

Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing

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Articles

FREEDOM OF DRESS: STATE AND PRIVATE REGULATION OF CLOTHING, HAIRSTYLE, JEWELRY, MAKEUP, TATTOOS, AND PIERCING

GOWRI RAMACHANDRAN*

This Article proposes a legal right to free dress, encompassing clothing, hair, jewelry, makeup, tattoo, and piercing choices. Neither speech rights nor equal protection provide an accurate account of the importance of self-presentation; instead a new theory of freedom of dress is needed, drawing on its unique location at the blurry border of the personal (as an exercise of control over the physical self) and the political and cultural (as the performance of social identity). Four of the most important applications of this theory are found in public schools, private workplaces, prisons, and direct state regulation. These settings require different balances of individual appearance choices against other interests.

In the workplace, employers should be required to reasonably accommodate employees' dress choices. Even in the absence of a distinct statutory right, conceiving of freedom of dress as a fundamental right would make viable disparate impact and "sex-plus" claims affecting dress under Title VII. On the street, the paucity of important countervailing state interests supports reviewing infringements on the freedom of dress with strict scrutiny and subjecting them to narrow tailoring requirements—rather than treating dress merely as an adjunct to speech. In schools, too, strict scrutiny is appropriate; carving out freedom of dress as a liberty for students may be easier even than carving out student liberties like speech. In prisons, a reasona-

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* Associate Professor, Southwestern University School of Law. I have received helpful advice from Akhil Reed Amar, Anshul Amar, Ian Ayres, Devon Carbado, David Cruz, Michael Dorff, Eric Fleisig-Greene, Bryant Garth, Steve Goldberg, Mitu Gulati, Tristin Green, Thomas Healy, Paul Horwitz, Emma Jordan, Dan Kahan, Neal Katyal, David Luban, Carrie Menkel-Meadow, Courtney Faye Powell, Angela Riley, Michael Shumsky, Gerry Spann, Julie Suk, David Super, Clint Thacker, Christopher D. Wang, Robin West, and Kenji Yoshino, as well as workshop participants at Cardozo Law School, Georgetown University Law Center, Seton Hall Law School, Southwestern Law School, Suffolk Law School, University of Illinois College of Law, and University of Maryland School of Law. I also received excellent research assistance from Jared Joyce-Schleimer. I am especially indebted to the editors of the *Maryland Law Review*, including Matt Klaiber, who have truly gone beyond the call of duty. Any errors are my own.

ble accommodation approach is appropriate, but with a much narrower construction of reasonable accommodation than in other settings.

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I. INTRODUCTION

Freedom of dress is the right to choose the hairstyle, makeup, clothing, shoes, head coverings, tattoos, jewelry, and other adornments that make up the public image of our sometimes private persons. These deeply personal yet often highly public choices are a site at which the adage, “[t]he personal is political,”¹ rings extremely true. I use the word “site” in more than a metaphorical sense: The items with which we cover our bodies and the ways in which we style them are *physically* located at the border—a manipulable border—between our bodies and the rest of the world. They are how we “make the human body culturally visible.”²

Many litigants have argued for legal recognition of such a right,³ and many of us have felt that we do or should possess it to one degree or another. Some of the framers of the Bill of Rights thought it so clear we have such a right that they considered it unnecessary to name it.⁴ Almost all of us have, at some point in our lives, felt as if we were

1. “The personal is political” was coined by members of New York Radical Women, including Carol Hanisch, in the late 1960s. JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA* 19 (2000).

2. Elizabeth Wilson & Amy de la Haye, *Introduction* to *DEFINING DRESS* 1, 2 (Amy de la Haye & Elizabeth Wilson eds., 1999) (quoting Kaja Silverman, *Fragments of a Fashionable Discourse*, in *STUDIES IN ENTERTAINMENT: CRITICAL APPROACHES TO MASS CULTURE* 145 (Tania Modleski ed., 1986)).

3. See cases cited *infra* Parts IV–VII.

4. During lengthy debates over whether the right of assembly should be included in the Bill of Rights, some Framers argued that it was unnecessary to include it because it was so clear that the right could not be infringed by a government. Congressman Theodore Sedgwick of Massachusetts analogized freedom of assembly to freedom of personal appearance to make his point:

If the committee were governed by that general principle . . . they might have declared that *a man should have a right to wear his hat if he pleased* . . . but [I] would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, *in a Government where none of them were intended to be infringed*. *Kelley v. Johnson*, 425 U.S. 238, 251–52 (1976) (Marshall, J., dissenting) (alteration in original) (quoting IRVING BRANT, *THE BILL OF RIGHTS: ITS ORIGIN AND MEANING* 54–55 (1965)). I include this bit of history not to make an originalist argument about the freedom of dress, but rather to dispel the idea that freedom of dress is somehow so radical as to be irreconcilable with American traditions.

pressured, if not forced, to alter the way we present ourselves, whether by a parent, potential employer, teacher, or some other more vague force, such as a social more. And this feeling that freedom of dress is important is not new. In 1836, early in the American feminist movement, at the same time that women's rights activists fought for the rights to vote and have jobs, they fought for the right "to wear sensible clothes."⁵

The extent of, or limitations on, freedom of dress affects each one of us every single day. Yet scholars to date have failed to theorize it fully as a legal issue. As a result of this neglect, we have no adequate theory of what its legally enforced and enforceable contours should be, and we have little respect for and affirmation of its value.

Instead of seeing dress theorized as a unique right, we usually see scholarship that theorizes dress in terms of equality,⁶ or in terms of other, related rights, such as freedom of speech.⁷ As for litigation, plaintiffs are usually successful only when they are able to claim that

5. KARLYNE ANSPACH, *THE WHY OF FASHION* 329 (1967) (internal quotation marks omitted). Feminists at this time started a movement called Bloomerism, referring to the baggy pants worn by feminist activist Mrs. Elizabeth Smith Miller and championed in the journal *The Lily* by Mrs. Dexter Bloomer. *Id.* at 330.

6. *See, e.g.*, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *CORNELL L. REV.* 1259, 1262, 1293–98 (2000) (discussing the effects of identity performance on antidiscrimination law in the context of employment); Devon Carbado, Mitu Gulati & Gowri Ramachandran, *The Jespersen Story: Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION STORIES* 105 (Joel Wm. Friedman ed., 2006) [hereinafter Carbado et al., *The Jespersen Story*] (questioning whether the forced wearing of makeup can form the basis of a sex discrimination suit); Tristin K. Green, *Work Culture and Discrimination*, 93 *CAL. L. REV.* 623, 646 (2005) (describing work cultures that discriminate on the basis of appearance); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 *N.Y.U. L. REV.* 1134, 1199–1202 (2004) (noting that Title VII was passed in an effort to further realize certain Fourteenth Amendment equal protection guarantees); Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 780–81 (2002) (identifying a contemporary form of discrimination as "enforced covering").

7. *E.g.*, Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 *DRAKE L. REV.* 527, 527–30 (2000) (analyzing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), as a speech case and arguing that it has effectively been overturned by later cases); Todd A. DeMitchell, *School Uniforms and the Constitution: Common Dress in an Uncommon Time*, 156 *EDUC. L. REP.* 1, 5–6 (2001) (analyzing school uniforms and dress codes as First Amendment issues although noting that dress and speech were distinguished from each other in *Tinker* because the Supreme Court characterized the black armbands at issue as "pure speech"); Gil Grantmore, *Lex and the City*, 91 *GEO. L.J.* 913, 913 (2003) (arguing that "fashion is speech"); Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 *BAYLOR L. REV.* 623, 627 (2002) (analyzing *Tinker*, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), as the student speech "trilogy").

their dress and appearance choices are actually political speech,⁸ religious expression,⁹ or limited in an explicitly discriminatory manner, such as by a sex-specific appearance regulation.¹⁰ Even in the latter case, these plaintiffs are rarely successful.¹¹

Sociologists, psychologists, anthropologists, and cultural theorists have long recognized that fashion and other forms of manipulating appearance play a unique role in the development of the individual as a member of society—the negotiation and formation of the public self. Writers from Charlotte Perkins Gilman¹² to Roland Barthes¹³ to

8. *E.g.*, *Tinker*, 393 U.S. at 505–06 (holding that a student’s decision to wear a black armband to school to protest the Vietnam War was protected speech); *People v. Craft*, 509 N.Y.S.2d 1005, 1013 (Rochester City Ct. 1986), *rev’d*, 564 N.Y.S.2d 695 (Monroe County Ct. 1991), *rev’d sub nom.* *People v. Santorelli*, 600 N.E.2d 232, 234 (N.Y. 1992) (finding that women who went topless to protest sexist laws could not be charged under a New York criminal statute aimed at topless waitresses).

9. *E.g.*, *Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005) (holding that the California Department of Corrections’s hair grooming policy violated the Religious Land Use and Institutionalized Persons Act of 2000 because it imposed a substantial burden on a Native American inmate’s religious practice and was not the least restrictive alternative available to achieve the prison’s interests in safety and security); *Craddick v. Duckworth*, 113 F.3d 83, 85 (7th Cir. 1997) (holding that a prison regulation forbidding a medicine bag from being worn under clothing violated the Religious Freedom Restoration Act); *Benjamin v. Coughlin*, 905 F.2d 571, 576–77 (2d Cir. 1990) (holding under *Turner v. Safley*, 482 U.S. 78 (1987), that an alternative means exists to accommodate Rastafarian inmates’ First Amendment religious rights without undermining reasonable security concerns); *Swift v. Lewis*, 901 F.2d 730, 731–32 (9th Cir. 1990) (holding under *Turner* that grooming regulations that prevent religious prisoners from keeping their beards infringed on inmates’ practice of religion).

10. *E.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion) (holding that a woman who was denied partnership in part because she failed to walk more femininely, talk more femininely, and wear makeup, jewelry, and softer-hued suits was a victim of sex discrimination under Title VII); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (finding that a pre-operative transsexual employee who had been suspended for his gender nonconforming appearance stated a claim of discrimination under Title VII); *Williams v. City of Fort Worth*, 782 S.W.2d 290 (Tex. App. 1989) (holding that an ordinance forbidding women but not men from being topless violated the Texas Equal Rights Amendment), *overruled by* *Schleuter v. City of Fort Worth*, 947 S.W.2d 920, 925 (Tex. App. 1997).

11. *E.g.*, *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1112–13 (9th Cir. 2006) (en banc) (upholding a casino’s policy that prohibited male beverage servers from wearing makeup and required women beverage servers to wear multiple forms of makeup); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977) (upholding a policy that required men, but not women, to wear ties); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1087–88 (5th Cir. 1975) (en banc) (upholding a policy permitting females to wear their hair at any length, but limiting the length of males’ hair); *State v. Vogt*, 775 A.2d 551, 560 (N.J. Super. Ct. App. Div. 2001) (holding that an ordinance prohibiting women, but not men, from being topless in public passed intermediate scrutiny and was constitutional).

12. CHARLOTTE PERKINS GILMAN, *THE DRESS OF WOMEN* (Michael R. Hill & Mary Jo Deegan eds., 2002).

Umberto Eco¹⁴ have commented on the meaning of dress: what it signifies and how it structures our experiences. The law is starting to take account of this meaning, but even as restrictions on appearance choices are challenged, those choices are usually not theorized as a socially and individually valuable life activity in its own right. Instead, they are characterized in terms of other rights, justifications for which scholars have endlessly explored: In the workplace, dress is often characterized as constitutive of racial, gender, or other identity, and therefore minimally protected by antidiscrimination law;¹⁵ in the public square, as well as in elementary and secondary schools, it is characterized as a form of speech-like “expression” protected by First Amendment law;¹⁶ and in prisons, it is sometimes characterized as protected religious expression.¹⁷ To be sure, some litigants have been able to describe it as engaging in a liberty protected by substantive due process, and some of these litigants have prevailed.¹⁸ Nevertheless, for the most part scholars have failed to explore that liberty and where it might come from to the extent they have explored liberties such as privacy, about which entire textbooks have been written.¹⁹ Courts that have recognized the right have explored its origins very little, if at

13. ROLAND BARTHES, *THE FASHION SYSTEM* (Matthew Ward & Richard Howard trans., Univ. of Cal. Press 1990) (1967).

14. UMBERTO ECO, *Lumbar Thought, in TRAVELS IN HYPERREALITY* 191, 191–95 (William Weaver trans., Harcourt Brace Jovanovich 1986) (1967) (characterizing clothes as semiotic devices).

15. Compare cases cited *supra* note 10 with cases cited *supra* note 11.

16. See cases cited *supra* note 8.

17. Compare cases cited *supra* note 9 (upholding religious prisoners’ personal-appearance rights), with *Hill v. Estelle*, 537 F.2d 214 (5th Cir. 1976) (per curiam) (holding that sex-differentiated appearance standards for prisoners did not violate equal protection), *Star v. Gramley*, 815 F. Supp. 276 (C.D. Ill. 1993) (holding that prohibiting cross-dressing and wearing makeup did not violate constitutional rights of prisoner), *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kan. 1986) (holding that a transsexual prisoner has no constitutional right to gendered clothing), and *Murray v. U.S. Bureau of Prisons*, No. 95-5204, 1997 U.S. App. LEXIS 1716, at *6–8 (6th Cir. Jan. 28, 1997) (per curiam) (permitting segregated confinement of a male-to-female transsexual prisoner for her refusal to follow orders to wear a brassiere, and holding that failure to provide her “with hair and skin products that she claims are necessary for her to maintain a feminine appearance” was part of routine deprivation in prison).

18. *E.g.*, *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1369–70 (11th Cir. 1987) (upholding the right of a man to jog shirtless); *Miller v. Ackerman*, 488 F.2d 920, 922 (8th Cir. 1973) (per curiam) (upholding the right of Marine Corps reservists to wear short-hair wigs during weekend training that allowed them to comply with Marine Corps grooming codes while preserving their longer hair when not on duty); *Lansdale v. Tyler Junior Coll.*, 470 F.2d 659, 664 (5th Cir. 1972) (upholding the right of male college students to have long hair).

19. *E.g.*, DANIEL J. SOLOVE & MARC ROTENBERG, *INFORMATION PRIVACY LAW* (2003); RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW* (2d ed. 2002).

all.²⁰ Moreover, the Supreme Court has never addressed the subject, denying certiorari in the face of a circuit split,²¹ and once assuming without deciding that a liberty interest in grooming and dress exists.²² As a result, the Court, too, has sidestepped the question of the origins, contours, and importance of the freedom of dress.

The rhetoric of rights is disfavored in many circles, as it is associated with an individualistic, libertarian understanding of freedom that treats the state with undue fear and the individual as existing in a vacuum, as opposed to a more communitarian understanding of what freedom means.²³ But rights do not have to be conceived of solely in this way,²⁴ and the conception of the freedom of dress that I offer is a more balanced one, fulfilled not only by the state refraining from regulation of self-presentation in public realms, but also via positively acting in the private realm of the workplace.²⁵ Moreover, this conception of freedom of dress explains why its protection in a setting like the workplace or a school may be appropriate even where protection of rights such as speech may not be appropriate.²⁶

A word about what I am not doing is necessary here. I am not making an argument that the freedom of dress is already protected by law, either constitutional or statutory. Indeed, I will essentially reject that argument by explaining how established areas of law, such as traditional antidiscrimination law and free speech law, even taken in the aggregate, will not work as an appropriate protection of the freedom of dress. Instead, I am proposing that we protect the freedom of dress, and I am providing the theory behind that proposal.

I do not answer here how the proposal should be accomplished. Should judges uniformly find freedom of dress somewhere in the

20. See, e.g., *Breese v. Smith*, 501 P.2d 159, 164–66 (Alaska 1972) (summarizing the various rationales given by courts for recognizing a constitutional right to control one’s personal appearance).

21. *Ollf v. E. Side Union High Sch. Dist.*, 404 U.S. 1042, 1045–46 & nn.6–7 (1972) (Douglas, J., dissenting from denial of certiorari).

22. *Kelley v. Johnson*, 425 U.S. 238, 244 (1976) (assuming that “there is some sort of liberty interest” in matters of personal appearance within the Fourteenth Amendment).

23. See ROBIN L. WEST, *RE-IMAGINING JUSTICE* 72–73 (2003) (discussing the alienating effect of a democracy’s emphasis on individual rights rather than community ideals).

24. See Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404–05, 424–27 (1987) (discussing the benefits of “rights-assertion” for minorities and the poor and urging the expansion of rights-entitlement); WEST, *supra* note 23, at 92 (proposing the revitalization of the rights tradition with the aim of constructing liberal rights that protect and guarantee “good society” ideals: “[A] society in which . . . citizens possess those fundamental capabilities which are themselves essential to the enjoyment of a fully human life”).

25. See *infra* Part IV.

26. See *infra* Part III.E.

Constitution? Should we pass an amendment to the Constitution? Should Congress enact a statute? When it comes to private workplaces, should we direct our energies at the states, many of which have stronger protections for worker rights than the federal government? The answers to these questions depend on one's beliefs about constitutional methodology, the competence of the various branches and levels of government (local, state, and federal) to accomplish these goals, and, of course, political realities. Instead of answering these questions, I am simply arguing that we should have freedom of dress, and that the law should treat it as a unique right with its own particularities. In later parts of this Article, I will explain how that might play out by proposing what the legal construct protecting freedom of dress in various contexts should look like.

I am also not arguing that my theory of why we should have a right to freedom of dress is necessarily applicable to other countries and societies. The theory I provide depends a great deal both on the fact that America is a capitalist country and that fashion has great meaning in Western societies.²⁷ Thus, I do not imply that if another country's treatment of the freedom of dress differed from the one I propose, it would necessarily not be a "free" country or a true democracy. Nor do I even imply that America is not a "real" democracy unless and until it adopts my proposal. Rather, I argue that in this age, recognizing the freedom of dress protects the ability of Americans to continually change and reconstruct their identities—their political values and cultural values. Freedom of dress promotes a society whose norms, politics, and laws are constructed by an engaged people, rather than by orthodoxy.

Failure to explore freedom of dress as a *unique* right prevents us from gaining a complete and coherent understanding of what it is we are really doing when we get a tattoo, style and color our hair, get dressed in the morning, choose to wear certain kinds of makeup, put on jewelry ranging from delicate to punk, or wear a uniform. Without that understanding, we fail to approach the regulation of this behavior in various contexts—schools, prisons, on the street, and in the workplace—with a coherent sense of what interests are at play and ought to be balanced. Indeed, recent efforts to conceive of self-presentation solely from an antidiscrimination perspective have left a number of very creative scholars unable to formulate coherent, principled rules of law protecting this activity.²⁸ Armed with a deeper un-

27. See *infra* Part III.

28. E.g., Green, *supra* note 6, at 676 (discussing legal deficiencies in addressing a culture of discrimination in the workplace); Yoshino, *supra* note 6, at 875–79 (addressing the

derstanding of the freedom of dress, especially what makes it unique, we could better approach the difficult questions of how this activity should be protected in various spheres, including on the street, in schools, in prisons, or in the workplace.²⁹

This Article initiates that exploration. First I explain why converting the very anti-essentialist, post-structuralist insight—personal appearance choices can be performances of race, gender, sexual orientation, and other identity categories—into a subject of traditional antidiscrimination law is misguided.³⁰ Deciding which performances we will count as “equivalent” to group identity—Do black women wearing cornrows count? What about white women wearing cornrows, or black women dying their hair blonde?—institutionalizes essentialism. Moreover, since many behaviors—from reading a magazine to being a prima donna—could be identity performative, more may be necessary to justify legal protection of such a behavior. These problems do much to explain why most scholars writing about the subject have refrained from proposing specific legal rules.

Next, I provide a better theory of the importance of freedom of dress.³¹ In brief, I argue that personal appearance choices play a unique and crucial role in the development and revision of a simultaneously public and personal identity—the foundation for the exercise of an array of other rights, such as religious and political beliefs, and choice of job or friends. Although law cannot, and should not, pursue eradication of the cultural norms that influence our identities, law can create a zone in which to better empower individuals to form and reform identity, promoting a dynamic, rather than static, culture and society. Personal appearance choices are a primary site of an individual’s confrontation with her separation from and identification with others in society. These choices are important and unique in that this confrontation occurs on the visible borders of the *physical* self. This highlights why thinking of personal appearance choices solely as speech and art is inadequate. The speech theory of dress ignores its

challenges of the antidiscrimination schism); see also Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2568–69, 2579–82 (1994) (proposing a principle for judging the validity of appearance requirements—whether they disadvantage women—but admitting that the principle is problematic to apply, and providing no resolution of this problem).

29. Of course, there are many other contexts in which one could grapple with whether and how freedom of dress can be regulated, such as military service and other forms of public employment or attorney appearances in court. But not all can be exhausted in one paper.

30. See *infra* Part II.A–B.

31. See *infra* Part III.

subjective form: the fact that personal appearance choices are *inherently* personal, by nature of the medium of dress. The experience of freedom of dress choices as exercises of control over the body makes personal appearance manipulation an excellent zone of identity exploration for law to protect.

Third, I apply the fruits of this exploration to four different legal contexts—the private workplace, the street or public square, public schools, and prisons—in order to demonstrate how conceiving of freedom of dress as a right and understanding its unique nature might affect the approach to its regulation in these contexts. In stark contrast with the workplace-equality approach based on identity politics that has recently garnered considerable attention, I propose protecting freedom of dress via a reasonable accommodation framework. I also explain how, even in the absence of such statutory change, understanding freedom of dress as an important right would affect Title VII challenges to restrictions on dress by making “sex-plus,” “race-plus,” and disparate impact claims viable. On the street, I propose giving freedom of dress the status we give rights deemed “fundamental.” In schools, I propose strong protection for student exercises of the freedom of dress, stronger perhaps even than speech. In prisons, I propose a reasonable accommodation framework, but acknowledge that a fair assessment of what accommodations are “reasonable” and what hardships are “undue” would lead to far less freedom of dress for prisoners than workers.

Finally, I conclude the Article with a plea to start treating the freedom of dress seriously, not just because of its race, sex, gender, and religious saliency and not just because it is a kind of speech or art. Instead, it is time to start taking it seriously in its own right.

II. THE PROBLEM WITH THE EQUALITY APPROACH

In the modern world, many persons have felt that their hairstyle, clothing, fashion sensibility, makeup, body piercings, tattoos, and/or partial or full nudity is important to them. In this Section, I explore one of the main legal theories currently occupying the field of thought about freedom of dress and explain why it is inadequate.

Several legal scholars have recently drawn on a crucial insight of post-structuralist theory—much of our identity, such as our race, gender, or sexual orientation, is not wholly immutable.³² Rather, our identities are either wholly or partially “performative,” meaning that they are constituted not just by immutable, biological traits but also by

32. See sources cited *supra* note 6.

our actions, such as the sexual acts we engage in, the way we wear our hair, the way we speak, our clothing, and even the magazines we like to read.³³ Thus, when an African-American woman wears her hair in braids, this act is usually part of what constitutes her status as an African-American woman.

These scholars, including myself, have applied this insight to interrogate the law's distinction between discriminating against an African-American woman because of the color of her skin and shape of her genitals and, on the other hand, discriminating against her because of the way she wears her hair. It is, after all, largely her outward appearance and behavior—certainly not the shape of her genitals—that signals to most people who interact with her that she is a woman, and that at least partially signals her identity as an African American. Denying her the ability to wear her hair in traditionally African-American styles, such as cornrows, is a means of forcing assimilation to the appearance norms of the dominant racial group.³⁴ Thus, many scholars have begun to question antidiscrimination law's limitation to protecting seemingly immutable aspects of identity and its corresponding failure to protect performative aspects of identity.

Dress is a common aspect of identity performance and, for the most part, theories of freedom from discrimination promote government intrusion into private realms to combat discrimination.³⁵ Thus, it may be appealing to think of freedom of dress, especially in the private workplace, solely in terms of traditional, equality-based antidiscrimination law.

A. *Ascribing Stable Categories to Unstable Practices: Antidiscrimination Law Turns Post-Structuralism into Essentialism*

Antidiscrimination law is not the best law for protecting identity performance such as dress.³⁶ Scholars outside the legal academy who

33. See, e.g., Yoshino, *supra* note 6, at 865–75 (discussing performative models of identity).

34. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 390–93 (stating that forced alteration of hairstyle is a form of assimilation).

35. For instance, the prohibition on private workplace discrimination on the basis of race in the Civil Rights Act of 1964 was in part justified on the grounds that rights in the public realm such as voting are not meaningful in the absence of protection from discrimination in the private realm. See H.R. REP. NO. 88-914, pt. 2, at 26 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2513 (“The right to vote, however, does not have much meaning on an empty stomach. . . . The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen.”).

36. Here, I am most directly disagreeing with Katharine Bartlett, who has argued against protecting choice in matters of workplace appearance and in favor of a principle

most famously have articulated the theory that identity is performative have made clear that the reading of an identity performance is highly contextual and complicated, and often rather counterintuitive. For instance, Eve Kosofsky Sedgwick has described the unexpected personal experience of appearing very femme upon becoming bald after cancer treatment.³⁷ Judith Butler has written an entire article, *Imitation and Gender Insubordination*, describing how activities like drag or butch-femme lesbian behavior can, rather than reify gender stereotypes by imitating them, actually subvert those stereotypes by de-naturalizing them and disassociating them from a system of compulsory heterosexuality.³⁸ These activities might seem to “buy in” to traditional models of gender identity and, indeed, some feminists have criticized them for doing so; yet, these activities can also be read as undermining and mocking the natural, fixed status of gender categories by exposing the manner in which they are performed.³⁹

The wearing of cornrows or dreadlocks by an African-American woman may not have the same meaning as the wearing of the same hairstyle by a white woman. On a white woman it may be culturally meaningless, culturally insensitive, or exoticizing. On the other hand, it may express a respect for and solidarity with African-American women. Or it may express the fact that the woman we thought was white is in fact, like many people, of mixed racial heritage.

When a lawyer wears makeup, high heels, and a skirt, she might be performing a normative, heterosexual identity at work or, as Kenji Yoshino has described it, “reverse cover[ing].”⁴⁰ But without changing a single aspect of her appearance, she may transform the meaning of that performance simply by going to a lesbian bar after work, where

that attacks dress regulations that disadvantage women. Bartlett, *supra* note 28, at 2548–50, 2568–71.

37. Eve Kosofsky Sedgwick, “Gosh, Boy George, You Must Be Awfully Secure in Your Masculinity!,” in *CONSTRUCTING MASCULINITY* 11, 18 (Maurice Berger et al. eds., 1995).

So far so good, I thought; I had always been attracted to very butch women, and now, it seemed to me, by some miracle, I was going to get to turn into one. . . .

What emerged over time, however, . . . was something else: that what I had become visible as was, in fact (no big surprises here), quite femme. The surprise was in seeing that it required the crossing over a threshold of, precisely, butchness, to become visible as, precisely, if it is precisely, femme. That is to say, I had to stumble my way onto a map of sexy gender-y-ness in the first place; and the portal to that place, for women, or for lesbians, or for queers, or just for me, I do not know yet, is marked “butch.”

Id. at 18.

38. Judith Butler, *Imitation and Gender Insubordination*, in *THE LESBIAN AND GAY STUDIES READER* 307 (Henry Abelove et al. eds., 1993).

39. *Id.* at 313–14.

40. Yoshino, *supra* note 6, at 780.

her ultra-femme look might take on an ironic meaning or signify participation in the lesbian butch-femme culture—a practice which is not only not normative, but is, like drag, deeply subversive of normative gender identities.⁴¹ And what if she is out of the closet at work? What if her coworkers know that she is a lesbian and know that she dresses in an ultra-femme manner? Is she “covering” her lesbian identity, making it easy for her coworkers to disattend it? Perhaps. But she might also be doing something rather subversive with her dress, even “flaunting” her femme role-playing behavior.⁴² She may even be having it both ways: “flaunting” her femme lesbian identity to coworkers who get it and “covering” her lesbian identity to coworkers who don’t get it.

The fact that identity performance is so contextual and complex makes it hard, if not impossible, to formulate legal rules for protecting identity performance under the traditional equality-based rubrics of antidiscrimination law. To do so would require isolating which identity performances constitute the performance of a protected identity category and which do not,⁴³ or, as Bartlett proposes, deciding which identity performances disadvantage women.⁴⁴ This is a task that is not only difficult, but one that risks turning good intentions into racist or sexist essentialist assertions.⁴⁵ Deciding which actions do and do not “count” as part of a protected identity will inevitably privilege the claims of those who behave in conformance with dominant group norms over the claims of those who are dissenters: Painting a red dot in the center of my forehead would most likely “count” as a performance of my ethnicity and gender (South Asian woman), but dyeing my hair red would most likely not “count.” This trades the orthodoxy of

41. Butler, *supra* note 38, at 318.

42. See generally LESBIANS, LEVIS AND LIPSTICK: THE MEANING OF BEAUTY IN OUR LIVES (Jeanine C. Cogan & Joanie M. Erickson eds., 1999).

43. See Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 386–93 (2006) (categorizing ways in which employers engage in trait discrimination and suggesting specific legal responses to each category, including models, such as the use of expert witnesses, for how plaintiffs should go about proving that a trait is associated with a protected category under Title VII).

44. Even Bartlett acknowledges that applying the principle she proposes is problematic. See Bartlett, *supra* note 28, at 2571–72 (describing situations in which it is difficult to decide if a rule disadvantages women, such as a requirement that Shannon Faulkner shave her head at the Citadel, or a hypothetical rule that both men and women must wear high heels, skirts, and makeup). But see Yuracko, *supra* note 43, at 386–93 (discussing ways in which plaintiffs can prove trait discrimination).

45. See, e.g., *Zalewska v. County of Sullivan*, 316 F.3d 314, 323–24 (2d Cir. 2003) (rejecting a bus driver’s equal protection claim that being asked to wear pants required her to dress “masculinely” because it would perpetuate the very stereotypes that courts were meant to combat using the Equal Protection Clause).

assimilation for the orthodoxy of identity politics.⁴⁶ Wearing a dot on your forehead—that is what it means to be a South Asian woman—is therefore good. Having a flashy hair color—that is not what it means to be a South Asian woman—is therefore not good. Yet in many contexts—the legal academy, an Indian restaurant, a new age bookstore—dyeing my hair red is most likely a deeper challenge to the cultural practices and values of those surrounding me than would be wearing a red dot.

Expanding the idea of legal equality to include identity performance is problematic. As such, most legal scholars writing in the field have carefully refrained from articulating specific legal rules for protecting identity performance. Nevertheless, they have been challenged as promoting essentialism.⁴⁷ Ironically, the theory that identity is performative is deeply anti-essentialist.⁴⁸ Why then, does even the beginnings of a project of translating it into law get criticized as essentialism? Because the particular translation intimated—one in which a strict equivalence is drawn between behavior and race, gender, sexual orientation, and any other protected “status”—is quite dangerous, given the complex and contextual nature of identity performance.

And yet, I do not argue that the lessons of post-structuralist theory are unimportant to law. To the contrary, I think they are deeply important, and that is why I have written about them elsewhere.⁴⁹ What I am arguing against is protecting identity performance under the formal equality rubric of traditional antidiscrimination law, rather than the rights-based rubric that I propose and detail in later Parts of this Article.

B. Acknowledging Performativity Without Essentializing It: The Need for a Different Rhetoric

Without certain essentialist moves to define which particular instances of identity performance “count” as equivalent to identity for purposes of antidiscrimination law, the theory of performative identity

46. See generally Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803 (2000) (discussing the politics of cultural identity).

47. See Roberto J. Gonzalez, Note, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2206–07 (2003) (criticizing Yoshino on an anti-essentialist basis).

48. See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990) (promoting practices that destabilize and subvert identity).

49. See generally Gowri Ramachandran, *Intersectionality as “Catch 22”: Why Identity Performance Demands are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299 (2005); Carbado et al., *The Jespersen Story*, *supra* note 6.

doesn't say enough about what antidiscrimination law should do because it is too limitless. Any aspect of behavior can be claimed as identity performance: not just hairstyle and clothing, but also harassment of coworkers,⁵⁰ using curse words,⁵¹ or speaking languages other than English.⁵² It is a wonderful thing to use the fact that identity is performative to interrogate restrictions on these behaviors in social and cultural commentary. It is an entirely different thing to protect all of these behaviors as a matter of law. To do so would be, frankly, unworkable. Law that protects identity performative behaviors must create some limits without being essentialist. Rights-based rhetoric, rather than equality rhetoric, is incredibly useful for this purpose.

In my view, the fact that identity is performative is relevant to dress and self-presentation because it helps us understand why that behavior is important to human flourishing: It is often a deeply personal and political act, even when not easily linked by the observer to a stable and protected identity category or to a particularized statement, such as "I oppose the war." The fact that identity is performative helps explain why we should care about dress, an extremely common site of both subversive and nonsubversive identity performance. However, a performative theory of identity is simply not a complete theory on which to base a legal approach, given the problem of essentialism and the fact that everything we do can be understood as identity performance. Some scholars writing about identity performance have therefore given up on the ability of law to undo any of the subordination they care about so deeply,⁵³ and others are skeptical of

50. See, e.g., *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 741–42 (9th Cir. 2004) (employee filed a religious discrimination claim after she was terminated by her employer for attempting to coerce a lesbian subordinate into renouncing her sexual orientation and living a heterosexual life); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 601–02 (9th Cir. 2004) (employee claimed religious discrimination and wrongful discharge after being terminated for condemning lesbian and gay coworkers in furtherance of his religious practices and beliefs).

51. Expletives are common in American hip hop music, leading it to be censored frequently. Wikipedia, *Hip Hop Music*, http://en.wikipedia.org/wiki/Hip_hop_music (last visited Oct. 1, 2006). While it may be controversial to claim that hip hop is a performance of African-American identity, it is surely a claim with enough plausibility to present a serious factual question. See Wikipedia, *Gangsta Rap*, http://en.wikipedia.org/wiki/Gangsta_rap (last visited Oct. 1, 2006) (describing controversy over whether the subgenre of gangsta rap accurately describes the life of inner city gang members or is better thought of as a minstrel show).

52. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1484 (9th Cir. 1993) (Spanish-speaking employees filed a lawsuit against their employer claiming that its English-only policy violated Title VII); *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980) (same).

53. See, e.g., Green, *supra* note 6, at 629 (concluding that courts are unequipped to effectively deal with cultural discrimination in the workplace).

the law's power in this realm.⁵⁴ In contrast, I am not skeptical of the law *per se*, only of the type of law being imagined—an antidiscrimination law that protects against intentional discrimination based on identity.

Instead, I argue for a rights-based approach, under which we are not forced to pass judgment on the meaning, both internal and external, of various identity performances, and under which only *some* types of identity performances are afforded special legal status; I argue for a freedom of dress.⁵⁵ All kinds of manipulation of personal appearance—not just those we think are performative of protected identities—will, under the rights-based approach, “count” and receive some protection. On the other hand, by isolating the freedom of dress as a right, I limit the identity performative behaviors to which special protection will be afforded: Only those that are exercises of the freedom of dress will count. This creates a workable, principled, but non-essentialist legal rule.

Why do I choose dress as the form of identity performance to protect as a unique right? Part III of this Article will theorize the unique importance of dress. However, for those concerned primarily with identity performance by members of protected classes, I point out that personal appearance is an extremely common site of identity performance. It is, in my view, preferable to secure some significant rights to identity performative behaviors than to abandon the prospects of law to provide protection at all.

C. *Why Scholars Turned to Equality Rhetoric Instead of Rights Rhetoric*

Why have academics largely ignored the rights-based possibility for protecting personal appearance choices in private spheres? It may be because the academy is court-centric. Thus, equality rhetoric gets more attention than rights or freedom rhetoric when it comes to “private” spheres like the workplace. Because of the state action doctrine, courts generally cannot step into a “private” arena like the workplace and hold that an employer has infringed upon a personal liberty. Only state actions can infringe a constitutional right under this doc-

54. See, e.g., Yoshino, *supra* note 6, at 781, 875–79 (contending that Title VII does not address trait discrimination).

55. In doing so, I am treating self-presentation much the way courts tend to treat religion—as a practice that they do not want to interrogate and become entangled with too deeply. See, e.g., *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972) (finding that even to determine whether discrimination by a religious institution stems from religious doctrine would constitute an impermissible infringement on free exercise).

trine; private actions or state inactions cannot.⁵⁶ However, despite critique of the state action doctrine, deeply held ideas about the proper role of judges in America have sustained the doctrine as a means of preventing judges from acting outside areas of judicial competence.⁵⁷ It is not disappearing anytime soon. Thus, for court-centric academics concerned with the private sphere, such as the workplace, equality rhetoric seems like a convenient way to get past the problem of the state action doctrine. Judges can intervene in private arenas to protect certain kinds of equality because legislatures have passed antidiscrimination laws telling them, roughly, how to do so.⁵⁸

However, academics and activists should not let court-centrism stand in the way of coherently theorizing the problem of freedom of dress as a right. Even though courts have stayed out of the “private” arena, Congress and state legislatures are generally deemed institutionally competent to act in that arena, and they do act. Rights rhetoric as well as constitutionalism talk can be aimed at legislators and voters, too.⁵⁹ Academics exploring freedom of dress in the workplace sometimes write of the problem as if there is no legal solution.⁶⁰ But it’s not the nature of law that’s necessarily the problem. It’s the nature of the specific type of law academics have been imagining.

56. Many have criticized the state action doctrine as incoherent in that it draws a line between state action and inaction, as if background property and contract law as well as wealth distribution were not sustained by state action. See, e.g., Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 779 (2004) (discussing Charles Black’s *Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 95 (1967)), and its proclamation that the state action doctrine was “a conceptual disaster area” (internal quotation marks omitted). It is, on this argument, almost entirely impossible for a state that enforces a criminal code to “not act.” It either allows or disallows self-help in the form of trespass and violence.

57. See Robin West, *Response to State Action and a New Birth of Freedom*, 92 GEO. L.J. 819, 829 (2004) (arguing that “[t]he constitutional status of welfare rights implicates the constitutional obligation of legislatures, not courts, to act”).

58. E.g., Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -17 (2000) (antidiscrimination in employment); Fair Housing Act, 42 U.S.C. §§ 3601–3619 (antidiscrimination in housing); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (antidiscrimination law for individuals with disabilities).

59. See *infra* notes 61–67 and accompanying text, describing the success of the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601–2654 (2000), which secures a minimal statutory *right* to employment leave in order to provide childcare or medical care to a family member. Yet the FMLA is seen by many as promoting substantive sex equality and, in fact, was deemed legitimately passed under Section Five of the Fourteenth Amendment by the Supreme Court of the United States in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 735, 740 (2003).

60. See *supra* notes 53–54 and accompanying text.

D. A Rights-Rhetoric Approach to Equality Problems: The FMLA Model

The use of rights rhetoric to assist in tackling a problem that appears fundamentally to be one of equality is not new. The Family Medical Leave Act (FMLA)⁶¹ is an example of how granting all workers certain substantive rights and better conditions can contribute to equality. The FMLA provides minimal rights to unpaid leave when workers have their own medical problems, must care for family members with medical problems, or must care for infants or newly placed adopted or foster children.⁶² These rights are granted to both men and women, but because women have historically borne the burden of providing this sort of care, the law promotes the equality of women in the workplace in two ways.

First, the FMLA counters the disparate impact that extremely stingy leave policies or policies of no leave have on women who take on greater shares of family care and, therefore, disproportionately need the kind of leave that the FMLA provides.⁶³ Second, the FMLA removes some of the incentives for men and women to divide this particular sort of domestic labor in the way they do in the first place.⁶⁴ Before the FMLA, some employers would grant women unpaid leave to care for a child, but would not grant the same unpaid leave to men. While this was nominally a benefit for women, it operated to ensure that women would continue to take that leave and, therefore, that women would continue to disproportionately need the leave. The FMLA breaks this cycle and encourages more men to take leave and contribute to family care, including childcare.⁶⁵ The FMLA thus operates as an antisubordination measure for women. The Supreme Court has even acknowledged, in a time when it was fairly accused of having an

61. 29 U.S.C. §§ 2601–2654.

62. *Id.* § 2612.

63. See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 1977 (2003) (discussing the disproportionate impact that inadequate sex-neutral leave policies have on women).

64. The legislative history of the FMLA expressly states:

As importantly, Federal policy is designed to afford all Americans equal employment opportunities based upon individual ability. While women have historically assumed primary responsibility for family caretaking, a policy that affords women employment leave to provide family care while denying such leave to men perpetuates gender-based employment discrimination and stereotyping and improperly impedes the ability of men to share greater responsibilities in providing immediate physical and emotional care for their families.

H.R. REP. NO. 103-8, pt. 2, at 14 (1993).

65. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736–37 (2003) (explaining how the FMLA combated gender-based stereotypes and reduced sex discrimination in hiring and promoting by mandating equal leave for *all* eligible employees).

“anti-antidiscrimination agenda,”⁶⁶ that the FMLA was legitimately passed under Section Five of the Fourteenth Amendment to remedy women’s inequality and thus abrogates States’ Eleventh Amendment immunity.⁶⁷

Moreover, a FMLA-type approach helps resolve a deep debate among feminist legal theorists over “equal-treatment/special-treatment” at work.⁶⁸ This debate, which centers on what to do about pregnancy and motherhood in the workplace, struggled with issues similar to the essentialism versus anti-essentialism debate currently swirling around identity performative behaviors. While equal treatment would seem to disadvantage women, who bear the greater burden of childcare, special treatment might legitimate and sustain that very disparity in the sex-division of domestic labor. The FMLA approach transcends this debate. It is informed by the fact of unequal sex-division of care work, but tackles the problem by providing substantive worker rights to at least some types of care provision, for everyone.⁶⁹

Similarly, the rights-based approach that I take provides a substantive right to some kinds of identity performance—the freedom of dress—but provides that right to everyone. To be clear, my argument for a rights-based approach is not meant to preclude the extension of antidiscrimination laws like Title VII to cover exercises of the freedom of dress.⁷⁰ If, instead of being codified as a separate statute, the FMLA had been passed as an amendment to Title VII, or if federal judges had interpreted Title VII to require something like the FMLA approach, I still would approve of the policy. Similarly here, I do not wish to engage in debates over judicial activism, statutory and constitutional methods of interpretation, or in what part of the United States

66. Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142 (2002) (emphasis omitted).

67. *Hibbs*, 538 U.S. at 727, 735.

68. See LISE VOGEL, *MOTHERS ON THE JOB: MATERNITY POLICY IN THE U.S. WORKPLACE* 100–13, 128–61 (1993) (discussing the equal-treatment/special-treatment debate).

69. *Id.* at 156–61.

70. In fact, I have separately argued, in the context of a particular case, that a makeup regulation should be held to violate Title VII. See Carbado et al., *The Jespersen Story*, *supra* note 6 (examining *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076 (9th Cir. 2004)). In some sense, this case ought to be particularly easy in the universe of possible Title VII challenges to appearance regulation because the makeup regulation at issue is explicitly sex-based. But it has not been easy for the courts, given doctrinal carve-outs to Title VII for grooming codes. *Id.* at 138. If dress were given the status of a fundamental right, this case would have been easy for courts using the “sex-plus” doctrine, which prohibits discrimination based on sex plus an immutable trait or exercise of a fundamental right. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (refusing to permit “one hiring policy for women and another for men—each having pre-school-age children”).

Code the freedom of dress belongs—although these debates are clearly necessary. Rather, I wish to first, and more broadly, promote the rights-based approach to freedom of dress.

III. THE FREEDOM OF DRESS

Many have felt that regulation of choices concerning freedom of dress is antithetical to freedom, liberty, or progress.⁷¹ Why? The few times that federal courts have sought to answer the question, even where they have found a right or liberty interest in self-presentation, they have often chosen not to explore the factors that might support that right.⁷² To the extent they have, the argument has gone something like, “Making everyone dress the same is something they do in other, uncivilized and unfree places. Therefore, we can’t regulate hair length.”⁷³ The lengthiest treatment by any court of which I am aware is one by the Supreme Court of Alaska,⁷⁴ but even this treatment is not extremely deep. It’s no wonder that courts are all over the map when it comes to balancing the right against other interests or rights⁷⁵—they haven’t tried to explore why it is important and therefore don’t have a principled basis for balancing it against other interests.

We have seen an argument that freedom of dress should be protected by formal equality-based antidiscrimination law because it is a type of identity performance, indistinguishable from protected identities like race or gender. I have rejected the argument that this is the

71. See, e.g., sources cited *infra* notes 73, 74, 82, 148, and 149.

72. E.g., *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969). The *Breen* court stated that [t]he right to wear one’s hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution. Whether this right is designated as within the “penumbras” of the first amendment freedom of speech, or as encompassed within the ninth amendment as an additional fundamental right[] . . . which exist[s] alongside those fundamental rights specifically mentioned in the first eight constitutional amendments, it clearly exists and is applicable to the states through the due process clause of the fourteenth amendment.

Id. at 1036 (citations and internal quotation marks omitted); *Hodge v. Lynd*, 88 F. Supp. 2d 1234, 1238–39 (D.N.M. 2000) (holding, without further explanation, that “there is a liberty interest in one’s choice of clothing, grooming, and other aspects of personal appearance[] under the Due Process Clause of the United States Constitution”).

73. See, e.g., *Olf v. E. Side Union High Sch. Dist.*, 404 U.S. 1042, 1042–44 (1972) (Douglas, J., dissenting from denial of certiorari) (describing practices in Asian institutions and in ancient Sparta); *Richards v. Thurston*, 424 F.2d 1281, 1285 & n.10 (1st Cir. 1970) (referencing “Peter the Great’s proscription of beards”).

74. See *Breese v. Smith*, 501 P.2d 159 (Alaska 1972), discussed *supra* at note 20.

75. See varying results in school cases, public employment cases, and public nudity cases cited *infra* Parts III.D, V.B, VI.

appropriate legal construct within which to protect the freedom of dress. Perhaps just as important, however, I want to reject the idea that equality should occupy our thinking about this subject. Scholarly obsession with expanding antidiscrimination law to cover non-immutable traits has been accompanied by a scholarly neglect of what is perhaps an even more difficult problem: deciding which activities we should value with special legal protections, and providing normative arguments for why.⁷⁶

A. *Identity: What Is It, and What Is It Good (and Bad) For?*

Cultural norms are imposed through law, the coercion of medical and psychological establishments, the coercion of subcultural groups such as religious organizations or social groups, the coercion of corporations engaged in advertising, and all kinds of informal micro-level social coercion.⁷⁷ These cultural norms affect our lives by influencing our choices, beliefs, and even desires and aversions, such that even when we are formally free to make choices, a myriad of factors determine and limit those choices. Even with the law's help, we could not exist "free" of these manifold forms of coercion, nor would we necessarily want to. However, while norms will always exist, it is important that those norms be capable of changing and, to that end, that individuals be empowered to challenge and contribute to the construction of those norms. As Jack Balkin has argued, certain kinds of nonpolitical speech must therefore be protected as crucial to participation in a democratic culture.⁷⁸ A democratic culture, in which eve-

76. Quite a few years ago, Richard Ford called on scholars to make rights-based, rather than equality-based, arguments for the protection of grooming choices from unjust regulation. See Ford, *supra* note 46, at 1813 (arguing that advocates of cultural rights must specifically identify traits that merit protecting). More recently, Kenji Yoshino has also moved away from an equality argument for protecting these behaviors. See generally Yoshino, *supra* note 6. Instead, he now more strongly promotes a "reason-forcing conversation" grounded in a respect for *liberty*. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 186–91 (2006). But, as Paul Horwitz has described it, even this latter work still seems to be "a conversation *about* that [reason-forcing] conversation." Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. (forthcoming 2007).

A rare example of a rights-based argument for protecting grooming and dress choices appears in Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006). Fisk only considers the workplace context and proposes thinking of dress and grooming choices in terms of the legal concept of worker privacy. *Id.* at 1125–31. But the political and public nature of dress choices, which depend on the gaze of others to gain their full import, makes the concept of privacy dissatisfying as a normative basis for protecting dress choices.

77. For a seminal work on this point, see MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 195–228 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

78. See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 1–6 (2004) (arguing for a theory of

ryone has the right to participate in making cultural meaning, is just as important in his view as is a democratic political system.⁷⁹ Balkin has therefore argued that we must, in addition to protecting the right of individuals to engage in political speech, protect their right to engage in cultural meaning making.⁸⁰

I add to this the crucial point that a precursor to cultural and political meaning making both is identity, which we can define as the particular values, beliefs, and aspects of our selves that we deem so important we consider them *self-defining*. Our aversions, desires, beliefs, and choices all make up our identity, but our identity in turn then affects our aversions, desires, beliefs, and choices. Even when an aspect of identity seems “unchosen,” such as a biological sex or an ethnicity, we still choose, albeit sometimes within very strong and other times within very weak constraints, whether that “immutable” trait will be part of our *identity*.⁸¹ The goal of a dynamic, changeable society—one in which people can change and challenge norms—is promoted by law that protects the formation and reformation of identity, law that carves out some space for the exercise of agency in the construction of identity.⁸² Without this space, identity becomes self-defining not in the good sense of a set of values and practices that one holds dear (but nevertheless could be different), but self-defining in the bad sense of a set of stereotypes about a group that are resistant to change.

For instance, identifying oneself as a “mother” signals some set of values, beliefs, and desires that the person who calls herself a “mother” deems relevant to the context at hand. It is incredibly contested what set of values, beliefs, and desires “mother” should signify,

freedom of speech that takes into account the cultural and participatory features of freedom of expression).

79. *Id.* at 3–4.

80. *Id.* at 37–42.

81. For a similar conception of identity as choice, rather than a “discovered” fact, see AMARTYA SEN, *THE ARGUMENTATIVE INDIAN* 350–52 (2005).

82. “[A] high tolerance of diversity of dress expression is a measure of our practical commitment to a democratic, open society, to which Mill’s advocacy of the ‘no harm’ criterion was so elegantly tailored.” William J.F. Keenan, *Dress Freedom: The Personal and the Political*, in *DRESSED TO IMPRESS* 179, 180 (William J.F. Keenan ed., 2001) (citation omitted); cf. Judith Butler, “*Appearances Aside*,” 88 CAL. L. REV. 55 (2000), reprinted in *PREJUDICIAL APPEARANCES* 73 (2001).

For this challenge to take place, it must be possible for a person whose appearance calls the category of the person into question to enter into the field of appearance precisely as a person. This is the power the astereotypical has to rewrite the stereotype, . . . a power that is “had” to the extent that such a person is not first defeated by the powers of discrimination.

Id. at 83.

but nevertheless, “mother” is a signal. It is a good thing for persons to be able to define and demonstrate the deep importance of certain values via the device of an identity, such as mother, but it is a bad thing when the meaning of “mother” is so fixed that all women with children are pressured to have the same deeply held values. At one time they were, for instance, by employers who forced all pregnant women to quit work.⁸³ Fortunately, people in the modern world have a bit more space to contest what it means to be a “mother.” But the space for that contestation has required freedom. Protecting the freedom of workers to become pregnant and have children—via bans on pregnancy discrimination and gender-neutral entitlements to child-care leave—is part of what provides more space for that contestation of what it means to be a mother.

Many behaviors are a part of identity formation and reformation. Law cannot protect the freedom to engage in all such behaviors; an attempt to do so would collapse into an attempt to transcend all norms and all coercion—a foolish task. However, there are more reasons to care about dress, reasons that make it unique among other types of speech, art, or identity performance. In this Part, I further explore the importance of dress in order to support my claim that we should have a freedom of dress.

B. Dress as an Exercise of Control over the Body

The body is the innermost part of *the material Self* in each of us; and certain parts of the body seem more intimately ours than the rest. The clothes come next. The old saying that the human person is composed of three parts—soul, body and clothes—is more than a joke. We so appropriate our clothes and identify ourselves with them that there are few of us who, if asked to choose between having a beautiful body clad in raiment perpetually shabby and unclean, and having an ugly and blemished form always spotlessly attired, would not hesitate a moment before making a decisive reply.⁸⁴

The Supreme Court, as well as many commentators, has recognized a fundamental right to bodily integrity in the Due Process

83. See, e.g., *Berg v. Richmond Unified Sch. Dist.*, 528 F.2d 1208, 1209–10 & n.1 (9th Cir. 1975) (describing policy requiring women to take unpaid maternity leave starting in the seventh month of pregnancy); see also H.R. REP. NO. 103-8, pt. 2, at 9–10 (1993) (prohibiting employers from interfering with an employee’s right to take medical or family leave).

84. 1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 292 (1890).

Clause.⁸⁵ Additionally, many courts and commentators have discussed a right to bodily privacy.⁸⁶ Bodily integrity is generally understood as a right to be free from unwanted touching, to make one's own choices about medical treatment, and to control, in general, one's own body.⁸⁷ Bodily privacy is generally understood to be a right to cover up certain areas of one's body considered to be especially private, such as the genitals.⁸⁸ Unfortunately, in some contexts courts have made this right to privacy explicitly dependent upon the gender of the person to whom the body is exposed.⁸⁹ I place no stock in this sort of explicitly sex-dependent right of privacy. Of course, even when not made explicitly sex-based, a right to genital or other bodily privacy in the sense of a right to cover oneself may be implicitly sex-based and problematic.⁹⁰ However, we cannot deny that in the current social context, some right of privacy is implicated when one loses personal control over whether one's own body is exposed. We cannot be forced to uncover or, I argue, cover ourselves against our will.

One reason self-presentation is important to individuals is that it involves the public presentation of the physical body. Piercings, tattoos, hair cutting, hair growing, and hair coloring involve the right to modify and manipulate one's own body as an exercise of the right to bodily integrity. Jewelry, clothing, and makeup all touch the body so closely that they also involve the right to bodily integrity, a concept with roots as deep as the common law protections against battery, which recognize that one must control not only the interior, but also the surface of one's own body against the actions of private entities.⁹¹ Finally, clothing choices can enact the right to bodily privacy, as sometimes individuals are required to expose more of their body than they

85. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Rochin v. California*, 342 U.S. 165 (1952)) (recognizing the right to bodily integrity); *Vacco v. Quill*, 521 U.S. 793, 807 (1997) (clarifying that the right to refuse medical treatment rests in the right "to bodily integrity and freedom from unwanted touching").

86. See, e.g., Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 *YALE L.J.* 1257, 1259–60, 1269 (2003) (discussing the possible existence of a right to be free from exposure of the body and criticizing judicial constructions of this concept that divorce it from consent and marry it to sex).

87. See cases cited *supra* note 85.

88. See Kapczynski, *supra* note 86, at 1276 (discussing limited recognition of privacy interests "in anything other than genital physicality").

89. See *id.* at 1269 (contending that courts incorrectly consider a viewer's sex in determining whether the right to privacy of bodily exposure has been infringed).

90. *Id.* at 1269–70.

91. See RESTATEMENT (SECOND) OF TORTS §§ 13, 16, 18, 19 (1965) (defining battery as causing an offensive or harmful contact with the person of another, or an apprehension of such a contact, defining the requisite level of intent, and defining offensive contact as that which "offends a reasonable sense of personal dignity").

wish. For example, Nikki Youngblood, a high school student in Florida who preferred to wear boys' clothing, was required to wear a "drape" for her high school yearbook photo, rather than the shirt and tie that boys were permitted to wear.⁹² She objected to this requirement partially because the drape exposed her neck, shoulders, and upper chest, something she was not used to as a girl who had worn boys' clothing since the age of eight.⁹³

Of course, many of our choices can be articulated in terms of the right to control one's own body. For instance, I could articulate my "right to speak" in terms of "my right to move my lips and control the passage of air in and out of my lungs." But these are not terms in which the activity of speaking are frequently experienced. On the other hand, we have all experienced self-presentation choices in terms of how we feel about our bodies. As Paul Sweetman explains:

When I wear a suit, I walk, feel, and *act* differently, and not simply because of the garment's cultural connotations, . . . but also because of the way the suit is cut, and the way its sheer materiality both enables and constrains, encouraging or demanding a certain gait, posture and demeanour, whilst simultaneously denying me the full range of bodily movement that would be available were I dressed in jogging-pants and a loose-fitting t-shirt.⁹⁴

Feminists have long fought for freedom from ultra-feminine forms of self-presentation not merely in terms of sexual politics, but also in terms of the right to control one's own body:⁹⁵ These clothes, hairstyles, and the like weren't bad merely because their cultural meaning operated to subordinate women, but also because they physically restrained women.

92. GenderPAC, National Conference on Gender, <http://www.gpac.org/youth/news.html?cmd=view&msgnum=0408> (interview of Nikki Youngblood, July 1, 2002).

93. *Id.*

94. Paul Sweetman, *Shop-Window Dummies? Fashion, the Body, and Emergent Socialities*, in *BODY DRESSING* 59, 66 (Joanne Entwistle & Elizabeth Wilson eds., 2001). Sweetman continues:

And this is—crucially—far from simply a matter of my own individual experience of the body: it is socially significant in a number of ways. . . .

We can talk, then, of fashion and adornment as "techniques of the body" which impact not only on our *appearance*, but also on our experience of the body and the ways in which the body can be used. . . .

. . . Bodies and selves are made and remade in part through the ways in which they are adorned, and this is a process that involves "carnal knowing" as well as "cognitive apprehension."

Id. at 66–67 (citations omitted).

95. *E.g.*, GILMAN, *supra* note 12, at 116–17, 133–41 (discussing the oppressive nature of fashion).

Moreover, how we experience our body is relevant to our experience of the entire world. We have “embodied subjectivities.”⁹⁶ This is why Elaine Scarry has argued that torturers actually “unmake the world” of the victim through the infliction of physical pain.⁹⁷ As Joanne Entwistle has explained, “our experience of the body is not as inert object but the envelope of our being, the site for our articulation of self. . . . [A]nd what could be more visible an aspect of the body than dress? . . . [D]ress constitutes part of the experience of the body and identity.”⁹⁸ Many other writers have eloquently described this aspect of dress—its close relation to and inseparability in some instances from the body—as relevant to the meaning and experience of clothing and cosmetics. For instance, Eco describes how wearing tight jeans so constrains him and forces his physical behaviors that it affects his writing.⁹⁹ He thinks of clothing as operating like a semiotic code, structuring our perception of the world.¹⁰⁰ Colette, in *The Vagabond*, describes the effect of makeup resting directly on the face—how it feels like a plaster that alters not only one’s outward image, but also one’s sense of self:

Me. As that word came into my head, I involuntarily looked in the mirror. There’s no getting away from it, it really is me there behind that mask of purplish rouge, my eyes ringed with a halo of blue grease-paint beginning to melt. Can the rest of my face be going to melt also? What if nothing were to remain from my whole reflection but a streak of dyed colour stuck to the glass like a long, muddy tear?¹⁰¹

This connection between freedom of dress and a notion that control over our own bodies is essential to human dignity is part of why it strikes many of us as intrusive and unwarranted when someone tells us what to wear, how to cut our hair, or whether we can have a tattoo. It is as if the body is being taken over. And without a large measure of control over our own bodies, it is difficult to experience the world as a free person. Eco began to understand this when, after becoming aware of the effects of restrictive clothing on his own relationship to the world, he realized that “[w]oman has been enslaved by fashion

96. See generally MARGARET A. McLAREN, *FEMINISM, FOUCAULT, AND EMBODIED SUBJECTIVITY* (2002).

97. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 37–38 (1985).

98. Joanne Entwistle, *The Dressed Body*, in *BODY DRESSING*, *supra* note 94, at 33, 46.

99. Eco, *supra* note 14, at 191–95.

100. *Id.* at 194–95.

101. COLETTE, *THE VAGABOND* 7 (Enid McLeod trans., Farrar, Straus and Giroux 2001) (1910).

not only because . . . it made her a sex object; she has been enslaved chiefly because the clothing counseled for her forced her psychologically to live for the exterior."¹⁰² When prisoners at Auschwitz were tattooed, they were not merely registered as prisoners; they were dehumanized.

Regardless of the private or public nature of the context we are in, certain rights to bodily integrity and privacy are generally protected by state criminal law¹⁰³ and the common-law torts of battery¹⁰⁴ and assault.¹⁰⁵ The sense that other persons should not, except in unusual circumstances, intrude on what we do with our own bodies is quite strong, even in the private context. Thus, when others control our self-presentation, this is intrusive in a unique manner, different from what we feel when our other actions are controlled. Because personal appearance choices involve manipulating the appearance of the physical self, they can be afforded special status: They are not just politically and culturally significant decisions; they are experienced as highly personal ones, too.

Why, then, do I not articulate borders of the freedom of dress that map more clearly onto traditional medical or biological understandings of the borders of the body? Why do I not argue for the protection of choices with respect to hairstyle and tattooing, and ignore protection of choices with respect to clothing and makeup? Deciding whether to cut one's own hair is, under a very traditional understanding of the body, quite different from deciding whether to wear a dress.¹⁰⁶

I do not draw the borders of the freedom of dress so as to map directly onto the borders of the human body because I am not promoting a naturalized and essentialized conception of the human body and its separation from the external world. I am not claiming that freedom of dress is important because the body is sacred, natural, or immutable. Indeed, I am positing that the body is not sacred, is deeply alterable, and that "natural" and "unalterable" attributes of our bodies—such as the color of our skin, the shape of our genitals, the color of our eyes, and the texture of our hairs—may be no more important to many of us than "artificial" and "alterable" aspects of our

102. ECO, *supra* note 14, at 194.

103. See MODEL PENAL CODE § 211.1 (1980) (consolidating battery, mayhem, and assault into a single crime).

104. RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965) (defining battery).

105. *Id.* § 21 (defining assault).

106. Similarly, why do I not include within the right choices concerning smell, such as choice of perfume, rather than only including choices affecting appearance?

bodies, such as our tattoos, piercings, jewelry, clothing, dyed hair, braided hair, straightened hair, or shaved heads.

In fact, the distinction between the natural or immutable and the artificial or choice-based aspects of our bodies is a slippery one. Skin color, genital shape, eye color, and hair texture are all alterable, with varying levels of effort. Body weight is alterable, but sometimes only with great effort and social support. Tattoos are close to unremovable. Hip implants are removable, but only at great medical cost to those who have them, and once implanted, they are internal to the owner. Are scars from accidents “natural,” or “artificial”? What about scars that are deliberately obtained as a form of cosmetic body modification? Scars that result from surgery? Does it matter if the surgery was defined as “elective” or “medically necessary,” and whose definition for those categories should we use?

Rather than treating the body as a temple, I am recognizing its inescapable, however historically, culturally, or politically contingent, role in our experience of self. Much theory attempts to de-naturalize the concept of identity by pointing to its social construction, but nevertheless tries to develop a politics which will not deny its historical and social importance to human life.¹⁰⁷ Thus, Butler promotes “gender trouble” as a subversive politics which avoids the essentializing and totalizing problems of identity politics.¹⁰⁸ One of her examples of such trouble is drag performance, which neither seeks to transcend gender nor essentializes it.¹⁰⁹ Rather, it subverts the naturalization of gender by highlighting its performativity.¹¹⁰ Similarly, in *Simians, Cyborgs, and Women: The Reinvention of Nature*, Donna Haraway promotes “cyborg politics” as an alternative to identity politics.¹¹¹ Her cyborg metaphor is an attempt to disrupt the naturalization of the human body and of gender,¹¹² but without seeking to be “innocent” or transcendent¹¹³ of the systems of power and coercion that socially construct gender and the body.¹¹⁴

I recognize that the body may hold no more inherent, acontextual value than chattel such as clothes, jewelry, computers, or iPods. Thus, I do not seek to construct a right that privileges outdated con-

107. *E.g.*, BUTLER, *supra* note 48, at 44, 95–100, 119.

108. *Id.* at 44.

109. *Id.* at 174–80.

110. Butler, *supra* note 38.

111. DONNA J. HARAWAY, *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 150 (1991).

112. *Id.* at 149–51.

113. *Id.* at 151, 180.

114. *Id.* at 180–81.

structions of a biological or “natural” body. The body’s manipulation and alteration has become widespread. The body and the world around it have begun to bleed into each other: Extreme body modification is on a more visible rise, clothes and other objects seem more and more like parts of our bodies and extensions of ourselves, transsexual persons’ alterations of their gender are more and more visible, some Asian Americans have opted for eyelid surgery,¹¹⁵ and Michael Jackson is widely thought to have changed his skin color. And yet, all these trends don’t seem to represent a *transcendence* of the body as having any importance at all. These are not even trends toward the soul and mind taking precedence over the body. If transsexual identity were about transcending the importance of genital shapes, then why would so many transsexuals endure the oppression they endure, spend the money they spend, and enter into complicated relationships with the medical establishment to change that which doesn’t matter—the shape of one’s genitals?

Rather, these manipulations, alterations, adornments, and extensions of our bodies themselves carry a great deal of meaning to most of the people engaged in them. We are not “liberated” from a “repressive” notion of the body’s importance, and we have not transcended it. However, we have extended our understanding of the self. We are selves constituted no longer simply by soul and body, but by soul, body, clothes, tattoos, piercings, and the like. Thus, the appropriate borders for the freedom of dress are not the exact borders of the body, but nor are they limitless or willfully ignorant of the body. My choice of clothing, hairstyle, tattoos, piercings, and makeup as the manipulations of the self that constitute a freedom of dress reflects social realities, realities I explore further in the next Section.¹¹⁶ After all, there’s more to the self, and the role of dress in exercising agency over it, than the physical self.

115. See Elisabeth Rosenthal, *Ethnic Ideals: Rethinking Plastic Surgery*, N.Y. TIMES, Sept. 25, 1991, at C1 (reporting that “[t]he creation of [an eyelid] fold is the most commonly requested cosmetic operation among Asian-Americans”).

116. Of course, one might take account of the body more than I do, and the commonality of appearance manipulation as a site of self-definition less. This might lead to, for instance, including choices about the way one smells, such as perfume-wearing, within the freedom of dress. To analogize once again to the FMLA, the decision to protect those who miss work to care for sick family, and not sick friends, sick neighbors, or sick strangers, is at some level an arbitrary one. But I would not call this arbitrariness unprincipled. The choice is informed by the well-recognized pervasiveness of appearance manipulation in the psychological development and exploration of identity, especially for children.

C. *The Developmental Role of Dress*

Individuals are not born with an entirely formed sense of identity and personality. Rather, a sense of both individual self and connection to others is formed over time. Freedom of dress serves the need of our culture to provide a setting in which the individual can form her personality.¹¹⁷ Thus, “[t]he discovery of identity is a crucial phase of the interaction of culture and the personality.”¹¹⁸ Children begin to have a visible interest in clothing around the age of two, one that is deeply influenced by parents “who confer their ideas of masculinity and femininity on young children,” and therefore encourage girls to develop a stronger and more detailed interest.¹¹⁹ Between the ages of five and nine, however, “the child becomes more of an independent consumer.”¹²⁰ Once children become teenagers, they tend to become extremely concerned with fashion and other forms of self-presentation.¹²¹ Although “adolescent subculture” is deeply affected by the industrialist and capitalist society in which it forms,¹²² the fact is that adolescent subcultures do exist, and are important to children’s development of a sense of both self and group identity.

Many used to understand fashion as detrimental to self-development, but no longer.¹²³ The therapeutic role of forms of self-presentation, and the fact that clothes can recall memories of good luck, are now acknowledged.¹²⁴ Moreover, the freedom to choose individual fashion can greatly improve self-esteem and provide a sense of power over the environment.¹²⁵

Fashion is functional in the search for meaning and to establish identity.¹²⁶ “People strive to discover who they really are, and to express their real selves in various ways, including the expression of self through the selection of fashion.”¹²⁷ In the past, personal appearance manipulation served to maintain class status and, therefore, tended to operate as a restriction on individuality. Sumptuary laws criminalized

117. ANSPACH, *supra* note 5, at 23.

118. *Id.*

119. *Id.* at 290.

120. *Id.*

121. *Id.* at 291–93.

122. *Id.* at 292.

123. JEANETTE C. LAUER & ROBERT H. LAUER, *FASHION POWER* 222–23 (1981).

124. *See, e.g.*, Tina Gaudoin, *Makeup*, *HARPER’S BAZAAR*, Sept. 1992, at 324, 326 (describing the Look Good . . . Feel Better program, which is said to have helped many women struggling with cancer survival).

125. LAUER & LAUER, *supra* note 123, at 228–29.

126. *Id.* at 3.

127. *Id.*

the practice of wearing attire inappropriate to one's social and economic class.¹²⁸ But now, the use of fashion to maintain class status has been greatly diminished. What is "in fashion" changes rapidly and often appropriates the practices of traditionally subordinated groups, such as people of color or the poor.¹²⁹ Moreover, fashion is far less rigid than it once was in the past. In this postmodern¹³⁰ world, almost anything can be in fashion. Nineteenth-century writers imagined that "consumers either would not or could not rebel against fashion trends."¹³¹ But in the twenty-first century, we understand that fashion can be reformed in a grassroots manner, even while its workings "elude human reason."¹³² For instance, women rebelled against the corset and succeeded in causing it to go out of fashion.¹³³ Since that time, American women have frequently protested various new fashions and even signed pledges not to wear them, no matter what anyone else does.¹³⁴ While these protests sometimes succeed and sometimes do not, "[f]ashion is obviously not the coercive social fact that it seemed to be in the nineteenth century."¹³⁵

Thus, on the one hand, "the function of fashion has shifted from class maintenance by status symbols to identity seeking by ego symbols," and clothes now have a deep linkage to the ego.¹³⁶ Clothes, and other aspects of personal appearance, help us negotiate the need to conform to the group and the need to express ourselves as individuals.¹³⁷ They also function "to stress the point that [one is] not committed wholly to one particular identity."¹³⁸ On the other hand, personal appearance serves to signify and enact our commitment to and membership in various subcultures. In fact, the way we present ourselves can so affect us psychologically that educators confirm that girls in high school "act up" more when they wear pants than when

128. See ANSPACH, *supra* note 5, at 261 (discussing Massachusetts's sumptuary laws); LAUER & LAUER, *supra* note 123, at 56–57 (noting that sumptuary laws regulate status distinctions in some societies).

129. For example, there are grunge, deconstructed, boho, hip hop, and "working class hipster" fashions.

130. I use postmodern here in the sense of fragmented, diverse, and self-contradictory.

131. LAUER & LAUER, *supra* note 123, at 144.

132. *Id.*

133. *Id.* at 144–45. Clothing that references the corset has, of course, now come back into fashion. However, this does not negate the progress of the feminist reformation of fashion, given that corsets are no longer considered required attire.

134. *Id.* at 148–49.

135. *Id.* at 150.

136. *Id.* at 3 (internal quotation marks omitted).

137. *Id.* at 4.

138. *Id.*

they are dressed femininely,¹³⁹ and that students in general “act up” less when they wear uniforms. Tattoos and piercings also, in their permanence, can have a profoundly emotional effect. After September 11th, many people in New York obtained tattoos commemorating the events.¹⁴⁰ These tattoos functioned as part of the grieving and recovery process, but will serve as reminders of the tragedy for years to come.

Given that our choices about how we manipulate our appearance have become so psychologically affecting, it's no wonder that feminists placed emphasis on being able to choose and reform women's clothes at a time when they did not even have the right to vote,¹⁴¹ and that feminist activists continued to be concerned with the meaning of women's dress in 1968, when they threw bras in a trash can to enhance their claims to equality and freedom.¹⁴² If we can't control the way we look, our self-esteem, personality, and social identity are all affected.

D. *Dress in Postmodern Life: The Personal is Political*

Freedom of dress is not important simply because it is indistinguishable from race, gender, or other important identity categories. To think of it only as such is too essentialist, while to think of it only as a means of exercising control over one's own body, ignoring its psychological, cultural, and political role would be too materialist. Freedom of dress is important because manipulation of personal appearance is for many of us the means by which we negotiate the personal and the political—a means constituted on the borders of our own bodies.¹⁴³ As such, it is the place where we form and reform an identity that is *both* individual *and* part of a community or subculture. This identity is not simply a communication to others of how we feel. Identity is something which, like religion, is unstable and mutable, yet it structures and colors our entire experience of the world. How we define our difference from and similarity to others and what we think

139. ANSPACH, *supra* note 5, at 329.

140. Tara Godvin, *Tattoos Memorialize Sept. 11, Lost Loved Ones*, TORONTO STAR, Sept. 9, 2002, at C3; Julie Salamon, *Tragedy Pierces the Heart, Memory the Skin*, N.Y. TIMES, Apr. 4, 2003, at E35.

141. See ANSPACH, *supra* note 5, at 330 (recounting the nineteenth-century Bloomerism movement).

142. ALICE ECHOLS, DARING TO BE BAD: RADICAL FEMINISM IN AMERICA 1967–1975, at 93 (1989). This event, at a Miss America pageant, was erroneously reported by the media as a “bra-burning” event, (although perhaps with egging on by feminist organizers themselves to gain publicity), and the term “bra-burning feminist” has remained in our parlance ever since. *Id.* at 94.

143. See Entwistle, *supra* note 98, at 33, 37 (“Dress lies at the margins of the body and marks the boundary between self and other, individual and society.”).

to be the significance of our corporeal bodies all define our existence as deeply as, if not more than, for some, our spiritual beliefs do.

Even when we are young in years, dress is a primary site of experimentation with, and formation of, our identities and our sense of belonging or the clarity of our convictions. Choice in dress is crucial in developing what often seems like a self-contradictory term, a “public self,” because the medium of dress is uniquely suited to this task. Dress is a particularly schizophrenic form of expression,¹⁴⁴ in that each instance of self-presentation highlights a tension between our existences as individuals who act, desire, and believe on the one hand, and as members of a socio-political-cultural system that determines our actions, desires, and beliefs on the other hand. When we sign in the medium of dress, we call attention to the individual, corporeal body, insisting on the fact of an individual self with an identity separate from the socio-political-cultural context in which it exists.¹⁴⁵ And yet, the symbology of dress depends entirely on the individual identifying herself as a conformist to and consumer of various group and class norms, as an antagonist of those norms, as an affiliate of various ideas and philosophies. Dress symbology involves covering, modifying, and otherwise denying the corporeal body in order to transform it into just another sign within the crude system of meanings that is fashion. “As Eugenie Lemoine-Luccioni suggests, clothing draws the body so that it can be culturally seen, and articulates it as a meaningful form.”¹⁴⁶ That the body requires the work of dress to transform it into a culturally visible, meaningful form calls attention to the dependence of individual status on the group and social power. Even if we were to describe self-presentation as art, no other kind of art does precisely this.

Rather than simply protecting this freedom of dress under First Amendment and equality rubrics, I propose treating it as a unique fundamental right. More than just a “hybrid” right,¹⁴⁷ it is a unique assertion of human agency in the context of cultural coercion. Dress also serves a unique psychological and developmental function, helping the individual, especially the adolescent, negotiate the borders between personal beliefs and desires, individualism and conformity. In

144. I thank Clint Thacker for helping me articulate this point.

145. As Jacqueline Lo writes in *Beyond Happy Hybridity: Performing Asian-Australian Identities*, in *ALTER/ASIANS* 152 (Ien Ang et al. eds., 2000): “The materiality of the body problematises the notion of identity formation as the endless free play of fluid, fragmented selves. . . . [I]dentities are grounded in specific bodies, histories and geographies.” *Id.* at 160.

146. Wilson & de la Haye, *supra* note 2, at 2.

147. See *Employment Div. v. Smith*, 494 U.S. 872, 881–82 (1990).

short, it helps the individual develop, revise, destabilize, and stabilize the identities that shape his or her entire experience of the world.

A large number of federal cases were brought in the 1960s and 1970s challenging hair length and beard regulations for students and teachers in public schools.¹⁴⁸ Judges on both sides of these cases felt it necessary to comment on their silliness and frivolity, and expressed personal irritation with having to decide the cases in a time of growing federal caseload. Some judges commented on the silliness of the public, who wrongly imagined that in these hair and beard variations lay “the seeds of violence and revolution.”¹⁴⁹ These judges hoped the public would “come to its senses” and stop regulating hair length and beards. Other judges commented on the frivolity of the claims being brought by the plaintiffs, and seemed irritated that the plaintiffs would even deign to think they could go to the federal courts to protect something as unimportant as their hairstyle or facial hair.¹⁵⁰

All these judges were wrong to comment on the “silliness” of the issue. The fact that so many public bodies sought to regulate haircuts and facial hair, and that so many people subject to those regulations felt injured enough to bring lawsuits, all within the space of a few years, indicates that something must have been at stake. The fight over haircuts and facial hair was not a fight over a specific and well-defined set of political values, but it was a fight over cultural values—a fight over a general attitude and approach to much of life itself, including consumer life. This is a fact that, ironically, is sometimes used against plaintiffs, as if expressing a general social attitude were less important than expressing a specific political belief.¹⁵¹ But if anything, the fact that the fight was a “culture war” probably made it more important, not less important, to parties on both sides. Thus, there simply cannot be any doubt that personal appearance regula-

148. See Recent Case, 84 HARV. L. REV. 1702, 1702–04 & n.4 (1971) (listing hair and grooming cases).

149. *E.g.*, *Hander v. San Jacinto Junior Coll.*, 519 F.2d 273, 281–82 (5th Cir. 1975) (Brown, C.J., concurring).

150. See, *e.g.*, *Holsapple v. Woods*, 500 F.2d 49, 52 (7th Cir. 1974) (Pell, J., concurring) (stating that the “high school-hair issue . . . [lacks] sufficient constitutional significance”).

151. *E.g.*, *Zalewska v. County of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003) (finding that appellant’s “broad statement of cultural values” communicated through dress was not sufficiently particularized to be protected); *E. Hartford Educ. Ass’n v. Bd. of Educ.*, 562 F.2d 838, 858 (2d Cir. 1977) (en banc) (holding that schoolteacher’s claim that refusing to wear a tie “communicates a comprehensive view of life and society” meant that it was afforded less protection than pure speech would be afforded); *Richards v. Thurston*, 424 F.2d 1281, 1283 (1st Cir. 1970) (recognizing that there “may be an element of expression and speech involved in one’s choice of hair length and style, if only the expression of disdain for conventionality. However, we reject the notion that plaintiff’s hair length is of a sufficiently communicative character to warrant the full protection of the First Amendment”).

tion and freedoms are important. The question is where cultural battles like the one that long hair on men embodied in the 1970s can be played out, and what forces can be marshaled in the fight. That question is still relevant today, as numerous litigants and scholars interrogate restrictions on their dress, behavior, and other aspects of identity performance in the workplace as potentially violative of antidiscrimination law.

E. *Dress as Communication*

One theory of why dress is important is that it is a kind of speech. Under this theory, we can address claims concerning freedom of dress by simply assessing whether the dress communicates a sufficiently “particularized” message, understandable by observers, to count as speech in a given instance, using well-established First Amendment doctrine for the protection of expressive acts as opposed to “pure speech.”¹⁵² Speech has, of course, been theorized endlessly, so if dress were really important only because it is often a type of nonverbal speech, then this would explain and justify the failure to theorize dress as a unique right.

Indeed, some litigants have been able to characterize their choices about dress as equivalent to political speech and, as a result, have prevailed in challenging unwarranted state regulation of their choices.¹⁵³ When litigants’ exercise of the freedom of dress has not been so easily understood as *political* speech, they have not fared as well.¹⁵⁴ But this alone is unremarkable, given that First Amendment doctrine privileges political speech over commercial and other kinds of speech.¹⁵⁵ This privileged status afforded political speech is

152. Compare *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (protecting flag burning as speech), with *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507–08 (1969) (distinguishing regulation of skirt length and hairstyle from prohibition of the black armband at issue in the case, which the court viewed as pure speech).

153. See *Cohen v. California*, 403 U.S. 15, 24–26 (1971) (protecting as speech the wearing of a jacket that said “Fuck the Draft”); *Tinker*, 393 U.S. at 508–09 (finding that wearing a black armband to protest the Vietnam War constituted pure speech); cf. *Johnson*, 491 U.S. at 404, 420 (viewing flag burning as speech).

154. See, e.g., *City of Erie v. Pap’s A. M.*, 529 U.S. 277, 296 (2000) (upholding the regulation of a nude dancing establishment based on the “secondary effects” of adult entertainment businesses); *S. Fla. Free Beaches, Inc. v. City of Miami*, 734 F.2d 608, 610 (11th Cir. 1984) (holding that nude sunbathing was not protected expression under the First Amendment).

155. E.g., *Pap’s A. M.*, 529 U.S. at 289, 294 (2000) (“[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate” (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976)));

deemed legitimate by many, as it is the most closely related to democratic functioning,¹⁵⁶ and illegitimate by others.¹⁵⁷ But these are debates about the proper way to match up First Amendment doctrine with theories of the importance and nature of free speech and art. They are not problems specific to the freedom of dress.

The theory that freedom of dress is just the same as freedom of speech is not, on its face, implausible. Some people have described fashion as a “language,” “code,” or “system”¹⁵⁸ because choices about dress can, like words, communicate ideas and statements. Like words, fashion has symbolic meanings.¹⁵⁹ However, these meanings shift over time, and sometimes even with the season, or with the social and political context.¹⁶⁰ For instance, “cowboy” attire once signified subscription to a code of honor, independence, rugged individualism, and other “Western” cultural values.¹⁶¹ But for a few years, when these clothes were worn in New York City, they more often than not signified membership in a mostly white youth hipster culture found in

Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 186–87 (1999) (reconfirming that First Amendment protection is “at its zenith” for “core political speech” like the circulation of a petition); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553–55 (2001) (denying commercial speech full First Amendment protection).

156. *See generally* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (Kennikat Press 1972) (1948) (examining the role that freedom of speech plays in the functioning and structure of our political system).

157. *See, e.g.*, Balkin, *supra* note 78, at 3–5 (emphasizing the importance of protecting all speech, including cultural communications); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 *YALE L.J.* 1, 37–43, 46–48 (2002) (arguing that artistic expression and commercial speech must be protected even when not political, as exercises of the freedom of imagination).

158. *See generally* RUTH P. RUBINSTEIN, *DRESS CODES: MEANINGS AND MESSAGES IN AMERICAN CULTURE* 6–7 (1995) (using semiotics to attempt to develop “a systematic understanding of clothing images and meanings in American society,” and describing the “language” of clothing as well as its “vocabulary”). *See also* BARTHES, *supra* note 13, at 254–55 (discussing the characters that fashion allows the wearer to embody).

159. *See* ANSPACH, *supra* note 5, at xiv–xv (discussing fashion as a symbol).

160. *See id.* (describing the circular flow of fashion); LAUER & LAUER, *supra* note 123, at 36 (noting that what clothes communicate varies by place and time within stable categories). *See generally* KATHY PEISS, *HOPE IN A JAR: THE MAKING OF AMERICA’S BEAUTY CULTURE* (1998) [hereinafter PEISS, *HOPE IN A JAR*] (tracking the changing meaning of cosmetics in America, from an accepted practice for men and women, to an immoral practice for men and women signifying aristocratic excess and racially animated fear of female sexuality and trickery, to an accepted practice for women that “reveals” inner beauty, and finally to a naturalized, largely gendered practice for women).

161. Museum of the American West, *How the West Was Worn*, <http://www.museumoftheamericanwest.org/explore/exhibits/archive/westworn.html> (last visited Oct. 24, 2006) (“Rooted in the fundamental, historic American mythic conditions of ‘rugged individualism,’ Western wear and the pioneers who made this style fashionable are the source of inspiration for those shaping American identity at home and abroad.”).

the Williamsburg section of Brooklyn, New York.¹⁶² Wearing visible, colored makeup was once deemed acceptable for both men and women in Western cultures.¹⁶³ Then, in America especially, it was deemed immoral and duplicitous. The term “painted woman” even became synonymous with prostitute.¹⁶⁴ Eventually, it became not only common for women to wear makeup in America, but encouraged, it being described as necessary to their mental health or essential to the war effort,¹⁶⁵ and even required in some businesses.¹⁶⁶

The symbols of personal appearance are imprecise in meaning because, like words, the meaning is not inherent to the symbol; it depends on context, and even then the words mean different things to different people.¹⁶⁷ For instance, many have debated whether miniskirts, makeup, and other choices about personal appearance that are understood by many as “sexually provocative” are liberating or denigrating to women,¹⁶⁸ just as some have debated whether headscarves and other clothes deemed to be “modest” by most are denigrating or liberating.¹⁶⁹ Imprecision and contextual contingency of meaning can be identified within verbal languages, but communication through dress is imprecise to another degree.

Beyond the degree of imprecision, however, there is an extremely important difference between expression via personal appearance choices and expression via words, one that is highly relevant to law: “Each person who adopts a fashion interprets the meaning in her own way and sends the message on in altered form. Fashion has a way of so

162. See ROBERT LANHAM, *THE HIPSTER HANDBOOK* 93, 111 (2003) (illustrating hipster culture and identifying its prevalence in certain cities).

163. Kathy Peiss, *Making Up, Making Over: Cosmetics, Consumer Culture, and Women's Identity*, in *THE SEX OF THINGS* 311, 315 (Victoria de Grazia & Ellen Furlough eds., 1996) [hereinafter Peiss, *Making Up, Making Over*].

164. *Id.*

165. PAULA BLACK, *THE BEAUTY INDUSTRY* 34 (2004); PEISS, *HOPE IN A JAR*, *supra* note 160, at 240–42; see also Library of Congress, *Rosie the Riveter: Real Women Workers in World War II*, <http://www.loc.gov/it/program/journey/rosie-transcript.html> (last visited Oct. 24, 2006) (transcript of Sheridan Harvey video presentation).

166. *E.g.*, *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1078 (9th Cir. 2004) (Nevada casino's policy required women beverage servers to wear makeup); PEISS, *HOPE IN A JAR*, *supra* note 160, at 240–42 (“Even the All-American Girls Professional Baseball League, organized during the war, ordered women ballplayers to take makeup lessons from Helena Rubinstein and to appear ladylike on the field.”).

167. See ANSPACH, *supra* note 5, at 240 (noting that “symbols do not mean the same thing to all people at all times”).

168. CAROLYN G. HEILBRUN, *THE EDUCATION OF A WOMAN: THE LIFE OF GLORIA STEINEM*, at xviii (1995) (describing Steinem's “feminis[m] in a miniskirt” as a walking “contradiction”).

169. See generally FADWA EL GUINDI, *VEIL: MODESTY, PRIVACY AND RESISTANCE* (1999) (discussing the evolution of differing views pertaining to veiling practices).

identifying with the wearer that it appears to be an integral part of the personality.”¹⁷⁰ As I would put it, the difference between verbal language and the language of dress is one of form. Statements in the language of dress use a more subjective and personal *form* than statements made in word language. They are somehow akin to statements that always have the word “I” in them. Such as, “I am a cowgirl,” or “I feel happy today,” or “I don’t want to be noticed,” or “I want to call attention to myself,” or “I’m not trying to say anything at all.” The clothes I wear never simply make the statement: “The war is wrong.” They make the statement, “I think the war is wrong.”

One might object to my claim about the subjective form of dress by pointing to the fact that when a model wears clothes, he or she makes no personal, subjective statement. Indeed, he or she often did not even choose the items exhibited on his or her body. However, I am not making any claims about art, including fashion shows, that makes use of clothing, hair, and other such items in general. Rather, I am exploring choices of *self*presentation. Thus, an artwork or fashion show in which clothes, hair, makeup, piercings, and even tattoos are exhibited on models does not come within the borders of the right I am exploring. Such activity might of course come within the borders of other rights, such as artistic or political expression under the First Amendment, but I am exploring specifically the right to manipulate one’s *own* image.

A further objection might find the fact of the subjective form of dress expressions inconsequential. But differences of form, especially the difference between subjective and objective form, are highly significant. Those who are careful writers know that even the smallest change in form—such as adding a paragraph break—can make a difference. When it comes to a choice concerning the objectivity or subjectivity of a form, most of us care even more: Few think that a documentary passing itself off as objective journalism should be judged by the same criteria as a movie passing itself off as a personal documentary about the filmmaker’s experience, or a documentary that interrogates the very notion of objectivity. The form of the film tells us something about what it communicates and what we seek from and expect of it. And indeed, if I say, “the war is wrong,” I am not communicating the same thing as when I say, “I believe the war is wrong.” Adding the subjective “I believe” qualifies my statement, and in many contexts, implies less or even no obligation on the listener’s part to agree or disagree. On the other hand, it calls attention to my

170. ANSPACH, *supra* note 5, at 241.

personal belief, which makes the statement stronger along some measures.

Various forms of self-presentation might also be understood as a form of artistic expression, which, like speech, is protected under the First Amendment.¹⁷¹ Of course, there are far fewer satisfying theories of why art, as opposed to speech, is protected under the First Amendment, but they are not non-existent, and theories protecting art tend to be a bit more generous about what kind of expression is important to freedom.¹⁷²

Some persons put a great deal of imagination and creativity into the way they dress, wear their hair, or otherwise present themselves in public. They may do so for aesthetic reasons, for the personal enjoyment they receive from the creative acts, to make political statements, or to communicate emotions, allegiances, or ideas. It is undeniable that such persons are engaging in a form of artistic expression via their dress, amateur or not. Moreover, “lowbrow” art receives no less protection under most understandings of the proper protection of art in our society than “highbrow” art.¹⁷³ So, it matters little that the art most of us produce when we dress in the morning is about as derivative as it gets. Perhaps, no matter what its value, dress is a kind of artistic expression.

However, thinking of dress as a kind of art does nothing to solve the problem identified with equating dress and speech. Art, like speech, is not restricted to the deeply subjective form, or anything like it, that is the manipulation of one’s own personal appearance. Dress expressions are explicitly personal and subjective in form, whether artistic or not, and putting something on or altering one’s own body is a unique form of expression that communicates affiliation, commitment, and self-definition in a way other kinds of art cannot. Personal appearance manipulation happens in an entirely different system of meaning than does sculpture. It is nowhere near the same thing to put a hat on one’s head as to put it on a pedestal in a museum.¹⁷⁴

171. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (describing the “painting of Jackson Pollock, music of Arnold Schönberg, or Jaberwocky verse of Lewis Carroll” as “unquestionably shielded” by the First Amendment).

172. *See, e.g.*, Rubinfeld, *supra* note 157, at 35–37 (arguing that both high-value and low-brow art are equally protected as art because they are all exercises of the freedom of imagination).

173. *Id.*

174. LAUER & LAUER, *supra* note 123, at 39 (“There is a vast difference between the costume in the closet and when it is worn. That difference is the spirit of the wearer.” (internal quotation marks omitted)).

Why does it matter for the law that dress is a uniquely subjective form? First, as a general matter, what distinguishes dress from speech doesn't sound like an argument for heightened *intrusion* on the right. Under a liberal theory of personal autonomy, it is an argument for heightened *protection* of the right. And even under a republican theory of rights as promoting the public good, it is clearly useful for citizens to have the option of signifying their deep personal commitment to an expression by manipulating their personal appearance. And yet, the treatment of dress within free speech law has always been as some kind of adjunct form of speech, less important than "pure speech."¹⁷⁵

Second, the subjective form of dress becomes relevant in arenas like the private workplace. While there are many limitations on government regulation of speech in the public sphere, there are few limitations on private regulation of speech, such as employer rules about what employees can say, due to the "state action" doctrine. The state action doctrine makes governmental action contributing to the infringement of a right into an element of any claim that a fundamental right such as speech, art, or privacy has been infringed in violation of the Fourteenth Amendment.¹⁷⁶ I believe there are three major arguments for this doctrine.

First, to protect the right to self-presentation, or speech, in the private sphere would, one might argue, interfere with other rights, such as property and contract. Many persons before me have competently argued that the exercise of certain fundamental rights by workers must at least be balanced against market forces and employer preferences, given that we spend such a great deal of time at work and given that, after all, we are balancing one right against another, such as property versus speech, contract versus speech, or property versus privacy.¹⁷⁷ When weighing property and contract rights against other

175. *E.g.*, sources cited *supra* note 151.

176. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) ("Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not.").

177. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 *Nw. U. L. REV.* 503, 505-06 (1985) (arguing for elimination of the state action requirement in general); Terry Ann Halbert, *The First Amendment in the Workplace: An Analysis and Call for Reform*, 17 *SETON HALL L. REV.* 42, 66-72 (1987) (questioning the state action requirement and proposing legislative reform as the best solution to shrinking opportunities for inexpensive exercises of free speech); Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 *TEX. L. REV.* 1, 66-70 (1990) (arguing that public and private institutional actors, especially private employers, should be treated alike when they infringe an individual's constitutional rights); Peller & Tushnet, *supra* note 56, at 793 (arguing that the state action concept is incoherent given the need for state enforcement of background contract and property rules); *cf.* Cynthia L. Estlund, *Free Speech and Due*

rights, a balance must be struck. For instance, the right to be free from discrimination on the basis of race is balanced against various other rights in this country, such as contract, property, marital privacy, and the right to send a child to private school. In the case of contract, the right to be free from discrimination on the basis of race is almost always deemed more important, and thus § 1982 and Title VII are the law of the land.¹⁷⁸ In the case of property, again, the right to be free from discrimination is almost always deemed more important, and thus we have the Fair Housing Act.¹⁷⁹ On the other hand, in the case of marital privacy, the privacy is considered more important, and thus no law prohibits persons from choosing their spouse for race-conscious or even blatantly racist reasons.

There are good reasons why contract and property are considered less important than the right to be free from discrimination. The areas of housing, employment, and contract-making form so much of a person's life in this country that if we have not secured the right to be free from race discrimination in these spheres, we are barely free from discrimination at all. When rights concerning personal autonomy and public participation come into conflict with property and contract rights, the importance of personal autonomy and public participation should not immediately fall by the wayside.

A second argument for the state action doctrine is one about the institutional competence of the judicial branch. The idea here is that judges are not well-suited to balance all these different interests, especially economic interests; the state action doctrine reins judges in, allowing them to protect fundamental rights whenever the government interferes with them in the absence of a compelling interest like public safety or order, while preventing them from striking improper balances between rights like speech, privacy, property, and contract.¹⁸⁰ However, this argument is simply an argument about which branch of government we should complain to when we believe rights like speech and privacy are being infringed. It means that we can complain to judges when there is state action but that we should complain to legislators when there is not state action.¹⁸¹ And of course, this is what

Process in the Workplace, 71 IND. L.J. 101, 106–14 (1995) (providing a normative argument for the value of free speech in the workplace).

178. 42 U.S.C. § 1982 (2000); 42 U.S.C. § 2000(e).

179. Fair Housing Act, 42 U.S.C. §§ 3601–3619.

180. *But see* Peller & Tushnet, *supra* note 56, at 794–95 (explaining and rejecting this argument as failing to address the democratic legitimacy of a regime in which economic inequality is not addressed).

181. West, *supra* note 57, at 829 (noting that dealing with welfare rights is within the purview of legislatures, not courts).

people often do. When it comes to freedom from race discrimination, many of our rights are protected in the private sphere by statutes that were passed by legislators, such as the Fair Housing Act,¹⁸² rather than by constitutional doctrine.

There is a third argument though, specific to speech and art, for why even legislators should not protect those rights in private realms, especially in the private workplace. To do so, the argument goes, would violate the speech rights of the property holder or employer. The theory is that when an employee speaks in the workplace, his or her speech is imputable to the employer because the employee represents the employer.¹⁸³ This is especially the case when the employee deals with customers, or when the employee is a supervisor dealing with other employees. Thus, we generally cannot try to simply balance economic rights or activity against speech rights, as any protection of employee or nonproperty holder speech rights would interfere with the employer's or property holder's speech rights by compelling speech that he or she does not wish to make.¹⁸⁴

Here is where the subjective form of dress is relevant. The expressions of an individual via dress—even if they are like art or like verbal language—are not as easily imputable to others as traditional art and speech. For instance, when an employee wears a colorfully painted t-shirt, this expression is not as easily confused with that of the employer as it would be if the employee hung a painting on the employer's premises, or even pinned the same t-shirt to the wall. When a cashier wears an eyebrow ring, customers will not impute this expression to the employer the way they might if she said to every passing customer, "The war is wrong."

Of course, this is not to say that what an employee wears *cannot* reflect on her employer. Indeed, whether it reflects on her employer will, in large part, be determined by the law: If an employer can tell an employee what to wear, which it usually can in the present legal context, we are more likely to impute employee dress to the employer

182. 42 U.S.C. §§ 3601–3619.

183. *E.g.*, *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004) (holding that Costco could not accommodate, without undue hardship, an employee's desire to wear an eyebrow ring for religious reasons because the employee's appearance is imputed to the employer).

184. For instance, in *PruneYard Shopping Center v. Robins*, the Supreme Court rejected a privately owned shopping center's claim that its speech rights were violated by a California law that required the shopping center to permit individuals to exercise speech and petition rights on its property on the grounds that "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner," and that "no specific message is dictated by the State to be displayed on [the] property." 447 U.S. 74, 87 (1980).

than if employers could not tell employees what to wear. This role of law in constructing the authorship of a particular communicative message is familiar in the First Amendment context. *PruneYard Shopping Center v. Robins*¹⁸⁵ involved the case of a shopping center that was required under California law to provide access to political demonstrators. The Supreme Court rejected the shopping center owner's argument that such a rule compelled it to author speech with which it did not agree.¹⁸⁶ Yet the law itself played a large role in constructing this situation: It is precisely because the shopping center was *required* to provide access that most observers would not impute the political demonstrator's beliefs to the center owner.

My point is that because dress has a largely subjective form, stemming from its use of the human body, we could, given the legal construct to assist us, quite easily distinguish employee dress from employer sanction in most cases. And, given its crucial role in forming and reforming both the physical and psychological self, we ought to. The relevant question seems not to be whether businesses may create an image of their choosing and communicate ideas of their choosing, but rather whether businesses can co-opt the bodies of their employees to communicate those ideas.

Similarly, in public schools, fear that student speech will be misattributed to schools and therefore interfere with both socialization and pedagogical goals has sometimes served to justify restrictions on that speech.¹⁸⁷ But this concern is usually inapplicable to student exercises of the freedom of dress, due to its subjective form.

In sum, the subjective form that dress uses to convey its meaning makes it a far less transferable expression than speech or art more generally. This strengthens the argument for giving some measure of protection to dress in realms like private workplaces and public schools. Treating dress as equivalent to speech or art is then inadequate as a matter of legal theory.

185. 447 U.S. 74 (1980).

186. *Id.* at 87–88.

187. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988) (explaining that the school, as publisher of the student newspaper, had the right to censor a student's article, which discussed student pregnancy and the effects of divorce on students at the school, to ensure "that the views of the individual speaker are not erroneously attributed to the school," and also noting that a school might need to disassociate itself from speech that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683–85 (1986) (arguing that, as an older high school student giving a speech at a school assembly at which younger, fourteen-year-old students were present, Fraser was "inescapably" like a "teacher[]," a "role model[]," and that the school acted properly to "disassociate itself" from the student's sexually suggestive speech).

F. Is "Freedom" of Dress an Illusion?

Perhaps I have been too optimistic. After all, even if our freedom of dress is protected in certain ways, clothing, hairstyling, jewelry, and makeup all cost money. Perhaps dress is so corrupted by the unequal distribution of wealth in America that any imagined "freedom" we have is an illusion. Perhaps, in the end, it is only the rich who have a freedom of dress, and dress is just one more way they make the poor feel bad and reify their class status. Alternatively, or perhaps simultaneously, freedom of dress may be so corrupted by gender and other systems of social limitation that it can never really be "free."

Similar claims have been made about speech,¹⁸⁸ and one might argue that they are even stronger when it comes to dress, given that clothing, jewelry, makeup, and the like can cost considerable amounts of money. Under this theory, the state might actually best promote freedom by interfering with capitalist, sexist, and racist regimes, and ensuring some equality when it comes to dress, through regulation.¹⁸⁹ Thus, school uniforms, or even citizen uniforms for all, might be a good choice, as they would prevent the wealthy from exercising freedom of dress at the social expense of the poor,¹⁹⁰ and would prevent sexist norms from encouraging women to make "false" choices that lead to their subordination. Perhaps these uniforms could be expunged of potentially gender-subordinating elements like makeup, headscarves, and corsets.

Unfortunately, this type of benevolent aim does not always operate to serve the goals of equality when it comes to cultural practices like dress. When it comes to speech, the government can intrude on the market to provide broadcast *access*, thereby attempting, at least, to give airtime to a diversity of content.¹⁹¹ When it comes to dress, how-

188. See, e.g., Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1412 (1986) ("I think it fair to say that in a capitalist society, the protection of autonomy will on the whole produce a public debate that is dominated by those who are economically powerful."); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 3-5 (1985) (describing an absolutist or "neutral" version of the First Amendment as "the systematic defense of those who own the speech because they can buy it or have speech to lose because they have the power to articulate in a way that counts").

189. But see Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 963 (1995) (arguing that governmental attempts to regulate speech using a market-based approach are ineffective because speech is not a fungible commodity).

190. See Alison M. Barbarosh, *Undressing the First Amendment in Public Schools: Do Uniform Dress Codes Violate Students' First Amendment Rights?*, 28 LOY. L.A. L. REV. 1415, 1439 (1995) (discussing the argument in favor of school uniforms); Miller, *supra* note 7, at 670 (same).

191. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389-90, 396 (1969) (upholding FCC licensing and regulation of broadcasters, including the fairness doctrine, as promoting First Amendment values rather than violating the First Amendment).

ever, I argue that government intrusion is more like state-run television than state-regulated television.

In the case of uniforms and dress code, the government intrudes on the market not as a neutral provider of access and promoter of diversity, but rather to remove certain kinds of content altogether and replace it with dress that is deemed more appropriate. Although this restriction on dress leads to a kind of equality, I argue that it is worse than the state in which unequal initial entitlements lead to unequal exercises of the freedom of dress. State-enforced equality of dress attaches permanent meaning to practices that could otherwise be the site of cultural flourishing and experimentation with new identities. I do not deny the effects of inequality altogether, and that is why I demand some protection of freedom of dress in the workplace, in order to soften the effects of major sites of power on appearance choices. "Neither the individual nor the society can rely for the security of our dress freedom upon the so-called free market. When vast differences in the respective sartorial powers of corporations and persons are palpably omnipresent, the non-interventionist principle is a dress authoritarian's charter."¹⁹² But to sacrifice dress choices completely in favor of equality poses its own problems.

First, queer theorists have noted the troubling fact that the capitalist market has actually opened up venues for flourishing queer culture and expression that are integral to queer identity.¹⁹³ It simply cannot be denied that gay men especially, and some lesbians, have found a refuge of sorts in many sectors of the market, such as bars, certain parts of the movie industry, and cable television.¹⁹⁴

I attempt in this Article to take a "post-queer, post-Marxist, post-feminist" view, one that recognizes that the existence of "private" spheres in which background inequality persists can nevertheless contribute to human flourishing, but also acknowledges and interrogates the effects of capitalist, racist, and sexist systems on the end results of that flourishing. This view acknowledges that gay men and lesbians have found much of their visible flourishing within a capitalist system, but also that this system has contributed to a gay culture that appears

192. Keenan, *supra* note 82, at 189.

193. See Alan Sears, *Queer Anti-Capitalism: What's Left of Lesbian and Gay Liberation?*, 69 *SCI. & SOC'Y* 92, 103–05 (2005) (lamenting the "commodification of queer life" (citing Michael Warner, *Introduction*, in *FEAR OF A QUEER PLANET*, at vii, xxxi n.28 (Michael Warner ed., 1993))); see also John D'Emilio, *Capitalism and Gay Identity*, in *THE LESBIAN AND GAY STUDIES READER*, *supra* note 38, at 467, 473–75 (noting that although capitalism has opened up identity expression possibilities for gays and lesbians, it has also further increased heterosexism and homophobia).

194. Sears, *supra* note 193, at 104–05.

to idolize the white, the wealthy, and the superficial. One only needs to watch *Queer Eye for the Straight Guy*,¹⁹⁵ an immensely popular television show that ridicules and chastises men who fail to spend all their disposable income on clothes, furniture, and other material goods, to realize that the versions of gay culture that have risen to the highest levels of mainstream acceptance within the capitalist system are not entirely rosy. Similarly, the sitcom *Will and Grace*¹⁹⁶ long enjoyed a prime time spot on a major broadcast network, but a main character's race- and class-based abuse of her Hispanic maid was played for laughs again and again, and it's simply not clear that the joke was ironic.

When it comes to eradicating gender subordination from dress choices, again, there are deep problems both with direct state intrusion and with leaving the private sphere to its own devices. Feminists have been right, for a long time, that enforced appearance standards for women do a great deal of the work of constructing their subordinated status as women.¹⁹⁷ However, these feminists are wrong to the extent they reject the possibility of cosmetics, corsets, high heels, and other ultra-feminine forms of dress as legitimate choices for women, rather than the products of false consciousness.¹⁹⁸ They are wrong, but not for the typical answer given: that such items are a great way for women to "use their sexuality as power," or more convincingly, to simply embrace it.¹⁹⁹ Those who reject women's dress that signifies sexuality are wrong because the wholesale rejection of these forms of appearance manipulation smacks of an earlier, but also subordinating, set of appearance standards for women.

Before women were encouraged to dress provocatively and sexually, they were discouraged from doing so, and not for feminist reasons. In nineteenth-century America, women were discouraged from doing so because of a moral code that equated the internal goodness and value of women with their external appearance.²⁰⁰ Women with pale, luminous skin got that way by being chaste and morally pure, and women who were chaste and morally pure developed pale, lumi-

195. *Queer Eye for the Straight Guy* (Bravo cable television network).

196. *Will and Grace* (NBC television).

197. See, e.g., GILMAN, *supra* note 12, at 110–17 (questioning why women willingly acquiesce to the force of fashion).

198. See *Joy of Resistance: Interview with Radical Feminist Carol Hanisch* (WBAI 99.5 radio broadcast July 2003), available at http://www.afn.org/~iguana/archives/2003_08/20030815.html [hereinafter *Hanisch Interview*].

199. PEISS, HOPE IN A JAR, *supra* note 160, at 156–59; Peiss, *Making Up, Making Over*, *supra* note 163, at 313.

200. PEISS, HOPE IN A JAR, *supra* note 160, at 24; Peiss, *Making Up, Making Over*, *supra* note 163, at 313.

nous skin.²⁰¹ Within this morality, the use of “artifice” such as cosmetics or corsets to alter the appearance was deemed a dangerous, feminine sort of trickery, and fear of this “deception” was animated by racist anxiety about passing.²⁰² But this morality did not promote equality. Rather, it valued women for their appearance, sexual purity, and white racial purity.

Thus, when Carol Hanisch criticizes the notion of women using their sexuality for power as dating back to Jezebel,²⁰³ she references a character that has long played a role in sexist and racist mythologies telling women how to behave.²⁰⁴ The provocative and sexual dress of women does not necessarily celebrate sexual “power.” Hanisch is correct to point out that such an assumption buys into a construction of women’s sexual desire as only serving others’ ends. However, we must accept these forms of dress for what they often purport to be—either the exercise of freedom and choice or the ironic reference to and subversion of past strict appearance codes. The alternative is to ascribe a single, stable meaning to these practices, and to recommend their replacement with another essentializing female ideal, just as problematic as the sexualized one.

Employers have forbidden women from bringing makeup to work for fear that feminine obsession with appearance would distract them from the job,²⁰⁵ and employers have required women to wear makeup at work in order to signal that, although they are working, they still understand that their status is woman.²⁰⁶ Both of these restrictions on women’s choices should offend feminists as a kind of psychic reminder that women are not people who primarily belong in the workplace.

Thus, while my view acknowledges the value of private cultural expression via the freedom of dress, even where that expression occurs in a context of inequality, it does require *some* interference with those who retain the economic power to privately manipulate and coerce the appearance choices we make. The interference I propose is to protect the freedom of dress in the private workplace, in order to diminish the control that employers have over the appearance choices

201. PEISS, HOPE IN A JAR, *supra* note 160, at 24.

202. *Id.* at 31–32.

203. Hanisch Interview, *supra* note 198.

204. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1438 (1991).

205. See PEISS, HOPE IN A JAR, *supra* note 160, at 242–43 (noting complaints that wartime working women spent too much time “making up” at work).

206. See *id.* at 193 (discussing women’s appearance requirements at work in the 1920s and 1930s).

of their workers, but to leave other private spheres largely untouched.²⁰⁷ Thus, while I accept the fact that dress choices will inevitably be made in a state of inequality, I wish to protect the right to cobble together whatever freedom of dress expression we may within our means and still make a living. Moreover, protecting freedom of dress in the workplace is particularly useful for the ends I argue this freedom serves—promoting freedom to participate in cultural confrontation and construction. Due to antidiscrimination laws like Title VII, work is a place where adult Americans of different races, genders, religions, and nationalities must confront and learn from each other. Work is, for many Americans, like a “public” space in this sense.²⁰⁸ Protecting freedom of dress in this zone ideally promotes the dynamic culture that is the goal of carving out a freedom of dress in the first place.

* * *

How should we apply this theory of the self-presentation right in particular instances? The notion that there are two sorts of constitutional rights—fundamental ones, subject to strict scrutiny, and nonfundamental ones, subject to rational basis review—is simply not true anymore, if it ever was.²⁰⁹ The right to vote is a fundamental right, but review of voting regulations now occurs in a “two-tiered” manner: regulations that “directly” target the voting right are subject to strict scrutiny, while regulations pertaining to ballot access are subject to rational basis review.²¹⁰ The right to an abortion is a fundamental right, but review of abortion regulation also occurs in a two-tiered manner. Regulations justified by the goals of maternal health or fetal life are assessed under the “undue burden” standard, while other sorts of regulations would presumably be assessed under a strict scrutiny standard.²¹¹

Thus, it simply will not do to state, as many federal courts have, that there is a liberty interest in personal appearance, but that it is not

207. In the realm of public accommodations, however, citizens might be able to make either “hybrid,” see *Employment Division v. Smith*, 494 U.S. 872, 881–82 (1990), or disparate impact claims.

208. See Estlund, *supra* note 177, at 112 (“The workplace functions not only as a self-governing institution and as a regulated institution; it also functions as a crucial intermediate institution that stands between the individual and the state.”).

209. See Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 868 (1994) (characterizing courts’ treatment of rights that are subject to differing levels of scrutiny as “indistinct”).

210. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

211. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874–78 (1992) (plurality opinion).

“fundamental,” and to therefore assume that a rational basis of review applies.²¹² More realistically, as some federal courts have realized, the standard of review will vary by context.²¹³ Some courts have stated that the standard might vary based on whether the regulation is directed at citizens at large or at public employees.²¹⁴ Others have claimed it varies based on whether the regulation is directed at law enforcement officials or other sorts of public employees.²¹⁵ Some courts have stated that the standard of review in schools is rational basis, yet others have said it is strict scrutiny.²¹⁶ Still others have distinguished the review given in high school cases from college cases.²¹⁷ Some courts have scrutinized regulations on student dress with greater skepticism than regulations on teacher dress, given the contractual nature of the teacher’s relationship to the state,²¹⁸ while other courts have held that if students have a freedom of dress, it obviously follows that teachers would have the same freedom.²¹⁹

The contextual variation in the standard of review needs to be more deeply rooted in a theory of why the right is important in the first place; therefore, figuring out what to do about the freedom of dress requires providing that theory. I have attempted to do so in this Part. In the next four Parts, I will apply that theory to a few contexts to show some of the payoff of the theory.

212. See, e.g., *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1366–67 (11th Cir. 1987) (recognizing a non-fundamental interest in freedom of dress).

213. E.g., *Zalewska v. County of Sullivan*, 316 F.3d 314, 321 (2d Cir. 2003) (“The appropriate standard [of review] depends, in part, on context and circumstances.”); *Rathert v. Village of Peotone*, 903 F.2d 510, 515–16 (7th Cir. 1990) (recognizing that the context of the transaction at issue, more than the right infringed, informs the standard of review a court applies).

214. E.g., *Rathert*, 903 F.2d at 516 (differentiating police officers from the public at large); *Tardif v. Quinn*, 545 F.2d 761, 763 (1st Cir. 1976) (distinguishing personal appearance in an individual sense from that of a high school teacher in a contractual relationship).

215. See, e.g., *Lowman v. Davies*, 704 F.2d 1044, 1046 (8th Cir. 1983) (“Because the park naturalist has law enforcement duties, we believe that *Kelley [v. Johnson]* is controlling.”).

216. Compare *E. Hartford Educ. Ass’n v. Bd. of Educ.*, 562 F.2d 838, 858–59 (2d Cir. 1977) (en banc) (applying rational basis review to a student dress code), with *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969) (imposing a “substantial burden of justification” on school officials to justify a student dress code (internal quotation marks omitted)).

217. E.g., *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100, 102 (5th Cir. 1982) (“[A]t the public college level, hairstyle regulations cannot, absent exceptional circumstances, be justified by the school’s asserted educational and disciplinary needs, while in the public elementary and secondary schools, such regulations are always justified by the school’s needs.”).

218. *Tardif*, 545 F.2d at 763.

219. E.g., *Hander v. San Jacinto Junior Coll.*, 519 F.2d 273, 276 (5th Cir. 1975) (“If college freshmen are treated as members of the adult population, college teachers a fortiori enjoy this status.”).

To exhaust every hypothetical context concerning the freedom of dress would be impossible. As such, I have chosen to discuss four important ones—worker rights to dress, direct state regulation of dress, public school student rights to dress, and prisoner rights to dress. These examples will demonstrate how we might differently look at the law in these areas with a more complete theory of the unique importance of the freedom of dress.

IV. FREEDOM OF DRESS IN THE WORKPLACE

Traditionally, that a right is important, even fundamental, does not mean its exercise is protected in a “private” sphere such as the workplace.²²⁰ For instance, the right to free speech is a well-established fundamental right, but federal case law currently does not protect private employees’ exercise of speech rights at the workplace.²²¹ It is only in public workplaces that the First Amendment has much traction.²²²

However, as I explained in Part III.E, a crucial argument for keeping free speech law out of the private workplace does not apply to the freedom of dress. Because of its subjective form, dress, more so than speech and other behaviors, can be carved out as a zone of employee freedom that does not reflect on the employer, given the right legal construct. While arguments about judicial competence to balance fundamental freedoms against rights like property, contract, and the promotion of various industries still apply to the freedom of dress, this does not mean there is nobody to argue to for protection of the freedom of dress. Legislators, at state and federal levels, can protect the freedom of dress by providing statutory rights to freedom of dress and directing a balance between those rights and economic rights. Politically achieving these protections is more possible than one might expect. A poll conducted by Employment Law Alliance, a network of law firms that engage in labor and employment law practice, found that thirty-three percent of responders believed those who are overweight, not physically attractive, or look or dress unconventionally

220. See generally Peller & Tushnet, *supra* note 56 (describing the state action doctrine).

221. See, e.g., *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972) (noting that the First and Fourteenth Amendments limit state action, not action taken on private property for private purposes).

222. One of the seminal cases holding that public employees retain some form of First Amendment protection on the job is *Pickering v. Board of Education*, 391 U.S. 563 (1968).

should be given special government protection against discrimination and retaliation at work.²²³

In the next Section, I argue that freedom of dress can be protected in the workplace using a reasonable accommodation approach coupled with specific exemptions for particular sorts of jobs.

A. *Enforcing Fundamental Rights in the Private Sphere: The Forgotten Role of Legislators and the Reasonable Accommodation Approach*

Employees need to work to make a living in a capitalist society, and that work is a large part of their public life, a life in which dress can be extremely important. Thus, to have the freedom of dress unnecessarily restricted in the workplace is to burden the freedom of dress too much, I argue. With adults spending most of the day unable to exercise the freedom of dress, it is hard to realize the democratic benefits of the right.

One might counter my argument with the claim that whether or not we feel choices about our appearance are important or meaningful, we should live with the consequences of those choices in the private realm. That is, for some, what it means to have choice. However, this position misunderstands the nature of the state's role in the matter. The state places limits on the consequences of our choices in order that we retain freedom against private threats to that freedom. If someone punches us because of what we say, the state will protect us, both because this protects our personal autonomy and because it promotes open debate. We would not have an acceptably strong right to free speech, I argue, if the state failed to protect us from the violence of others angry with what we have to say. The state's failure would be damaging both to our personal autonomy to say what we like and to the goal of open debate. Similarly, if someone fires us because we choose not to have sex with them, the state will again protect us. We would not have an acceptable level of employment opportunity if we were constantly forced to choose between coerced sex and a job.

Personal appearance choices are choices that depend on an idea of individual existence, but also acknowledge dependence on the gaze of others for that existence to have meaning. Freedom of dress thus contributes to open cultural confrontation—with others and with one-

223. Employment Law Alliance, *National Poll Shows Public Opinion Sharply Divided on Regulating Appearance—From Weight to Tattoos—in the Workplace*, figs. (Mar. 22, 2005), http://www.employmentlawalliance.com/pdf/ELALooksPollCharts2-3_16_2005.pdf. These opinions were not evenly distributed by gender or race: Women favor employee rights more than men, and non-whites favor employee rights more than whites do. Those with less education and lower status jobs also favor greater employee rights.

self. I argue that to sustain the vitality of dress as a means of identity formation and reformation, the state must step in to guarantee some measure of self-control and authority over our body and its borders, even against private restriction. Of course, it must do so without so broadly limiting the consequences of our self-presentation that those choices become meaningless. The compromise I choose is that the state intervenes in the workplace, but not in other “private” realms.

The workplace is such an important part of our public lives that having some minimal protections in this arena will go far toward promoting freedom of dress. Thanks to antidiscrimination laws, people of different races, genders, nationalities, and in some locales, sexual orientations, come together in the workplace to engage in common enterprises.²²⁴ Providing workers with more responsibility and agency over the self-image they bring to the workplace improves the opportunities for meaningful cultural exposure and confrontation. But we must also recognize that the business an employer owns or controls may be the site of other forms of important communication and expression.

If worker freedom of dress is truly interfering with core job functions and the core goals of the enterprise in question, then I believe we should not protect employee dress. To do so might eliminate or heavily burden certain sectors of the market, such as the entertainment and clothing industries. Eliminating these sectors would be counterproductive to the freedom of dress, as they often provide a venue for the codification of dress meanings. Protecting the freedom of dress might also pose safety problems in certain industries.

On the other hand, there are many instances where an employer might rationally wish to regulate employee choices concerning personal appearance, but where preventing the employer from doing so would not unduly burden the industry as a whole. For instance, waiters and waitresses, bartenders, cashiers, and many other service employees are often required to wear uniforms. Uniforms might provide some marginal benefits in terms of keeping employees “in line,” and the oft-repeated claim that “customers like uniforms” may indeed be true in some instances. But if no employer could require uniforms of these sorts of employees, customers would, I predict, grow accustomed to the lack of uniforms, and the businesses in question would not be harmed. Customers go to restaurants primarily for food, not to

224. See Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 17 (2000) (arguing that “even the partial demographic integration that does exist in the workplace yields far more *social* integration—actual interracial interaction and friendship—than any other domain of American society”).

be served by people in uniforms. If there were few restaurants with waitstaff in uniforms, customers would still eat out.

Additionally, sacrificing minimal amounts of economic efficiency that might be obtained by the use of uniforms in order to protect worker dress choices is the kind of sacrifice that protection of rights like the freedom of dress entails. Problems of permitting easy customer identification of employees can often be solved with much narrower intrusions on workers' freedom of dress, such as identification tags. All this seems to point to the fact that questions of when accommodating dress choices is too burdensome to an employer, how much accommodation is "reasonable," and how much accommodation is "unreasonable," can only be answered on a case-by-case basis.

The law has encountered this sort of problem before, in the case of protecting worker rights to religious freedom;²²⁵ I propose a similar solution for protecting worker rights to freedom of dress. Specifically, I propose balancing the freedom of dress against employer interests by using a reasonable accommodation standard, and by exempting a select number of jobs from the accommodation requirement: those jobs in which the *core* function of the employee is to have his or her body co-opted for the purpose of employer expression, such as modeling and acting. Readers will of course disagree about how stringent the reasonable accommodation standard should be and what sort of businesses should get the benefit of the statutory exemption. The main point I would like readers to take away, however, is that employers should, at the very least, have to make an attempt at accommodation. Currently, they do not have to accommodate an employee's self-presentation at all, even when dress is religiously motivated,²²⁶ and this is unreasonable, given the personal and subjective form of dress.

*B. Models, Actors, Performance Art, the Dinner Theatre, and Advertising:
When the Core Job Function is About Dress*

In general, when employees exercise the freedom of dress, the expressive rights of employers and property holders are not implicated in the same way that they are when employees exercise speech rights.²²⁷ This is because of the subjective form that dress takes. However, there are exceptions to this general rule—when one of the core

225. See 42 U.S.C. § 2000e(j) (2000) (couching the defined scope of the right to religious freedom in the workplace in terms of reasonable accommodation).

226. *E.g.*, *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004) (holding that allowing an employee to wear facial jewelry to accommodate the employee's religious practices would impose an undue hardship on the employer).

227. See *supra* Part III.E.

job functions of an employee is to have his or her body, including the way it is dressed and adorned, co-opted for the employer's purposes. Of course, many employers wish to co-opt their employees' bodies for this purpose, but there are only a few instances in which that co-opting is actually part of the core activity the employee is engaged to perform.

The most obvious examples of jobs that are fundamentally about co-opting the body for communicative and expressive purposes are modeling and acting. There might actually be ways for employers to reasonably accommodate a model's or actor's dress choices. For instance, if a model is hired to be photographed in a dress, an employer might accommodate her wish to keep her wedding ring on, as long as the ring did not interfere with the image being presented. Or, for instance, an actor might wish his tattoo to show in a scene, and a director might refrain from covering the tattoo with makeup, as long as the presence of a tattoo did not conflict with the character being portrayed. However, because a core function of modeling and acting is to have the body co-opted for the purpose of communicating and expressing on behalf of the employer, the fact that dress is generally a subjective form of expression does not apply in these cases. In the case of models and actors, viewers will not understand their dress to represent subjective choices on the part of the employee. Thus, to require reasonable accommodation in these instances would, in fact, infringe on the expressive and imaginative rights of the employer.

The difficulty comes when employers claim that their employees are actors or models, yet the employees appear to primarily serve a large number of other functions. For instance, Disney World describes its employees, many of whom operate rides, sell food and beverages, and ensure safety, as "cast members."²²⁸ The idea is that going to Disney World is like going to a highly interactive play. And indeed, Disney World is distinguished from most other amusement parks in this regard. Everything from trash cans, to the color of sidewalks, to the structures in which ride-goers stand in line, are coordinated in Disney World to remind the park-goer of specific films, books, and legends.

For a less plausible claim of this sort, the Borgata Hotel in Atlantic City has claimed, as a means of justifying an extremely stringent weight policy that forbids employees from ever gaining more than seven percent of their body weight at the time of hire or adoption of

228. Disney Online, *Casting at the Walt Disney World Resort*, <http://disney.go.com/Disney-Careers/wdwcareers/overview.html> (last visited Oct. 26, 2006).

the policy, that its cocktail waitresses and other beverage servers are like cast members in a sexy fantasy that the hotel tries to create.²²⁹ If these employees gain more than seven percent of their body weight, they have only ninety days to lose it or be fired.²³⁰ Yet, despite attempts to make the Borgata seem like a sexy fantasy-land, such as having maid service tags in the rooms that say “Tidy Up/Tied Up,”²³¹ the casino has been reported as remaining largely indistinguishable from other casinos: a place frequented by people in sweatshirts who want to gamble and be served drinks, the vast majority of whom do not ogle waitresses or care if they gain weight.²³²

I do not argue that either the statutory exemption for models and actors or the undue hardship defense should be nearly as narrow as defenses to disparate treatment and disparate impact discrimination under Title VII, such as the bona fide occupational qualification (BFOQ) and business necessity defenses.²³³ Antidiscrimination laws aim to shift social norms in a particular direction—away from racism, sexism, and the like—and with good reason: a long history of discrimination. The freedom of dress I propose for the workplace aims only to soften the effects of capital on social norms. Thus, if an employer claimed undue hardship in response to an employee’s assertion of the freedom of dress on the grounds that the co-optation of employee bodies were part of the product being sold, this claim need not be dismissed out of hand. Of course, allowing bare assertions of customer preference or the desire to control a corporate image to serve as an undue hardship defense would swallow the reasonable accommodation rule altogether.²³⁴ But employers can show actual proof

229. See Gersh Kuntzman, *Babes Up in Arms*, NEWSWEEK, Feb. 28, 2005, <http://www.msnbc.msn.com/id/7047491/site/newsweek>.

230. Stephanie Armour, *Your Appearance, Good or Bad, Can Affect Size of Your Paycheck*, USA TODAY, July 20, 2005, at B1.

231. Kuntzman, *supra* note 229.

232. *Id.*

233. See, e.g., 42 U.S.C. § 2000e-2(k) (2000) (placing the burden of persuasion on the employer to prove business necessity, and permitting plaintiffs to rebut that showing by demonstrating that an alternative employment practice would also serve the business need with less of an impact); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981) (stating the rule that customer preference for one gender over another is not a BFOQ, even in a case in which the customer preference at issue was that of foreign clients in countries with different cultural mores than Americans); see also *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 435–36 (1975) (rejecting an employer’s attempts to show that diploma requirements and standardized tests served a business necessity).

234. As such, I disagree with the outcome and reasoning of *Cloutier v. Costco Wholesale Corp.*, in which the court appears to hold that accommodation of any religion-based request to deviate from an employer’s dress code constitutes an undue hardship on the employer. 390 F.3d 126, 132–33 (1st Cir. 2004).

that they target a niche market—such as Disney World, or perhaps a restaurant like Hooters, or an interactive theme restaurant. Such proof can consist in market research to determine what customers are willing to pay more money for, or what brings customers to an employer's business. (What customers are willing to pay money for is not the same as, and may be much narrower than, what customers "prefer.") This is exactly the type of evidence that Southwest Airlines once sought to use to prove that its practice of hiring only female flight attendants was justified by its branding as the "[L]ove [A]irline."²³⁵ The data failed to be convincing to the judge in that case and, if anything, showed that customers flew Southwest because the tickets were cheap.²³⁶ But that would not be the case in every instance.

Courts would, of course, need to engage in factfinding when presented with cases like Disney World, the Borgata Hotel, and salespeople in clothing, jewelry, or makeup stores who could plausibly be described as also being models. But the need to draw these lines is not unusual, and it's been done before—in cases where employers claimed that they were combining the business of providing air travel with the business of sexually titillating customers in order to justify sex discrimination in hiring flight attendants.²³⁷ Unlike the line-drawing that would be involved in determining what kinds of dress constitute African-American identity, gay male identity, or the like, this kind of line-drawing would not involve the law in drawing essentialist conclusions about race, gender, and similar categories.

Similarly, I do not argue that an undue hardship defense is so narrow as to prevent the enforcement of anti-harassment policies in the workplace against harassment that can be enacted through dress. Indeed, in the context of reasonable accommodation claims based on religion, courts have interpreted accommodations that would prevent enforcement of policies against harassment of lesbian and gay employees to be either unreasonable or as constituting an undue hardship.²³⁸ I use the reasonable accommodation framework, with its undue hardship defense, specifically to avoid the implication that the defense is as narrow as a BFOQ or business necessity defense.

235. *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 294–95 (N.D. Tex. 1981).

236. *Id.* at 302–03.

237. *See, e.g., Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387–88 (5th Cir. 1971) (rejecting Pan Am's use of sex as a hiring criterion for its flight attendants); *Wilson*, 517 F. Supp. at 294–95 (rejecting Southwest's argument that its customers' preferences required it to only hire female flight attendants).

238. *See, e.g., Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606–07 (9th Cir. 2004) (finding that an employer had no duty to accommodate an employee's efforts to post anti-gay scripture because doing so would constitute an undue hardship).

C. *Returning to the Possibilities of Title VII: Reinvigorating the “Sex-plus” and Disparate Impact Doctrines By Recognizing the Freedom of Dress*

Understanding freedom of dress as a fundamental right, whether by Congressional directive or judicial recognition, would also appropriately alter the analysis of certain challenges to personal appearance restrictions raised under Title VII. Understanding dress as a fundamental right would have important effects on both the “sex-plus” and disparate impact categories of Title VII claims—effects that should please those who care about dress as identity performance but are wary of the essentializing effects of reading identity performances.

The sex-plus category of Title VII claims is based on the theory that an employer has discriminated in violation of Title VII when employment decisions are made on the basis of sex, race, or another protected category “plus” an immutable trait or the exercise of a fundamental right.²³⁹ So, for instance, while an employer would not necessarily violate Title VII by firing employees who have children, an employer would violate Title VII by firing only female employees who have children, because having children is the exercise of a fundamental right.²⁴⁰ Employees have attempted to challenge sex-differentiated appearance requirements under Title VII using the sex-plus claim,²⁴¹ but they have generally lost on the grounds that grooming and dress requirements do not involve either an immutable trait or the exercise of a fundamental right.²⁴² However, once freedom of dress is recognized as a fundamental right, this ground for rejecting claims that sex-differentiated grooming and appearance regulations violate Title VII evaporates.

Disparate impact claims under Title VII have also been proposed as a means of challenging certain facially neutral employer appearance requirements, such as policies forbidding all employees from wearing their hair in cornrows.²⁴³ Disparate impact claims notably do not invoke the kind of essentialist danger that disparate treatment

239. *E.g.*, *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1088–89 & n.4 (5th Cir. 1975) (en banc).

240. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (rejecting company hiring policy that discriminated solely against women with pre-school-age children).

241. *See, e.g.*, *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755–56 (9th Cir. 1977) (alleging wrongful discharge after being terminated for failure to wear a tie during work hours); *Willingham*, 507 F.2d at 1088–89 (involving a challenge to a publishing company's short hair policy for men).

242. *See, e.g.*, *Fountain*, 555 F.2d at 756; *Willingham*, 507 F.2d at 1091–92.

243. *See Gonzalez, supra* note 47, at 2196–97 (discussing the failure of courts to protect “ethnic traits”).

claims of the same sort invoke, since they do not equate practices such as wearing cornrows with racial identity, but rather, they simply acknowledge the fact that such practices are engaged in at different rates by various groups.²⁴⁴ The problem with bringing disparate impact claims of this sort under Title VII is that these claims tend to have no weight when the trait impacted by the regulation is not immutable, because the employee is not seen as experiencing a truly adverse effect.²⁴⁵ Recognizing the freedom of dress as a fundamental right would mitigate this problem because it would indicate why disparate impact on dress represents real adversity to affected employees: Their exercise of a fundamental right is impacted.

Roberto Gonzalez has recommended that scholars argue for the “immutability” limitation on disparate impact claims to be relaxed as a solution to the essentialist problems posed by recognizing identity performance claims under Title VII.²⁴⁶ But while he solves the problem of essentialism, he does not find a solution to the “limitless” problem of identity performance claims. If the requirement that disparate impact claims reference an impacted immutable trait or fundamental right evaporates, then the universe of disparate impact claims is extremely broad. For instance, under Gonzalez’s proposal, if a litigant proved that male employees were more likely to commit homophobic harassment of coworkers, then the litigant would prevail when bringing a sex-based disparate impact challenge to an employer’s tolerance and anti-harassment policy.²⁴⁷ Gonzalez argues that the business necessity defense to disparate impact claims provides a proper limit to disparate impact claims, but that defense is probably too narrow to encompass something like an anti-gay-harassment policy in all but the most progressive of American communities. The problem with Gonzalez’s proposal, which is otherwise excellent, is that it doesn’t permit employers to promote cultural values at all. In contrast, my proposal permits disparate impact claims to be brought with reference to re-

244. *Id.*

245. *See, e.g.,* *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (holding that bilingual employees did not make a prima facie case showing that their employer’s English-only policy constituted discrimination under Title VII); *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980) (upholding an employer’s English-only policy as not amounting to discrimination based on national origin, as applied to employees fully capable of speaking English but refusing to do so).

246. *Gonzalez, supra* note 47, at 2217, 2221–22.

247. *Cf. Bodett v. CoxCom, Inc.*, 366 F.3d 736, 740 (9th Cir. 2004) (terminated employee claimed religious discrimination arising from employer’s harassment policy that protects lesbian and gay employees); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 601 (9th Cir. 2004) (same).

strictions on dress, but not with reference to every kind of restriction on employee choice imaginable.

V. FREEDOM OF DRESS ON THE STREET

A. *The Compelling Interest Approach*

As many challenges to state regulation of personal appearance as there were in the 1970s, there have not been many published cases challenging state attempts to regulate the freedom of dress in the public square. Perhaps this indicates that as deep as the culture war over long-haired men was, most local political entities did not deign to tell men they could not walk down the street with long hair. As a result, there have been few cases indicating what legal approach should be taken to assess any attempts by the state to regulate the freedom of dress on the street.

However, state regulation of the freedom of dress is not unheard of even in the public square. Centuries ago, sumptuary laws prevented wearing dress that was not appropriate to one's class so as to enforce class divisions and prevent social mobility.²⁴⁸ For many years, major cities in America criminalized cross-dressing.²⁴⁹ As late as 1976, there were still laws prohibiting cross-dressing.²⁵⁰

While cross-dressing prohibitions and uses of public decency laws to harass cross-dressers have mostly died,²⁵¹ state regulation of dress is far from unheard of even today. In fact, in February 2005, the Virginia House passed a bill imposing a fine on anyone wearing pants low enough to show their underwear.²⁵² Virginia is not alone. In May 2004, the Louisiana House considered a bill—on its fourth attempt—to make wearing low-slung pants in public a crime carrying a \$175 fine and community service.²⁵³ Representative Derrick Shepherd, the sponsor of the bill, complained about basketball-playing youth, stating

248. ANSPACH, *supra* note 5, at 261 (discussing fashion among the “elites”); LAUER & LAUER, *supra* note 123, at 56–57.

249. WILLIAM N. ESKRIDGE, JR., GAYLAW 338–41 (1999).

250. *See, e.g.*, *City of Chicago v. Wilson*, 389 N.E.2d 522, 522 (Ill. 1978). In this case, the law was found unconstitutional as applied to two pre-operative transsexuals who cross-dressed as part of their treatment, but notably, was not found unconstitutional on its face, even though a liberty in personal appearance was recognized. *Id.* at 523.

251. *See* ESKRIDGE, *supra* note 249, at 111 (noting the rapid invalidation of cross-dressing ordinances in major cities).

252. H.D. 1981, 2005 Gen. Assem., Reg. Sess. (Va. 2005). After being mocked in a number of national newspapers, the Virginia Senate killed the bill. Tara Bahrapour, *A Brief Matter of Style: Va. Senate Panel Bags Bill Outlawing Droopy Pants*, WASH. POST, Feb. 11, 2005, at B1.

253. Bethany Thomas, *Memo to Britney: Lose the Low-Slugs*, MSNBC.COM, May 13, 2004, <http://www.msnbc.msn.com/id/4963512>.

that “[y]ou don’t have to shoot hoops with your pants below your waist,” and that perhaps by “pull[ing] up their pants” the legislature could also “lift their minds” as well.²⁵⁴ A town in Louisiana already prohibits low-slung pants.²⁵⁵ Breaking the law carries a fine of \$500 and up to six months in jail.²⁵⁶ And, in a nonscientific national poll conducted by MSNBC adjoining an article covering the Louisiana bill, a full thirty-two percent of the responders believed low-slung jeans should be banned.²⁵⁷

In *Hodge v. Lynd*,²⁵⁸ a federal case decided in 2000, a young man was arrested for wearing his baseball cap backwards at the county fair.²⁵⁹ Police had determined in advance of the fair that wearing a baseball cap backwards was associated with “gang activities,” and therefore enforced a dress code that they thought would improve safety and the feeling of safety at the fair. The plaintiff ultimately prevailed in his federal case challenging the arrest, but the judge determined that rational basis review is the proper standard of review for a state regulation concerning how one wears one’s baseball cap at the fair.²⁶⁰ The judge simply found that the dress code law in this case was not reasonable.²⁶¹

In *Gatto v. County of Sonoma*,²⁶² a 2002 case out of California, a man was expelled from fairgrounds for wearing a vest with motorcycle gang insignia on it.²⁶³ The vagueness of the dress code at the fair was its fatal flaw, but the court found that the operators of a county fair could in fact ban clothing that they “reasonably believe might lead to substantial disruption of or material interference with the event.”²⁶⁴ Because the operators had not in fact proscribed the wearing of a vest with gang insignia, and had no reasonable belief that it would cause disruption, the plaintiff prevailed.²⁶⁵

254. *Id.*

255. *Id.* (noting that wearing saggy pants in the town of Opelousas is considered a misdemeanor).

256. *Id.*

257. *Id.* Twenty-five percent of responders felt the pants should not be banned, due to freedom of expression concerns, and forty-two percent said they did not care because there are more important things to worry about. *Id.*

258. 88 F. Supp. 2d 1234 (D.N.M. 2000).

259. *Id.* at 1236–37.

260. *Id.* at 1242.

261. *Id.* at 1242–44.

262. 120 Cal. Rptr. 2d 550 (Cal. Ct. App. 2002).

263. *Id.* at 553.

264. *Id.* at 576.

265. *Id.*

In *DeWeese v. Town of Palm Beach*,²⁶⁶ an Eleventh Circuit case from 1987, a man challenged Palm Beach's ordinance prohibiting shirtless running. He succeeded in arguing that the ordinance violated freedom of personal appearance, but the Eleventh Circuit used rational basis review, placing the burden on the runner to prove that the law was unreasonable, and based its analysis heavily on the fact that it is commonly considered acceptable to run shirtless and is therefore not "offensive."²⁶⁷

Finally, numerous cases have challenged public nudity laws. Many of these cases involve adult entertainment establishments, and are analyzed under First Amendment laws. However, a fair number involve nude sunbathers and other sorts of nudists. These, too, are generally analyzed as First Amendment cases, and the sunbathers usually lose, with courts citing a footnote to *Erznoznik v. City of Jacksonville*,²⁶⁸ in which the Supreme Court distinguished the legality of prohibiting public nudity from the First Amendment issue in the case—the legality of prohibiting a film with nudity from being shown at a drive-in.²⁶⁹ Even where statutes only prohibit women from exposing their breasts, but allow men to be topless, equal protection claims of gender discrimination often fail.²⁷⁰

Thus, we must determine what the legal approach to freedom of dress in public, "on the street," should be. For all the reasons outlined in Part III, public areas are an incredibly important locale for exercise of the freedom of dress, since it is an activity that derives its unique meaning from its simultaneously private and public role. Moreover, a crucial element of the freedom of dress is the freedom to create a personal identity for oneself that is individual and nonconformist, so as to challenge and contribute to cultural norms.²⁷¹ Thus, I argue that the proper approach to freedom of dress on the street (or the beach) is not, as most courts have held, to see if there is a "reasonable" state interest in regulating it and put the burden on the plaintiff to prove that there is no such interest. I argue that freedom of dress

266. 812 F.2d 1365 (11th Cir. 1987).

267. *Id.* at 1366–67, 1369 & n.6.

268. 422 U.S. 205 (1975).

269. *Id.* at 211 n.7. For a public nudity case in which *Erznoznik's* footnote 7 is cited, see *State v. Vogt*, 775 A.2d 551, 557 (N.J. Super. Ct. App. Div. 2001).

270. See, e.g., *Vogt*, 775 A.2d at 557 (upholding an ordinance barring toplessness by women on the basis of "[p]rotecting the public sensibilities"). But see *People v. David*, 585 N.Y.S.2d 149, 151 (Monroe County Ct. 1991) (finding that a statute prohibiting women from exposing their breasts in public violates the equal protection clauses of the U.S. and New York State constitutions).

271. One is, of course, reminded of a similar aspect of freedom of speech—the importance of being free to state an unpopular idea.

must be heavily protected on the street, with only the most compelling of interests and narrowly drawn laws potentially justifying its regulation.

In practice, most courts have, even under a nominally “reasonable basis” standard of review, found regulations of dress such as limitations on wearing a baseball cap backwards to be unconstitutional. This “rational basis” standard nominally places the burden of proof on plaintiffs, but appears to actually impose at least a burden of production on the state. However, when it comes to public nudity, plaintiffs tend to lose.

B. *The Right to Nudity*

Numerous courts have assessed public nudity challenges under the rubric of the First Amendment. In doing so, they have been required to assess whether the act of being nude expresses a particularized idea, and how clearly communicative it is, in order to determine how close it is to pure speech, which would receive heavy First Amendment protection.²⁷² They have generally found that public nudity, apart from some other expressive communication, such as dancing, does not express a particularized idea, and that being nude cannot be an essential component of the communication.²⁷³

I do not object to this analysis of public nudity laws as applied to businesses, such as strip clubs. In these cases, the plaintiffs are the businesses, not the dancers and models themselves, and under my theory, businesses don’t have a freedom of dress because they are not people. Were the dancers and strippers the litigants in these cases, then the freedom of dress would be implicated. However, analyzing public nudity of persons arrested on the street or at the beach only under the First Amendment represents a failure to recognize the intrusion of those laws on the freedom of dress.

272. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (plurality opinion) (finding that nude dancing is expressive conduct under the First Amendment, but “only marginally so”); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1253 (5th Cir. 1995) (“It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.” (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)) (alteration in original)); *S. Fla. Free Beaches, Inc. v. City of Miami*, 734 F.2d 608, 610 (11th Cir. 1984) (“[N]udity is protected as speech only when combined with some mode of expression which itself is entitled to first amendment protection.” (quoting *Chapin v. Town of Southampton*, 457 F. Supp. 1170, 1174 (E.D.N.Y. 1978))); *Vogt*, 775 A.2d at 557 (stating that nude sunbathing does not implicate the First Amendment).

273. E.g., *S. Fla. Free Beaches*, 734 F.2d at 610 (finding that nudity is not an inherently expressive state).

When it comes to freedom of dress, it matters little that the expression is not specific, particular, or necessarily political, because freedom of dress is not important only as an adjunct to speech. Thus, how similar it is to speech should be irrelevant. What matters in assessing whether an act is a core exercise of the freedom of dress is whether it represents an individual's decision with respect to how he or she is defined in relation to the rest of society—whether it emphasizes, reconfirms, or revises parts of his or her identity and personality. Some have argued that the freedom of personal appearance does not include the freedom to be entirely naked.²⁷⁴ The theory that I provide in Part III for why freedom of dress is important, however, makes clear that being naked can be an exercise of the freedom of dress because it represents a choice about the relevance of one's exposed body to social interaction. My search of the case law, nevertheless, turned up no cases in which a litigant successfully challenged a public nudity statute on the grounds that it violated his or her right to determine personal appearance.²⁷⁵ In this Section, I assess whether there really are state interests sufficient to justify banning individuals' choices to be nude in public.

One possible state interest is the interest in protecting non-nudist citizens from being offended and acting disruptively. However, the nature of the freedom of dress is that it encompasses the choice to dress (or not dress) in a way that others will dislike, in order to enact a nonconformist identity, as well as to challenge the current code of meanings for dress choices. To restrict the freedom of dress merely because it offends public sensibilities is for the state to choose sides in a cultural war over the appropriate way for individuals to present themselves in public.

Another possible state interest is to protect citizens from threatening sexual behavior. Public masturbation and other "indecent acts"

274. *People v. Craft*, 509 N.Y.S.2d 1005, 1011–12 (Rochester City Ct. 1986) (finding nudity not to be within any Ninth Amendment rights to personal appearance).

275. In *Williams v. Kleppe*, the First Circuit rejected a challenge to the ban on nudity at the beach, because the right of personal appearance implicated only rational basis review, and the federal government's desire to environmentally protect the beach was a legitimate interest justifying the ban, even in the face of failure to simply limit access to a small or nonexistent number of persons. 539 F.2d 803, 806–07 (1st Cir. 1976). Other cases that come close, but also do not secure public nudity rights based on personal appearance, include *DeWeese v. Town of Palm Beach*, in which a litigant prevailed in challenging a statute prohibiting shirtless running under this theory, but the litigant was male and the statute was not a public nudity statute. 812 F.2d 1365, 1365, 1369 (11th Cir. 1987). Another case is *People v. David*, where female litigants in New York prevailed on equal protection grounds when the law forbade women but permitted men to go topless. 585 N.Y.S.2d at 151.

may be deemed threatening because they might warn of an impending sexual assault to the observer. While I am not sure whether this fear is accurate, a law that prohibits public nudity in the form of sunbathing and walking down the street naked is neither drawn nor enforced narrowly to address the problem of “indecent acts” as sexual threats. A law drawn to more accurately target that problem should include mens rea elements such as intent, knowledge, or at a minimum, recklessness. Indeed, some jurisdictions are careful to limit the crime of indecent exposure in this way.²⁷⁶

If the freedom of dress is understood as a unique right, rather than as within the penumbra of “pure speech,” public nudity on the part of individuals on the street or at the beach is at the core of that right. Thus, statutes applied to prohibit that behavior, in the absence of some showing of threat or harassment, should not survive. One could argue from a legal realist perspective that theorizing dress separately from speech would, in practice, do little to change the law of public nudity. On this theory, the frequent failure of First Amendment challenges brought by those found to violate public nudity laws stems largely from judges’ affinity for Victorian sexual repression. Thus, even if nudity were understood to be at the core of freedom of dress, judges would, in individual cases, find defendants to have requisite criminal intent to cause fear of sexual assault in others. While that might well be the case, on the margins, I do believe that understanding nudity to be a core exercise of a fundamental right, rather than an act of symbolic speech existing on the periphery of the First Amendment, would make some difference. Although obscenity laws remain constitutional under prevailing First Amendment doctrine, they are certainly more narrowly constrained than they would be in the absence of our continual affirmation of and belief in the importance of free speech.²⁷⁷

276. See, e.g., *In re Dallas W.*, 85 Cal. Rptr. 2d 493 (Cal. Ct. App. 2001).

[A] person does not expose his private parts “lewdly” within the meaning of section 314 unless his conduct is sexually motivated. Accordingly, a conviction of that offense requires proof beyond a reasonable doubt that the actor not only meant to expose himself, but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.

Id. at 494 (quoting *In re Smith*, 497 P.2d 807, 810 (Cal. 1972)).

277. See, e.g., *Miller v. California*, 413 U.S. 15, 36 (1973) (reaffirming that obscene materials are not protected by the First Amendment).

C. Threatening Dress and Safety Regulations: This Gun is Part of My Outfit

In the interest of carefully defining the borders of the freedom of dress in public, I address the hypothetical in which an element of a person's dress might actually raise a safety concern. Many Sikh worshippers subscribe to a tenet that requires the carrying of a kirpan, a ceremonial knife.²⁷⁸ Others might also claim that a gun or other weapon is part of personal appearance, apart from religious tenets.

Under my theory, protecting the safety of citizens is in fact a compelling interest that legitimates restrictions on the freedom of dress and would, in general, justify concealed weapons laws that do impinge upon the freedom of dress, as long as they are drawn narrowly. Moreover, if an item of dress is concealed from public view, this radically diminishes the strength of the interest in freedom of dress under my theory of the freedom. However, because the freedom of dress does not prevent other constitutional claims from being brought, my theory of the freedom of dress doesn't answer whether freedom of religious exercise should require reasonable accommodation where possible for Sikhs and other religious believers.²⁷⁹ However, it does imply that challenges to such laws would generally fail when articulated as assertions of the freedom of dress.

D. Licensing and Age of Consent Regulations on Tattoo Artists and Body Modifiers

Another important arena in which the freedom of dress is regulated, although not directly, is licensing regulations that apply to tattooing and body modification as well as hair salons. Health and safety regulation is generally considered a compelling government interest,²⁸⁰ and the intrusion on freedom of dress that such laws cause doesn't strike at the core of the freedom of dress. Such laws do limit

278. See, e.g., *Cheema v. Thompson*, 67 F.3d 883, 884 (9th Cir. 1995) (describing three Khalsa Sikh children in a public school system for whom the wearing of a kirpan was a fundamental tenet of their faith).

279. See *id.* at 885 & n.3 (identifying public schools that had found ways to accommodate the wearing of kirpans without compromising student safety, such as dulling the knives and securely riveting them to their sheaths).

280. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

On various occasions we have accepted the proposition that "States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."

Id. at 625 (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)).

access to tattooing, piercing, and hairstyling, but minimally so, especially in light of the state's interest in preventing the spread of hepatitis, HIV, and other blood-borne diseases. The law permits states to engage in such licensing even where a fundamental interest is implicated. For instance, in the case of abortion, such laws are scrutinized using the "undue burden" standard.²⁸¹

Such a relaxed standard makes a great deal more sense for scrutinizing the licensing of tattoo and piercing providers than the licensing of abortion providers because the need for particularly speedy access, high levels of privacy, and a documented regional lack of providers²⁸² are absent in the case of tattooing and piercing. However, there are states that have gone much further than simply licensing tattoo and piercing artists. Until recently, South Carolina banned tattooing altogether, except as performed by a physician for cosmetic or reconstructive purposes.²⁸³ Massachusetts has a similar ban as well.²⁸⁴ In 2002, the Supreme Court of South Carolina upheld this ban against a First Amendment challenge from a man who was prosecuted after being shown on the news tattooing another person, and the Supreme Court of the United States denied certiorari.²⁸⁵ Many states forbid children from obtaining tattoos, or forbid tattooing by anyone but a physician.²⁸⁶

Because these regulations forbid all persons or an entire class of persons from exercising their freedom of dress to obtain tattoos, I argue that they must be scrutinized closely as laws that strike at the core of the freedom of dress, not merely as health regulations. In *State v. White*, South Carolina failed to grant tattooing any sort of protection because it was analyzed as implicating only speech interests, and was

281. *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309, 1313 (Souter, Circuit Justice 1994).

282. See Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services In the United States in 2000*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 6, 10 (2003) (finding that in 2000, 87% of counties in the United States had no abortion provider, and that 34% of women lived in such a county).

283. S.C. CODE ANN. § 16-17-700 (West 2003 & Supp. 2005) (amending § 16-17-700 to allow licensed tattoo artists and physicians' employees to perform tattooing procedures); see also *State v. White*, 560 S.E.2d 420, 421 (S.C. 2002) (citing § 16-17-700 of the South Carolina Code).

284. MASS. GEN. LAWS ANN. ch. 265, § 34 (West 2000).

285. *White*, 560 S.E.2d at 421, 424, cert. denied, *White v. South Carolina*, 537 U.S. 825 (2002).

286. See National Conference of State Legislatures, *Tattooing and Body Piercing*, <http://www.ncsl.org/programs/health/bodyart-1.htm> (last visited Aug. 31, 2006) (collecting state tattoo and body piercing regulations and noting that, as of January 2006, over twenty-nine states restrict or prohibit adolescents from getting tattoos or body piercings).

found to not communicate particularized messages.²⁸⁷ Properly recognizing the freedom of dress as a unique right means that total bans on practices like tattooing and body piercing, given the availability of health regulations to address safety and public health concerns, should be understood as illegitimately infringing that right.²⁸⁸

Bans on the tattooing of minors of course present a more complicated problem. In general, the state is permitted to exercise parentalism toward children.²⁸⁹ However, parentalism toward children is highly problematic with respect to freedom of dress because the exercise of freedom of dress is crucial as a child, given its special role in the development of social identity for children. Other forms of identity performance and exploration are often less available for children than they even are for adults, such as choices with respect to work, sexual practice, or where to live. Because freedom of dress plays such a crucial role in helping the human being develop a public personality, and because adolescence is such an important time in that developmental process, we should be wary of allowing the state to exercise its usual parentalist role toward children.

However, certain forms of body modification are rather long-lasting and, as a result, the experimentation that is normally associated with adolescent freedom of dress is fraught with permanence when it comes to tattooing, as well as body modifications more permanent than simple piercings. Moreover, the long-term consequences of not receiving a body modification like a tattoo until adulthood are not nearly as significant as the consequences of banning the exercise of a right such as the right to abortion until adulthood. Nevertheless, there are consequences to not getting a permanent body modification. The permanent nature of many body modifications can make the time at which they are obtained a significant element of meaning. Tattoos serve as reminders of events that inspired them, and of the

287. *White*, 560 S.E.2d at 423–24.

288. What about practices that cause death or grave bodily injury, severely disable, or carry a high risk of death or disability accompanying the procedure? Cosmetic amputation or infliction of gunshot wounds come to mind. Resolving at what point state paternalism is justified to criminalize or heavily regulate a practice, due to the risks of death and disability, is always a difficult one. I do not believe that allowing the state to engage in some paternalism, in extreme cases, undermines the case for setting the bar of justification for that paternalism quite high.

289. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992) (plurality opinion) (upholding a parental consent requirement for minors seeking abortions on the “assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart,” while striking down a spousal notification provision because the Court could not “adopt a parallel assumption about adult women”).

person the wearer was when he or she got the tattoo. Asking children to delay items like tattoos until adulthood can interfere with such personal, private aspects of freedom of dress.

As a result, acknowledging the particular importance of freedom of dress for children implies that a complete ban on the tattooing of minors goes too far. Concerns associated with the permanence of the choice could be more narrowly addressed by requiring parental notification and cooling-off periods for minors.

VI. FREEDOM OF DRESS IN SCHOOLS

In the United States, we've long recognized that students in public schools retain some of their basic rights.²⁹⁰ However, because public schools serve the function of educating children, they may generally regulate the exercise of these rights more than the government could directly.²⁹¹ In this Part, I will argue that public school restrictions on student freedom of dress should be subjected to high levels of scrutiny. Interests such as preserving children's safety or health are legitimate to justify narrow restrictions on freedom of dress, but interests such as avoiding "distractions," promoting school spirit, or generally improving "discipline" will not be legitimate under my theory of freedom of dress, without some showing of disruption that rises to the level of interfering with educational functions. My earlier extended engagement with the unique reasons why freedom of dress is important, in its own right, helps to demonstrate why giving dress second-class status as a nonfundamental liberty interest is unwise in the school context. Rather, the arguments for protecting student dress may be even more compelling than the arguments for protecting students' "pure speech," often considered one of the most fundamental of all American liberties.

Then, I examine the cases of banning gang-related attire and expensive and fashionable items in an attempt to promote student safety. I look at the appropriateness of school administrator responses to these problems that more broadly restrict the freedom of dress, such as bans on all hats.

290. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.").

291. *E.g.*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school." (citations and internal quotation marks omitted)).

Next, I look at attempts to restrict items like headscarves for girls in schools, these attempts being grounded on the notion that the restrictions actually promote freedom of dress by interfering in the private control of children's dress exercised in communities outside of school. Finally, I look at the use of uniforms in public school, on the grounds that school uniforms will operate as a class equalization measure, preventing the class awareness that comes when wealthier students are permitted to spend a great deal of money on their personal appearance.

A. *The Socialization of Children*

In recent years, federal courts appear to have embraced a theory of public education as a place where children are socially integrated into a single, unitary public community.²⁹² Thus, repressing difference and inducing conformity are essential components of this educational function, and often serve to overcome student assertions of individual rights.²⁹³ It is true that one of the functions of public school is to socialize children, and that even within a pluralistic society, part of that socialization may involve the promotion of certain universal values.²⁹⁴ Yet, an understanding of this socialization process as one that is in direct conflict with student liberty is not only unwise, it does not make sense for a pluralistic society such as America. In other words, student liberty and successful socialization are not perfectly inversely related. Two facts complicate the notion of an inverse relationship between the two: first, respect for others' liberty is one of the norms public schools attempt to promulgate, and second, in a world where exit altogether from the public school system is an option, preservation of some student liberty may avoid inducing that exit, and the resulting isolation and marginalization such exit would entail.

First, as many commentators have noted, and as the Supreme Court referenced in *Tinker v. Des Moines Independent Community School*

292. See Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 64–70, 86, 93 (1996) (discussing the Court's opinions dealing with school power and contrasting two models of public education—the social reconstruction model, in which students are empowered to reconstruct society culturally, and the social reproduction model, in which schools reproduce society's current cultural values by inculcating children).

293. See Miller, *supra* note 7, at 637–38 (outlining the trend in Supreme Court cases post-*Tinker* to reject student rights challenges to school policies and decisions).

294. See, e.g., *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1209, 1211 (9th Cir. 2005) (rejecting a challenge by parents to a survey on sex administered to students by a public elementary school psychologist), *amended by* 447 F.3d 1187 (9th Cir. 2006) (per curiam).

District,²⁹⁵ among the most important of social norms schools must teach children are norms of tolerance, respecting the liberty of others, and the value of public debate and confrontation.²⁹⁶ Thus, schools must teach children not to conform unquestioningly, not to respect authority mindlessly, and not to make political and social gains simply by silencing, suppressing, or exiling difference. If school administrators do not model these norms to some degree, by permitting and respecting conflict and dissent in certain areas, these important norms will be less successfully imparted.

Second, our rights to privacy mean that the more public schools promote norms by coercing those who disagree with them, the greater the chance they will induce retreat into the private sphere. Leaders and parents in subcultures that clash with school administrator norms can remove children from public schools and place them in private schools, or even remove children from school altogether.²⁹⁷ This retreat into the private sphere simply isolates, and can even economically marginalize, the very children that are claimed to be in need of socialization. This phenomenon has been described by those writing about controversies surrounding headscarf bans in France and Turkey.²⁹⁸ In America, rights of privacy and rights of parents to control the upbringing of their children are considered fundamental rights that are accorded great deference.²⁹⁹ Thus, when the values of those

295. 393 U.S. 503 (1969).

296. *Id.* at 511–13.

297. See *Wisconsin v. Yoder*, 406 U.S. 205, 234–36 (1972) (holding that the Free Exercise Clause protected the rights of Amish parents to remove their children from school altogether after eighth grade, even in the face of the state interest in universal compulsory education); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding unconstitutional an Oregon law compelling attendance at public school).

298. See, e.g., Maximilien Turner, Comment, *The Price of a Scarf: The Economics of Strict Secularism*, 26 U. PA. J. INT’L. ECON. L. 321, 336–43 (2005). Turner cites evidence that “[f]or thousands of women [in Turkey], headscarf prohibitions require abandoning hopes for joining professional-class careers in medicine, science or education.” *Id.* at 336–37. He also describes how

[a]nother serious effect of the headscarf ban, particularly in rural areas, may be that many families will simply choose not to send their daughters to school at all. In one case study, a Turkish woman recalls that her family never wanted her to go to primary school; she had to struggle to get their permission at each step of her educational advancement.

Id. at 337–38. Turner also describes how a 1997 expulsion of twenty girls in Lille, France from school for wearing headscarves led to “their parents open[ing] the country’s first private Muslim school, although they faced significant administrative hurdles and scrutiny.” *Id.* at 340. He also demonstrates that foreign religious entities “have shown themselves willing to finance Islamic education in both France and Turkey.” *Id.* at 343.

299. See *Yoder*, 406 U.S. at 213–14, 232–35 (discussing parents’ rights to control the upbringing of their children); *Pierce*, 268 U.S. at 534–35 (same).

who dominate a subculture are afforded no place at all in public schools, parents may be incentivized to remove their children from public school and place them in private school, home school their children,³⁰⁰ or even stop their education altogether, as early as that is legally permitted.³⁰¹ Religious and other subcultural leaders may be incentivized to create private schools that cater to subcultural tastes. For instance, children in marginalized and isolated polygamous communities in America may learn racial hatred from church leaders.³⁰² Even where children do not exit the public school system as a result of infringements on their liberty, too much coercion leads to resentment and resistance.³⁰³ In general, regimes in which persons are given a choice between their subculture and participation in public life fail to respect the fact that many persons want both, and that by having both, individuals can be empowered to further democratic norms and norms of tolerance, legality, and nonviolence within subculture, as well as to exit subcultures or exercise real choice to stay within them.³⁰⁴

In sum, while socialization is indeed a crucial function of public school, to characterize socialization as in direct conflict with student liberty is far too simplistic. Schools need to respect and accommodate *some* exercises of student liberty within school, not only to comply with constitutional or human rights constraints, but also to fulfill the socialization function itself. How then, does freedom of dress fit into this more complicated picture?

300. See David Crary, *Evangelicals Lead Push for Home Schooling*, ASSOC. PRESS, Sept. 3, 2006, available at <http://www.dfw.com/mld/dfw/news/nation/15432797.htm> (describing the immense political passion of the home-schooling community and its relationship with the religious right wing); see also Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties"*, 84 NEB. L. REV. 795, 827 & n.134 (2006) (same).

301. See, e.g., *Yoder*, 406 U.S. at 210–12 (discussing the Amish community's objection to formal education beyond the eighth grade).

302. See, e.g., David Kelly, *Lost to the Only Life They Knew*, L.A. TIMES, June 13, 2005, at A1 (reporting on life in the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS), including accounts of formal education in racism from "Lost Boys," male children exiled from their church and community); see also Southern Poverty Law Center, *In His Own Words* (2005), <http://www.splcenter.org/intel/intelreport/article.jsp?sid=342> (quoting the radical teachings of Warren Jeffs, the recently apprehended FLDS "prophet").

303. See Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17, 50–51 (2005) (describing how the headscarf, once a symbol of subservience, has become "a symbol of distinction and prestige for urban Muslim women," and a form of rebellion against their parents, in the wake of the French government's prohibition of headscarves in public schools (quoting Nilüfer Göle, *The Voluntary Adoption of Islamic Stigma Symbols*, 70 SOC. RES. 809, 821 (2003))).

304. See Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1404–08 (2003) (discussing individuals' rejection of a binary system that forces them to choose between, rather than reconcile, life in the public sphere versus the private religious sphere).

Four features of freedom of dress make it an excellent area in which to provide students with the kind of liberty that allows for democratic, rather than coercive, socialization. First, exercises of the freedom of dress play a special role in forming and re-forming individual and community-based identity, especially for those who are not yet adults, as I described in Part III. Dress is an extremely common site of identity performance and identity seeking behavior both for larger groups with more social power, such as major religions and racial groups,³⁰⁵ as well as smaller subcultures that may have little democratic power, such as sexual minorities, members of less common religions, and many youth movements and groups.³⁰⁶

Second, given its subjective rather than objective nature, as I've described in Part III.E, student exercises of the freedom of dress are not easily confused with school-sponsored speech. The idea that schools must avoid the misattribution of messages communicated by students to the schools themselves has been a prominent factor in the two major Supreme Court cases to uphold restrictions on student speech in public schools—*Bethel School District No. 403 v. Fraser*³⁰⁷ and *Hazelwood School District v. Kuhlmeier*.³⁰⁸ In these two cases, punishment for a sexually suggestive student council nomination speech,³⁰⁹ as well as censorship of a student newspaper article concerning teen pregnancy and sexuality,³¹⁰ were both upheld because of the school's interest in controlling its own speech.³¹¹ Both the nomination speech and the newspaper article were deemed confusable with school-sponsored views. These cases have been viewed as chipping away at student rights to free speech articulated in *Tinker*, in which a student's right to wear a black armband to protest the Vietnam War was upheld against school attempts to forbid the armband.³¹² While *Fraser* and *Hazelwood* have been understood as implicitly overturning *Tinker*,³¹³ or as representing narrow exceptions to *Tinker* that uphold school prerogatives

305. For instance, some Christian people wear necklaces with a cross, some Muslim people wear a hijab, and some Jewish people wear a yarmulke.

306. For instance, some gay men and lesbians wear pink and black triangles, respectively, Kim Ode, *Gay Pride's Rainbow Flag No Cause for Alarm*, STAR TRIB., Jan. 23, 2001, at 2E, and some punks obtain tattoos, TattooJohnny.com, Punk Tattoos and Tattoo Design Guide, <http://www.tattoojohnny.com/punk-tattoo-designs.asp> (last visited Oct. 7, 2006).

307. 478 U.S. 675 (1986).

308. 484 U.S. 260 (1988).

309. *Fraser*, 478 U.S. at 685–86.

310. *Kuhlmeier*, 484 U.S. at 270–71.

311. *Fraser*, 478 U.S. at 685–86; *Kuhlmeier*, 484 U.S. at 272–73.

312. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504, 514 (1969).

313. *E.g.*, Chemerinsky, *supra* note 7, at 541–42 (noting the Court's changing approach to student expression following *Tinker*).

to ban lewd speech or regulate student newspapers,³¹⁴ we could also distinguish *Tinker* because it involved the freedom of dress, and thus claims that the student expression at issue in that case were confusable with school sponsored or school administrator speech would have been quite implausible.³¹⁵

Third, the overlap, and therefore the conflict, between student dress and the most essential aspects of pedagogy and socialization in public schools is actually quite minimal. Typical pedagogical and socialization goals in school are promoting a work ethic, teaching students how to compromise, teaching students how to engage in respectful disagreement, and of course, teaching subjects like English, Math, Art, and History. The kind of pedagogical goals a “charm school” might have are not typical of a public school. Thus, in contrast to verbal speech, dress intersects with core pedagogical functions relatively rarely. For instance, respecting cultural difference in the form of nonstandard English problematically intersects with the pedagogical functions of teaching reading, writing, and speaking. In order to learn standard spelling and grammar, most students need to practice using that standard grammar and spelling on a daily basis, even when they write essays in Biology class, for instance. Learning the skill is not easily compartmentalized.

Similarly, any rights of parents to shelter their children from certain concepts, such as sexuality and evolution, conflict quite sharply with traditional tools of pedagogy—the provision of information selected by teachers, the asking of questions selected by teachers, and the promotion of discussion between students that is supervised and directed by teachers. Thus, accommodating a religious student’s request that the equality of men and women not be taught in school, or even that she be excused from that day’s lesson, conflicts sharply with the pedagogical function of teaching American history, as well as the socialization function of promoting sex equality. On the other hand, accommodating that same student’s request to wear religious garb does not prevent the equality of men and women from being taught in school, even if school administrators are confident that her dress symbolizes inequality of men and women. Teachers could even teach that a type of religious garb promotes inequality while letting a stu-

314. *E.g.*, Miller, *supra* note 7, at 649–50, 673–74.

315. Of course, the *Tinker* Court made clear that it was not giving the armband protection because of its status as an exercise of the right to personal appearance, but rather due to its equivalence with political speech. But surely the fact that the armband was tied around individual students’ bodies helped negate any concern that the students’ anti-war opinions could be imputed to the school.

dent wear it. Of course, such a lesson would represent a deep challenge to the student's beliefs, but this is precisely the sort of challenge the school might wish to make. Similarly, in order to learn that wearing a tongue pierce to a job interview can harm one's chances of getting the job, one merely needs to be told this fact or perhaps tested on it. Few students would need to practice not wearing a tongue pierce to school every day in order to understand.

One might argue that regulating dress does intersect with the pedagogical function of preparing children for the work world, and that strict dress codes and uniforms are part of that preparation. Being forbidden from wearing a tongue pierce to school does of course reinforce the lesson that the pierce may be disliked by members of the community, but the benefits of this reinforcement are clearly marginal when compared to the reinforcement benefits that come with daily practice of the skills involved in solving math problems, learning a language, developing exercise habits, creating art, performing and composing music, engaging in polite debate, or critically thinking.³¹⁶

It is only when the study of dress is understood as the study of a rote, habitual skill that enforcing dress codes and uniforms on children makes a great deal of pedagogical sense. There is, indeed, a trend toward teaching many subjects as rote or "vocational" skills in public schools, especially schools that are plagued with other problems.³¹⁷ Struggling schools sometimes require students to take vocational courses that train them to be robotic, but skilled, workers, rather than focusing on more academic study, whether that study is basic (literacy) or high level (literary criticism).³¹⁸ Some administrators view this as the best they can do for poor children, or worse, the best they can do for a society that seeks not personal and social fulfillment for the children themselves, but rather the use of their labor.³¹⁹ I oppose this trend and therefore do not find this vocationalized understanding of dress a compelling enough pedagogical concern to override the social development and identity formation/reformation

316. Of course, personal appearance *can* be studied on a higher and more serious level, and at this level of study, the benefits of daily practice using one's own body are clearer. But at this level of study, where fashion, makeup, hairstyling, and body art are deemed objects of deeper academic study, enforcing uniformity or making some forms of dress off-limits seems only to inhibit the pedagogical goal, which includes creativity and innovation.

317. See JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* 89–96 (2005) (discussing the work-oriented nature of the curriculum at some public schools).

318. See *id.* at 102–03 (describing the culinary arts vocational and job-training focus in one public school).

319. *Id.* at 104–07 (noting that some business leaders advocate "school-to-work" for their own benefit).

functions that exercise of the freedom of dress serves for children. This is especially the case where schools have the option of providing children with information about personal appearance, and even testing them on their understanding of that information.

Fourth, and finally, “hands off student bodies” is already part of many public school approaches to teaching and socialization. Although corporal punishment does still occur in public schools, it is uncommon and in decline.³²⁰ More than half of all states ban the practice, and many students in the other states live in school districts where the practice is banned.³²¹ Strip searches also appear to be relatively uncommon.³²² Respecting the freedom of dress requires little extension of this principle of respect for the independence of the student’s physical being.

In sum, in order that public schools may fulfill their socialization functions most effectively, some student liberty should be maintained within schools. For the above reasons, freedom of dress is an ideal area of liberty for public schools to respect. In the case of political or artistic speech, it is easy (for some) to live with restrictions on children, especially young children, because we know that they will be able to fully exercise these rights and participate in public life once they exit school as adults. In the case of abortion, it is impossible to live with such restrictions, given the irreversible effects of a woman’s decision to have or not have an abortion, no matter what her age. Exercise of the right of freedom of dress falls between these two extremes, and in general, it cannot wait until adulthood. As explained in Part III, freedom of dress is especially important to children because it is part of developing a sense of private and public identity, and it is during adolescence that the use of personal appearance in that process is highest for many people.

Of course, dress, like any other behavior, might be manipulated to violate school rules that do not target dress, such as rules against making threats or harassing other students—an issue I will deal with

320. See National Association of School Psychologists, *Position Statement on Corporal Punishment in Schools*, July 21, 2001, http://www.nasponline.org/information/pos-paper_corppunish.html; The Center for Effective Discipline, U.S. Statistics on Corporal Punishment by State and Race, <http://www.stophitting.com/disatschool/statesBanning.php> (last visited Aug. 29, 2006) (showing a long-term downward trend in students struck in public schools).

321. National Association of School Psychologists, *supra* note 320; The Center for Effective Discipline, *supra* note 320.

322. See Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. CAL. L. REV. 921, 923 (1997) (finding approximately one dozen instances of strip searches reported in national newspapers between 1990 and 1997).

in the next Section on gang dress in schools. When this occurs, schools cannot ignore it, just as schools cannot ignore other forms of threats and harassment, even in the face of the First Amendment. But assuming schools can punish threats, harassment, and the like when they happen to be enacted through dress, just as they would punish such behavior when enacted through speech or physical actions and violence, schools can still generally allow students to exercise their freedom of dress in public school. Doing so promotes, rather than undermines, a pluralistic culture in which the value of both individuals and community are explored and respected, and in which students can explore their own identities through manipulation of their own appearance and body.

B. Disruptions and Safety: Gang Dress

Some states have promulgated laws permitting school districts to impose mandatory school uniforms on students or stringent dress codes in an explicit effort to deal with the problems associated with gang violence and culture.³²³ Some gangs use dress, including tattoos, to express gang affiliation. Affiliation may be expressed in a range of ways, from wearing a particular color of clothing, to tucking a pen behind either a left or right ear.³²⁴ Thus, it is unsurprising that extremely stringent dress codes or mandatory uniforms have been used in an attempt to suppress the violence and intimidation that are associated with gangs.

In general, protecting the students who attend public school from violence, harassment, and threats would be, in my view, a compelling enough interest to overcome many assertions of student liberty, including the freedom of dress. However, as I've argued above, a proper understanding of the unique aspects of freedom of dress helps demonstrate why it should be valued highly within public schools, rather than given a low value as an adjunct to freedom of speech. Thus, an argument often launched in favor of upholding regulations of student dress in public school—that other avenues for traditional communication remain—treats dress merely as an adjunct to speech, and therefore fails to appreciate the unique qualities of dress that make it even more compelling of a liberty to protect within schools than speech.

323. *E.g.*, CAL. EDUC. CODE § 35183 (West 1993 & Supp. 2006).

324. *See* Ann Kordas, Note, *Losing My Religion: Controlling Gang Violence Through Limitations on Freedom of Expression*, 80 B.U. L. REV. 1451, 1455–56 (2000) (noting several fashion styles that have been targeted by schools as indicative of gang membership).

Given that dress should be given a wide berth in public schools, targeting dress directly, rather than enforcing school rules against the making of threats, violence, and the like, is unwarranted even in the case of alleged gang disruption of school. Of course, enforcing such rules takes work, and even money, but then, respecting any student liberty will impose some costs, and as I've argued above, public schools should respect *some* area of student liberty. If a student has used his or her dress to spark a violent conflict with other students, that student can be punished without resorting to regulations of dress. Or, if a student is shown to have used dress to break school rules in the past, that particular student can even be forbidden from wearing similar dress to school in the future. Suppose, for instance, that in a racially homogenous community, one African-American student attended an otherwise all white school. Then suppose that one of this student's classmates was embroiled in an ongoing battle with the African-American student. Then suppose that student wore a Confederate flag t-shirt to school to express that he planned on attacking the other student, or to racially harass him. School administrators could punish that student for threats and harassment. Administrators might even be required to do something about certain forms of harassment under Title IX. The white student might claim that he was not, in fact, threatening and harassing anyone, but this question of fact could be resolved one way or another. T-shirts can, of course, be harassing and threatening, but a rule that treats such t-shirts as harassing and threatening in every instance is not only factually implausible—consider a student who is wearing the t-shirt as part of a Halloween costume, or a play—it uses the bodies of students to teach the lesson that Confederate flags inherit a history of racism and violence.

Students can be discouraged from joining gangs, displaying confederate flags, and otherwise doing things that are considered antisocial in many ways, but forbidding them from wearing these clothes or forcing them to wear uniforms is one of the most invasive methods we could imagine. Protecting teenagers from sexually transmitted diseases and unwanted pregnancy is a concern we might find just as important as protecting them from gang intimidation. But would we respond to this concern by requiring all students to wear shirts to school that say "I believe in safe sex"? Or if students had developed a code in which red meant "Not a Virgin," would we forbid students from wearing red? The better response to the problem is to teach a sex education course.

When dress is analyzed as an important right to preserve for students in schools, mandatory school uniforms and dress codes as solu-

tions to the spread of gangs would usually be seen as extremely overbroad mechanisms for accomplishing the very legitimate and compelling goals of discouraging gang membership and stopping intimidation. Such mechanisms are not narrowly tailored in the slightest.

C. Headscarf Bans: Restricting the Freedom of Dress or Promoting It?

Many countries have attempted to justify bans on the wearing of headscarves as supportive of student rights, rather than infringing on student rights. France, for instance, has justified such bans as promoting the rights of Muslim girls who might otherwise be coerced into wearing headscarves by parents and fundamentalist religious leaders. By providing a space at school where girls can decide to be secular, decide that they feel headscarves are not appropriate, or decide to be religious without subscribing to the admonition that a headscarf be worn, government actors claim to actually further the rights of these girls, who may be facing coercion at home to wear a headscarf.³²⁵

While I think that the meaning of a headscarf is not as fixed as the French government claims, in general, discouraging the wearing of headscarves by teaching a negative history of their meaning would, in my view, be a permissible means of socializing children in the manner the government sees fit. However, as I've argued above, the relationship between socialization and liberty is not perfectly inverse. Granting students *some* liberty within school actually furthers socialization goals and can prevent exit into the private sphere, where children may be economically marginalized and unable to make the very choices the government hopes to provide them. Moreover, granting some liberty can prevent backlash by students who feel isolated and wronged by the intrusion on what they see as their identity and community.

As I've argued in Section A of this Part, given that schools need to protect some student liberty in order to socialize their students, dress is an ideal one to protect. Granting this accommodation, even where the state believes that a child's choice is anything but freely made, can provide the necessary demonstration of good will to begin a dialogue that empowers children within their communities. Rather than telling children they must choose freedom in the public sphere or op-

325. See, e.g., Steven G. Gey, Address, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1, 8–10 (2005) (describing the French principle of *laïcité*, or “secularism,” that supports the headscarf ban as including “the social value of protecting each individual citizen’s intellectual and political independence from domination by powerful social institutions such as the church”).

pression in a private sphere, schools can reach out to students and give them the tools to be empowered within both public and private spheres.

D. Uniforms as Class Equalization Measure?

Public school uniforms have been promoted not only to stem gang violence and affiliation, but also to improve school spirit and behavior.³²⁶ Even President Clinton promoted the use of uniforms in public schools during his time in office.³²⁷ One argument frequently launched in favor of school uniforms is their ability to equalize students coming from different economic means.³²⁸ By removing many of the markers of class and status, school uniforms may remove pressure on students to wear status symbol items. They also remove pressure on parents to buy their children expensive clothes.

I readily admit that this is a laudable goal and that mandatory uniforms can, and probably do, help schools accomplish the goals of removing class-based social pressure on children of lesser economic means. Of course, many actual school uniform choices do not promote a healthy anti-materialism. Instead, those uniforms that incorporate tartan prints and short pleated skirts for girls are premised on a nostalgia for the traditions of a different time and place. However, some school uniforms do seem to involve serious efforts by administrators to choose “neutral” and simple clothing. (Even these uniforms often involve some sort of “business casual” dress, such as khakis and polo shirts, rather than jeans and a t-shirt.)

Nevertheless, for the reasons outlined in Section A of this Part, dress is an ideal area of liberty to provide students with, given that some area of student liberty must be respected. Dress could be carved out relatively cleanly as a sphere of general non-interference. Thus, my arguments lead me to believe that the worthy goal of promoting friendships and respect among students of different economic classes, and helping less well-off students avoid feelings of exclusion, are better pursued through other means. Children cannot, of course, be sheltered entirely from the realities of our society’s enormous wealth

326. *E.g.*, CAL. EDUC. CODE § 35183(a)(7) (“Schools that have adopted school uniforms experience a ‘coming together feeling,’ greater school pride, and better behavior in and out of the classroom.”); N.J. STAT. ANN. § 18A:11-7 (West 1999) (same).

327. President William Jefferson Clinton, Remarks by the President on School Uniform Program (Feb. 24, 1996), *available at* <http://www.ed.gov/PressReleases/02-1996/whpr28.html>.

328. *E.g.*, Miller, *supra* note 7, at 670 & n.289 (citing multiple sources that make arguments in favor of uniforms because they act as “socioeconomic levelers” and “create financial savings for the students’ parents”).

disparities. It may be tempting for parents to shift responsibility for what may be highly frustrating battles with children over dress onto school administrators, but the fact that adults seek to recruit the authority of the state to control their own children's personal appearance choices should serve to remind us how crucial the exercises of these choices are to children.

VII. FREEDOM OF DRESS IN PRISONS

Another arena in which the freedom of dress is heavily regulated is prisons. Although federal regulations provide some prisoner freedom with respect to hair length and facial hair,³²⁹ state prison wardens do not necessarily follow the same practices. In the State of California, prisoners' grooming choices are heavily restricted, and in an explicitly gender discriminatory fashion.³³⁰ Transsexual prisoners have sometimes had success in obtaining hormone therapy as part of their medical treatment, but less success in obtaining access to cosmetics, even though this, too, is generally part of pre-operative treatment.³³¹ Of course, prisoners have many of their liberties curtailed; that is the nature of imprisonment—it punishes and rehabilitates via the exercise of control over the prisoner. And yet, we respect certain liberties of prisoners, despite the fact that they are in prison.³³² Scrutiny of interference with prisoner rights does not stop with a ban on cruel and unusual punishment. It goes further, encompassing restrictions on rights that “survive[] incarceration” and which are not rationally related to “legitimate penological interests.”³³³ Justice Stevens has described this scrutiny as recognizing the ethical responsibilities of society to treat persons as individuals worthy of dignity, even when they are in prison.³³⁴ Perhaps part of our aversion to acts like state-

329. 28 C.F.R. §§ 551.1, .2, .4 (2006) (permitting inmates to select the hair style of personal choice and wear a mustache or beard or both, and prohibiting the Warden from restricting an inmate's hair length, respectively).

330. CAL. CODE REGS. tit. 15, § 3062 (2004) (providing different grooming restrictions for male and female inmates).

331. *See, e.g.*, Murray v. U.S. Bureau of Prisons, No. 95-5204, 1997 U.S. App. LEXIS 1716, at *7-8 (6th Cir. Jan. 28, 1997) (per curiam) (denying transsexual prisoner's Eighth Amendment claim that she was entitled to receive hair and skin products).

332. *E.g.*, Turner v. Safley, 482 U.S. 78, 82, 99-100 (1987) (holding unconstitutional a regulation prohibiting inmates from marrying).

333. *See* Overton v. Bazzetta, 539 U.S. 126, 131-32 (2003). *But see id.* at 139-40 (Thomas, J., concurring) (arguing for a doctrinal approach under which only the Eighth Amendment would limit infringement of prisoner rights, and under which the main inquiry would be one of state law: whether the infringement of the prisoner's rights is part of the punishment for the crime committed).

334. *Id.* at 138 (Stevens, J., concurring).

established religion in prison, or arbitrary violations of prisoner First Amendment rights, comes from our knowledge that what the state does to prisoners using force, we do to ourselves using cultural coercion.³³⁵ When the state refuses to allow prisoners to voice their objection to the President's actions, but allows prisoners to voice their support of those actions, we are afraid of what it means for the rest of us that we let the state take sides in this way. When the state tells female prisoners that they cannot get married because it is bad for them, we are afraid of what that says about our own choices concerning intimate relationships. Put less selfishly, the fact that we accept incarceration of prisoners does not allow us to fully detach ourselves from our shared humanity with them.

Currently, speech rights and equal protection rights are considered rights that survive incarceration, and can therefore only be infringed for legitimate penological reasons, such as safety and rehabilitation.³³⁶ If such rights survive incarceration, I argue that the freedom of dress also survives incarceration. Unlike the deprivation of liberty or isolation, freedom of dress is not inconsistent with the very concept of incarceration. Moreover, when the state arbitrarily restricts the ability of prisoners to experiment with their own identities, the state uses its power of violence to take a side in cultural wars, and to impede the development of personality and identity itself.

A. *The Nature of Incarceration*

Because exercise of the freedom of dress is such an important means of developing a social identity, I argue that it is not appropriate to restrict the freedom of dress as "part of the punishment" of incarceration, just as forcing a convict to change religions, political parties, or cut off all contact with his or her family would not be acceptable as punishment. These activities so structure life experience that to limit them arbitrarily is to deny the humanity of prisoners.

Such restrictions are a means of inducing conformity and discipline. That conservative and uniform dress induces submission to authority explains why prison wardens, military leaders, police chiefs, school boards, employers, and anyone else in power wish to impose that type of dress on others. However, not letting prisoners develop and express political beliefs, or requiring all prisoners to subscribe to

335. See FOUCAULT, *supra* note 77, at 200–09 (analogizing to the Panopticon to illustrate the coercive effect of constant visibility).

336. See *Turner*, 482 U.S. at 91 (restricting prison officials' ability to prohibit prisoner marriage); *Procunier v. Martinez*, 416 U.S. 396, 413–14 (1974) (limiting prison officials' ability to censor prisoner mail).

a uniform religion, might also induce feelings of discipline and submission to authority. The problem with unnecessarily restricting freedom of dress is that it fails to recognize that the prisoner, despite being subject to punishment and rehabilitation, is still a human and an individual, still someone with a personality that he or she must be free to determine and develop.

However, there are elements of incarceration for which restrictions on dress may be necessary, such as the need to make escape difficult, the need to confiscate items such as jewelry that are usable as weapons, the need to quickly tell the difference between prisoners and guards in case of riot, and the need to ensure that prisoners do not pose health and safety risks to other prisoners, such as when prisoners work in the kitchen or their mode of dress poses an extreme hygiene problem. These needs justify restrictions on the freedom of dress as extreme as requiring uniforms. However, I argue that they cannot justify all restrictions, and I therefore propose a reasonable accommodation framework in prisons, like that which I have proposed for the workplace. Of course, the concept of undue hardship would rightly be far broader in the context of a prison than a workplace.

B. The Interests in Security and Identification

The interests in security and identification are of course strong in prisons. However, while it may be necessary to require uniforms for prisoners as a result, it is not necessary to restrict prisoner freedom of dress to the extreme that it is restricted in places like California. Thus, I propose a reasonable accommodation approach for prisons. For instance, because California prisons allow women prisoners to wear their hair longer than men prisoners, it is clearly reasonable to allow men to wear their hair at least as long as women may. Use of makeup by men can be accommodated without great expense, as can numerous sorts of short beards. Giving prisoners some chance to develop and alter their personality vis-à-vis others, before release, can be accomplished by reasonable accommodation.

I do not suggest that the accommodation given prisoners who seek to individualize their appearance need be as strong as that given to prisoners who seek religious exemptions from dress and grooming codes, or medical exemptions on the basis of gender identity disorder. Because these latter claims require an affirmative assertion of a particular religious belief or transsexual gender identity, it may be easier for prison authorities to accommodate these claims than it would be to accommodate nonreligious and nonmedical claims, which can be du-

plicated by large numbers of prisoners. Thus, while prison authorities may be able to accommodate the long hair of a Rastafarian without undue hardship, it might be an undue hardship to accommodate extremely long hair in every single prisoner who desired it. Because prohibitions on long hair are often intended to prevent smuggling of contraband in the hair,³³⁷ allowing all prisoners to have long hair would impose much greater search costs on the prison system than would allowing only those prisoners who are Rastafarians to wear their hair long.³³⁸ Similarly, providing transsexual prisoners with certain accommodations, such as access to cosmetics as part of medical treatment, might impose fewer costs on prisons than providing those rights to all prisoners.

VIII. CONCLUSION

The fact that all of us wear clothes and get haircuts “may perhaps . . . have contributed to the sometimes marginalised position that dress is given within academia and museology.”³³⁹ But, that an activity is commonplace should never keep legal scholars from exploring what the law’s relationship should be to that activity.

In this Article, I have attempted to theorize a freedom of dress and apply it to specific areas of the law. In doing so, I have radically departed from the typical treatment of this problem in today’s legal scholarship as a problem of antidiscrimination law,³⁴⁰ as well as a general apprehension about whether the law can ever do anything about it. I return to a rights-based approach to the problem because what is at stake is the way we define ourselves in relation to the rest of society—our identity. Identity is not a static, immutable given, nor is it so insubstantial as to be meaningless to human existence. Identity is shaped by social norms and the law, and it is a ground from which to rally for reshaping those norms and the law. In the consumer culture we live in, without freedom of dress, we do not have the freedom to continually revise, disrupt, and reform our identities; we do not have freedom over our self-determination.

337. See, e.g., *Hoevenaar v. Lazaroff*, 422 F.3d 366, 369 (6th Cir. 2005) (including prevention of hiding contraband in hair among asserted correctional interests in support of total ban on long hair for prisoners); *Warsoldier v. Woodford*, 418 F.3d 989, 997 (9th Cir. 2005) (same); *Pollock v. Marshall*, 845 F.2d 656, 658 (6th Cir. 1988) (same).

338. See *Hoevenaar*, 422 F.3d at 369 (describing less restrictive alternatives to the warden’s kouplock ban such as “allowing inmates to grow their hair long, but requiring them to be subjected to periodic hair searches,” or “permitting, on a case-by-case basis, those inmates with a low security risk to grow a kouplock”).

339. Wilson & de la Haye, *supra* note 2, at 2.

340. See sources cited *supra* note 6.