>

With respect to sexual orientation, the EEOC reasons similarly, posing the hypothetical of an employer who “suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk.”<sup>50</sup> If a plaintiff can prove she would have received better treatment if she were a he—that’s sex discrimination.

As Yuracko explains, this formal logic suffers from “nominalism” problems (pp. 36–37). How one names the trait that was the reason for the

47. See, e.g., *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334, 1347 (N.D. Fla. 2016) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998)).

48. Consistent with Yuracko’s assessment, arguments premised on expressive freedom are not doing the work here. Expressive freedom is more likely to be deployed as a straw figure by opponents of expanded rights. For example, in one recent Title VII case, a district judge characterized the EEOC’s argument as one that the plaintiff “be allowed to wear a skirt-suit in order to *express* [her] gender identity,” rather than as a claim for sex equality. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2016 WL 4396083, at \*2 (E.D. Mich. Aug. 18, 2016) (emphasis added), *appeal docketed*, No. 16-2424 (6th Cir. Oct. 13, 2016). This characterization allowed the court to see the dispute in terms of conflicting liberties—the employer’s religious freedom against the employee’s freedom of expression—and to rule in favor of the employer. *Id.* Courts may be more likely to defer to the employer’s liberty interests when value on the other side of the scale is the employee’s liberty interest rather than her right to equality. *Cf.* Clarke, *supra* note 43, at 50–52 (arguing that when “gay rights are cast as liberties, rather than questions of equality” those rights claims are less likely to overcome objections based on religious freedom, because “[w]hen the values at stake sound in the same register, accommodation seems more reasonable.”).

49. *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*10 (E.E.O.C. Apr. 20, 2012).

50. *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*5 (E.E.O.C. July 15, 2015).

discrimination—sex or LGBT status—determines the result of the logical exercise. Employers might argue that they treat transgender men and women the same: had Macy been a man assigned the female sex at birth, rather than a woman assigned the male sex, “he” would have faced the same anti-trans discrimination.<sup>51</sup> Likewise, with respect to the hypothetical married lesbian, one court responded that homosexuality, not sex, was the basis for the employer’s discrimination, because the employee would have been fired had she been a gay man with a photo of his male spouse on his desk, or a bisexual person with a picture of a spouse of any sex.<sup>52</sup>

To add persuasive force to its neutrality arguments, the EEOC draws analogies to religion and race. It argues that Supreme Court precedent requires that every protected trait (race, sex, religion, and so forth) be treated the same.<sup>53</sup> Just as it is discrimination on the basis of religion to punish the convert, so should it be discrimination on the basis of sex to fire an employee because of a gender transition.<sup>54</sup> But those in doubt might ask, is this the right comparison? Does the law prohibit discrimination on the basis of religion for the same reason as discrimination on the basis of sex? Might it protect the religious convert in the interest of ensuring freedom of conscience? Is gender an issue of conscience?<sup>55</sup> With respect to sexual orientation, the EEOC argues that just as it is discrimination on the basis of race to fire an employee for an interracial relationship, so too is it discrimination on the basis of sex to fire an employee for her same-sex relationship.<sup>56</sup> But those in doubt might ask whether opposition to interracial relationships, which is part and parcel of the ideology of white supremacy, is the same as opposition to same-sex relationships. Is opposition to same-sex relationships premised on a view of male supremacy?<sup>57</sup> Neutrality cannot answer these deeper

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51. On the other hand, a plaintiff might show that women and men are treated differently by presenting evidence that women have the latitude to dress as men, but men are not permitted to dress as women. *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (holding that it would have been sex discrimination for a bank to “treat, for credit purposes, a woman who dresses like a man differently than a man who dresses like a woman”).

52. *Winstead*, 197 F. Supp. 3d at 1344 (“Imagine now that the female employee is bisexual. She is married to a man, and her co-worker—who we will assume is heterosexual—is married to a woman. Each keeps a picture of their spouse on their desk. The female employee is suspended not for displaying a photo of her spouse, but rather for *being* bisexual.”). *Winstead* would not accept the neutrality argument, but it did accept the argument that “sexual orientation discrimination is a cognizable form of sex discrimination because it falls under the category of gender stereotype discrimination.” *Id.* at 1344–47.

53. *Baldwin*, 2015 WL 4397641, at \*7 (“Title VII ‘on its face treats each of the enumerated categories’—race, color, religion, sex, and national origin—‘exactly the same.’” (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989))).

54. *Macy*, 2012 WL 1435995, at \*11 (citing *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008)).

55. For an argument that it is, see, for example, David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1005–06 (2002).

56. *Baldwin*, 2015 WL 4397641, at \*6–7.

57. For an argument that it is, see, for example, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 234–35 (1994).

questions. Some thicker understanding of the wrong of gender discrimination is required to make these analogies plausible to skeptics.

As a separate inquiry, some courts ask whether anti-LGBT bias involves impermissible sex stereotyping because it requires, as a first step, that the discriminator classify the plaintiff by sex.<sup>58</sup> One court, while rejecting neutrality arguments, still agreed that animus on the basis of sexual orientation, “whatever its origin, is at its core based on disapproval of certain behaviors (real or assumed) and tendencies towards behaviors, and those behaviors are disapproved of precisely because they are deemed to be ‘inappropriate’ for members of a certain sex or gender.”<sup>59</sup>

Other courts refuse this anticlassification argument and return to neutrality-based thinking about whether men and women are treated the same. In *Hively*, the Seventh Circuit panel put the plaintiff to the task of proving that anti-gay bias could *never* be based on sex-neutral ideas.<sup>60</sup> It speculated that anti-gay bias might sometimes be based on “prejudicial or stereotypical ideas about particular aspects of the gay and lesbian ‘lifestyle,’ including ideas about promiscuity, religious beliefs, spending habits, child-rearing, sexual practices, or politics.”<sup>61</sup> Recent decisions have not insisted on the same showing for transgender plaintiffs, even though transphobia could hypothetically result from similar purportedly sex-neutral ideas. The reasons for this distinction are unclear; perhaps courts imagine that homophobia is driven by opposition to same-sex sexuality, a social phenomenon distinct from gender bias, and they do not imagine opposition to same-sex sexuality motivating anti-trans bias.

Yuracko’s book suggests courts may balk at an anticlassification argument that would forbid any sex- or gender-based reasoning because, if taken seriously, this rule would challenge all sex-based distinctions and gender roles, even those that are conventional and “comforting.”<sup>62</sup> While some may regard the aspiration of race discrimination law as a “colorblind” society in which skin color is no more socially meaningful than eye color, many abhor the idea of a sex-blind society.<sup>63</sup> These concerns may take the shape of fears

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58. Courts sometimes divide the neutrality argument and the stereotyping argument into two separate questions. See, e.g., *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334, 1343–47 (N.D. Fla. 2016).

59. *Id.* at 1346.

60. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 709–10 (7th Cir. 2016) (“Although it seems likely that most of the causes of discrimination based on sexual orientation ultimately stem from employers’ and co-workers’ discomfort with a lesbian woman’s or a gay man’s failure to abide by gender norms, we cannot say that it must be so in all cases.”), *vacated and reh’g en banc granted*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016).

61. *Id.* at 709. Whether any of these reasons for bias, if investigated, would prove sex neutral or independent of sex-role stereotyping is unlikely.

62. P. 46. Suzanne Goldberg has articulated a variation on this argument: “More graphically, it is almost as though there is an internalized sense, on the part of at least some judges, that if sex-based rules were not tolerated on occasion, we would all wind up in unisex tunics, having lost our sexed and gendered bearings.” Goldberg, *supra* note 1, at 2133. She argues that “this fetishization of the law’s power over identity” explains cases like *Jespersen. Id.*

63. See Siegel, *supra* note 2, at 956–59.

of a world of unisex restrooms where women are made vulnerable to male sexual predators, must put up with filth, and lose the “female sociability” of their own private gendered spaces.<sup>64</sup> The strong anticlassification argument may raise concerns about an enforced androgyny that squelches benign gender difference or assimilates all to rules that, while facially neutral, are premised on, and privilege, male experiences, such as a rule requiring both male and female recruits to receive buzz haircuts (p. 48).

Similar concerns have arisen in the HB2 district court’s analysis of the transgender plaintiffs’ motion for a preliminary injunction to allow those plaintiffs to use restrooms consistent with their gender identities.<sup>65</sup> To win a preliminary injunction, a plaintiff must show she is likely to succeed on the merits.<sup>66</sup> Although the court concluded, in light of the precedent established by *G.G.*, that the plaintiffs were likely to succeed on the merits of their Title IX claim,<sup>67</sup> it did not reach the same conclusion on their claim that the North Carolina restroom law is a sex classification that violates equal protection.<sup>68</sup> What seems to be driving this analysis is a concern about how far the anticlassification argument might extend. Under equal protection doctrine, a sex classification is justified if it is substantially related to an important government objective.<sup>69</sup> The district court concluded that the state had an important interest in protecting bodily privacy by segregating restrooms based on genitalia<sup>70</sup> rather than gender identity.<sup>71</sup> It cited the Supreme Court’s case integrating the Virginia Military Academy for the proposition that privacy concerns are related to the fact that “[p]hysical differences between men and women . . . are enduring” and the “two sexes are not fungible.”<sup>72</sup> The district court noted that the law recognizes physical differences between the sexes in

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64. See Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 211, 219 (Harvey Molotch & Laura Norén eds., 2010). Case points out that there is no data to support the claim that unisex restrooms increase crime. *Id.* at 220. She also argues that the “flip side” of the argument that the women’s restroom should be a “safe space” for female sociability is that “the men’s room in some environments can function as something like the executive washroom.” *Id.* at 219–24. I am not aware of data to support the stereotype that men are less sanitary in the restroom, and some expert opinions on the question are to the contrary. See, e.g., Mary Schmich, *Sharing Bathroom with Men Raises Question of Cleanliness*, CHI. TRIB. (Jan. 29, 2016, 5:02 AM), <http://www.chicagotribune.com/news/columnists/schmich/ct-gender-neutral-bathroom-mary-schmich-0129-20160128-column.html> [<https://perma.cc/NSP6-FC22>] (quoting the owner of a commercial cleaning service as saying that the women’s restroom is dirtier “hands down”).

65. See *Carcaño v. McCrory*, No. 1:16cv236, 2016 WL 4508192, at \*1 (M.D.N.C. Aug. 26, 2016).

66. *Id.* at \*10.

67. See *supra* note 16 and accompanying text (discussing *G.G.*).

68. *Carcaño*, 2016 WL 4508192, at \*11–26.

69. See *id.* at \*17.

70. Technically, the North Carolina law relies on birth certificates rather than genitalia, but the court thought that the birth certificate sex designation was a reasonable proxy for genitalia. *Id.* at \*20.

71. *Id.* at \*18.

72. *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).



allowing different physical fitness standards to be applied to male and female job applicants.<sup>73</sup> It found persuasive the plaintiffs' concession that the state had an interest in "ensuring that '12-year-old girls who are not familiar with male anatomy' are not exposed to male genitalia by" adults in restrooms.<sup>74</sup> This concern did not have sufficient force to defeat the motion for a preliminary injunction, however, because prior to HB2, public agencies had allowed transgender individuals to use restrooms consistent with their gender identities through a process of "case-by-case . . . accommodat[ion]" without any privacy-related problems.<sup>75</sup> While the court may have been concerned about the implications of a ruling that would void all sex classifications, it was comfortable with this case-by-case approach.

Nonetheless, the argument that anti-LGBT discrimination violates the principle of sex neutrality is making headway, forcing arguments about whether there are any permissible sex classifications into the realms of defenses and exemptions.<sup>76</sup>

### B. Status Protection

Are these recent cases guided by the principle that LGBT workers and students must be protected because gender identity is immutable? Should those who seek to expand the social space for gender creativity be alarmed? The influence of immutability (or "status" protection, to use Yuracko's term) in recent cases is complicated. In the cases brought by transgender plaintiffs, status-based arguments are made intentionally in response to restroom privacy concerns, but their effect is not necessarily to entrench essentialist concepts of gender. In the sexual orientation cases, status-based arguments are peripheral or absent. And courts are growing dissatisfied with how the doctrine inadvertently promotes essentialist stereotypes about the correspondence of gender nonconformity and lesbian, gay, and bisexual orientations.

Many of the recent transgender rights cases mention medical understandings of gender identity only as background facts, if at all. The EEOC's 2012 *Macy* opinion did not refer to any medical evidence about the plaintiff's gender identity.<sup>77</sup> Like most of the recent cases, it used the term "transgender,"<sup>78</sup> which refers to people whose gender identities differ from the

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73. *Id.* at \*19 (citing *Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016)).

74. *Id.* at \*20.

75. *Id.* at \*7.

76. *See, e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2016 WL 4396083, at \*1-2 (E.D. Mich. Aug. 18, 2016) (concluding that an employer's sex-differentiated dress code was an impermissible form of sex discrimination, but holding that the employer was exempt from suit under the Religious Freedom Restoration Act), *appeal docketed*, No. 16-2424 (6th Cir. Oct. 13, 2016).

77. *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*1 (E.E.O.C. Apr. 20, 2012) (mentioning only that the plaintiff was "a transgender woman" who was, at the time of the alleged discrimination, "in the process of transitioning from male to female").

78. *Id.*

gender identity “typically associated with the sex they were assigned at birth.”<sup>79</sup> The umbrella term “transgender” has eclipsed the narrower term “transsexual,” which refers to people who have changed, or wish to change, their bodies through hormones or surgeries.<sup>80</sup> This shift in nomenclature recognizes more diversity in gender-nonconforming people, although it does not reject the view that gender identity is immutable. To be sure, most federal appeals court cases on whether anti-trans discrimination is sex discrimination involved plaintiffs who cast their conditions in medical terms and expressed the desire to live all aspects of their lives as either male or female.<sup>81</sup> And yet, these opinions do not rely on any status-related reasoning to reach their holdings. One of the most recent, the Eleventh Circuit’s opinion in *Glenn v. Brumby*, even seems to eschew it. There, the plaintiff raised two claims, one alleging sex discrimination and one alleging that her employer discriminated against her due to her medical condition.<sup>82</sup> The court accepted the sex discrimination argument,<sup>83</sup> but did not reach the medical-condition question.<sup>84</sup> Rather than limiting protection to those with GID, the court held that “[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.”<sup>85</sup> Thus, these cases do not dictate the result in *Jespersen*.<sup>86</sup> They do not hold that a woman cannot object to a makeup requirement unless she has the soul of a man. In terms of avoiding status arguments, the sex discrimination route to protection has advantages

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79. *GLAAD Media Reference Guide—Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> [<https://perma.cc/C468-96DG>]. Advocates generally recommend avoidance of terms such as pre- and postoperative, which imply that all transgender people wish to, or ought to have surgery. *Id.*

80. *Id.*

81. *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011) (“Since puberty, Glenn has felt that she is a woman, and in 2005, she was diagnosed with GID, a diagnosis listed in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders.”); *Barnes v. City of Cincinnati*, 401 F.3d 729, 733 (6th Cir. 2005) (beginning the opinion with the explanation that the plaintiff “was living as a pre-operative male-to-female transsexual”); *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004) (“After being diagnosed with GID, Smith began ‘expressing a more feminine appearance on a full-time basis’—including at work—in accordance with international medical protocols for treating GID.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (“Schwenk considered herself a transsexual and . . . she planned to seek sex reassignment surgery in the future.”). A 2000 First Circuit case often cited as recognizing transgender rights simply held that discrimination against a man for wearing women’s attire could be impermissible sex stereotyping under *Price Waterhouse*, with no discussion of any medical evidence, whether the plaintiff’s gender identity was female, or whether he was in the process of transition. *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (denying the defendant’s motion to dismiss).

82. *Glenn*, 663 F.3d at 1314.

83. *Id.* at 1316 (“[D]iscriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause.”).

84. *Id.* at 1314, 1321.

85. *Id.* at 1318.

86. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

over a litigation strategy that would seek a ruling that transgender individuals are themselves a “suspect class.” One of the traditional factors in determining suspect class status is whether a trait is immutable.<sup>87</sup> The sex discrimination argument bypasses that inquiry.<sup>88</sup>

Status considerations come to the surface as transgender plaintiffs advance arguments that they should be treated as women or men for purposes of using sex-segregated restrooms and changing facilities.<sup>89</sup> In *G.G. v. Gloucester*, the legal question was whether, under a regulation allowing schools to segregate restrooms based on sex, schools should determine a student’s sex based on “genitalia” or “gender identity.”<sup>90</sup> G.G. sought a preliminary injunction requiring the school to allow him to use the boys’ restroom.<sup>91</sup> This required that he demonstrate that the balance of hardships tipped in his favor.<sup>92</sup> To do so, G.G. argued that he had been diagnosed with gender dysphoria, “a medical condition characterized by clinically significant distress caused by an incongruence between a person’s gender identity and the person’s birth-assigned sex”; that he had changed his name to a “traditionally male name”; and that he now “lives all aspects of his life as a boy.”<sup>93</sup> He had also undergone hormone therapy, although he had not undergone sex reassignment surgery.<sup>94</sup> To use the girls’ restroom would cause him hardship because it would be inconsistent with his treatment for gender

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87. See Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 559 (2016) (analyzing the immutability argument for transgender status).

88. See, e.g., *Glem*, 663 F.3d at 1316 (holding that discrimination based on “gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause” without assessing whether gender identity is immutable). *But see* *Evancho v. Pine-Richland Sch. Dist.*, No. CV 2:16-01537, 2017 WL 770619, at \*13 (W.D. Pa. Feb. 27, 2017) (reasoning that “gender identity is entirely akin to ‘sex’ as that term has been customarily used in the Equal Protection analysis” because gender identity “is deeply ingrained and inherent” and “neither transitory nor temporary”).

89. See, e.g., *Carcaño v. McCrory*, No. 1:16CV236, 2016 WL 4508192, at \*1 n.1 (M.D.N.C. Aug. 26, 2016) (accepting, for purposes of transgender plaintiffs’ motion for a preliminary injunction allowing them to continue using restrooms consistent with their gender identities, that “some transgender individuals form their gender identity misalignment at a young age and exhibit distinct ‘brain structure, connectivity, and function’ that does not match their birth sex”). Advocates also make use of medical expertise regarding gender dysphoria in cases involving discriminatory denials of healthcare. See Brief Amici Curiae of Transgender Legal Defense and Education Fund et al. in Support of Appellant, *Tovar v. Essentia Health*, No. 16-3186 (8th Cir. Oct. 11, 2016), 2016 WL 6310514.

90. See *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016), *vacated and remanded*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017). The Fourth Circuit concluded that the question of how to determine a child’s sex was left ambiguous by the regulation, and so it deferred to the Department of Education’s interpretation that schools should consider gender identity. *Id.* at 720–21.

91. *Id.* at 715.

92. *Id.* at 724.

93. *Id.* at 715.

94. *Id.*

dysphoria and would result in “severe psychological distress.”<sup>95</sup> In response to the controversy over G.G., the school had constructed three single-stall unisex restrooms.<sup>96</sup> But G.G. argued that being required to use those facilities would “make him feel even more stigmatized” because it would “set[ ] him apart from his peers, and serve[ ] as a daily reminder that the school views him as ‘different.’”<sup>97</sup> As a result of his reluctance to use the restroom at school, G.G. developed “multiple urinary tract infections.”<sup>98</sup>

These arguments were likely made to respond to the district judge’s skepticism about the concept of gender dysphoria in general, and G.G.’s gender dysphoria in particular.<sup>99</sup> Medical expertise may be necessary to rebut the idea that transgender identities are “lifestyle choices” that could be discouraged, or that the appropriate medical response is to persuade a patient to embrace the gender associated with the sex he or she was assigned at birth.<sup>100</sup> This argument also has moral dimensions. As Attorney General Lynch remarked in response to North Carolina’s HB2:

What we must not do—what we must never do—is turn on our neighbors, our family members, our fellow Americans, *for something they cannot control*, and deny what makes them human. This is why none of us can stand by when a state enters the business of legislating identity and insists that a person *pretend to be something they are not . . .*<sup>101</sup>

Part of the harm, on this account, is in forcing people to live inauthentic lives.<sup>102</sup>

These harms are articulated to outweigh the privacy interests in segregating restrooms based on biological notions of sex, as Yuracko explains (p. 96). It is here that her account of perfectionist concerns—a “belief that

95. *Id.* at 716.

96. *Id.* at 733 (Niemeyer, J., dissenting).

97. *Id.* at 716–17 (majority opinion).

98. *Id.* at 717.

99. *Id.* at 726 (discussing comments at oral argument suggesting the judge thought it might have mattered if G.G.’s gender identity was in “his mind” rather than having a “physical” cause, and the judge’s assertions that gender dysphoria itself was a “mental disorder,” despite the attempts of counsel to explain that gender dysphoria does not become a disorder unless it goes untreated).

100. For other views on this question, see, e.g., Paisley Currah, *The Transgender Rights Imaginary*, in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 245, 256 (Martha Albertson Fineman et al. eds., 2009) (arguing that, rather than opposing the medical narrative of transgender identity, “the solution lies in ensuring that the many, often conflicting, narratives of transgender identity that now appear in social and legal arenas continue to circulate and proliferate”); Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 *BERKELEY WOMEN’S L.J.* 15, 32 (2003) (discussing the practical need for legal strategists to use medical knowledge to expand trans rights while “proceed[ing] with caution and work[ing] to reduce the gatekeeping powers of medical experts over us”).

101. Lynch Remarks, *supra* note 13 (emphases added).

102. Part of the harm might also be rooted in libertarian resistance to state efforts to legislate gender identity. And as discussed *infra*, part of the harm is also treating certain people as less than human.

human dignity and flourishing is tied to one's ability to shield one's body and sexuality from unwanted and forced exposure"—has particular explanatory value (p. 116). The district judge in *G.G.* understood “G.G.’s claims of stigma and distress” to be in conflict with “the privacy interests of the other students protected by separate restrooms.”<sup>103</sup> Drawing on cases involving forced nudity in prisons, the court opined that “[m]ost people. . . have a special sense of privacy in their own genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.”<sup>104</sup> The distinction between *G.G.*’s use of the boys’ restroom and a prison strip search is that no student is forced to disrobe in full view of others in a school restroom.<sup>105</sup> Indeed, the school had added additional privacy strips to restroom stall doors and partitions between urinals.<sup>106</sup> The district judge, however, reasoned that “no amount of improvements to the urinals can make them completely private because people sometimes turn while closing their pants.”<sup>107</sup> Also at issue was a worry about sexualization, phrased in terms of safety and child development. A dissenting Fourth Circuit judge argued that these privacy concerns were “linked to safety concerns that could arise from sexual responses prompted by students’ exposure to the private body parts of students of the other biological sex.”<sup>108</sup> The school’s responsibility to protect students from this type of sexualization was “particularly true in an environment where children are still developing, both emotionally and physically.”<sup>109</sup> The Fourth Circuit majority challenged the assumption of universal heterosexuality behind this concept of privacy, noting that “[t]he same safety concern would seem to require segregated restrooms for gay boys and girls.”<sup>110</sup>

The district judge acknowledged that the concept of privacy operating here was not literally about shielding genitals from exposure.<sup>111</sup> Rather, the issue was that some male students would not “be comfortable with [*G.G.*’s]

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103. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 750 (E.D. Va. 2015), *rev’d in part and vacated in part*, 822 F.3d 709 (4th Cir. 2016).

104. *Id.* at 751 (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)).

105. See *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 n.10 (4th Cir. 2016), *vacated and remanded*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017).

106. *Id.* at 716.

107. *G.G.*, 132 F. Supp. 3d at 751.

108. *G.G.*, 822 F.3d at 735 (Niemeyer, J., dissenting).

109. *Id.*

110. *Id.* at 723–24 n.11 (majority opinion). In the HB2 litigation, the district judge preliminarily rejected safety arguments on the grounds that prior to HB2, transgender individuals had used sex segregated restrooms consistent with their gender identities without incident; that public safety was protected by “the sustained validity of peeping, indecent exposure, and trespass laws”; and that the evidence in the record indicated that jurisdictions that had enacted rules allowing transgender individuals to use restrooms consistent with their gender identities had not seen increased restroom crime by “non-transgender predators.” *Carcaño v. McCrory*, No. 1:16CV236, 2016 WL 4508192, at \*27 (M.D.N.C. Aug. 26, 2016).

111. *G.G.*, 132 F. Supp. 3d at 751–52 (acknowledging that the privacy interests at issue were not about “preventing most exposures of genitalia”).

presence in the male restroom,” and, due to their embarrassment, these students might feel compelled to use the school’s unisex restrooms.<sup>112</sup> Yuracko’s book helps us to understand the operative concept of privacy here as a personal one, protecting an individual’s (or community’s) autonomy to make decisions about who will view him or her (or the community’s children) in certain contexts.<sup>113</sup> It is not about privacy in an objective sense. To decide on questions of restroom access, courts weigh these personal privacy interests against the interests of transgender students in using the facilities consistent with their gender identities.

The emphasis on status in this balance of hardships could be cause for concern for those who would prefer that the law challenge the assumptions behind segregated spaces like restrooms, rather than assigning everyone to either the girls’ or the boys’ room.<sup>114</sup> But the changes wrought by the integration of transgender students may be in the direction of increased privacy for all, ultimately reducing the need for sex segregation over the long term. For example, *Students & Parents for Privacy v. United States Department of Education* challenges a settlement between a school district and the Department of Education allowing a transgender girl to use private spaces in a communal girls’ locker room.<sup>115</sup> The Department of Education’s investigation revealed that, even though the school’s changing facilities were sex-segregated, many students still took steps to avoid exposure of their naked bodies.<sup>116</sup> Students did not shower fully naked, and some used a “buddy system” while changing into or out of swimwear, having a friend hold up a towel to create privacy, while others held towels in their mouths.<sup>117</sup> As a result of the Department of Education’s complaint, the school district

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112. *Id.*; see also *Carcaño*, 2016 WL 4508192, at \*3 (“It is also possible that sex-segregated facilities protect against embarrassment from engaging in intimate bodily functions in the immediate vicinity of the opposite sex, regardless of whether one’s body is subject to view.”).

113. P. 118. Yuracko offers the example of cases in which “courts respect elderly women’s preferences to be cared for only by female nurses, even when the same women are simultaneously being treated by male doctors.” P. 118.

114. Arguments against sex-segregated restrooms include that they are sites of violence against gender-nonconforming people; they reinforce the belief that sex is naturally binary; they cause problems for families, especially fathers parenting daughters; they result in longer wait times, most often for women; and they are based in heteronormative ideas of privacy.

115. Verified Complaint for Injunctive & Declaratory Relief, *Students & Parents for Privacy v. U.S. Dep’t of Educ.*, No. 1:16-cv-04945 (N.D. Ill. May 4, 2016), 2016 WL 2591322.

116. Letter from Adele Rapport, Reg’l Dir., U.S. Dep’t of Educ., Office for Civil Rights, to Daniel E. Cates, Superintendent, Twp. High Sch. Dist. 211, at 6 (Nov. 2, 2015), <https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf> [<https://perma.cc/KGA2-95ML>] (finding a school district in violation of Title IX for failing to allow a transgender girl to use the girls’ locker room); see also *Carcaño*, 2016 WL 4508192, at \*4 (discussing the testimony of a North Carolina school district’s diversity officer who was, with respect to locker rooms, “confident that the privacy interests of transgender and non-transgender students alike could be accommodated through the same means used to accommodate any student with body image or shyness issues”).

117. Letter from Adele Rapport to Daniel E. Cates, *supra* note 116, at 6.

agreed to install “privacy curtains” in the girls’ locker rooms “to accommodate [the transgender student] and any other students who wish to be assured of privacy while changing.”<sup>118</sup> As spaces are reconfigured with partitions, walls, and curtains, arguments for sex segregation may begin to lose their force. The requirements of privacy may seem set in stone, but the history of restroom architecture reveals variation in the configuration of public and private spaces in response to changing gender norms.<sup>119</sup>

By contrast to the transgender rights cases, the sexual orientation cases do not rest on any explicit status-protection rationale that would affirm the immutability of lesbian, gay, or bisexual identities.<sup>120</sup> The EEOC and those district courts that have followed that agency’s interpretation have not used any form of status-based reasoning in holding that sexual orientation discrimination is, by definition, sex discrimination.<sup>121</sup> One district court went so far as to explain: “A plaintiff’s ‘actual’ sexual orientation is irrelevant to a Title IX or Title VII claim because it is the biased mind of the alleged discriminator that is the focus of the analysis.”<sup>122</sup>

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118. *Students & Parents for Privacy v. U.S. Dep’t of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at \*4 (N.D. Ill. Oct. 18, 2016) (report and recommendation of magistrate judge). Under the policy, students who desired more privacy than that created by the changing stations in the communal locker room could use “separate, single-use facilities.” *Id.* at \*23. In recommending that the district court deny the plaintiff’s request for a preliminary injunction, the magistrate judge concluded that the right to privacy does not “insulate[ ] a person from coming into contact with someone who is different than they are, or who they fear will act in a way that causes them to be embarrassed or uncomfortable, when there are alternative means for both individuals to protect themselves from such contact, embarrassment, or discomfort.” *Id.* at \*24.

119. Laws requiring sex segregation of public restrooms were first enacted in the late nineteenth century to protect the “Victorian modesty” of working women entering the public sphere, which “was threatened if a woman could even be seen entering the facility.” Terry S. Kogan, *Sex Separation: The Cure-All for Victorian Social Anxiety*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra* note 64, at 145, 159. Some laws went so far as to require that women’s and men’s restrooms have “separate approaches.” *Id.* On university campuses and in many cities today, “all-gender restrooms” are becoming ubiquitous. Aimee Lee Ball, *The Symbols of Change*, N.Y. TIMES, Nov. 8, 2015, at ST1, <http://www.nytimes.com/2015/11/08/style/transgender-restroom-all-gender.html> (on file with *Michigan Law Review*).

120. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which recognized the constitutional right to same-sex marriage, made a brief reference to the view of medical professionals that sexual orientation is immutable, but its holding rested more on the immutable nature of marriage as an institution than on the immutability of sexual orientation. *See Clarke, supra* note 43, at 4 n.2, 26–27 (discussing *Obergefell*, 135 S. Ct. at 2596). For an argument that the premise that sexual orientation is immutable is unscientific, unnecessary, and unjust, see Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities*, 53 J. SEX RES. 363 (2016).

121. *See Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015); *see also EEOC v. Scott Med. Health Ctr.*, No. CV 16-225, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016); *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015); *Issacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015).

122. *Videckis*, 150 F. Supp. 3d at 1159–60.

But no circuit court has yet adopted the EEOC's view. When confronted with discrimination that could be based in both sexual orientation and gender nonconformity, most courts attempt to draw a line between the two,<sup>123</sup> an exercise that reinforces stereotypes in unexpected ways. In a 2006 case, *Vickers v. Fairfield Medical Center*, a plaintiff subjected to anti-gay harassment argued that his mistreatment was sex discrimination because, "in the eyes of his co-workers, his sexual practices, whether real or perceived, did not conform to the traditionally masculine role."<sup>124</sup> The Sixth Circuit held this was not the sort of gender nonconformity protected by Title VII.<sup>125</sup> It reasoned that "*Price Waterhouse* focused principally on characteristics that were readily demonstrable in the workplace, such as the plaintiff's manner of walking and talking at work, as well as her work attire and her hairstyle."<sup>126</sup> *Vickers* had not shown "his appearance or mannerisms on the job were perceived as gender non-conforming in some way."<sup>127</sup> This limitation, the court reasoned, was necessary, lest plaintiffs "bootstrap" protection for sexual orientation into sex discrimination law, a result not intended by Congress.<sup>128</sup> By contrast, in *Prowel v. Wise Business Forms*, the Third Circuit allowed a gay plaintiff to proceed on a sex stereotyping theory because his coworkers had taken notice of his "effeminate" traits, including, among other things, his high voice, manner of sitting with his legs crossed, and interest in interior design.<sup>129</sup> In his 2014 study of judicial opinions on sexuality and sex discrimination, Brian Soucek concluded that the result of this doctrine is that "employees who manifest traits coded as gay in observable ways at work often succeed under Title VII," but when the discrimination is based only on the fact that a coworker knows or suspects a plaintiff is gay, courts refuse to extend protection.<sup>130</sup>

Soucek argues that this doctrine gives workers incentives to "flaunt" their sexual orientation by behaving in ways coded as gay if they want legal protection, a dynamic that "might actually be bolstering perceived differences between gay and straight workers."<sup>131</sup> In a 2016 case, *Hively v. Ivy Tech*

123. Some circuit precedents might be interpreted as holding that any implication of sexual orientation-based prejudice means a plaintiff's sex discrimination claim fails. See *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 705–06 (7th Cir. 2016) (describing these cases as "essentially throw[ing] out the baby with the bathwater"), *vacated and reh'g en banc granted*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016).

124. 453 F.3d 757, 763 (6th Cir. 2006).

125. *Vickers*, 453 F.3d at 763.

126. *Id.*

127. *Id.*

128. *Id.* at 764–65 (discussing *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)).

129. 579 F.3d 285, 291–92 (3d Cir. 2009) (holding there were sufficient facts for a jury to conclude "Prowel was harassed because he did not conform to Wise's vision of how a man should look, speak, and act—rather than harassment based solely on his sexual orientation").

130. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 718 (2014).

131. *Id.* at 783–85.



*Community College*, the Seventh Circuit observed that this doctrine requires that courts “attempt[ ] to identify behaviors that are uniquely attributable to gay men and lesbians.”<sup>132</sup> This “often lead[s] to strange discussions of sexual orientation stereotypes,” such as whether speaking with a lisp is a stereotype associated with women or gay men.<sup>133</sup> The court recognized that it is “an odd state of affairs” that Title VII only protects lesbian, gay, and bisexual plaintiffs “to the extent that those plaintiffs meet society’s stereotypical norms about how gay men or lesbian women look or act.”<sup>134</sup> Echoing Soucek’s conclusions,<sup>135</sup> the court guessed that “neither the proponents nor the opponents of protecting employees from sexual orientation discrimination would be satisfied with a body of case law that protects ‘flamboyant’ gay men and ‘butch’ lesbians but not the lesbian or gay employee who acts and appears straight.”<sup>136</sup> Thus, the doctrine’s effect is to reaffirm, rather than disrupt, essentialist understandings about the linkages between gender non-conformity and marginalized sexual orientations. Although the court was concerned with this absurdity, it did not see a sufficiently “compelling reason” to reverse its many past decisions holding that sexual orientation and sex discrimination must be distinguished.<sup>137</sup> But it acknowledged that “[p]erchance, in time, these inconsistencies will come to be seen as defying practical workability and will lead us to reconsider our precedent.”<sup>138</sup> At the time of this writing, the Seventh Circuit is reconsidering the *Hively* decision.<sup>139</sup>

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132. 830 F.3d 698, 709 (7th Cir. 2016), *vacated and reh’g en banc granted*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016).

133. *Hively*, 830 F.3d at 709 (discussing *Anderson v. Napolitano*, No. 09–60744–CIV, 2010 WL 431898, at \*6 (S.D. Fla. Feb. 8, 2010)).

134. *Id.* at 711.

135. Soucek, *supra* note 130, at 786 (“What this discussion shows is that courts, faced with the Title VII dilemma, yet uncomfortable with the treatment some gays and lesbians experience in the workplace, have crafted a largely unnoticed, de facto [Employment Non-Discrimination Act (ENDA)] of their own. It is an ENDA that no imaginable Congress would pass. And . . . it is quite possibly an ENDA that we should not want.”). ENDA was a proposed law that would have prohibited discrimination on the basis of sexual orientation.

136. *Hively*, 830 F.3d at 715.

137. *Id.* at 718.

138. *Id.*

139. It is possible that a new decision could rest on status-protection arguments. At the en banc oral argument, Judge Posner hinted at an immutability rationale by suggesting that the cause of “lesbianism” is “genetic, or biological, or maybe early childhood effects,” rather than a “casual . . . sort of choice.” Oral Argument at 38:00 to 39:30, *Hively v. Ivy Tech Cmty. Coll.*, No. 15-1720 (7th Cir. argued Nov. 30, 2016), [http://media.ca7.uscourts.gov/sound/2016/nr.15-1720.15-1720\\_11\\_30\\_2016.mp3](http://media.ca7.uscourts.gov/sound/2016/nr.15-1720.15-1720_11_30_2016.mp3) [<https://perma.cc/FY7Q-SM79>]. He went so far as to ask whether the immutability of sexual orientation meant that lesbians were a “different sex” than other women. *Id.* at 38:09. In *Baskin v. Bogan*, 766 F.3d 648, 655 (7th Cir. 2014) (Posner, J.), the Seventh Circuit adopted immutability arguments about sexual orientation in striking down statutes banning same-sex marriage. See Clarke, *supra* note 43, at 34–35 (criticizing *Baskin v. Bogan*’s reliance on immutability).

### C. Antisubordination

Instead of a theory of protection for immutable status, recent cases are beginning to follow another path: bolstering neutrality arguments with variations on antisubordination ideas. While Yuracko is somewhat optimistic about the power of antisubordination theories to challenge gender conventions, she regards them as limited with respect to gender nonconformity (pp. 87–88). This is because the version of antisubordination that she sees manifested in the case law is, for the most part, concerned only with harms to women as a group relative to men as a group. But new versions of the antisubordination argument have emerged in cases brought by LGBT plaintiffs. These cases recognize that sex discrimination law protects everyone from subordinating sex-based classifications, not just women.<sup>140</sup> This Section will explain how these cases (1) see subordination in sex-based classifications that stigmatize LGBT people as less worthy of dignity or respect, and (2) acknowledge how sexism, heterosexism, and transphobia intersect as subordinating systems of bias.<sup>141</sup>

Sex discrimination can stigmatize groups other than “women.” The cases brought by transgender plaintiffs exhibit concern about stigma: the ways that discrimination can brand its targets with a “spoiled identity.”<sup>142</sup> “The harm of stigma is that a single perceived characteristic is seen as ‘disqualifying’ the whole person, excluding him or her from membership in the community that calls itself the ‘normals.’”<sup>143</sup> This exclusion allows a community to set certain people aside and “treat[ ] them as not quite human”<sup>144</sup> or as “less worthy of equal concern or respect” than others.<sup>145</sup> The concept of constitutionally impermissible attributions of stigma has an extensive pedigree in the law of race discrimination,<sup>146</sup> and has recently played a role

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140. See, e.g., *supra* text accompanying notes 85, 122. In *Hively*, the Seventh Circuit panel clarified that it recognizes that “‘Title VII protects persons, not classes’ and that anyone can pursue a claim under Title VII no matter what her gender or sexual orientation or that of her harasser.” 830 F.3d at 707–08. This recognition may underscore the *Hively* court’s dissatisfaction with a doctrine that protects only gender-nonconforming lesbian, gay, and bisexual workers. See *supra* text accompanying notes 127–139.

141. My aim here is to trace the emergence of these theories in the cases and to provide some theoretical context for them. This Review does not attempt a complete defense of these theories.

142. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 2–3 (Simon & Schuster 1986) (1963).

143. Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 286 (1995) (quoting GOFFMAN, *supra* note 142, at 2–5).

144. Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 249 (1983).

145. Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036, 3044–47 (2014) (discussing debates over the concept of stigma in *Brown v. Board of Education*, 347 U.S. 483 (1954), and advancing a theory of discrimination as socially or institutionally empowered practices that express that certain people “are less worthy of equal concern or respect”).

146. See, e.g., R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 864–78 (2004) (tracing the concept of stigma through the Supreme Court’s cases on race discrimination and equal protection).

in the Supreme Court's same-sex marriage cases.<sup>147</sup> Stigmatizing practices concern antistatization theory because they contribute to systems of group-based hierarchy in which members of the stigmatized group are rendered a lower caste and systematically denied equal opportunity.<sup>148</sup>

Stigma does important work in *G.G.* The Fourth Circuit described a school board meeting regarding *G.G.*'s use of the boys' restroom as follows:

Some speakers threatened to vote the Board members out of office if the Board members voted against the proposed policy. Speakers again referred to *G.G.* as a "girl" or "young lady." One speaker called *G.G.* a "freak" and compared him to a person who thinks he is a "dog" and wants to urinate on fire hydrants. Following this second comment period, the Board voted 6–1 to adopt the proposed policy, thereby barring *G.G.* from using the boys' restroom at school.<sup>149</sup>

Despite this context, the district court regarded *G.G.*'s argument about stigma as an expression of his own "feel[ings]."<sup>150</sup> Failing to understand the social meaning of the Board's policy as demeaning to *G.G.*, the district court equated *G.G.*'s stigmatization with the inconvenience of those male students who might have felt compelled to use the unisex restroom to avoid *G.G.*<sup>151</sup> A concurring Fourth Circuit judge, however, saw an obvious difference: "For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for *G.G.*, using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students."<sup>152</sup> It is not

147. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("[L]aws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("The avowed purpose and practical effect of the [Defense of Marriage Act] is to impose a disadvantage, a separate status, and so a stigma on all who enter into same-sex marriages made lawful by the unquestioned authority of the States.").

148. Cf. Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 444–45 (2000) (discussing how stigmatizing practices construct the category of "disability" and lead to systematic denials of opportunity that mark the group of people with disabilities as a "dependent caste").

149. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 716 (4th Cir. 2016) (citations omitted), *vacated and remanded*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017).

150. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 752 (E.D. Va. 2015) (holding that *G.G.*'s declaration had "fail[ed]" to articulate the specific harms that would occur to him if he uses [the unisex] restrooms while this litigation proceeds" because "it simply sa[id] that using these restrooms would cause him distress and make him feel stigmatized"), *rev'd in part and vacated in part*, 822 F.3d 709 (4th Cir. 2016).

151. *Id.* ("It does not occur to *G.G.* that other students may experience feelings of exclusion when they can no longer use the restrooms they were accustomed to using because they feel that *G.G.*'s presence in the male restroom violates their privacy."). *G.G.* had in fact used the boys' restroom for seven weeks without hearing any complaints from other students. *Id.* at 740, 751. But the district judge speculated that "[i]t would not be surprising if students, rather than confronting *G.G.* himself, expressed their discomfort to their parents who then went to the School Board." *Id.* at 751.

152. *G.G.*, 822 F.3d at 729 (Davis, J., concurring).

that unisex restrooms are inherently stigmatizing. Rather, in this social context, requiring a transgender student to use unisex restrooms denies his gender identity and is a discriminatory practice linked to the systematic denial of the humanity of transgender people.

As the Department of Justice's complaint against North Carolina argued, "[C]ompliance with and implementation of H.B. 2 stigmatizes and singles out transgender employees, results in their isolation and exclusion, and perpetuates a sense they are not worthy of equal treatment and respect."<sup>153</sup> In her speech about HB2, Attorney General Lynch drew a connection to Jim Crow-era policies, arguing that "[i]t was not so very long ago that states, including North Carolina, had signs above restrooms, water fountains and on public accommodations keeping people out based upon a distinction without a difference."<sup>154</sup> Lynch implored, "Let us not act out of fear and misunderstanding, but out of the values of inclusion, diversity and regard for all that make our country great."<sup>155</sup> The use of restroom policies to stigmatize transgender students and workers is thus analogized to racial stigma, although it is not a form of race discrimination. It is a form of sex discrimination because it uses sex classifications to subordinate transgender people.

The recent sexual orientation cases include antisubordination threads of a different nature, in the form of arguments linking heterosexism to social systems of subordination based on sex.<sup>156</sup> To be sure, the EEOC's *Baldwin v. Foxx* decision relied on neutrality arguments and neglected to articulate how sexual orientation discrimination relates to sexism.<sup>157</sup> But the intersections have not been lost on federal courts. Because gender stereotypes and discrimination on the basis of sexual orientation are tightly intertwined, many courts have expressed frustration with the "exceptionally difficult" task of drawing a line between them.<sup>158</sup> Courts are beginning to give up.<sup>159</sup> This is not just because a legal test has proven unmanageable. It is also because

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153. Complaint at 9, *United States v. North Carolina*, 192 F. Supp. 3d 620 (M.D.N.C. 2016) (No. 1:16-cv-00425), 2016 WL 2730796.

154. Lynch Remarks, *supra* note 13.

155. *Id.*

156. Legal theorists have long advanced such arguments. See, e.g., Koppelman, *supra* note 57, at 234–55; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187.

157. See Recent Adjudication, *Employment Law—Title VII—EEOC Extends Work-Place Protections to Gay and Lesbian Employees—Complainant v. Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015), 129 HARV. L. REV. 618, 620–25 (2015) (making this point).

158. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 709 (7th Cir. 2016) (citing cases from various circuits reflecting on the elusiveness of this distinction), *vacated and reh'g en banc granted*, No. 15-1720 (7th Cir. Oct. 11, 2016); *Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 619 (S.D.N.Y. 2016) (citing more such examples), *appeal docketed*, No. 16-748 (2d Cir. Mar. 9, 2016).

159. *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) ("Simply put, the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct.")

courts are connecting sexual orientation–based discrimination with ascription of traditional gender roles. As the Seventh Circuit explained:

Discrimination against gay, lesbian, and bisexual employees comes about because their behavior is seen as failing to comply with the quintessential gender stereotype about what men and women ought to do—for example, that men should have romantic and sexual relationships only with women, and women should have romantic and sexual relationships only with men. . . . Lesbian women and gay men upend our gender paradigms by their very status—causing us to question and casting into doubt antiquated and anachronistic ideas about what roles men and women should play in their relationships. Who is dominant and who is submissive? Who is charged with earning a living and who makes a home? Who is a father and who a mother? In this way the roots of sexual orientation discrimination and gender discrimination wrap around each other inextricably.<sup>160</sup>

Drawing similar connections in support of the argument that sexual orientation discrimination is sex discrimination, one district court cited *Weinberger v. Wiesenfeld*,<sup>161</sup> a 1975 sex discrimination case rejecting the “‘archaic and overbroad’ generalization . . . that male workers’ earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families’ support.”<sup>162</sup> *Wiesenfeld* was an equal protection case brought by a father denied widow’s benefits.<sup>163</sup> The Supreme Court’s equal protection precedents target stereotypes about both men and women because “[s]tereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men.”<sup>164</sup> It is not just that these stereotypes threaten one’s liberty to choose a life free of predetermined roles; it is that they “create[ ] a self-fulfilling cycle of discrimination” that locks women out of the workplace and reinforces their subordinate status.<sup>165</sup> More courts may one day be persuaded by neutrality arguments against sex-differentiated treatment, alongside this thicker understanding of the ways heterosexism reinforces gender roles and subordinating social hierarchies.

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160. *Hively*, 830 F.3d at 705–06.

161. 420 U.S. 636 (1975).

162. *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334, 1345 (N.D. Fla. 2016) (quoting *Wiesenfeld*, 420 U.S. at 643).

163. *Wiesenfeld*, 420 U.S. at 639–41.

164. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736–37 (2003) (holding that, pursuant to the Fourteenth Amendment, Congress may enact a gender-neutral family leave law to remedy state discrimination in providing only maternity, but not paternity leave).

165. *Id.* at 736; see also *id.* at 729 (linking these stereotypes to the long history of laws excluding women from employment opportunities); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 120 (2010) (discussing how, in the 1970s, “[a]nti-stereotyping arguments enabled [then-women’s rights advocate Ruth Bader] Ginsburg to foreground the state’s enforcement of the male breadwinner-female caregiver model—a set of practices that was not visible in the canonical race discrimination cases but had long entrenched women’s secondary status in the American legal system.”).

Might such arguments be of use to plaintiffs like Darlene Jespersen? On the one hand, many judges may continue to see conventional gendered grooming requirements as too trivial to implicate concerns about systemic social stigma or gender roles.<sup>166</sup> On the other hand, as a dissenting judge in *Jespersen* wrote: “The inescapable message [of the makeup requirement] is that women’s undoctored faces compare unfavorably to men’s, not because of a physical difference between men’s and women’s faces, but because of a cultural assumption—and gender-based stereotype—that women’s faces are incomplete, unattractive, or unprofessional without full makeup.”<sup>167</sup> Feminists have long argued that such gender-based stereotypes stem from a sexist ideology in which women are judged primarily for their appearances. Whether this argument has any cultural traction in an era in which a former beauty-pageant owner has been elected President of the United States is uncertain. But perhaps it might gain legal plausibility as LGBT litigants show there is nothing to fear from challenges to sex classifications.

#### CONCLUSION

*Gender Nonconformity and the Law* is an essential book for anyone wishing to understand recent developments in the law of sex discrimination. While normative assessment is not the book’s main purpose, it offers the important warning that status-protection arguments will only lead to protection for conventional and binary versions of masculinity and femininity, rather than a wider range of gender possibilities. This Review illustrates that, while status-protection arguments have been in the background of recent legal victories for LGBT plaintiffs, the cases also evince reliance on neutrality arguments and variations of the antistatutory principle. Courts, advocates, and scholars might further develop and refine these antistatutory ideas to advance the sex discrimination argument against anti-LGBT bias. It remains possible, though, that the doctrine will revert to the lodestar of status protection. It is also possible that recent progress will be reversed as a new presidential administration directs executive agencies to cede the terrain entirely to individual employers and local school districts. In any event, as advocates and courts push the law of sex stereotyping to new frontiers, they would be wise to consider Yuracko’s warning about the dangers of status-based understandings of equality, and to ask whether there might be other paths forward.

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166. The panel opinion in *Hively* suggests grooming is trivial in its lament:

Title VII leaves us with a somewhat odd body of case law that protects a lesbian who faces discrimination because she fails to meet some superficial gender norms—wearing pants instead of dresses, having short hair, not wearing make up—but not a lesbian who meets cosmetic gender norms, but violates the most essential of gender stereotypes by marrying another woman.

*Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 715 (7th Cir. 2016), *vacated and reh’g en banc granted*, No. 15-1720 (7th Cir. Oct. 11, 2016).

167. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1116 (9th Cir. 2006) (en banc) (Pregerson, J., dissenting).