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The “Lower” Federal Courts: Judging in a Time of Trump*

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The scenes that unfolded in courtrooms across the country in the days and weeks after the inauguration of President Trump were unfamiliar to me, even though I had been a United States district judge for seventeen years. The new President had announced a “travel ban” shortly after taking office.¹ The ban was wideranging. It suspended entry of foreign nationals from seven countries for 90 days,² halted the U.S. refugee resettlement program for 120 days,³ indefinitely suspended resettlement of Syrian refugees,⁴ reduced the cap on the number of refugees that can be accepted into the United States,⁵ and suggested that Christians and others from minority religions be granted priority over Muslims.⁶ The policy, reportedly drafted without input from key officials and lawmakers,⁷ went into effect immediately, sweeping within it visa holders and lawful permanent residents, some in midflight to the United States. It was immediately challenged in district courts across the country; one entered a national injunction.⁸ In short order, the Ninth Circuit denied the Government’s emergency motion for a stay pending appeal.⁹

Rather than continuing to litigate the original order, the Government revoked it and issued a new one. A second ban was implemented¹⁰—this time apparently with the help of government lawyers.¹¹ It dropped Iraq from the list of targeted countries,¹² exempted legal permanent residents and valid visa holders,¹³ removed the indefinite restriction on the admission of Syrian refugees,¹⁴ and omitted the language offering preferential status to persecuted religious minorities.¹⁵ Yet, despite the changes, the revised ban was again enjoined by district courts in the Fourth and Ninth Circuits¹⁶

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1. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

2. *Id.* § 3(c).

3. *Id.* § 5(a), (d).

4. *Id.* § 5(c).

5. *Id.* § 5(d).

6. *See id.* § 5(e).

7. Ron Nixon, *Travel Ban Caught Homeland Security by Surprise, Report Concludes*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/us/politics/homeland-security-travel-ban-inspector-general.html> [<https://perma.cc/STD6-RDKG>].

8. *Washington v. Trump*, 2017 WL 462040 (W.D. Wash., Feb. 3, 2017).

9. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

10. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

11. Ariane de Vogue & Tal Kopan, *New Trump Travel Ban Order Nearing Completion*, CNN (Feb. 21, 2017, 9:16 AM), <https://www.cnn.com/2017/02/20/politics/trump-new-executive-order-immigration/index.html> [<https://perma.cc/2V9J-TG78>].

12. Exec. Order No. 13,780 § 1(g)–(i), 82 Fed. Reg. at 13,211–12.

13. *Id.* § 3(b).

14. *Id.* § 6(a).

15. *Compare* Exec. Order No. 13,769 § 5(e), 82 Fed. Reg. at 8979, *with* Exec. Order No. 13,780 § 3(c), 82 Fed. Reg. at 13,214–15.

16. *Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw 2017) (entering preliminary

and upheld by their respective courts of appeals.¹⁷ The Supreme Court granted certiorari, put the case on the October 2017 calendar, and lifted the bans with some exceptions.¹⁸ The Court held that a travel ban could only apply to refugees and travelers without a “bona fide” relationship to a person or entity in the United States.¹⁹

It was an unfamiliar scene to me on a number of levels: The plaintiffs requested a preliminary injunction, an area which the Supreme Court acknowledged involved “an exercise of discretion and judgment.”²⁰ In determining whether to issue an injunction, a court is charged with balancing the equities—the irreparable harm to the parties if the ban were implemented or to the government if it were suspended, the public interest which was arguably implicated on both sides of the case, and the likelihood of success on the merits of the claim.²¹ The outcome was not a foregone conclusion: On the one hand, the executive bans were stunning in their breadth and in the speed with which they were issued—with little or no process let alone attention to detail. The comments made by the President while campaigning strongly suggested religious and national origin discrimination had motivated the implementation of the bans. On the other hand, the bans concerned an area in which the President had substantial independent authority, namely, his significant power to set national security priorities and to exercise control over national borders.

In ordinary times, I would have expected a different result. Since a preliminary injunction is all about deference and judgment, I would have expected courts to defer to the President in a host of ways, to trivialize the irreparable harm to the plaintiffs, and to dramatize the costs to national security. I am not suggesting that that would have been the correct result—on the contrary—only that it would have been a typical one.

The reaction of the lower courts to the travel ban, no matter what the party affiliation of the judge or who the appointing authority was, made me consider whether judging in 2017, what I call “judging in a time of Trump,” will look different than the judging I was used to. I had been a U.S. district judge for seventeen years, from 1994 to 2011; I am in the process of writing about that experience.

There is substantial literature about the role of context in judicial decision making.²² Context could mean considering the relative positions of power of parties in a

injunction); *Hawaii v. Trump* 241 F. Supp. 3d 1119, (D. Haw. 2017) (entering temporary restraining order); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, (D. Md. 2017).

17. *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

18. *Trump v. Int’l Refugee Assistance Project v. Hawaii*, 137 S. Ct. 2080 (2017) (per curiam).

19. *Id.* at 2088.

20. *Id.* at 2087.

21. *See id.*; *see also* FED. R. CIV. P. 65.

22. *See, e.g.*, BENJAMIN NATHAN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 103–04 (1921); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983); Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990). *See generally* Trinyan Mariano, *Legal Realism and the Rhetoric of Judicial Neutrality: Richard Wright’s Challenge to American Jurisprudence*, 1 BRIT. J. AM. LEGAL STUD. 467, 472 (2012).

lawsuit, examining the actual impact of a judicial decision, or looking at the case through an even broader lens, namely the political context of the litigation.²³ To use the most graphic example, judging in a time of war is arguably different from judging in peace time—different balances, different considerations.

What was the context in which the travel ban decisions were made? The bans were the work of a President that—at least from the media—appeared to have no appreciation of constitutional checks and balances, let alone the role of the courts. He questioned the impartiality of Judge Gonzalo Curiel, then presiding over a case against Trump University because of Curiel’s “Mexican heritage” even though Judge Curiel was born in Indiana.²⁴ He had no sense of the limits of his own authority. He has threatened to withhold funds from so-called sanctuary cities, notwithstanding congressional directives and Tenth Amendment limitations.²⁵ He has been accused not simply of flouting constitutional rules but also constitutional norms.²⁶ He reportedly suggested that the head of the FBI, a somewhat autonomous agency, was supposed to be “loyal” to him.²⁷ The challenges to checks and balances, to the separation of powers, even to elementary notions of federalism, were not abstract but concrete, not aberrant but systemic.

Do these considerations figure into the process of judging in a time of Trump, especially in cases like the travel ban preliminary injunction cases where judicial discretion and judgment is explicitly involved? My question is not the narrow one, about the admission of certain kinds of evidence, namely, whether courts evaluating the travel ban could consider what Trump had said on the campaign trail. It is about whether judging at a time when the systems of government seem to be working for the most part, looks different from judging when there is a concern of real executive overreach. The ordinary work of judging involves judgment at all levels; contrary to the legal formalists, the law does not enforce itself. Choice is everywhere as Justice Cardozo described: “There is nothing that can relieve us of the pain of choosing at every turn.”²⁸ And in that work—those choices, that balancing, the exercise of that discretion, the interpretation of often ambiguous provisions and decisional law that

23. Larry DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN. ST. L. REV. 397 (2004); Minow & Spelman, *supra* note 22, at 1598–99, 1602–03.

24. Nina Totenberg, *Who Is Judge Gonzalo Curiel, the Man Trump Attacked for His Mexican Ancestry?*, NPR (June 7, 2016), <http://www.npr.org/2016/06/07/481140881/who-is-judge-gonzalo-curiel-the-man-trump-attacked-for-his-mexican-ancestry> [https://perma.cc/42AB-CQC7].

25. Darla Cameron, *How Sanctuary Cities Work, and How Trump’s Stalled Executive Order Might Affect Them*, WASH. POST (Apr. 26, 2017), <https://www.washingtonpost.com/graphics/national/sanctuary-cities> [https://perma.cc/JWU7-KK54].

26. Adam Liptak, *Donald Trump Could Threaten U.S. Rule of Law, Scholars Say*, N.Y. TIMES (June 3, 2016), <https://www.nytimes.com/2016/06/04/us/politics/donald-trump-constitution-power.html> [https://perma.cc/XD8W-87YM].

27. Massimo Calabresi, *Donald Trump’s Loyalty Pledge for the FBI Challenges the Nation*, TIME (June 8, 2017), <http://time.com/4810490/donald-trump-fbi-loyalty-pledge> [https://perma.cc/92LY-MBM4].

28. BENJAMIN CARDOZO, THE GROWTH OF THE LAW (1924), *reprinted in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 185 (Margaret E. Hall ed., 1947) (discussing how courts cannot escape the obligation and pain of choosing).

judges must do—does the Trump context play a role, explicitly or not? More important, should it?

To be sure, I offer only preliminary thoughts in this Essay. The Trump presidency is young. There are multiple challenges to multiple executive decisions and orders in courts across the country. A full treatment would take the reader into the robust literature on judicial decision making about context and pragmatism, with historical comparisons to other epochs where the challenges were comparable, even to empirical analyses of judging at different periods of time.

I start with judging in “ordinary” times, the period during which I served. I then describe the challenges of judging in a time of Trump, and I conclude by illuminating the implications of those challenges perhaps for judicial education, law schools, and advocacy.

JUDGING IN “ORDINARY” TIMES

The “lower” federal courts are not just the way stations you have to pass through the get to the Supreme Court. They are—or are at least supposed to be—common law courts considering new constitutional issues on the merits, prefiguring arguments that may one day be appealed to the Supreme Court, and shaping the way justice is actually delivered in the vast majority of cases.

Too often lower federal courts have behaved otherwise, in what I have called “duck, avoid, or evade.”²⁹ They have resorted to a host of doctrines that narrow access to justice and they have created a set of procedural trip wires to avoid dealing with substantive issues on the merits. In so doing, they have reduced certain kinds of cases—notably, civil rights cases and police misconduct litigation—to kabuki rituals in which the plaintiffs, and plaintiffs alone, regularly lose long before trial. As I wrote:

These were pressures—or better yet incentives—that cut across the usual political and ideological lines other scholars have written about. While they were presented to us as efficiency measures, and neutral in their impact, they in fact affected the way the job of judging was done, and, advertently or inadvertently, the outcomes. Indeed, in my view, the result of “duck, avoid, and evade” was a bench that seemed to be more reticent about the exercise of judicial power at all than were prior generations of judges. This was a passive judiciary, even timid, all the more extraordinary for being the first independent judiciary in the world.³⁰

And these tendencies cut across the appointing president, the party affiliation, and so on.³¹

29. Nancy Gertner, *Opinions I Should Have Written*, 110 NW. U. L. REV. 423, 428 (2016).

30. *Id.* at 426–27.

31. Even when courts do not “duck, avoid, and evade,” when they engage with the issues on the merits, too often, rather than considering new constitutional concepts and new applications, they excuse constitutional violations as harmless or narrow their application anticipating that that is the direction in which a more conservative Supreme Court is likely to go. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

This was not appropriate judicial restraint, as the concept is usually understood.³² What I saw were pressures to avoid principled decision making of any kind, to avoid making the kind of reasoned judgments with which common law judges were supposed to be involved.

There are many explanations for this, which I have offered in other articles.³³ There are caseload pressures, or at the least, the appearance of caseload pressures. Caseload pressure leads to what has been described as “managerial judging,” where judging privileges moving cases and engaging in dispute resolution, rather than generating common law decisions.³⁴ Since the concern for efficiency provides the incentive for judges to eschew writing opinions, unless they have to as a matter of law, as in the case of the grant of summary judgment, a body of law evolves which is one-sided, asymmetric. As I describe it, with reference to Title VII law:

When the defendant successfully moves for summary judgment in a discrimination case, the case is over. [Under the Rules], the judge must “state on the record the reasons for granting or denying the motion,” which means writing a decision. But when the plaintiff wins, the judge typically writes a single word of endorsement—“denied”—and the case moves on to trial. . . .

The result of this practice—written decisions only when plaintiffs lose—is the evolution of a one-sided body of law. Decision after decision grants summary judgment to the defendant After the district court has described—cogently and persuasively, perhaps even for publication—why the plaintiff loses, the case may or may not be appealed. If it is not, it stands as yet another compelling account of a flawed discrimination claim. If it is appealed, the odds are good that the circuit court will affirm the district court’s pessimistic assessment of the plaintiff’s case.³⁵

Over time, the way judges view these cases changes: “If case after case recites the facts that do not amount to discrimination, it is no surprise that the decision makers have a hard time envisioning the facts that may well comprise discrimination. Worse, they may come to believe that most claims are trivial.”³⁶ Even statistics about judicial

32. Bickel, for example, characterized judicial restraint as avoiding constitutional questions with which the country was not yet ready to deal. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 133–43 (2d ed. 1986).

33. Nancy Gertner, *The Judicial Repeal of the Johnson/Kennedy Administration’s “Signature” Achievement*, in *A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50*, at 165–83 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015); Nancy Gertner, *Losers’ Rules*, 122 *YALE L.J. ONLINE* 109, 116–23 (2012), http://www.yalelawjournal.org/pdf/1111_aau9fyvc.pdf [hereinafter Gertner, *Losers’ Rules*]; Gertner, *supra* note 29.

34. Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374 (1982) (describing the extent to which the judge was a manager and pointing out the negative consequences of that approach).

35. Gertner, *Losers’ Rules*, *supra* note 33, at 113–14.

36. *Id.* at 115. Similar observations have been made about criminal sentencing, Margaret Truesdale, Note, *Pro-Prosecution Doctrinal Drift in Criminal Sentencing*, 111 *NW. U. L. REV.* 1131 (2017), and about case load pressures in appellate dockets, Martin K. Levy, *Judging Justice on Appeal*, 123 *YALE L.J.* 2386, 2386 (2014) (noting that the cases receiving less attention than others are social security cases, prisoner cases, and criminal

decision making—the reports required by the Civil Justice Reform Act of 1990 that list motions pending over six months and cases over three years³⁷—affect substantive outcomes.³⁸ As Professor Harold Koh described: “When you cannot measure what is important, you tend to make important what you can measure.”³⁹ Concerns about the costs of litigation and delay have become far more important than concerns about access to justice.

Another explanation for the evolution of discrimination and civil rights law, however, may be context—the changing political and social context in which civil rights claims are heard. An asymmetric decision-making process—formal opinions in civil rights cases only when the plaintiff loses—leads to decision rules that provide a blueprint for the judge to grant summary judgment or dismiss a complaint in case after case. Over time, the decisional law evolves, in this case narrowing the statute’s reach to cases of intentional discrimination. That understanding of the law maps onto what may be a prevailing political view, namely that the market was working fairly, for the most part, that the country was post-race and post-gender. The focus of the civil rights law was to identify the aberrant individuals who did not get the antidiscrimination message and fewer and fewer cases met that test.

I would suggest that the early Title VII cases, decided in the context of the civil rights demonstrations and beatings of the 1960s and the women’s rights movement of the 1970s, provided a different context and led to different outcomes. To be sure, many of the cases were blatant—explicit discrimination in the job descriptions of help wanted ads and explicit comments by employers—and that shaped the courts’ understanding of the issues. The media was filled with narrative of discrimination. The market was plainly not working; it was discriminating against women and minorities in overt ways. What Susan Sturm has described as “second generation” discrimination⁴⁰ is more subtle and complex—a pattern of interaction among groups that operates over time to exclude minorities and is difficult to trace to the intentional actions of aberrant actors. But today’s context—the belief that the problems of race and gender have been solved and that cost and delay are more important than access to justice—provides a disincentive for judges to probe very deeply into the case, let alone to give the plaintiffs time and meaningful discovery to prove their case.

cases, which the author describes as cases brought by parties who are arguably the most vulnerable); *see also* Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1116–33 (2011) (comparing circuit courts with suddenly high docket loads to those with normal docket loads and the impact on different categories of cases).

37. 28 U.S.C. § 476 (2012).

38. *See* Miguel de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *Against Judicial Accountability: Evidence From the Six Month List* (Feb. 25, 2018) (unpublished manuscript), <https://ssrn.com/abstract=2989777> [<https://perma.cc/DR7S-UWC5>] (finding that plaintiffs win a smaller fraction of cases that close just before the six-month list is compiled).

39. Harold Hongju Koh, *The Just, Speedy, and Inexpensive Determination of Every Action?*, 162 U. PA. L. REV. 1525, 1529 (2014).

40. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

JUDGING IN A TIME OF TRUMP

After the election of President Trump, I was concerned not only about what the President did—the executive orders that he enacted—but also about the official conduct he enabled and even encouraged. The media reported changes in the way border officials dealt with noncitizens.⁴¹ To an audience of police officers, the President seemed to endorse police brutality.⁴² I predicted a plethora of cases raising civil rights and discrimination claims against post-Trump government officials, not just the big cases, the ones that garner amicus briefs and media attention like the travel ban, but the little cases in the cities and towns of our country, the cases that were a federal court’s regular fare. At the same time I was pessimistic about the extent to which courts would serve as a meaningful backstop to official abuse, given what I had observed in my tenure. I was pessimistic even as the need for robust judicial review was even more urgent. This was so not simply because of the failure of checks and balances in the usual sense—one-party control of Congress and the Presidency. It was so because of the media reports that other checks were being undermined—an independent civil service,⁴³ a relatively independent Department of Justice.⁴⁴

But now I am not so certain about the courts. I began to believe that to some degree—I don’t want to overstate this—“judging in a time of Trump” has a different resonance than when I was on the bench. It was one thing to duck, avoid, and evade when you believe that the system is working, when official actors are acting more or less within legal and constitutional bounds. It is another to do so when you are concerned about real overreach at all executive levels. Typically, judges deal with “slippery slope” arguments in connection with judicial line drawing, “that a particular act [or judicial line], seemingly innocuous when taken in isolation may yet lead to a future host of similar but increasingly pernicious events.”⁴⁵ We believe that the slope will inevitably slide to an unwelcome point because we lack the confidence that future courts or political actors will be able to stop it, hence we narrow the relevant principle in the first instance. Post-Trump we fear an executive slippery slope. If government actors are permitted to do this, if we exercise our discretion to permit an overbroad, constitutionally infirm travel ban, for example—if courts do not draw the line here, what other behavior will courts privilege? And given this administration’s

41. E.g., Jonathan Blitzer, *The Border Patrol Was Primed for President Trump*, NEW YORKER (Feb. 17, 2017), <https://www.newyorker.com/news/news-desk/the-border-patrol-was-primed-for-president-trump> [<https://perma.cc/79FS-352B>].

42. Jelani Cobb, *Donald Trump Is Serious When He “Jokes” About Police Brutality*, NEW YORKER (Aug. 1, 2017), <https://www.newyorker.com/news/news-desk/donald-trump-is-serious-when-he-jokes-about-police-brutality> [<https://perma.cc/VQ8X-2EG9>].

43. See Landon R. Y. Storrs, *The Ugly History Behind Trump’s Attacks on Civil Servants*, POLITICO MAG. (Mar. 26, 2017), <http://www.politico.com/magazine/story/2017/03/history-trump-attacks-civil-service-federal-workers-mccarthy-214951> [<https://perma.cc/AUY9-RBF5>].

44. See Sally Q. Yates, Opinion, *Sally Yates: Protect the Justice Department from President Trump*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/opinion/sally-yates-protect-the-justice-department-from-president-trump.html> [<https://perma.cc/WP3G-VMKH>].

45. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 361–62 (1985).

statements, we are less than confident that calmer heads (let alone constitutional scholars) will prevail.

To be sure, the travel ban cases may be *sui generis*. While even here the lower courts had many grounds to duck—there were standing challenges and challenges to the extent of the irreparable harm, and there was also the option to defer to the executive on national security and immigration at an early stage in the litigation—they did not. In part, it may have been the history of the litigation—a hastily drafted first executive order that was clearly overbroad, the record of incendiary campaign rhetoric which was still fresh in the minds of the courts. Executive orders in year two or three of this administration may be looked at differently. The run-of-the-mill discrimination or police abuse case, against customs officials emboldened by the President’s remarks about immigration may fit into the old patterns. And one reaction to the President’s attack on judges may be to seek to prove their neutrality by bending over backwards to sustain official acts. It would be a version of what Robert Cover wrote about in *Justice Accused*, describing the Northern antislavery judges who enforced the Fugitive Slave Act with a rigor that was not required by the law. He called it “judicial can’t.”⁴⁶

THE IMPLICATIONS

These challenges make it all the more important to address the “duck, avoid, and evade” doctrines, when they are inappropriate. It is especially critical to dramatize the fact that these doctrines are not just commendable judicial restraint, but the undermining of access to justice. And it is critical to emphasize the special importance of court access “in a time of Trump.” More than legal analysis, we should look to new tools to evaluate the courts. The same statistical methods that lead judges to “duck, avoid, and evade,” lest their six month reports compare unfavorably with their peers, can be deployed to identify troubling patterns in access to justice. We can use empirical tools to identify the judges who literally dismiss all civil rights cases, who have never seen an excessive force civil rights case pass muster, to remind them that they are in fact exercising discretion and making judgments in one direction and one direction only.

A prominent civil rights law firm in Atlanta, for example, commissioned a study of employment discrimination cases in the Northern District of Georgia over a two-year period.⁴⁷ While there were limits to the study, some of the results were staggering. Of 181 cases in which the plaintiff had counsel, the court dismissed 95% of them at least in part, and 81% of the cases in full. Racial hostile work environment cases were dismissed 100% of the time. Data broken down per judge revealed that some judges had dismissed all discrimination cases in the two-year period and that when a magistrate judge recommended dismissal, the judge followed the recommendation 100% of the time. Data also suggested that white defendants alleging reverse discrimination had a better success rate than black plaintiffs alleging discrimination.

46. ROBERT M. COVER, *JUSTICE ACCUSED* 119–23 (1975).

47. AMANDA FARAHANY & TANYA MCADAMS, BARRETT & FARAHANY, *ANALYSIS OF EMPLOYMENT DISCRIMINATION CLAIMS FOR CASES IN WHICH AN ORDER WAS ISSUED ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT IN 2011 AND 2012 IN THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA* (2013).

Likewise, judicial training is critical to underscore the fact that apparently neutral doctrines promoting efficiency and cutting costs have substantive impacts.

With respect to the academic literature—including this Symposium—academics must stop speaking in tongues, must make their insights more available to judges and practitioners, must write for a larger audience about the implications of judicial opinions. In *Centola v. Potter*,⁴⁸ I held that since discrimination was, at core, about stereotyping men (she is not a “real woman” because she is too mannish; he is not a “real man” because he is effeminate), it surely should include discrimination on the basis of sexual preference. The idea was not original with me. It derived from an article written years before by Professor Sylvia Law of New York University, whose work I had followed.⁴⁹ The Seventh Circuit has recently taken a similar position, after numbers of amicus briefs and guidance from the EEOC.⁵⁰ That public mobilization communicates the context to the court and the circumstances in which judgment is exercised.

To be sure, this administration will be able to fill a substantial number of judicial vacancies, perhaps with judges who would resolve these issues more deferential to official overreach, although “duck, avoid, and evade” characterized judicial appointees of all stripes. The challenge is to change that calculus—to make the context clear—no matter who the incumbent is.

48. 183 F. Supp. 2d 403, 413 (D. Mass. 2002).

49. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WISC. L. REV. 187. Professor Law argues that disapprobation of homosexual behavior is a reaction to the violation of gender norms, that is, traditional concepts of masculinity and femininity, rather than merely scorn for homosexual practices. *Id.*

50. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).