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ONLY GIRLS WEAR BARRETTES: DRESS AND APPEARANCE STANDARDS, COMMUNITY NORMS, AND WORKPLACE EQUALITY

*Katharine T. Bartlett**

[My son, Jeremy,] naively decided to wear barrettes to nursery school. Several times that day, another little boy insisted that Jeremy must be a girl because "only girls wear barrettes." After repeatedly insisting that "wearing barrettes doesn't matter; being a boy means having a penis and testicles," Jeremy finally pulled down his pants to make his point more convincingly. The other boy was not impressed. He simply said, "Everybody has a penis; only girls wear barrettes."¹

In the thirty-year history of Title VII, the meaning of workplace equality for women has undergone a vast number of changes. Many of these changes represented gradual, incremental steps in the elimination of barriers to women's employment such as height and weight requirements,² rules against hiring mothers with small children,³ and the denial of overtime work to women.⁴ Other changes in the meaning of workplace equality required major shifts in understanding about the nature of sex-based discrimination and came only after scholars and advocates laid substantial theoretical and political groundwork. Recognition that pregnancy-based exclusions constitute discrimination "based on sex"⁵ and the extension of Title VII to prohibit workplace environments that subject women

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1. SANDRA L. BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY* 149 (1993).

2. *See, e.g.,* *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

3. *See, e.g.,* *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

4. *See, e.g.,* *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972); *see also* *Hailes v. United Air Lines*, 464 F.2d 1006 (5th Cir. 1972) (holding that discriminatory job advertising violates Title VII); *Danner v. Phillips Petroleum Co.*, 447 F.2d 159 (5th Cir. 1971) (holding that the withholding of seniority rights from nonunionized employees, which included all female employees, violates Title VII).

5. *Compare* *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (upholding the exclusion of pregnancy from a disability plan on the grounds that discrimination based on pregnancy is not discrimination based on sex so long as it is not used simply as a pretext for discriminating against women) *and* *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (same, with respect to the exclusion of pregnancy from a sick-leave policy) *with* 42 U.S.C. § 2000e(k) (1988) (stating that discrimination on the basis of pregnancy is discrimination on the basis of sex) *and* *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (holding that an employer

to lewd remarks and unwanted sexual advances⁶ are examples of these more radical transformations.

Despite the progress made under Title VII in eliminating barriers to women's access to equal employment opportunities, the Act has never kept up with the expectations many have had for it. At any given time, there seems to be a significant gap between what the law finds unacceptable under Title VII and what scholars and advocates contend the Act should prohibit. A gap between a law's reach and the aspirations of those who seek to use it to accomplish substantial societal reform is a common enough phenomenon, but this is small consolation, and critics look for explanations. In the case of Title VII, one explanation seems to lie in an unnecessary judicial reliance on community norms in determining what the Act requires. For example, privacy expectations of patients in nursing homes or hospitals have been held to justify an employer's sex-based hiring policies,⁷ even though those expectations are themselves based on gender-role stereotypes.⁸ Another example can be found in hostile environment sexual harassment cases, in which community norms have come into play in evaluating whether a sex-

policy barring employees "capable of bearing children" from positions involving exposure to lead discriminated on the basis of sex).

6. *Compare* *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (noting that the verbal and physical sexual advances by a supervisor were the result of a "personal urge" not related to the nature of the employment and thus could not be a violation of Title VII), *vacated and remanded*, 562 F.2d 55 (9th Cir. 1977) with *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (concluding that hostile environment sexual harassment, as well as quid pro quo harassment, constitutes sex discrimination under Title VII).

7. *See, e.g., Jennings v. New York State Office of Mental Health*, 786 F. Supp. 376 (S.D.N.Y.) (finding that sex is a bona fide occupational qualification (BFOQ) at a state psychiatric hospital for a "security hospital treatment assistant" whose duties included feeding, clothing, and cleaning patients, assisting in personal hygiene, and observing patients in bathrooms and bedrooms), *affd.*, 977 F.2d 731 (2d Cir. 1992); *EEOC v. Mercy Health Ctr.*, 29 Fair Empl. Prac. Cas. (BNA) 159 (W.D. Okla. 1982) (finding that in a medical facility for high-risk pregnancies, complaints by male physicians and survey results indicating objections by prenatal patients to the use of male nurses in the labor and delivery area justified the exclusion of male nurses to avoid "medically undesired tension"); *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346 (D. Del. 1978) (finding that being female is a BFOQ for nurses and nurses' aides in a nursing home, after nine female residents signed an affidavit objecting "most strenuously" to male nurses and nurses' aides), *affd. mem.*, 591 F.2d 1334 (3d Cir. 1979).

8. For example, patients who object to male nurses helping them perform their toileting functions are unlikely to object to — and, in fact, may prefer — male doctors. Most commentators disagree with the privacy exception. *See, e.g.,* Deborah A. Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 *FORDHAM L. REV.* 327 (1985); Elsa M. Shartsis, *Privacy as Rationale for the Sex-Based BFOQ*, 1985 *DET. C.L. REV.* 865; Kenneth W. Kingma, Comment, *Sex Discrimination Justified Under Title VII: Privacy Rights in Nursing Homes*, 14 *VAL. U. L. REV.* 577 (1980). There are hints in *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206 n.4 (1991), and 499 U.S. at 219-20 n.8 (White, J., concurring), however, that the Supreme Court is inclined, at the moment at least, to endorse it.

ual advance at the workplace was "unwelcome" or whether harassing conduct was sufficiently "pervasive" to violate the Act.⁹

The example of judicial reliance on community norms on which this essay focuses concerns employer dress and appearance requirements. Employers have traditionally assumed substantial prerogatives with respect to the dress and appearance of their employees, imposing burdens on women that are different from those imposed on men. For example, women may be required to wear skirts of a certain length¹⁰ or high-heeled shoes,¹¹ to conform to different weight criteria than men,¹² or to wear makeup.¹³ They may be fired if they have unladylike facial hair¹⁴ or if they wear their hair in a style that may offend customers.¹⁵ They may be required to have sexually alluring figures or to wear sexually provocative clothing,¹⁶ or they may be made to downplay their sexuality.¹⁷ Men, in turn,

9. For discussions of this point, supported by analyses of numerous cases, see Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1197-209 (1989); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 826-34, 843-47 (1991); Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 508-20 (1994).

10. See, e.g., *Tardif v. Quinn*, 545 F.2d 761 (1st Cir. 1976) (considering a policy prohibiting short skirts); *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388 (W.D. Mo. 1979) (considering a company policy prohibiting women from wearing pantsuits); see also Diana Kunde, *Firms finding dress codes turning into battleground*, ARIZ. REPUBLIC, Mar. 15, 1993, at E4 (reporting that a J.C. Penney store reversed its policy forbidding women employees from wearing slacks).

11. See, e.g., *Magnuson v. Peak Technical Servs., Inc.*, 808 F. Supp. 500 (E.D. Va. 1992) (denying summary judgment for the defendant in a sexual harassment and retaliatory discharge case in which the plaintiff alleged, among other things, that the defendant told her that her legs were very sexy and thus he did not want her to wear flat shoes again).

12. See, e.g., *Jarrell v. Eastern Airlines, Inc.* 430 F. Supp. 884 (E.D. Va. 1977) (finding that a weight control program that had different standards for male and female flight attendants did not violate Title VII), *aff'd*, 577 F.2d 869 (4th Cir. 1978).

13. See, e.g., *Tamimi v. Howard Johnson Co.*, 807 F.2d 1550 (11th Cir. 1987) (holding that an employee's discharge for failure to wear makeup was discrimination based on sex, when the makeup policy was linked to the employee's pregnancy); see also Stanley Ziemba, *Worker rights debate is back*, CHI. TRIB., Apr. 18, 1993, § 7 (Business), at 1 (reporting that a Continental ticket agent was fired for failing to wear foundation and lipstick but was reinstated after media uproar).

14. See, e.g., *Her Mustache or Her Job*, WASH. POST, Mar. 25, 1994, at B1 (reporting that an audiovisual technician was fired from her hotel job because of facial hair).

15. See, e.g., *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981) (upholding a policy prohibiting employees from wearing all-brided hairstyles).

16. See, e.g., *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981) (finding that a requirement that a female lobby attendant wear a sexually revealing costume violated Title VII); see also *Priest v. Rotary*, 634 F. Supp. 571 (N.D. Cal. 1986) (stating that transferring a waitress from the cocktail lounge to the less lucrative coffee shop because of her failure to wear sexually suggestive clothing was a prima facie violation of Title VII); *infra* notes 176-77 and accompanying text (discussing dress and appearance requirements at Hooters restaurants).

17. See, e.g., *Wislocki-Goin v. Mears*, 831 F.2d 1374 (7th Cir. 1987) (holding that discharging a female employee for wearing her hair down and excessive makeup, in violation of a dress code, did not violate Title VII), *cert. denied*, 485 U.S. 936 (1988); *Fadhl v. City of San*

may be required to wear ties¹⁸ or to keep their hair cut short,¹⁹ or may be prohibited from wearing "women's" jewelry.²⁰ These requirements pose a special challenge to conventional equality concepts and illustrate especially well the difficulties of rooting out workplace rules and practices that are based on well-settled community norms.

For the most part, courts have rationalized dress and appearance requirements by reference, directly or indirectly, to community norms. Based on these norms, courts may excuse dress and appearance requirements they deem trivial in their impact on employees, or neutral in affecting men and women alike, or essential to the employer's lawful business objectives. These rationalizations have been criticized by scholars, who argue that reliance on community norms constitutes an acceptance or legitimation of the very gender stereotypes that Title VII was established to eliminate.²¹ The proposed solution is that community norms be put off limits as a basis for justifying discriminatory standards and that mandatory dress and appearance codes be found unlawful under Title VII.

In this essay I study both the judicial rationales and the scholarly criticisms thereof, agreeing with critics that community norms are too discriminatory to provide a satisfactory benchmark for de-

Francisco, 741 F.2d 1163 (9th Cir. 1984) (finding that a city discriminated against a female trainee when it evaluated her negatively in part for looking and acting "too much like a lady"); *Carroll v. Talman Fed. Sav. & Loan Assn.*, 604 F.2d 1028 (7th Cir. 1979) (holding that a requirement that female bank employees wear uniforms to prevent them from following prevalent fashion styles, such as the slit skirt, which the employer deemed unprofessional, violated Title VII when men were not required to wear uniforms), *cert. denied*, 445 U.S. 929 (1980).

18. *See, e.g., Sandstrom v. State*, 309 So. 2d 17 (Fla. Dist. Ct. App. 1975) (finding that a judge did not violate an attorney's civil rights when he ordered him to wear a tie in court), *cert. denied*, 336 So. 2d 572 (Fla. 1976).

19. *See, e.g., Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (upholding an employer's refusal to hire a male job applicant because his hair length violated the employer's grooming code, despite differences in standards for male and female employees); *see also Earwood v. Continental Southeastern Lines*, 539 F.2d 1349 (4th Cir. 1976) (finding that sex-differentiated grooming standards do not constitute *per se* discrimination).

20. *See e.g., Lockhart v. Louisiana-Pacific Corp.*, 795 P.2d 602 (Or. Ct. App. 1990) (upholding a rule prohibiting male employees from wearing facial jewelry, including earrings, but allowing women to wear jewelry that is not "unusual or overly-large"); *Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993) (denying a claim of handicap discrimination by a transsexual terminated for wearing "excessively feminine" attire, including a strand of pink pearls).

21. *See, e.g., Karl E. Klare, Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1417-18 (1992) ("In using [phrases like *commonly accepted social norms* or *generally accepted community standards of dress and appearance*], the courts are of course referring to mainstream or conventional norms, which in our society are thoroughly sexist and patriarchal."); Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73, 84 (1982) ("When 'commonly accepted social norms' disadvantage women, the countenancing of an employment practice that takes its justification from those norms defeats the purpose of a statute proscribing sex discrimination.").

fining workplace equality, but also questioning the usual implications of this critique. Critics assume that it is possible, and desirable, to evaluate dress and appearance rules *without regard* to the norms and expectations of the community — that is, according to stable or universal versions of equality that are uninfected by community norms. I question this assumption, arguing that equality, no less than other legal concepts, cannot transcend the norms of the community that has produced it. I argue, further, that eliminating dress and appearance discrimination against women in the workplace is not as simple a matter as the critics suggest. As I explain in Part I, women are disadvantaged by dress and appearance expectations beyond those formally mandated by employers. Strategies to eliminate mandatory codes fail to address this disadvantage. Moreover, it is not clear that mandatory dress and appearance codes are always a source of disadvantage to women; in some instances, they may even be beneficial. Accordingly, in evaluating dress and appearance codes, my focus is not on whether they are mandatory but on whether, mandatory or not, they further gender-based disadvantage in the workplace. Because what constitutes disadvantage, as well as what it takes to reduce that disadvantage and even what reducing disadvantage means, can only be determined in context, in relation to a particular set of circumstances, I conclude that the evaluation of equality claims under Title VII requires more, not less, attention to community norms.

In Part II, I review how courts, in evaluating dress and appearance restrictions under Title VII, have relied on community norms in an incorrect way, as objective, external criteria that tend to legitimate most restrictions. In Part III, I explore the implications of a more complex, interactional view of community norms as provisional givens, which are neither fixed for all time nor easily changed by simple legal fiat. Within this framework, I urge an abandonment of the judicial practice of justifying dress and appearance requirements by their correspondence to existing community norms. As noted above, however, I advocate not a rejection of community norms altogether but a more deliberate focus on them, as an important reference point both for determining whether workplace rules and practices disadvantage women and for defining which discriminatory rules — for strategic as well as legal reasons — might have to be allowed as essential to businesses that, however objectionable from a sex-equality perspective they might be, society is not yet prepared to prohibit.

One premise of this essay is that no version of gender equality can accomplish substantial social change unless it is familiar enough to take root in the very conditions of subordination it is expected to eliminate. This familiarity is especially important with respect to matters affecting personal identity, such as dress and appearance,²² about which sharp breaks and shifts in understanding are difficult if not impossible to achieve. I leave the details of this argument for another day²³ but mention it here to give further context to why I think it should not be surprising that legal reform affecting gender-role stereotypes, like legal reform in other areas, often reincorporates the kinds of defects it is designed to eliminate.²⁴ The law shapes, and is shaped by, community norms, in an ongoing series of negotiations over form and function, over ideals and reality, and over difference, disadvantage, and the difference between the two. In this process of negotiation, only those versions of equality that incorporate past understandings, as well as new insights, will be stable enough to form the basis of even better future versions.²⁵ Viewing community norms as a central part of this process rather than as an evil that can or should be ignored reflects this premise.

I. THE FEMINIST CRITIQUE OF DRESS AND APPEARANCE

For feminists, dress and appearance norms raise both autonomy and equality concerns. As an autonomy issue, the problem is that dress and appearance norms impede women from making their own choices and restrain them from expressing their true identity.²⁶ As

22. It is not entirely clear *why* dress and appearance are so important to identity. The explanation might be as simple as that clothing, cosmetics, and hairstyle compose what is most closely attached to the corporeal self. See FRED DAVIS, *FASHION, CULTURE, AND IDENTITY* 25 (1992). According to Davis, clothing is more important in the West and fashion more shifting than in other cultures because Westerners are so ambivalent about such matters as gender, social status, and sexuality, and clothing is a means by which they "manage" their ambivalence. *Id.* at 28. Whether it is possible that dress and appearance could be made *less* important in this culture, and if so, how that might be accomplished, is very much an open question in my mind. See *infra* text accompanying notes 179-92.

23. See Katharine T. Bartlett, *The Idea of Progress in Feminist Legal Thought* (1994) (unpublished manuscript, on file with author).

24. See generally Katharine T. Bartlett & Rosanne Kennedy, *Introduction to FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 2, 2-5 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (discussing the constraints of law as an instrument of reform).

25. This is the point Erik Erikson makes about the development of individual identity. See ERIK H. ERIKSON, *IDENTITY AND THE LIFE CYCLE* 118-31 (1980).

26. For an autonomy-based critique of fashion, cosmetics, and cosmetic surgery, see JOANNE FINKELSTEIN, *THE FASHIONED SELF* (1991). Finkelstein argues that the reliance modern individuals place on physical appearance to make judgments about human character strongly resembles the claims of ancient and medieval physiognomists that physical features, such as nose shape, jaw angle, size of eyes, and color of hair, are the key to understanding human character. See *id.* at 1-77; see also *infra* text accompanying notes 38-43.

an equality issue, the problem is that dress and appearance expectations subordinate women to men. For example, women's dress and appearance demands are much more complex than men's, involving more frequent changes in fashion, more time and effort to assemble, and a greater premium placed on having different clothes for different occasions and on not being seen in the same outfits too frequently.²⁷ Women's standards are harder to attain than men's and matter more.²⁸ Substantively, women's dress and appearance expectations objectify women and construct them as inferior, submissive, and less competent than men. Throughout European history, men's clothing has emphasized strength and competence, while women's clothing since the early nineteenth century has conveyed the message that its wearers are fragile, helpless, debilitated, armored, hobbled, decorative, nonthreatening, useless, and immobile.²⁹

Employer dress requirements codify these inequities, channeling women's self-presentation according to someone else's judgment about when women should be sexy or businesslike and what sexy and businesslike, for women, mean. Given that women in paid employment is itself a contradiction within traditional gender-role schemes, the channels into which women have been steered often have been impossibly narrow. A woman can be neither too much like a woman nor not enough like one; she must appear competent — and thus formal, covered, and neutered — but not too assertive or manly — and thus soft, frilly, and ornamental. She must not distract others with her sexiness, and thus must be wrapped tight and inaccessible, but she cannot be too independent, and thus should be appropriately exposed (legs), painted (eyes, lips, cheeks, hair), elevated (high-heeled shoes), and vulnerable (clothes that prevent easy movement or escape).³⁰

27. JANET R. RICHARDS, *THE SCEPTICAL FEMINIST* 182 (1980); see also NAOMI WOLF, *THE BEAUTY MYTH* 52-53 (1991) (explaining that "beauty maintenance" is expensive).

28. RICHARDS, *supra* note 27, at 182-83; see also *infra* text accompanying notes 50-60 (discussing the tightrope women are expected to walk in choosing appropriate dress and the consequences for how they are evaluated with respect to competence and authority).

29. See ALISON LURIE, *THE LANGUAGE OF CLOTHES* 215-29 (1981). This critique was offered at least as early as 1899 by Thorstein Veblen, who interpreted women's fashion as a tool for maintaining women as men's chattel. See THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 179-82 (Modern Library ed. 1934) (1st ed. 1899). For a listing of historical sources on dress and fashion, see LURIE, *supra*, at 265-66.

30. See *infra* text accompanying notes 49-58. For a case illustrating this double bind in the sexual harassment context, see *Magnuson v. Peak Technical Servs., Inc.*, 808 F. Supp. 500 (E.D. Va. 1992). In *Magnuson*, the plaintiff was told not to wear flat-heeled shoes because her legs were very sexy. 808 F. Supp. at 506. After refusing the defendant's sexual advances, she was criticized for failure to dress in a professional manner and to "fit the profile" of her position. 808 F. Supp. at 506.

The feminist position on dress and appearance restrictions has much validity as critique but proceeds on two conflicting views of the woman subject that have quite different implications for legal reform. In adopting the goal of liberating women from oppressive restraints so that they can be who they want to be, the position presupposes the possibility of women's free choice, autonomy, and capacity for self-definition, accomplished with respect to dress and appearance merely by eliminating coercive codes. On the other hand, in portraying women as victims who cannot help but be constructed or defined by forces outside their control, the position negates the possibility of women's autonomy, even in the absence of coercive measures.

As many scholars have argued, it is not necessary to view the individual subject as either wholly free or wholly constrained by social forces.³¹ Meaning and identity are continually shaped by social arrangements and institutions and at the same time continually reshaped by the interventions of individuals who, even as their preferences and beliefs are shaped by external forces, perceive gaps and contradictions in existing structures of meanings through which they will be able to construct new meanings and possibilities. Seen from this perspective, contingency is inevitable but agency is possible, even if itself socially constructed.³²

Although the point that our choices are both constrained and free is by now too obvious to be worth stating, scholars who seem to recognize the point tend to ignore its implications, addressing employer dress and appearance codes as if the elimination of such codes is a self-evident and complete response to the constraints they impose. Karl E. Klare, for example, who notes both the "disciplinary and repressive aspects of gendered appearance expecta-

31. I review some of this scholarship in Katharine T. Bartlett, *Minow's Social-Relations Approach to Difference: Unanswering the Unasked*, 17 LAW & SOC. INQUIRY 437, 464-69 (1992) (book review). My analysis on this matter draws especially on the work of William E. Connolly, Martha Minow, and Steven Winter. See WILLIAM E. CONNOLLY, *IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* 20-21, 64-94, 158-222 (1991); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 50-79, 173-228 (1990); Steven Winter, *Foreword: On Building Houses*, 69 TEXAS L. REV. 1595, 1595-610 & nn.1-70 (1991) (collecting references); see also DRUCILLA CORNELL, *TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE* 170-94 (1993) (describing the process of imagining differences in terms that presuppose the possibility of grasping what is unseen); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1059 (1992) (appealing to fresh images of feminine sexuality through experimental expressions with uncertain consequences).

32. To say a concept is constructed does not mean that it does not have real force. The construction itself may have characteristics as a self-fulfilling prophecy. Thus, for example, individuals who understand themselves to have "agency" may well have greater control "in fact" with respect to their choices than those who do not.

tions" and the "interstitial possibilities of agency [and] resistance,"³³ offers no more in the way of a proposed legal response to such codes than that they be "relaxed to permit greater on-the-job experimentation, imagination, play, enjoyment and expression of sexual autonomy."³⁴ This approach is consistent with that of law review commentators considering dress and appearance issues under Title VII who, like Klare, tend to emphasize the individual's interest in autonomy, freedom, and sense of self, over the interest of women in equality with men.³⁵ One feminist commentator analyzes clothing regulation in terms of the sexual objectification of women and the perpetuation of male hierarchy — or "patriarchy" — but even she characterizes the right involved as an "appearance interest" and seems to assume that the solution to the problem is simply to prohibit such regulation.³⁶ The popular literature, too, stresses autonomy and choice as if that were the problem, rather than inequality and subordination.³⁷

The notion that fewer dress codes means more individual autonomy and that more autonomy is better than less autonomy seems intuitively correct, but the issue is far more complicated. First, if meaning is created through the institutions, arrangements, and practices of a particular time and place, the freedom to create one's "own" meanings is a misleading objective. What one might express through his or her dress and appearance decisions is always dependent on the cultural codes that give meaning to the range of possible expressions.³⁸ This dependence is present especially with respect to oppositional dress and appearance, which require clear standards against which the expression of dissent or rebellion can

33. Klare, *supra* note 21, at 1435.

34. *Id.* at 1443.

35. See, e.g., Peter B. Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 839 (1987).

36. See Whisner, *supra* note 21, at 118-19.

37. See, e.g., WOLF, *supra* note 27, at 272 ("The real issue has nothing to do with whether women wear makeup or don't, gain weight or lose it, have surgery or shun it, dress up or down, make our clothing and faces and bodies into works of art or ignore adornment altogether. *The real problem is our lack of choice.*").

38. Klare would be the first to agree. See Klare, *supra* note 21, at 1409-10; see also DUNCAN KENNEDY, *SEXY DRESSING ETC.* 126, 162-70 (1993); RICHARDS, *supra* note 27, at 194 (1980) (claiming that feminist contempt for fashion and cosmetics is a muddle about the natural person being the real thing).

One fascinating history of representations of the nude body demonstrates the strength of the cultural codes conveyed by clothing, as well as how the authentic and the dressed up are blended to form reality, by showing how these representations have conformed to changes in idealizations of the nude body. See ANNE HOLLANDER, *SEEING THROUGH CLOTHES* (1978).

be made and understood.³⁹ In this sense, the ability to "be oneself" is necessarily as much an act of conformity to these codes as it is one of personal invention.⁴⁰ Individuals cannot create their own meaning system, and efforts to do so can amount to no more than a Tower of Babel, from which everyone speaks but no one understands.⁴¹ If meanings are socially constructed rather than self-produced by autonomous individuals, the abolition of employer dress and appearance requirements will not restore autonomy of self-production to the individual. It will simply eliminate one type of constraint on individual autonomy and leave more room for different, less explicit, and potentially even more insidious constructing forces.⁴²

Individuals, of course, have an interest in expressing themselves within the cultural codes of their time, unconstrained, insofar as possible, by undesirable penalties such as the inability to obtain or retain a certain job. But here the real problem arises. In many contexts, the available (constructed) meanings do not leave room for the expression of what an individual perceives as her "self." A female marine who considers herself a professional will seem frivolous, decorative, and flighty if she wears a dress or skirt, but when she wears the male uniform she may be perceived as dressing up like a man and thus either silly or sexy.⁴³ If the cultural codes leave little or no leeway for a woman to dress so as to be understood as a

39. Fred Davis observes that as a result of today's postmodern "cacophony of acceptable fashions, it is difficult to register a riveting antifashion message." DAVIS, *supra* note 22, at 187.

40. A similar point can be made about feminist invitations to invent new languages to speak about woman's pleasures and identity. See Susan R. Suleiman, *(Re)Writing the Body: The Politics and Poetics of Female Eroticism*, in *THE FEMALE BODY IN WESTERN CULTURE* 7, 14 (Susan R. Suleiman ed., 1986) (criticizing the French feminist Luce Irigaray's advocacy for a "woman's language").

41. I borrow the Tower of Babel metaphor from James Boyle. See James Boyle, *Modernist Social Theory: Roberto Unger's Passion*, 98 HARV. L. REV. 1066, 1078 (1985) (book review) ("[T]he Tower of Babel offers a metaphorical reminder of what happens when a shared 'context' is completely shattered.").

42. Even Klare's argument that the employee's "right to appearance autonomy" encompasses the ability to express resistance and defiance is a difficult notion to square with the social constructionist view of the individual. See Klare, *supra* note 21, at 1434-35, 1442-44. The meaning of resistance and defiance presupposes conventions with meanings that are understood, against which one might protest. Those conventions, of course, need not be coercive to act as a backboard for dissent, but no dissent can be effective unless it deviates from expectations that are clear and unambiguous. See NATHAN JOSEPH, *UNIFORMS AND NONUNIFORMS: COMMUNICATION THROUGH CLOTHING* 207 (1986).

43. This general point is made in Susan Bordo, *Reading the Slender Body*, in *BODY/POLITICS: WOMEN AND THE DISCOURSES OF SCIENCE* 83, 104-05 (Mary Jacobus et al. eds., 1990); see also JOHN T. MOLLOY, *THE WOMAN'S DRESS FOR SUCCESS* BOOK 28-29 (1977) (cautioning women against the "imitation male look," which looks cute, not authoritative, like a small boy who dresses up in his father's clothing).

competent and confident professional, she faces an equality barrier that the removal of formal employment restrictions cannot effectively address.

There is another problem. Dress and appearance expectations are pervasive and persist even in the absence of mandatory codes. These constraints are popularly attributed both to the advertising images with which the society constantly is bombarded, in association with products as diverse as cars, beer, household detergents, makeup, and diet aids, and to the assumptions and values of the patriarchal culture in which this kind of commercialism actually works.⁴⁴ Wherever and however acquired, the resulting expectations run deep, constituting the reality by which employers and employees judge what is normal and acceptable, and even the norms by which women judge each other.⁴⁵

At the workplace, a good deal of control over appearance is exercised at the hiring stage, when the absence of formal dress and appearance codes is not likely to prevent an employer from excluding applicants who would not appear to "fit in."⁴⁶ This unspoken control is probably strongest at the hiring stage with respect to appearance characteristics that the employer assumes the applicant would not be able to change, such as facial features, body build, breast size, voice, or posture. Once on the job, oral traditions of dress and appearance prevail in many business settings, again making formal codes unnecessary.⁴⁷

Still another factor suggests that the concern about whether dress and appearance standards are mandatory is misdirected. In some workplace settings, men may obtain respect and privilege by wearing the accepted uniform — the male suit — while women tread uneasily in a minefield of choices between the recommended

44. See WOLF, *supra* note 27, at 58-85.

45. See *id.* at 284-91.

46. See Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2040-42 & nn.31-41 (1987) (citing studies and human resource selection manuals that demonstrate the importance of appearance in hiring). Although it is impossible to determine with any reliability how much appearance matters in hiring decisions, there is reason to believe that many job applicants who would be constrained by dress and appearance standards on the job are never hired in the first place.

47. Anecdotal evidence of the strength of these oral traditions in the professional world is found in Cate Plys, *Green Ties Mean Pink Slips!*, SPY, July 1990, at 62. This evidence suggests that the distinction between formal dress codes and the unspoken law is deceptive. One source was reported as saying, "Leaving the second button on your suit jacket unbuttoned was an unspoken law until I broke it." *Id.* at 64.

skirted business suit⁴⁸ and more feminine or "stylish" outfits consisting of skirts, blouses, sweaters, jackets, dresses, and pants. In choosing what to wear, women often find themselves trapped in no-win situations — being considered too feminine if they wear traditionally female clothing, or not feminine enough if they do not.⁴⁹ The "dress-for-success" literature makes chillingly clear the tight-rope women are expected to walk. Women are cautioned to avoid both the "imitation man" look and the feminine look, both of which detract from their authority. The imitation man look — a shirt and tie, vest, or pinstriped suit — causes women to look as if they are dressing up in someone else's (their father's?) suit and thus silly or, in some cases, sexy.⁵⁰ It is important for the individual woman to show — with a skirt, for example — that she is not departing in too radical or threatening a way from accepted gender identifications.⁵¹ The feminine look causes a woman to be perceived as a subjugated object rather than as an authority figure. Thus, women should not wear frilly or lacy blouses,⁵² pastel colors,⁵³ short or long skirts,⁵⁴ heavy makeup,⁵⁵ low necklines,⁵⁶ open-toed shoes, or boots.⁵⁷ The

48. This recommendation was popularized by John T. Molloy. See MOLLOY, *supra* note 43. Subsequent research affirms that suits still work better than more feminine dress in the business setting. See, e.g., Sandra M. Forsythe, *Effect of Applicant's Clothing on Interviewer's Decision to Hire*, 20 J. APPLIED SOC. PSYCHOL. 1579 (1990) (studying the applicant ratings and hiring recommendations made by 109 banking and marketing respondents); Sandra M. Forsythe, *Effect of Clothing on Perception of Masculine and Feminine Managerial Traits*, 65 PERCEPTUAL & MOTOR SKILLS 531 (1987) [hereinafter Forsythe, *Effect of Clothing*] (studying the applicant ratings and hiring recommendations made by 70 college-student subjects); Sandra Forsythe et al., *Influence of Applicant's Dress on Interviewer's Selection Decisions*, 70 J. APPLIED PSYCHOL. 374 (1985) (studying the applicant ratings and hiring recommendations made by 77 personnel administrators); see also Mary B. Harris et al., *Clothing: Communication, Compliance, and Choice*, 13 J. APPLIED SOC. PSYCHOL. 88 (1983) (reporting that shoppers in a shopping mall, when shown photographs of a model in four different outfits, attributed the most positive characteristics to the model wearing a formal skirt outfit).

49. Another situation concerns dress codes designed with only male employees in mind. For example, in *Andre v. Bendix Corp.*, 841 F.2d 172 (7th Cir. 1988), the plaintiff was sent home for wearing a tank top because, according to her supervisor, it was inappropriate for her position. 841 F.2d at 173-74. The supervisor refused to tell her what kind of shirt she could wear, and the dress code only addressed pants and shoes, not shirts. 841 F.2d at 174.

50. See MOLLOY, *supra* note 43, at 27-32. Molloy writes, "Research indicates that when a woman wears a vest, she draws attention to her bust. With all women this is sexy, and with a busty woman it is very sexy." *Id.* at 77.

51. See DAVIS, *supra* note 22, at 42-54. In other contexts as well, woman's "cross-dressing," which is far more acceptable than male cross-dressing, is often qualified by such feminine touches as a scarf, bow, or pin, or oversizing, or is in some other way distinguishable from the real thing. *Id.* at 42-46.

52. MOLLOY, *supra* note 43, at 54.

53. *Id.* at 53.

54. *Id.* at 50 ("Suits with skirts that fall just below the knee test best.").

55. *Id.* at 86 ("Makeup works best with men when they don't know you're wearing it.").

56. *Id.* at 54-55.

57. *Id.* at 79.

irony is striking: women have a greater range of dress and appearance options, but with that freedom a greater possibility of mistake and a narrower range of error than men.⁵⁸

Studies continue to show that women are evaluated with respect to their competence and authority based in part on their dress and appearance.⁵⁹ Studies also show that wearing "appropriate" dress makes women more role-confident, more involved in the business, and, by extension, more competent.⁶⁰ It would be dangerous to conclude from these studies that clearer and simpler dress expectations for men are a cause of their greater authority in the workplace, or that the same clarity and simplicity for women would cause women to be perceived as more competent. The causes of women's subordination run far deeper than dress and appearance, which are as much symptoms of male dominance as they are contributing causes. The fact that clear dress expectations benefit men and unclear dress expectations disadvantage women, however, does tend to undermine the assumption that eliminating dress and appearance codes would represent a significant step toward gender equality in the workplace.

A different kind of concern about an approach that focuses on the elimination of formal dress and appearance codes is that an employer, too, has an "appearance interest" in expressing itself in terms of the learned associations and cognitive categorizations of the day. These symbolic expressions can have considerable value to the employer. Dress color, dress style, and dress material, for example, can trigger associations that help the business identify with certain attributes or values. Blue (as in blue suits) conveys dignity, red (as in Disneyland costumes) conveys affection, brown (as in the UPS uniform) conveys trust, white (as in hospital uniforms) conveys purity and cleanliness, and dark colors (as in police uniforms) convey authority.⁶¹ The degree of homogeneity and distinctiveness of dress norms can also help to reveal information about the values of the business or the division of labor that can be valuable to the

58. See DAVIS, *supra* note 22, at 41-42.

59. See, e.g., Forsythe, *Effect of Clothing*, *supra* note 48 (discussing the impact of female applicants' clothing on interviewers' hiring decisions).

60. See, e.g., Michael R. Solomon & Susan P. Douglas, *Diversity in Product Symbolism: The Case of Female Executive Clothing*, 4 PSYCHOL. & MARKETING 189, 207 (1987).

61. See Anat Rafaeli & Michael G. Pratt, *Tailored Meanings: On the Meaning and Impact of Organizational Dress*, 18 ACAD. MGMT. REV. 32, 35 (1993) (summarizing the research in this area). In addition, formal and tailored clothing styles symbolize higher status than informal and casual styles. *Id.* at 36. Pure fibers such as silk convey higher status and class than synthetic fibers such as polyester. *Id.*

business.⁶² If a business values consistency and homogeneity and is proud of the suppression of individual differences in the service of the overall organization, as a fast-food chain or a worldwide mail delivery system might be, this message may be conveyed through uniform dress standards.⁶³ If it wants to stress stratification and a clear division of labor within the organization, it may wish to maintain dress distinctions that parallel the lines of authority within the business.⁶⁴

Dress standards can fulfill other business goals as well. Dress conventions like judicial robes, theme-park costumes, police uniforms, and clerical garb can make employees more aware of their roles and thus more attuned and faithful to those roles.⁶⁵ Dress standards can legitimate the functions of some individuals, like nurses, police, or sports referees, who require respect in those functions in order to do their jobs effectively.⁶⁶ Such standards also can provide cues allowing customers and members of the public to

62. *Id.* at 41.

63. *Id.* at 41-42; see also JOSEPH, *supra* note 42, at 150 (describing Honda's efforts to promote internal egalitarianism and team work through single, common uniforms and insignias).

64. Rafaeli & Pratt, *supra* note 61, at 42-43. Some organizations are able to use appearance and dress requirements to enforce both a homogeneous enterprise and status levels within the organization. Disneyland is perhaps the best example. Homogeneity at Disneyland is facilitated through hiring only good-looking, young, and enthusiastic employees all dressed in roles serving the common enterprise, while status among employees is created not by pay differentials but by uniforms communicating social rank. See John Van Maanen & Gideon Kunda, "Real Feelings": *Emotional Expression and Organization Culture*, in 11 *RESEARCH IN ORGANIZATIONAL BEHAVIOR* 43, 58-70 (L.L. Cummings & Barry M. Straw eds., 1989). High-status jobs for men include "the crisp, officer-like monorail operator[,] . . . the swashbuckling Pirate of the Caribbean, the casual cowpoke of Big Thunder Mountain, [and] the smartly vested Riverboat pilot." *Id.* at 61. For females, "the perceived sexiness of uniforms, rather than social rank, seems to play a larger role." *Id.* at 62. This phenomenon was evidenced one year when the high-status tour guides felt they were being upstaged by the ride operators at a new ride, "It's a Small World," when these operators were outfitted with "what were felt to be the shortest skirts and most revealing blouses in the park." The guides lobbied actively against the new uniforms and apparently succeeded in having the skirts of their rivals lowered and the necklines raised. *Id.*

65. See Rafaeli & Pratt, *supra* note 61, at 43-45; see also JOSEPH, *supra* note 42, at 155.

66. JOSEPH, *supra* note 42, at 158 (discussing nurses); Rafaeli & Pratt, *supra* note 61, at 45 (discussing sports referees). A dramatic example of this phenomenon was illustrated when nurses' uniforms were abolished at a ward for severely disturbed preadolescents and adolescents in the Bronx on a three-month trial basis. The response by patients was acute disorientation, fear, anxiety, anger, and eventually the formation of a patient army, complete with uniforms, roles, and new titles (the patients assumed the names of fictitious doctors). See generally Donald J. Marcuse, *The "Army" Incident: The Psychology of Uniforms and Their Abolition on an Adolescent Ward*, 30 *PSYCHIATRY* 350 (1967). Other studies showing more beneficial results from nurses changing from uniforms to everyday clothes are reported in A. Lavender, *The effects of nurses changing from uniforms to everyday clothes on a psychiatric rehabilitation ward*, 60 *BRIT. J. MED. PSYCHOL.* 189, 194-98 (1987).

recognize who may be asked to perform what services.⁶⁷ In a different vein, dress conventions in the workplace can help to level out group-based differences that the organization may wish to downplay, like differences in social class, age, size, or even race and sex.⁶⁸

There is no problem under Title VII if an employer can satisfy such business interests without gender-specific dress or appearance requirements. All hospital personnel, both female and male, can wear white, and all UPS employees can wear the standard brown UPS uniform. In some cases, however, employers may feel their business interests genuinely compromised by their inability to impose sex-specific dress and appearance requirements. An employer whose desired clientele has conservative expectations and tastes, for example, will be hurt if its male employees who have contact with this clientele arrive for work wearing skirts, earrings, sleeveless blouses, and pink pearls, even though female employees are allowed, or even encouraged, to wear such items. This interest in attracting a particular type of clientele is comparable to the interest of businesses that wish to code themselves as "progressive" to prospective customers by hiring only employees who demonstrate their rejection of gender-role stereotypes — men with earrings, hairbands, or long hair, for example, or women with short crew cuts, unshaved legs, tattoos, oversized "men's" clothes, or motorcycle pants.⁶⁹ An approach that focuses on eliminating mandatory dress and appearance codes to enhance worker freedom should find both sets of restrictions equally objectionable, because one is no less an intrusion on an employee's (or potential employee's) autonomy than the other. In contrast, an approach that is more concerned with nonsubordination and the generation of more empowering

67. Dress patterns can indicate, for example, which employees customers might expect to be able to handle specific issues or whom to approach for service. Rafaeli & Pratt, *supra* note 61, at 49 (citing studies). Hence "hospitals that eliminated the requirements that staff wear stratified uniforms experienced chaos because delineations regarding authority and responsibility became unclear." *Id.* (citing Lavender, *supra* note 66, Marcuse, *supra* note 66); see also JOSEPH, *supra* note 42, at 146-47 (citing the examples of red caps, porters, and doormen).

68. See Marcuse, *supra* note 66, at 354-55, 368.

69. A perhaps more interesting and ambiguous example, which relates to the regulation of customers rather than employees, is a former West Hollywood, California practice whereby some bars excluded customers with open-toed shoes in an effort to exclude women and male transvestites. See Susan B. Kaiser et al., *Cultural Codes and Sex-Role Ideology: A Study of Shoes*, 5 AMER. J. SEMIOTICS 13, 13-14 (1987). This practice was specifically banned by a 1985 local ordinance prohibiting "standards of appearance or dress . . . when the purpose or effect . . . is to arbitrarily discriminate against any person or any class or category of persons. . . . Violations . . . include . . . a rule or condition that the patron not wear open-toed shoes or be required to wear clothes customarily associated with his or her biological sex." *Id.* (citing WEST HOLLYWOOD, CAL., MUNICIPAL CODE Ordinance No. 21, § 4503 (1988)).

symbols for women will need to examine the dress and appearance requirements in light of the workplace and societal conditions and norms that give them meaning, and determine whether they subordinate on the basis of sex. After examining in Part II the way courts have used societal conditions inappropriately as a justification for upholding dress and appearance requirements, I will return in Part III to explain how closer attention to these conditions and norms might work.

II. HOW COURTS INCORPORATE COMMUNITY NORMS INTO THEIR REVIEW OF DRESS AND APPEARANCE STANDARDS

A. *Dress and Appearance Restrictions Do Not Raise Significant Questions of Equal Employment Opportunity*

The earliest administrative decisions by the Equal Employment Opportunity Commission (EEOC) considering challenges to sex-based dress and appearance restrictions concluded that such restrictions violate Title VII because they discriminate "on the basis of sex" and are not sufficiently essential to the employer's business to satisfy the bona fide occupational qualification (BFOQ) exception of the Act.⁷⁰ The results and the mechanistic reasoning of these cases was criticized at the time,⁷¹ and courts confronting similar issues did not follow them.⁷² Instead, courts have resisted the application of Title VII to dress and appearance requirements, following a variety of approaches that incorporate and thus, in effect, legitimate the community norms on which such requirements are based.

Some courts have summarily dismissed challenges to employer dress and appearance requirements on the grounds that they are simply too trivial to implicate equal employment opportunity con-

70. Several EEOC cases invalidated hair-length requirements or no-beard rules, which applied to men but not women. See, e.g., EEOC Dec. No. 72-1931, 1973 EEOC Dec. (CCH) ¶ 6373 (1972); EEOC Dec. No. 71-2343, 1973 EEOC Dec. (CCH) ¶ 6256 (1971); EEOC Dec. No. 71-1529, 1973 EEOC Dec. (CCH) ¶ 6231 (1971); see also *Donohue v. Shoe Corp. of Am.*, 337 F. Supp. 1357 (C.D. Cal. 1972) (holding that an employee challenging a hair-length policy applicable only to men states a prima facie violation of Title VII); *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661 (C.D. Cal. 1972) (same). Another EEOC decision found an employer's refusal to allow female employees to wear pants a factor in determining that the employer discriminated against female employees. See EEOC Dec. No. 70-920, 1973 EEOC Dec. (CCH) ¶ 6156 (1970).

71. See, e.g., Peter F. Ziegler, Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. CAL. L. REV. 965, 980-85 (1973); see also Michael L. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEXAS L. REV. 1025 (1977) (arguing for broad application of BFOQ exceptions).

72. See, e.g., *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975); *Janina v. Bartlett & Co. Grain*, 466 F. Supp. 1388 (W.D. Mo. 1979).

cerns. Such requirements are considered trivial in the sense that they are matters of mere "personal preference" that the employee can change "at will."⁷³ Courts reason that employees can change their hairstyle, clothing style, and other grooming habits — unlike their immutable characteristics, like race or sex — to conform to workplace standards, and that because the importance of these matters is negligible,⁷⁴ employees have no reason not to do so.

Courts that treat dress and appearance requirements as trivial to the employee typically use two other rationales as well. The first is that such requirements represent decisions by the employer about how to "run its shop" rather than about the terms and conditions of employment.⁷⁵ This rationale makes it irrelevant whether the employer is correct in its factual assessment about the tastes and expectations of its clientele, so long as its judgment represents an effort to satisfy community norms.⁷⁶ The second is that although these requirements are trivial to the employee, they serve important interests of the employer.⁷⁷ Under a combination of these ra-

73. See *Earwood v. Continental Southeastern Lines*, 539 F.2d 1349, 1351 (4th Cir. 1976) ("[D]iscrimination based on factors of personal preference does not necessarily restrict employment opportunities and thus is not forbidden.").

74. See, e.g., *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977) ("Employer grooming codes requiring different hair lengths for men and women bear such a negligible relation to the purposes of Title VII that we cannot conclude they were a target of the Act."); *Knott v. Missouri Pac. R.R.*, 527 F.2d 1249, 1252 (8th Cir. 1975) ("Where, as here, such [personal grooming] policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities."); *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981) ("[T]his type of [hairstyle] regulation has at most a negligible effect on employment opportunity."). The negligibility argument is articulated by H.L.A. Hart, who writes that "[i]n contrast with morals, the rules of . . . dress . . . occupy a relatively low place in the scale of serious importance. They may be tiresome to follow, but they do not demand great sacrifice." H.L.A. HART, *THE CONCEPT OF LAW* 169 (1961).

75. See *Willingham*, 507 F.2d at 1091-92; see also *Brown v. D.C. Transit Sys., Inc.*, 523 F.2d 725, 728 (D.C. Cir.) (upholding facial-hair restrictions as "falling within the ambit of managerial decision to promote the best interests of its business"), *cert. denied*, 423 U.S. 862 (1975); *Lanigan*, 466 F. Supp. at 1392 ("Employment decisions . . . based on either dress codes or policies regarding hair length are more closely related to the company's choice of how to run its business rather than to its obligation to provide equal employment opportunities.").

76. See, e.g., *Boyce v. Safeway Stores, Inc.*, 351 F. Supp. 402, 404 (D.D.C. 1972) ("Safeway's management may well be out of touch with the attitudes of its own customers, but all this is beside the point."); *Willingham v. Macon Tel. Publishing Co.*, 352 F. Supp. 1018, 1021 (M.D. Ga. 1972) ("[A]n employer should not be coerced into countenancing . . . what society may frown upon."), *rev'd*, 482 F.2d 535 (5th Cir. 1973), *vacated*, 507 F.2d 1084 (5th Cir. 1975).

77. See, e.g., *Fagan v. National Cash Register Co.*, 481 F.2d 1115, 1124-25 (D.C. Cir. 1973) ("Perhaps no facet of business life is more important than a company's place in public estimation.").

tionales, employee weight restrictions,⁷⁸ dress codes,⁷⁹ prohibitions on all-braided hairstyles,⁸⁰ and hair-length regulations⁸¹ all have been upheld.

Commentators have attacked each of these rationales. Some have argued that the fact that dress and appearance are alterable does not mean they are not critical to an individual's sense of dignity and self, much as race and sex are.⁸² This argument focuses on the individual's autonomy interest to the exclusion of the individual's interest in equal treatment. Others have focused on the apparent inconsistency in finding dress and appearance trivial to the employee but important to the employer.⁸³ This criticism correctly underlines the flaw in categorically assuming that the interests of employees will always be less weighty than those of the employer, but it relies on its own questionable empirical assumption that the interests of the employee will always be either equivalently important or stronger than those of the employer.

The real problem with the assumptions courts make about the trivial impact of dress and appearance requirements on employees and their importance to employers is not that they are never right; nor is it a problem of inconsistency. The problem is that they rely on unexamined, culture-bound judgments that will tend to reinforce existing, hidden prejudices and stereotypes. Such judgments reflect more about the high degree of societal consensus regarding dress and appearance expectations than about the value that individuals or businesses attach to dress and appearance.⁸⁴ That a woman

78. See, e.g., *Air Line Pilots Assn. Intl. v. United Air Lines*, 480 F. Supp. 1107 (E.D.N.Y. 1979); *Jarrell v. Eastern Airlines, Inc.*, 430 F. Supp. 884, 892 (E.D. Va. 1977) ("Weight . . . is a characteristic subject to the reasonable control of most individuals."), *affd. mem.*, 577 F.2d 869 (4th Cir. 1978); *In re National Airlines, Inc.*, 434 F. Supp. 269 (S.D. Fla. 1977); *Cox v. Delta Air Lines*, 14 Fair Empl. Prac. Cas. (BNA) 1767 (S.D. Fla. 1976). But see *Gerdorn v. Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (holding that an airline's desire to compete with other airlines by using attractive cabin attendants did not rebut the plaintiffs' prima facie case that sex-specific weight requirements were discriminatory under Title VII), *cert. denied*, 460 U.S. 1074 (1983).

79. See, e.g., *Lanigan*, 466 F. Supp. at 1392 ("An employer is simply not required to account for personal preferences with respect to dress and grooming standards.").

80. See *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) ("An all-braided hair style is an 'easily changed characteristic,' and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.").

81. See, e.g., *Earwood v. Continental Southeastern Lines*, 539 F.2d 1349 (4th Cir. 1976); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333 (D.C. Cir. 1973).

82. See, e.g., *Bayer*, *supra* note 35, at 839.

83. See, e.g., *Klare*, *supra* note 21, at 1400-01; *Whisner*, *supra* note 21, at 74.

84. For studies documenting this high degree of societal consensus, see ELAINE HATFIELD & SUSAN SPRECHER, *MIRROR, MIRROR . . . : THE IMPORTANCE OF LOOKS IN EVERYDAY LIFE* 282-83 (1986) (describing a study that found a high correlation among re-

should wear knee-length skirts and high heels and a man should not can be understood as trivial to the employee but important to the employer only from within a culture in which women commonly wear knee-length skirts and high heels and men do not. In such a culture, a requirement that men wear knee-length skirts and high heels could not be so easily dismissed. Similarly, a prohibition against all-braided hairstyles may seem trivial from the point of view of individuals in that culture who find such hairstyles bizarre or threatening, but it will seem anything but trivial to individuals struggling in a larger social context to define and express themselves in ways that affirm their connection to, and identification with, particular historical roots.⁸⁵ In short, whether dress and appearance standards are trivial or significant depends upon the relationship between the standard and the culture in which it is imposed.⁸⁶

Prejudgments about what is trivial and what is important without regard to the specific relationship between a rule and its cultural context take for granted the very habits Title VII should be used to scrutinize, and thereby undermine the Act. These habits form the basis for practices that, in their normality, are those that will most easily escape suspicion, without rigorous review. Indeed, they are difficult enough to uncover and analyze even when Title VII is taken more seriously, as will be shown in the sections that follow.

B. *Dress and Appearance Restrictions Do Not Discriminate "Based on Sex"*

Courts that decline to accept preemptive approaches to dress and appearance restrictions based on judgments about their triviality must face the question whether such restrictions discriminate "on the basis of sex." This question is critical in that its answer

spondents ranging in age from 7 to 50 who were asked to rate the physical attractiveness of models in photographs) (citing John F. Cross & Jane Cross, *Age, Sex, Race, and the Perception of Facial Beauty*, 5 DEV. PSYCHOL. 433, 434-36 (1971)); DANIEL S. HAMERMESH & JEFF E. BIDDLE, *BEAUTY AND THE LABOUR MARKET* 3-4 (National Bureau of Economic Research Working Paper No. 4518, 1993). Other studies are cited in Note, *supra* note 46, at 2048 n.82.

85. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

86. Depending on the culture and the constraints imposed, dress and appearance can be, indeed, a matter of life or death. See, e.g., Youssef M. Ibrahim, *Bareheaded, Women Slain in Algiers: 2 Deaths Attributed to Islamic Radicals*, N.Y. TIMES, Mar. 31, 1994, at A3; see also Whisner, *supra* note 21, at 74-75 (noting that "[w]omen who wore men's clothing in the sixteenth and eighteenth centuries were sometimes even executed" (citing LILLIAN FADERMAN, *SURPASSING THE LOVE OF MEN* 47-61 (1981))).

sorts workplace rules between those that require strict review under the BFOQ exception of the Act and those that do not. In addressing the question, however, courts again have tended to apply highly formal reasoning that accepts and builds upon prevailing community norms rather than challenging them.

The tendency to rely upon community norms is apparent in a number of types of cases that present different structural components of analysis. One set of cases involves the regulation of characteristics that are more or less unique to one sex. In these cases courts have upheld grooming criteria on the grounds that these criteria discriminate on the basis of the characteristic in question rather than on sex. A restriction on beards, for example, is said to discriminate on the basis of beards, not sex.⁸⁷ Accordingly, a requirement that individuals have busts of a certain minimum size⁸⁸ or that individuals with certain gender-related skin problems wear makeup⁸⁹ could be said to discriminate on the basis of bust size or skin condition rather than sex.⁹⁰

87. See, e.g., *Dripps v. United Parcel Serv.*, 381 F. Supp. 421 (W.D. Pa. 1974), *affd. mem.*, 515 F.2d 506 (3d Cir. 1975); *Rafford v. Randle E. Ambulance Serv., Inc.*, 348 F. Supp. 316 (S.D. Fla. 1972). In *Rafford*, the court explicitly distinguished prohibitions of beards and moustaches, which could affect only men and thus could not discriminate on the basis of sex, from hair-length regulations that had potential application to women as well as men and thus could discriminate on the basis of sex.

88. See *Mary Chamberlain v. Indian Valley Realty Corp.*, No. CS-21209-70 (State Human Rights Appeal Board, Appeal No. 743), *affd. per curiam*, 38 A.D.2d 890 (N.Y. App. Div. 1970), *reprinted in* KENNETH M. DAVIDSON ET AL., *TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION* 634 (1st ed. 1974) (rejecting a challenge by a cocktail waitress who was fired for being too flat-chested).

89. In *Tamimi v. Howard Johnson Co.*, 807 F.2d 1550 (11th Cir. 1987), an employee was protected from being fired for failure to follow her employer's direction that she wear makeup to conceal a pregnancy-related skin problem because her discharge, according to the court, fell under the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1988). *Tamimi* suggests that if the plaintiff's skin problem had not been related to her pregnancy, an appearance standard applied by the employer to address the problem would not have been discriminatory.

90. This analytic framework parallels the reasoning of the Supreme Court in concluding that a state disability plan that excluded pregnancy from its otherwise comprehensive coverage discriminated between pregnant and nonpregnant persons, rather than between women and men, and thus did not discriminate "on the basis of sex." See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974); see also *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that discrimination on the basis of pregnancy does not constitute discrimination on the basis of sex under Title VII). This rationale has been eliminated by act of Congress in the employment context with respect to the specific, unique characteristic of pregnancy. See *Pregnancy Discrimination Act*, 42 U.S.C. § 2000e(k) (1988). It continues to be available with respect to other sex-unique characteristics, even though stereotypes based on sex-specific characteristics are likely to be the strongest and most invidious of all. See Katharine T. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CAL. L. REV. 1532, 1564 (1974).

A variation on the sex-unique analysis has been applied when members of only one sex are hired in a particular job category. See, e.g., *Earwood v. Continental Southeastern Lines*, 539 F.2d 1349 (4th Cir. 1976). Although some courts have noted that an employer should not be able to immunize its discriminatory appearance standards by hiring only members of one

Another set of cases involves sex-based requirements affecting members of both sexes. Paradoxically, while workplaces with rules affecting members of only one sex can be found not to discriminate on the basis of sex because *only* men or *only* women are affected, if an employer imposes dress and appearance requirements on *both* men and women, this fact also is used to support the conclusion that there is no discrimination on the basis of sex.⁹¹ In reaching this conclusion, courts have engaged in little or no comparative analysis of the burdens men and women, respectively, face. In some cases it has been enough that *some* requirements were imposed on both men and women, regardless of how burdensome or demeaning either set of requirements might be.⁹² Other courts have seemed to engage in a more qualitative review, implying that the burdens on men and women must be at least roughly comparable, by some criterion or another.⁹³ Even in cases in which a stricter, more functional approach is articulated, however, courts accept as given certain community norms and thus are slow to recognize disparities in the burdens sex-specific appearance criteria impose.

*Jarrell v. Eastern Air Lines, Inc.*⁹⁴ is a case in point. The plaintiffs in *Jarrell* challenged the airline's weight restrictions for flight attendants, showing that (i) the weight maximums could be met by men with large frame sizes, while only women with medium and small frames could meet the criteria; (ii) a greater percentage of men than women could satisfy the restrictions; (iii) women gain more weight with age than do men; and (iv) a higher percentage of women than men were suspended under the program.⁹⁵ Despite these showings, the court upheld the restrictions, using a variety of masking devices.

First, the court noted that the airlines employed many more women than men as flight attendants and thus the restrictions were

sex, *Gerdorn v. Continental Airlines, Inc.*, 692 F.2d 602, 607 (9th Cir. 1982), *cert. denied*, 460 U.S. 1074 (1983), this line of reasoning remains available whenever single-sex job categories can be justified under the BFOQ exception.

91. See, e.g., *Knott v. Missouri Pac. R.R.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973); *Boyce v. Safeway Stores, Inc.*, 351 F. Supp. 402, 404 (D.D.C. 1972).

92. See, e.g., *Knott*, 527 F.2d at 1252.

93. See, e.g., *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 181 (3d Cir. 1985) (holding that an employer who told a female employee to "tone down" her attire did not violate Title VII when it also required male employees to dress conservatively), *cert. denied*, 475 U.S. 1035 (1986).

94. 430 F. Supp. 884 (E.D. Va. 1977), *affd.*, 577 F.2d 869 (4th Cir. 1978).

95. 430 F. Supp. at 889-90. Between the ages of 25 and 33, 33.3% of women and 43.5% of men could satisfy the requirements. 430 F. Supp. at 889-90.

not discriminatory against women: "In light of the female dominance of the flight attendant position, the plaintiffs' attempt to prove discriminatory effect falls short."⁹⁶ This reasoning, like the conclusion that restrictions applied to single-sex job categories do not discriminate on the basis of sex,⁹⁷ perversely grants employers who manage to segregate women into separate, socially normalized job categories greater leniency in regulating these employees than they would otherwise possess.

Second, the court downplayed the demonstrated differential burden by dismissing it as a "statistical phenomenon," not explainable by any cause specifically related to sex.⁹⁸ It could not relate the differential burden on women to discrimination because it accepted the public expectation that flight attendants be young, thin, and beautiful.⁹⁹ Thinness in women was so taken for granted in *Jarrell* that the court assumed, without apparent support, that the airline's weight standards were "consistent with accepted medical notions of good health" and did not "impos[e] a health hazard."¹⁰⁰ Weight gain, even that "associated with aging," it declared, "can be reasonably controlled."¹⁰¹

Whether women can conform to societal weight standards without compromising their health is, in fact, increasingly a highly debatable proposition. The medical evidence is overwhelming that women require more body fat as a percentage of their body weight than men do. Without sufficient fat, women will not begin, or continue, to menstruate,¹⁰² sustain a successful pregnancy, or breastfeed a child.¹⁰³ Even with the pressures girls receive to keep

96. 430 F. Supp. at 892.

97. See, e.g., *Earwood v. Continental Southeastern Lines*, 539 F.2d 1349 (4th Cir. 1976); see also *supra* note 90 (discussing *Earwood*).

98. 430 F. Supp. at 892.

99. Another court, considering a similar issue with the same public expectation in mind as the court in *Jarrell*, circumvented the discrimination issue by concluding that the appropriate categories to be compared were not women and men, but women and men who were "young, healthy, [and] good looking." *In re National Airlines, Inc.*, 434 F. Supp. 269, 274 (S.D. Fla. 1977).

100. 430 F. Supp. at 893.

101. 430 F. Supp. at 892.

102. See JOAN J. BRUMBERG, *FASTING GIRLS: THE EMERGENCE OF ANOREXIA NERVOSA AS A MODERN DISEASE* 27 (1988).

103. ANN S. BELLER, *FAT AND THIN: A NATURAL HISTORY OF OBESITY* 81-87 (1977); see also ÉVA SZÉKELY, *NEVER TOO THIN* 39 (1988) ("[W]omen may in fact live longer and be generally healthier if they weigh ten to fifteen per cent *above* the life-insurance figures and they refrain from dieting."). For a review of the scientific studies relating to the positive correlation between adequate body fat in women and their reproductive health and the health of their children, see T.M. Caro & D.W. Sellen, *The Reproductive Advantages of Fat in Women*, 11 *ETHIOLOGY & SOCIOBIOLOGY* 51, 60-62 (1990).

their weight "under control," at puberty girls generally have ten to fifteen percent more body fat than boys.¹⁰⁴ When faced with such medical evidence, however, courts, as in *Jarrell*, find a way to associate health hazards only with some females, such as those who make the voluntary, individual decision to take birth control pills.¹⁰⁵ Some opinions acknowledge the rather radical methods many flight attendants have used to maintain their weight, including fasts, water shots, diet pills, water pills, and laxatives.¹⁰⁶ At the extreme, these methods can lead to diet pill addictions and eating disorders such as bulimia and anorexia, which is associated with severe physical consequences, including bradycardia (impaired heartbeat), kidney failure, osteoporosis, tooth erosion, seizures, and infertility.¹⁰⁷ Alternatives such as liposuction — the surgical removal of body fat — also carry risks that have no medical justification.¹⁰⁸ That the contemporary community ideal of the thin woman can be viewed as natural and medically well grounded in the face of these health consequences is a testament to the strength and pervasiveness of this ideal.¹⁰⁹

A few cases appear to engage in rigorous comparative analysis of the respective burdens imposed by dress and appearance stan-

104. ROBERTA P. SEID, NEVER TOO THIN: WHY WOMEN ARE AT WAR WITH THEIR BODIES 263 (1989).

105. See, e.g., *Cox v. Delta Air Lines*, 14 Fair Empl. Prac. Cas. (BNA) 1767 (S.D. Fla. 1976) (failing to take notice of a discrimination plaintiff's claim that she was unable to meet weight requirements because of "the singular physiological constitution of females and because of her taking birth control pills").

106. See, e.g., *Air Line Pilots Assn., Intl. v. United Air Lines, Inc.*, 26 Fair Empl. Prac. Cas. (BNA) 607, 609-11, 619 (E.D.N.Y. 1979) (conceding that weight requirements constitute "mental and morale hazards" for flight attendants).

107. See BRUMBERG, *supra* note 102, at 26.

108. Although the medical consensus is that the suction-assisted removal of fatty tissue, or liposuction, is "an apparently safe and effective means of removing the localized, genetically foreordained deposits of fat that some people believe stand in the way of their bodily perfection," documented medical risks are serious and include infection, shock, and fat embolisms. The American Society of Plastic and Reconstructive Surgery in 1987 surveyed 100,000 liposuctions and documented eleven deaths and nine serious, nonfatal complications. See Nancy Pappas, *Body by Liposuction*, 3 HIPPOCRATES, May-June 1989, at 26, 28-29. Much of the gory data on the medical risks of cosmetic surgery, including liposuction, was gathered at a 1989 congressional hearing. See *Unqualified Doctors Performing Cosmetic Surgery: Policies and Enforcement Activities of the Federal Trade Commission, Hearing Before the Subcomm. of Regulation, Business Opportunities, and Energy of the House Comm. on Small Business*, 101 Cong., 1st Sess. (1989).

109. For additional issues relating to discrimination based on obesity, see Patricia Harnett, Note, *Nature or Nurture, Lifestyle or Fate: Employment Discrimination Against Obese Workers*, 24 RUTGERS. L.J. 807 (1993). Under certain circumstances, discrimination on the basis of obesity may violate the Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1988 & Supp. IV 1992). See *Cook v. Rhode Island Dept. of Mental Health, Retardation & Hosps.*, 834 F. Supp. 57 (D.R.I. 1992). One state has enacted a statute prohibiting discrimination on the basis of weight and height. See MICH. COMP. LAWS § 37.2102 (1979).

dards on male and female employees. This analysis, however, more often masks and reinforces, rather than exposes, the discriminatory nature of these standards. Such was the case with the use of customer surveys in *Craft v. Metromedia, Inc.*¹¹⁰ In *Craft*, television anchor Christine Craft was demoted after management found her taste in clothing and makeup unacceptable. Craft charged that she was judged by criteria that were stricter and more onerous than those applied to male television anchors.¹¹¹ The employer defended Craft's demotion on the grounds that customer surveys rated her poorly in comparison to other female anchors based on her dress and appearance,¹¹² and other on-air employees, both male and female, demonstrated "a fairly consistent ability to maintain their appearance at a level acceptable to management"¹¹³ and thus did not require as much supervision. Faced with such tangible evidence linking the plaintiff's appearance to her public unacceptability, the court accepted the objectivity of the management's negative appraisal of her performance and potential.¹¹⁴ Though this evidence merely incorporated the viewing public's sex-specific, subjective notions of what a news anchor should look like, it became "objective" proof of the dowdy plaintiff's unsuitability for the job.¹¹⁵

The *Craft* analysis exemplifies the difficulty of establishing, in individual cases, the extent to which a female plaintiff's appearance has been judged by more extreme standards than those used to judge men. Studies rating the good looks of men and women show that men are more often rated as "average" than women, while women are more often dispersed to the "above average" or "below average" categories;¹¹⁶ in other words, "[w]omen's appearances evoke stronger reactions, both positive and negative, than do men's."¹¹⁷ As judged by these heightened standards, good looks in

110. 572 F. Supp. 868 (W.D. Mo. 1983), *modified*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986).

111. 572 F. Supp. at 876-77.

112. 572 F. Supp. at 873-74.

113. 572 F. Supp. at 878.

114. 572 F. Supp. at 878-79.

115. Age aggravates the disproportionate effect of discriminatory appearance standards. One survey showed that of 1200 local news anchors around the country, 48% of the men were over 40 years old and 16% were over 50. See Sally B. Smith, *Television Newswoman's Suit Stirs a Debate on Values in Hiring*, N.Y. TIMES, Aug. 6, 1983, at 1, 44. Only three percent of the women were over 40 and none were over 50. *Id.*

116. See Hamermesh & Biddle, *supra* note 84, at 10-11 & tbl. 2.

117. *Id.* at 11 (citing HATFIELD & SPRECHER, *supra* note 84). As further proof of the gender disparity in the importance of "good looks" to women and men, other evidence confirms that women are more dissatisfied with their looks than men. See Judith Rodin, *Body*

the workplace have substantial economic consequences. A study by Daniel Hamermesh and Jeff Biddle found that people with above-average looks receive a pay premium of up to thirteen percent, while those with below-average looks receive a pay penalty as large as fifteen percent.¹¹⁸ According to these economists, the only question is whether these consequences are primarily due to employer discrimination or to customer "preference."¹¹⁹ It is perhaps a sign of the extent to which customer preferences are seen as neutral that the economists refer to the influence of customer preference and tastes on employee pay as a "productivity" factor.¹²⁰

C. *Dress and Appearance Restrictions Satisfy the BFOQ
Exception to Title VII*

Some courts have recognized that dress and appearance requirements constitute discrimination based on sex and have faced the tough question whether they are nonetheless justified under the BFOQ exception to Title VII.¹²¹ Even some of these courts, however, despite moving to a further level of analysis, remain fixed on community norms as the point of reference for evaluating such requirements. In *Wislocki-Goin v. Mears*,¹²² for example, a woman's discharge from a teaching position at a juvenile detention facility based on her wearing excessive makeup and wearing her hair down, in violation of requirements that she achieve the "Brooks Brothers Look,"¹²³ was upheld on the basis of the facility's conclusory representations about the need to protect "the public's confidence in the professionalism of government employees."¹²⁴

Mania, 25 PSYCHOL. TODAY 56 (1992). Rodin reports that although men are increasingly concerned about their appearance, appearance expectations still weigh more heavily on women than on men. *Id.* at 57 (reporting that in 1987, 14% more women than men were dissatisfied with their weight and 13% more women than men were concerned about their muscle tone); see also Anita L. Stewart & Robert H. Brook, *Effects of Being Overweight*, 73 AM. J. PUB. HEALTH 171 (1983) (noting that women more often see themselves as overweight than men do, even when their weight is within "normal" limits).

118. HAMERMESH & BIDDLE, *supra* note 84, at 13 & tbls. 3-5. These authors cite numerous other studies showing a strong correlation between beauty and earnings. See *id.* at 12-20.

119. *Id.* at 22-25.

120. See *id.*

121. See, e.g., *Carroll v. Talman Fed. Sav. & Loan Assn.*, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); *O'Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F. Supp. 263 (S.D. Ohio 1987); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981).

122. 831 F.2d 1374 (7th Cir. 1987), *cert. denied*, 485 U.S. 936 (1988).

123. 831 F.2d at 1376.

124. 831 F.2d at 1380.

Wislocki-Goin typifies the deference shown by courts to the asserted interest of employers in obtaining respect for their employees and the uncritical acceptance by courts of what it takes to command that respect.¹²⁵ It also exemplifies the courts' tendency, as a result of the BFOQ exception, to stress the distinctiveness of the workplace circumstances, rather than how ordinary, minor, or trivial the requirements are, as courts do in analyzing whether the requirements discriminate "on the basis of sex."¹²⁶ These factors are identical to those present in cases raising constitutional claims, in which public employers assert the need for their employees to have the public's respect.¹²⁷ In *Gadberry v. Schlesinger*,¹²⁸ for example, the court upheld sex-based grooming regulations promulgated by the Air Force, because traditional gender distinctions are an important part of the "public image" of the military, upon which public respect is assumed to depend.¹²⁹

A few cases have invalidated sex-based dress and appearance requirements because they do not meet the BFOQ test. These cases have used reasoning uniquely sensitive, among the cases as a whole, to the disadvantages faced by women subject to the requirements at issue. Nevertheless, even these cases rely on community norms as an objective measure of which disadvantages women should have to put up with and which they should not. In one of the first of these cases, a court held that requiring a female lobby attendant to wear sexually revealing outfits resembling the American flag and inviting acts of sexual harassment was not justified

125. See, e.g., *Boyce v. Safeway Stores*, 351 F. Supp. 402 (D.D.C. 1972).

126. See *supra* text accompanying notes 73-81.

127. See *Gadberry v. Schlesinger*, 419 F. Supp. 949 (E.D. Va. 1976) (upholding the Air Force's gender-based grooming regulations), *aff'd*, 562 F.2d 46 (4th Cir. 1977); *Morrison v. Hamilton County Bd. of Educ.*, 494 S.W.2d 770, 773 (Tenn.) (accepting a school superintendent's argument that beard prohibition avoided the problem of parents who "would strongly disapprove of teachers wearing beards and as a result would undermine the confidence of their children who were students in the school"), *cert. denied*, 414 U.S. 1044 (1973).

128. 419 F. Supp. at 949.

129. 419 F. Supp. at 951 (acknowledging, with approval, that "[t]he image the defendants wish to project is one that recognizes the differences in personal appearances between men and women which have traditionally existed in this country"). The military's related interest in military authority, which it raises in defense of its policy against gays and lesbians, may also be implicated by its dress and appearance requirements. If its women look too much like men or its men too much like women, the disciplinary mechanisms that rely on gender stereotypes, as well as male bonding, may be compromised. For a description of some of the military practices that are built on gender stereotypes and, relatedly, on the rejection of homosexuality, see Michelle M. Benecke & Kirstin S. Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215 (1990).

under the BFOQ exception.¹³⁰ The reasoning of the opinion left it clear that less revealing uniforms considered more appropriate to the duties and responsibilities of a lobby attendant would have been acceptable, and suggested that differential stigma, alone, would not have been unacceptable.¹³¹ The results of other cases, as well, turn on the fact that the standards imposed on women seemed out of step with conventional societal norms, especially when compared with those imposed on men. In *O'Donnell v. Burlington Coat Factory Warehouse, Inc.*¹³² and *Carroll v. Talman Federal Savings & Loan*,¹³³ for example, female employees were required to wear special business uniforms, while male employees were allowed to wear ordinary professional attire.¹³⁴ Because the female uniforms were demeaning and gave women a lesser professional status than men, the court in *Carroll* reasoned that the uniform requirement was unacceptable.¹³⁵ The court acknowledged, however, that if the dress code were justified "in commonly accepted social norms and . . . reasonably related to the employer's business needs,"¹³⁶ it would not necessarily violate Title VII. Only because the standards at issue offended ordinary business standards was their discriminatory nature found to be unlawful under Title VII.¹³⁷

130. See *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 611 (S.D.N.Y. 1981). Most of the written opinion, fighting the tide of cases finding that dress and grooming standards do not discriminate on the basis of sex, was devoted to establishing the existence of discrimination, rather than the absence of the BFOQ defense.

131. 507 F. Supp. at 603-04 n.8.

132. 656 F. Supp. 263 (S.D. Ohio 1987).

133. 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

134. The female employees in *O'Donnell* were required to wear "smocks," 656 F. Supp. at 266, while the female employees in *Carroll* had to wear color-coordinated skirts or slacks and either a jacket, tunic, or vest. 604 F.2d at 1029.

135. 604 F.2d at 1032-33.

136. 604 F.2d at 1032; see also *O'Donnell*, 656 F. Supp. at 266 (citing *Carroll*). As in *EEOC v. Sage Realty*, the written decision in *Carroll* focused on the question of whether the dress codes discriminated on the basis of sex, rather than on the BFOQ defense. The defendant in *Carroll* had not raised the BFOQ defense. 604 F.2d at 1031.

137. See also *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763, 790 (D.D.C. 1973) (holding that a rule prohibiting only female cabin attendants from wearing eyeglasses violated Title VII), *modified*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

Other cases lost by employers at this stage are cases in which the employers attempted to justify dress and appearance standards on factors other than their public image. See, e.g., *Roberts v. General Mills, Inc.*, 337 F. Supp. 1055, 1056 (N.D. Ohio 1971) (holding that a rule that women wear a hairnet but men wear their hair short enough for it to be covered by a hat was not justified by the need to maintain sanitary conditions for handling food). In *Roberts*, the employer had attempted to defend the sex-specific regulation on the grounds that the employees worked with exposed food and that the regulation was required to ensure sanitary food processing. The court questioned the factual assertions made by the employer, concluding that food contamination was no more likely from a man's hair contained with a hairnet than from a woman's. 337 F. Supp. at 1056.

In Part I, I argued that although employer dress and appearance requirements tend to subordinate women, the elimination of such requirements is an incomplete, and sometimes undesirable, response to the problem. I also argued that no effective approach to undermining the oppressive role dress and appearance expectations play in women's lives could be based on the effort to rise above or transcend community norms. In this Part, I demonstrated the ways in which courts have used community norms as if they were neutral criteria against which to evaluate employer dress and grooming practices, and I argued that these approaches are unsatisfactory in that they ratify discriminatory norms and allow them to be perpetuated throughout workplace practices that Title VII was intended to break down. My point is that the problem with the caselaw in this area is not that it fails to transcend community norms — an impossible goal — but that the law fails to look critically enough at the extent to which these norms incorporate the type of attitudes and stereotypes about women that Title VII is meant to combat. If community norms operated as objective, neutral principles on which to base the legal definition of equality, Title VII would need to do little more than to guarantee that there are no obstacles to the free expression of these norms. Insofar as community norms subordinate women on account of their sex, however, Title VII cannot simply accept them as givens. Rather, ways must be found to sharpen the Act's standards for identifying discriminatory employment practices that appear harmless and ordinary because of these norms. Moreover, because community norms will remain in inevitable point of reference in defining equality in the workplace, despite strict Title VII review, ways must be found to improve those norms. Part III of this essay pursues these objectives.

III. AN INTERACTIONAL VIEW OF COMMUNITY NORMS, LAW, AND SOCIAL CHANGE

I have criticized the notion that community norms are background conditions that the law can transcend, and I have criticized the use of community norms as neutral standards against which workplace restrictions and conditions can be validated. In this Part, I explore what it would mean for courts to treat community norms

If the employer's interest is in defining its own public image through its employees' appearance, the BFOQ exception is more easily satisfied. See cases cited *supra* notes 122-26. The *Roberts* court distinguished its facts from a fact situation in which the employer's sex-specific grooming regulation applied to public-contact employees and was important for customer satisfaction. 337 F. Supp. at 1056.

in interaction with, rather than as distinct from, the legal concept of equality that current Title VII law is capable of generating. This interactional view sees community norms and the legal concept of equality both as mutually confining and as mutually enabling. Community norms limit legal alternatives while also defining the terms required for equality to exist; the law limits the permissible effect of community norms while defining higher ideals to which the community might aspire. Both operate simultaneously and reciprocally as cause and effect, as carriers of gender-role stereotypes and propellants for change, as provisional givens and targets for reform.

When community norms and equality ideals are viewed in interactional or relational terms, the task of interpreting Title VII becomes one of steering and steadying a moving target rather than of discovering and fixing its permanent meaning. Within this view, it becomes clearly inappropriate to short-circuit Title VII analysis with judicial assumptions that sex-based conditions of employment are too normal and ordinary — or “trivial” — to be taken seriously. Such judgments will reflect, and freeze, prejudices and stereotypes that may be deeply submerged and highly subversive of efforts to enhance women’s equality in the workplace. Thus, as a first proposition, courts should approach challenges to practices grounded in community norms by attempting to identify the cultural meanings underlying them and determining to what extent they impose burdens that disadvantage members of one sex in relation to the other. For example, in reviewing the apparently “trivial” rule that women wear skirts, a court must ask whether there is something in the cultural coding of skirts that disadvantages their wearers by making them seem, say, less professional and more ornamental or vulnerable than those who wear pants.¹³⁸ In answering this question, it is useful to inquire whether it would be considered equally trivial if men in the same workplace were required to wear skirts. Such inquiries may help to reveal status distinctions buried in dress norms that have become normalized by their cultural familiarity. When such status distinctions are revealed, rules built on them must be carefully scrutinized for job-relatedness under the BFOQ exception to Title VII. Likewise, weight restrictions grounded in the community’s expectations that women be thinner than men must be examined to determine whether these expectations are tied to, and

138. See, e.g., *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1391 (W.D. Mo. 1979) (finding no Title VII violation in the case of a prohibition against pantsuits — a prohibition that, according to the plaintiffs, perpetuated “a sexist, chauvinistic attitude in employment”).

help to sustain, gender disadvantage. Biological explanations for women's lower average weights might help to establish that different weight standards impose no extra actual burden on women. But scientific explanations should be examined suspiciously as measurements that may potentially validate the familiar, including familiar prejudice and stereotype. Average weight tables, it turns out, demonstrate only what average women and men actually weigh, not what they would weigh without societal pressures, placed disproportionately on women, to be thin. Beneath this scientific surface lies an ideal of the thin woman that may have more to do with the passivity, anxiety, and emotionality¹³⁹ society promotes in its women than with any biological truth.¹⁴⁰ Identifying these damaging links cannot be done with scientific certainty, of course, but nonetheless is legally required.¹⁴¹

It is a sign of the pervasiveness of gender coding in the symbolic system of dress and appearance that few female-associated dress or appearance conventions exist that are not linked with stereotypes about women that emerged from or have become interwoven with their historically inferior status. Courts should find all such conventions discriminatory "on the basis of sex," unless narrowly tailored to sex differences in ways that do not perpetuate this historically inferior status. Under this approach employers should be able to supply women's uniforms in women's sizes, rather than men's, without having to justify the differences as sex-based discrimination. Indeed, the failure to make adjustments for women may, in some instances, be discriminatory.¹⁴² Employers should bear a strong

139. See Ilana Attie & J. Brooks-Gunn, *Weight Concerns as Chronic Stressors in Women*, in GENDER AND STRESS 219, 237 (Rosalind C. Barnett et al. eds., 1987) (citing JANET POLIVY & C. PETER HERMAN, *BREAKING THE DIET HABIT: THE NATURAL WEIGHT ALTERNATIVE* (1983)); WOLF, *supra* note 27, at 187-88 (also citing the Polivy & Herman findings).

140. The feminist critique of the objectivity of science and the extent to which scientific truths, like other truths, are socially constructed has become quite convincing. Some examples include ANNE FAUSTO-STERLING, *MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN* (1985); SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986); EVELYN F. KELLER, *REFLECTIONS ON GENDER AND SCIENCE* (1985).

141. The same type of analysis is required, and familiar, in the review of sex-based discrimination under the U.S. Constitution. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) ("MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy."); *Stanton v. Stanton*, 421 U.S. 7, 15 (1975) (holding unconstitutional a statute that terminated child support for girls three years earlier than for boys and noting that "bringing her education to an end earlier coincides with the role-typing society has long imposed").

142. One such instance appears to have arisen in *Milligan-Jensen v. Michigan Technological University*, 767 F. Supp. 1403 (W.D. Mich. 1991). In *Milligan-Jensen*, the plaintiff, who alleged that she was discharged in violation of Title VII, had been criticized for her uniform and dress, which was mandatory and designed for men. 767 F. Supp. at 1413.

BFOQ burden, however, in attempting to justify sex-based requirements that convey disparaging messages about women or restrict them in gender-based ways — for example, policies requiring high heels that restrict mobility or tight bodices that accentuate women's breasts and reinforce their sexual objectification.¹⁴³

Dress and appearance expectations that perpetuate man's historically commanding status are more difficult to analyze. Take the expectation that male lawyers wear pants, not skirts, or have short, not long, hair, or wear ties.¹⁴⁴ Insofar as pants symbolize power and competence, requiring them for men does not pose the same problem of disadvantage as requiring skirts for women. In fact, the objective of a law firm in insisting that its male attorneys wear pants and other suitable "professional" attire is that its attorneys should look "the part" in order to have the credibility necessary to succeed in professional settings.

This is not to say, however, that either the male dress prohibition or the pants requirement for women is unproblematic. The male dress prohibition, trivial as it may seem to most individuals, reflects and perpetuates gender-role expectations that men wear the pants and only women, or sissies, wear skirts.¹⁴⁵ As to the pants requirement for women, the problem is that under some circumstances and coding practices, women may be burdened from the requirement in a way that men are not. As illustrated by the controversy over whether Shannon Faulkner will be required to shave her scalp along with other first-year cadets (all male) at the Citadel, depending on the context, a "male" rule may have quite a different

143. According to one source, "women's dress uniforms [in the military] are cut 'to cling' rather than for comfort or function, making it difficult for women to display excellent 'military bearing.'" Benecke & Dodge, *supra* note 129, at 237. Other reported sex-specific dress requirements in the military include "a special hat for [the Army's] women drill instructors rather than . . . the traditional 'smokey-bear' hats of their male colleagues and the potent aura of authority which accompanies them." *Id.* at 236-37. In the Marines, female recruits are required "to wear makeup and take classes on hair care, poise, and etiquette." *Id.* at 236 (citing CHRISTINE L. WILLIAMS, *GENDER DIFFERENCES AT WORK: WOMEN AND MEN IN NONTRADITIONAL OCCUPATIONS* 63 (1989)).

144. See *supra* text accompanying notes 18-20.

145. Analogously, many have argued that discrimination against gays and lesbians is discrimination on the basis of sex, because it is based on the threat gays and lesbians pose to the gender-role stereotypes upon which male supremacy is based. See e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. (forthcoming May 1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187; *Developments in the Law — Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1517-18, 1527-28 (1989). For an examination of the psychological factors entailed in the response to this threat, including the need of men without power and privilege to have clear indications of male status with which they may identify their status as "real men" and through which they may distinguish themselves from others who are even less powerful, see BEM, *supra* note 1, at 151, 163-67.

impact on women than on men.¹⁴⁶ Being required to wear pants in certain settings, like being required to shave one's scalp, may be more stigmatizing to women than to men. Conversely, crossing the gender boundary will tend to have more negative consequences for men than for women,¹⁴⁷ as would be apparent in rules that required men as well as women to wear skirts, high heels, or makeup.¹⁴⁸ Moreover, for those who resist the cultural symbols of the power majority, a requirement that employees wear the symbols of power may, in some contexts, be as oppressive, in the equality sense, as requiring them to identify with the powerless.¹⁴⁹ In *Rogers v. American Airlines, Inc.*,¹⁵⁰ for example, a black woman challenging a prohibition of all-braided hairstyles asserted her interest in being able to identify with traditional cultural symbols of her oppressed group.¹⁵¹ In rejecting her challenge, the court prevented her from associating herself with a tradition and culture from which she derived her sense of identification and belonging, which in that particular time and place was important to her ability to operate as an equal with others in the workplace.

Once disadvantage is shown, a workplace requirement should be upheld under Title VII only if it passes strict review as a BFOQ. Community norms are relevant to this review, but in a different way than they are relevant to the determination of whether a rule or practice discriminates on the basis of sex. In determining whether or not a workplace rule is discriminatory, community norms are a background factor that affects whether the rule causes disadvantage; if the rule is grounded in community norms that either are

146. Ironically, the ritual of scalp shaving in the military-school context is to humiliate and to provide a basis for group bonding. When applied to the only woman in an otherwise all-male environment, however, there should be little doubt that the effect is to set apart the female for whom a bald head means something quite different than for men. See Ellen Goodman, *Does Equality at the Citadel Mean Shaving Shannon Faulkner's Head?*, HARTFORD COURANT, Aug. 5, 1994, at C13 ("A shaving that bonds 2,000 males can further ostracize one female.").

147. Empirical research has established that not only do children make more of socially constructed cues than of biological ones, but by 20 to 24 months of age, children have internalized cultural cues that prescribe much harsher treatment for male gender deviance than for female. See BEM, *supra* note 1, at 114. Bem discusses at length the psychological processes of gender acculturation that help to sustain this asymmetry throughout adulthood and the dependence of these processes on gender-polarizing social practices. See *id.* at 138-67.

148. The difficulty of imagining such rules makes it strikingly clear how undesirable those who have power consider the symbols associated with those without power to be.

149. See Caldwell, *supra* note 85 (arguing that interference with a means of race and gender identification is a means of race- and gender-based oppression).

150. 527 F. Supp. 229 (S.D.N.Y. 1981).

151. 527 F. Supp. at 232.

themselves discriminatory or interact with the rule to create a discriminatory effect, disadvantage is established. In determining whether discrimination is justified as a BFOQ, community norms constitute the context within which the employer must establish whether its discriminatory rule is necessary to its essential business purpose. Here, oddly enough, the more closely linked the central purpose of the business is to the sexualization or objectification of women, the more justified its discriminatory employment practices are likely to be.

Customer tastes and preferences provide the usual link between an employer's discriminatory dress and appearance requirements and the business purpose the requirements are meant to serve. It is useful, then, to examine the role consumer preferences have played in cases concerning other types of discriminatory rules evaluated under Title VII. The cases are instructive. The BFOQ exception has been strictly applied, with courts repeatedly affirming EEOC guidelines providing that a BFOQ exception should not be based on "the preferences of coworkers, the employer, clients or customers."¹⁵² This strict approach has had positive payoffs, with respect to not only more equal employment opportunity but also, in turn, more enlightened, less discriminatory customer expectations.

Two cases in the airline industry illustrate the pressure the law can exert on discriminatory customer attitudes. In *Diaz v. Pan American World Airways, Inc.*,¹⁵³ Pan American Airlines attempted to justify its policy of hiring only female flight attendants on the grounds that its passengers "overwhelmingly preferred to be served by female stewardesses."¹⁵⁴ These assertions were backed up by expert psychiatric testimony that led the trial court to conclude that "an airplane cabin represents a unique environment in which an air carrier is required to take account of the special psychological needs of its passengers," which "are better attended to by females."¹⁵⁵ The airline's point was not that men could not be effective flight attendants but that women were so much better on average that sex was " 'the *best* available tool for screening out applicants *likely* to be unsatisfactory and thus reduce the *average* level of performance.' "¹⁵⁶ The Fifth Circuit Court of Appeals rejected

152. 29 C.F.R. § 1604.2(a)(1)(iii) (1993).

153. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

154. 442 F.2d at 387.

155. 442 F.2d at 387.

156. 442 F.2d at 387-88 (quoting the lower court's decision, *Diaz v. Pan American Airways, Inc.*, 311 F. Supp. 559 (S.D. Fla. 1970)).

the airline's argument, reading narrowly the BFOQ exception to require business necessity, not business convenience.¹⁵⁷ Determining that "[t]he primary function of an airline is to transport passengers safely from one point to another" and that this function did not require "a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide,"¹⁵⁸ the court held that the BFOQ test was not met.

Diaz was followed a decade later by *Wilson v. Southwest Airlines*,¹⁵⁹ a case in which the factual premise of the employer's justification was more strongly demonstrated. In *Wilson*, a female-only flight attendant policy was part of a successful attempt to rescue the airline from near-bankruptcy. The policy was an advertising campaign to project an image of "feminine spirit, fun and sex appeal."¹⁶⁰ Southwest Airlines' primarily male business passengers were promised "'tender loving care,' " to be provided by youthful, attractive women who dressed in high boots and hot-pants.¹⁶¹ There was no question but that "Southwest's overall 'love image' . . . enhanced its ability to attract passengers" and thus that "femininity and sex appeal [were] qualities related to successful job performance."¹⁶² The court held, nevertheless, that this relationship was not sufficiently strong to make *female* attendants essential to the business of flying passengers.¹⁶³

Diaz and *Wilson* represent a decisive choice between two approaches to community norms: (i) sex-based rules and practices may be justified if these norms, in the form of customer tastes and preferences, make it economically profitable to the employer; or (ii) sex-based rules and practices may be justified only if essential in order to provide the product or service that the employer sells. The first option takes community norms as the fixed, operative norm and ratifies business practices that are in accord with prevailing cus-

157. 442 F.2d at 388.

158. 442 F.2d at 388.

159. 517 F. Supp. 292 (N.D. Tex. 1981).

160. 517 F. Supp. at 294.

161. 517 F. Supp. at 294-95.

162. 517 F. Supp. at 296. Southwest offered passenger survey evidence in an effort to establish a tight connection between its image and success as an airline and its feminine flight attendants. This survey evidence was not nearly as impressive as the airline asserted, in that it demonstrated that other factors — departure schedules and helpful reservations personnel — were more important than its attractive flight attendants. 517 F. Supp. at 295-96. In rejecting the relationship between customer preferences and business necessity, however, the court made the content of the survey evidence irrelevant, even if the surveys had shown stronger support for the airline's contentions. This rejection clearly contrasts with the approach taken in *Craft*. See *supra* text accompanying notes 110-15.

163. 517 F. Supp. at 303-04.

tomers expectations and desires. When pressed, the employer would only have to present sufficient market data to demonstrate that the practice was generated, in fact, by market factors rather than prejudice on the part of the employer.¹⁶⁴ If the courts in *Diaz* and *Wilson* had followed this option, the female-only job restrictions would have been upheld, and sexually subordinating stereotypes frozen in place. The second and better option, followed in *Diaz* and *Wilson*, does not ignore consumer expectations but reviews those expectations in light of the actual service or product consumers seek to purchase. Because customer preferences in relation to the mood or sexuality of the flight are secondary to their desire to get from one place to another, employers will not be allowed to indulge these preferences. As a result of restricting the ability of the airlines to exploit sexually subordinating consumer preferences to its commercial ends, the courts set the oar that would help to change those preferences.¹⁶⁵ Since *Diaz* and *Wilson*, the "look" of flight crews has become more diversified and less dependent on the traditional female-object stereotype and community expectations for the appearance of flight attendants have broadened. Notwithstanding years of losing efforts by women plaintiffs to eliminate airline weight restrictions,¹⁶⁶ this evolution has contributed to airline carriers' relaxation of these rules as well, and recent

164. Market factors have been credited and thus allowed to defeat "comparable worth" claims under Title VII and the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d)(1) (1988)). See, e.g., *American Fedn. of State, County, & Mun. Employees v. Washington*, 770 F.2d 1401 (9th Cir. 1985) (holding that compensation based on market rates does not establish liability under either a disparate impact analysis or a disparate treatment theory so long as the employer did not create the market disparity and was not motivated by impermissible sex-based considerations); *American Nurses' Assn. v. Illinois*, 783 F.2d 716, 722 (7th Cir. 1986) (same).

165. In Title VII cases raising other types of sex-based discrimination, courts have also construed the BFOQ exception very narrowly. In the most notable example, the U.S. Supreme Court turned back an effort by a battery manufacturer to exclude women of childbearing age from certain job categories due to the risk of lead to potential unborn or unconceived children, on the grounds that the essential nature of the battery-producing business did not include providing a safe environment for the potential children of its employees. *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). Again, community norms might have been used to ratify damaging patterns of response to the potential risks of childbearing, applied typically so as to burden only women, as childbearers, and not also men, as cocontributors of the genetic material necessary to produce a child. Instead, the Court closely examined these conventional patterns of response, determining that they were not compelled by the employer's business needs but rather by their own, community-reinforced, patronizing assumptions that women are not able to make intelligent choices for their own benefit or for the benefit of their potential children. 499 U.S. at 203-04, 211.

166. See *supra* text accompanying notes 94-109.

lawsuits challenging the remainder of them have begun to settle in favor of the plaintiffs.¹⁶⁷

The area where the least visible progress has been made concerns businesses that are the *most* objectionable from the perspective of reducing the sexual subordination of women: businesses that trade on women's sexual objectification. Under even a strict interpretation of the BFOQ exception, the closer a business defines itself in terms of sexual services and display, as contrasted with using sex to attract customers to buy an unrelated product or service, the more clearly it is sheltered by the Act. Title VII bears only on the terms and conditions of employment and, apart from these terms and conditions, does not regulate the legality of a business or its essential purpose.¹⁶⁸ It also does not reach advertising practices that may help maintain a market for discriminatory business products or services.¹⁶⁹ Even as to those practices that constitute terms and conditions of employment, the BFOQ exception seems specifically tailored to accommodate businesses that trade on sex and sexuality. Thus, for example, EEOC regulations specify that a BFOQ is established with respect to a job, such as an acting role, for which sexual authenticity is required,¹⁷⁰ and it is generally assumed that sex is a BFOQ for such positions as Playboy Bunnies, "female sexuality being reasonably necessary to perform the dominant purpose

167. In April 1994, for example, USAir settled a 1992 lawsuit by substituting a performance test for its weight standards. See Tamar Lewin, *USAir Agrees To Lift Rules on the Weight of Attendants*, N.Y. TIMES, Apr. 8, 1994, at A12. Delta placed a moratorium on its weight policy, and American Airlines relaxed its weight standards, in part by allowing for increases in weight with age. Northwest and Continental still impose weight requirements correlated with height. United remains in litigation over its weight policy. Its standards for female flight attendants are based on small and medium frames, while the standards for male flight attendants are based on men with large frames. *Id.*

168. Whether or not a practice constitutes a term or condition of employment, of course, can itself be contested. See *infra* note 169.

169. Some efforts are being made to attack advertising practices through claims that sexualized advertising contributes to sexual harassment in the workplace. For example, several lawsuits have been filed against the Stroh Brewery Company claiming that its advertising campaign for Stroh's beer — a campaign that used the Swedish Bikini Team to link Stroh's beer to its consumers' success with beautiful, bikini-clad blond women — contributed to sexual harassment against women employees at Stroh's by creating an overall atmosphere of hostility against women. These lawsuits, the facts of which are discussed in Stacy J. Cooper, *Sexual Harassment and the Swedish Bikini Team: A Reevaluation of the "Hostile Environment" Doctrine*, 26 COLUM. J.L. & SOC. PROBS. 387, 389-91 (1993), were consolidated for trial in *In re Stroh Litigation*, No. C1-92-1336 (D. Minn. Dec. 1, 1993), cited in *Former Stroh Brewery Employees Settle Sexual Harassment Suits Against Firm*, Daily Lab. Rep. (BNA) No. 230, at A-6 (Dec. 2, 1993). In pretrial motions, the state judge ruled that only advertising that was posted in the factory would be admissible evidence at the trial on sexual harassment. Shortly before trial, the case was settled on confidential terms. *Former Stroh Brewery Employees Settle Sexual Harassment Suits Against Firm*, *supra*, at A-6.

170. See 29 C.F.R. § 1604.2(a)(2) (1993); see also *Button v. Rockefeller*, 351 N.Y.S.2d 488 (Sup. Ct. 1973) (holding that sex is a BFOQ for female undercover police officers).

of the job which is forthrightly to titillate and entice male customers."¹⁷¹

Although this allowance for what will often be the more extreme forms of sexual subordination may seem ironic and perverse, it is understandable within an interactional view of community norms and the law and, arguably, beneficial in a long-term, pragmatic sense to the goal of eliminating the sexual subordination of women. This approach permits only those discriminatory rules that are necessary, in a definitional sense, to the employer's business — the lawfulness of which, again, Title VII is not designed to adjudicate. To sustain its discriminatory practices, the employer must be explicit about the nature of its business and about the necessity to discriminate in order to engage in that business. Pressure on the practices, thus, comes on two fronts. The law exerts steady pressure on what requirements are essential to the conduct of an employer's business,¹⁷² and community norms impose limits on the kinds of businesses employers are willing, explicitly, to defend. As a result of both of these pressures, the band of permissible discriminatory practices is forced within evernarrowing margins — literally, marginalized. Additional pressure can be exerted by legislators representing the community, who can take such measures as are consistent with the First Amendment to limit the legality of certain businesses that demean women.¹⁷³ Employees of such businesses, in turn, can put pressure on employers to protect them from sexual harassment in the workplace resulting from the clothing they are made to wear.¹⁷⁴ In each of these ways, legal ideals and community

171. *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 301 (N.D. Tex. 1981) (citing dicta from New York Human Rights Appeal Board cases); *see also* *Playboy Clubs Intl., Inc. v. Hotel & Restaurant Employees & Bartenders Intl. Union*, 321 F. Supp. 704, 704 (S.D.N.Y. 1971) (taking for granted the validity of "bunny image" criteria in litigation over whether their application was subject to union agreement's arbitration provision).

172. The Supreme Court's decision that the "fetal protection" policy challenged in *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), did not satisfy the BFOQ exception exemplifies this narrowing of the essential business purpose test. *See supra* note 165.

173. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (upholding an Indiana public indecency law requiring dancers to wear pasties and G-strings against a First Amendment challenge by a bar that featured nude dancing). As has been seen with respect to efforts to regulate pornography, these efforts face heavy going and with good reason, considering the competing interests at stake. I collect sources on the vast pornography debate within feminism in KATHARINE T. BARTLETT, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 564-88 (1993). A not-altogether-dissimilar battle to attack the legitimacy of an entire industry is now going on over the regulation of the tobacco industry. *See* Marlene Cmons, *Key FDA Panel Finds Nicotine Is Addictive*, L.A. TIMES, Aug. 3, 1994, at A1.

174. *See, e.g., Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992); *Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569 (W.D.N.Y. 1987); *EEOC v. Newtown Inn Assocs.*, 647 F. Supp. 957 (E.D. Va. 1986). For a discussion of the connections between

norms gradually adjust and evolve, rendering the marginal practices harder and harder to defend both under the law and within the community that sustains them.

Litigation against the Hooters restaurant chain provides an occasion for thinking about the appropriate role of Title VII in this interactive process.¹⁷⁵ Hooters is a restaurant chain with an image based on the "Hooters girl" concept, which is " 'indisputably sexy in tone.' "¹⁷⁶ The chain hires only women servers, bartenders, and hosts and requires them to wear sexy attire, such as " 'cutoffs, T-shirts, tanktops and orange jogging shorts.' "¹⁷⁷

To defend its practice of hiring only females for its front-of-house positions, and to justify its dress code if that should also be challenged, Hooters would need to establish that its business is, at its essence, the service of sexual excitement. Consistent with Title VII's goal of ending sexual subordination in the workplace, the employer's burden should be interpreted in the most rigorous possible terms, with a view toward isolating to the greatest possible extent businesses that exist to exploit women. When such businesses are segregated and labeled as harmful in the specific ways required by a strictly applied BFOQ exception, forces can be more easily mobilized that may lead to both reduced public support and alternative legal handles that can reach manifestations of sexual subordination beyond those already defined in the law.

Accordingly, Hooters should be required to show that the sex distinctions at issue are so essential to its business that without them it could no longer provide the primary product or service it intends, lawfully, to provide. Following *Diaz* and *Wilson*, it should not be enough that consumers at Hooters enjoy — and even demonstrate through customer surveys that they enjoy — having the option of buying food in an environment in which sexual excitement is also provided. What *Wilson* establishes is that the sexual

sexual harassment and the "production and reproduction of sexuality through female dress and men's responses to it," see KENNEDY, *supra* note 38, at 162-213.

175. At least two suits have been filed against Hooters for sex discrimination in its failure to hire male waiters. In one suit, the EEOC hearing officer found in favor of the plaintiff, but the follow-up federal lawsuit filed in 1991 was apparently dismissed or settled. See Jack Hayes, *Hooters Vows to Defend Women-Servers-Only Rule*, NATION'S RESTAURANT NEWS, Jan. 17, 1994, at 4; L.A. Lorek, *Federal Lawsuit Could Send Food Servers Running for Cover*, SUN SENTINEL, Dec. 13, 1992, at 1D. No action on the merits has yet been taken on a virtually identical suit filed against Hooters in Illinois in 1993. See *Latuga v. Hooters, Inc.*, No. 93 C 7709, 1994 WL 113079 (Apr. 1, 1994); see also Hayes, *supra*.

176. *Food Chain Charged with Bias for Hiring Only Females for "Hooter Girls" Waitstaff*, Daily Lab. Rep. (BNA) No. 248, at A-9 (Dec. 30, 1993) (quoting an attorney representing Hooters on employment issues).

177. *Id.* (quoting franchise literature).

subordination of women cannot be used simply to gain competitive advantage. A business must show that its primary purpose is to provide sexual stimulation rather than food, drink, or some other service for which sex is not an essential component. This it has a perfect right to do, although to defend its right to discriminate on the basis of sex, a business will not be able to hide behind the legitimacy of ordinary business purposes the public deems more "respectable" — flying passengers, serving food, and so on. Once it attempts to defend its business in nonsexual terms, the BFOQ exception is no longer available to protect sex-specific requirements. The rule of thumb at the end of the day is simple: sex bars may subordinate women, but airlines and restaurants may not.¹⁷⁸

The process I describe relies, as do *Diaz* and *Wilson*, on slippery tests involving questions about the "essence" of the business and the "primary" product or service. But once the law and community norms are viewed as interdependent, interactive, and evolving, no other alternative seems realistic. There can be no abstract, all-purpose definition of equality that fits all times and places. Title VII is, in this sense, fluid and evolving — a work in progress rather than a mandate that still-stubborn courts simply refuse to fulfill.

Insofar as current social understandings of what equality would require are imperfect, this fluidity should be seen as a strength of Title VII, not a weakness. It means that practices seeming trivial and nondiscriminatory at one time — hiring only slim, pretty women as airline flight attendants or tall, muscular men as firefighters — may come to be understood as unacceptable at another. Conversely, dress and appearance styles that seemed wholly out of the question at one time — women in pants and men in barrettes — may come to seem normal, rather than offensive and bad for business. Likewise, businesses normalized as restaurants or bars in one time and place may come to be understood by customers as exploitative in another. The interactive and changeable quality of community norms means that they can evolve, over time, in negoti-

178. Some sexually revealing dress requirements, insofar as they encourage sexually harassing conduct by customers or other employees, might also support a charge of sexual harassment. Because a charge of sexual harassment requires a showing that the conduct is "unwelcome," however, courts have tended to entertain such claims only in types of employment not otherwise considered sexual in nature. See, e.g., EEOC Dec. No. 85-9, 37 Fair Empl. Prac. Cas. (BNA) 1893 (1985); see also EEOC v. Sage Realty Corp., 507 F. Supp. 599, 605 n.10 (S.D.N.Y. 1981) (reporting that a female lobby attendant, complaining of a sexually revealing uniform, indicated that "if she had wanted to wear [such] a uniform . . . she would have sought work as a cocktail waitress"); *Marentette v. Michigan Host, Inc.*, 506 F. Supp. 909, 911-12 (E.D. Mich. 1980) (in dictum, suggesting that "a sexually provocative dress code" might violate Title VII if it subjected persons to sexual harassment); *supra* note 169.

ation with a law that insists on better and better standards as it acknowledges that it has not yet, and probably will never, reach its limits.

CONCLUSION

I close with a concern. I chose this topic because I believe that dress and appearance norms present an important workplace issue. Although courts tend to treat dress and appearance matters as legally insignificant, all the available management literature supports the view that dress and appearance matter a great deal in the workplace,¹⁷⁹ as they do in other social contexts, and it is clear that on both an individual level and with respect to women as a whole, dress and appearance have important, albeit complicated, autonomy and equality implications.

A problem for feminists is that calling attention to the importance of dress and appearance matters may reinforce that importance and, accordingly, the power of dress and appearance norms to oppress women. The dilemma is the same one feminists face in addressing the larger matter of sexual difference: taking account of sexual difference reinforces it, which in turn, at present, means reinforcing sex-based disadvantage.¹⁸⁰ Likewise, responding to dress and appearance matters as important participates in the validation of appearance as a basis for judging individuals and, thereby, for constraining women.

Feminists have responded to the dilemma posed by dress and appearance in different ways. Some, like Susan Brownmiller, adopt personal guidelines and political stances that reject feminine fashion, makeup, and self-adornment as uncomfortable, inconvenient, and supportive of damaging gender distinctions.¹⁸¹ This approach comports with the view that fashion is artificial¹⁸² and that if women can be released from codes that serve male interests, they can discover clothes and appearance norms that better suit their own "nat-

179. See *supra* text accompanying notes 61-68.

180. A vast literature now exists on the so-called difference dilemma. One of the first contemporary articulations of this dilemma in the gender context was an article by Martha Minow. See Martha Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987). A major project of feminists today is the "transcendence of" the difference dilemma, otherwise referred to as the "sameness-difference debate." One of the better recent examples is Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296.

181. See SUSAN BROWN MILLER, *FEMININITY* 79-102 (1984).

182. See FINKELSTEIN, *supra* note 26.

ural" values and tastes.¹⁸³ In addition to raising the questions referred to earlier about what it would mean to have one's "own" values and tastes,¹⁸⁴ feminists cannot avoid, in the course of offering such arguments, giving dress some of the importance they wish to deny it; as soon as either opposition or even indifference to fashion needs to be explained, it becomes, in Fred Davis's words, "anti-fashion," which itself helps to sustain and nurture the "dialogue of fashion symbolism and countersymbolism."¹⁸⁵

Other feminists have argued about the need for playful experimentation with sexual codes and meanings as way of shattering conventional understandings and expectations about women. Dress and appearance were especially important to Mary Joe Frug, who advocated a wide range of strategies that would produce fresh images of the human body, through legal experimentation and innovation.¹⁸⁶ While I find no published writings by Frug relating specifically to dress and appearance, she was well known for her own love of "sexy dressing" both as a source of fun and play and as a way of challenging conventional gendered meanings.¹⁸⁷ Elizabeth Wilson has made fashion a more explicit academic focus. She emphasizes the pleasure, liberating potential, and tantalizing essence of fashion, which, she argues, in its constant changes, "actually serves to fix the idea of the body as unchanging and eternal."¹⁸⁸ Wilson also explores the use of dress as an oppositional strategy, not only to challenge the conventional gender roles expressed in the prevailing fashion images of the times, but also to express dissent against such matters as social class, waste and impracticality, economic relationships, sexual attitudes, and racial oppression.¹⁸⁹

Is it possible to have it both ways, that is, to preserve the fun, creative, and even subversive potential of dress and appearance without at the same time strengthening its potential to oppress? Psychologist Sandra Bem struggles with a form of this question when she attempts, valiantly, to reframe the goal of feminism from that of eliminating male and female in an androgynous society to

183. See DAVIS, *supra* note 22, at 176-77.

184. See *supra* text accompanying notes 38-42.

185. DAVIS, *supra* note 22, at 161-62.

186. See MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 128-45 (1992).

187. See KLARE, *supra* note 21, at 1396-97.

188. ELIZABETH WILSON, ADORNED IN DREAMS: FASHION AND MODERNITY 58 (1987); see also *id.* at 53, 125.

189. *Id.* at 179-206; see also DAVIS, *supra* note 22, at 168-86 (cataloging types of oppositional dressing into categories of utilitarian outrage, health and fitness naturalism, feminist protest, conservative skepticism, minority group disidentification, and counterculture insult).

that of erasing gender-based scripts so that at a minimum "males and females would . . . be freer to be masculine, feminine, or androgynous . . . than they are now."¹⁹⁰ Note, however, that in this rearticulation of the ideal, Bem duplicates the route taken by those criticizing dress and appearance codes under Title VII;¹⁹¹ she begins with a concern over equality but ends with a cure based on the goal of autonomy. In the course of this transformation, the problem of uneven or oppressive scripts is regarded as solved by doing without scripts. But what would this mean? What function would the preserved categories of masculine and feminine serve once stripped of any force as social organizing principles? What's a category without a function?

My approach, both in formulating legal standards under Title VII and in developing strategies more generally for the elimination of oppressive gender-role expectations, is to concede the necessity of scripts, of social meanings, and of signs, and then to focus on how the content of those scripts, meanings, and signs might be made better. Autonomy is not bad, but, like equality taken by itself,¹⁹² it is empty. Efforts to address dress and appearance standards must be focused on improving meanings, rather than eliminating them. At the same time, it is worth thinking about how important these meanings are constructed to be. In one ideal world, dress and appearance would be sources of playfulness and imagination as much because they did not impinge on fundamental human needs and values as because they did. If this is the world most worth having, the effort to end the oppressive power of dress and appearance conventions might have to aim not only at inventing more and better meanings but also at making these improved meanings matter less.

190. BEM, *supra* note 1, at 192.

191. See *supra* text accompanying notes 33-37.

192. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982).