GENDER PERFORMANCE OVER JOB PERFORMANCE: BODY ART WORK RULES AND THE CONTINUING SUBORDINATION OF THE FEMININE

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INTRODUCTION

In a society saturated with images that intertwine beauty and youth with personal improvement and individual happiness, it is not surprising that the United States has developed into a culture of body modification.[1] United States consumers spend billions of dollars trying to modify their bodies superficially through cosmetics and toiletries[2] or invasively through increasingly popular

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1. *See* MICHAEL ATKINSON, TATTOOED: THE SOCIOGENESIS OF A BODY ART 3–4 (2003); CLINTON R. SANDERS, CUSTOMIZING THE BODY: THE ART AND CULTURE OF TATTOOING 3, 6–7 (1989) (noting that Western culture constantly pursues body modification with a proliferation of body modification services from haircuts to diet centers and surgery aimed at changing our corporeal selves and therefore purportedly bettering our lives overall).

2. Americans are increasingly willing to spend top dollar for beauty with high-end or "prestige" products, topping $8 billion in 2005, although this figure only accounts for about one-third of all makeup, fragrance, and skin-care retail sales. Press Release, The NDP Group, Prestige Beauty Industry Reaches Record High $8 Billion (Apr. 13, 2006), http://press.npd.com/dynamic/releases/press_060413.html (last visited Oct. 15, 2006). In an aging population, sales of anti-aging

cosmetic surgery procedures.[3] Reality television programs extol the virtues of makeovers, plastic surgery, and tattoos.[4] The once-static boundaries of one's biological sex have become further mutable through dress, grooming, and surgical or medical means.[5] Both men and women have become caught up in this drive to change their bodies[6] and to forge "new and improved" identities throughout their lives.[7]

In this shape-altering environment, there is increasing societal interest in body modification[8] through tattoos,[9] body piercing,[10] and other forms of body

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facial-care products rose thirty-three percent in 2005, compared to basic skin-care products, which increased four percent in 2005. *Id. See infra* note 6 and accompanying text.

3. Current figures indicate that Americans spent over $12 billion on cosmetic procedures in 2005. The American Society for Aesthetic Plastic Surgery, 2005 Cosmetic Surgery National Data Bank (2005), http://www.surgery.org/download/2005stats.pdf (last visited Oct. 15, 2006) [hereinafter Cosmetic Surgery National Data Bank]. Between 1997 and 2005, there has been a 444% increase in cosmetic surgery procedures. *Id.*

4. Television shows like ABC's *Extreme Makeover*, http://abc.go.com/primetime/extreme makeover/, Fox Reality Channel's *The Swan*, http://www.foxreality.com/shows.php?storyid=1062, and E!'s *Dr. 90210*, http://www.eonline.com/on/shows/dr90210/, trumpet the benefits of plastic surgery, while *Oprah*, http://www.oprah.com/index.jhtml, and other talk shows commonly feature weight-loss and grooming and fashion makeovers. The lives of tattoo artists and their patrons are chronicled on TLC's *Miami Ink*, http://tlc.discovery.com/fansites/miami-ink/miami-ink.html, and A&E's *Inked*, http://www.aetv.com/inked/index.jsp. *See also generally* THE GREAT AMERICAN MAKEOVER: TELEVISION, HISTORY, NATION (Dana Heller ed., 2006) (tracing the historical roots of the makeover mythos in the United States and examine Reality TV programs as new iterations of that original mythos); MAKEOVER TELEVISION: REALITIES REMODELED (forthcoming Dana Heller ed., 2007) (analyzing the international explosion of the makeover genre of Reality TV, looking especially at the way such TV texts aim to remodel "reality").

5. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 35 (1995). In the context of transgendered persons, Prof. Franke states that there is a "tension between immutability, body, sex, and gendered identity. According to the traditional view, the sexed body—one's inside—is immutable, whereas gender identity—one's outside—is mutable. Yet for the transgendered person, the sexed body—one's outside—is regarded as mutable while one's gendered identity—one's inside—is experienced as immutable." *Id. See also infra* note 7 and accompanying text.

6. Although female consumers dominate the cosmetics and skin care markets, the sales of men's skin care products are advancing at a faster pace than those for women, up thirteen percent in 2004. *Male vanity spurs development of skin care*, MSNBC.com July 19, 2005, http://www.msnbc.msn.com/id/8631299 (last visited Oct. 15, 2006). *See also supra* notes 3–4 and accompanying text. *See also generally* SANDERS, *supra* note 1, at 3–20 (reviewing historical and sociological aspects of appearance alteration from impermanent fashions and body painting to permanent tattoos, scarification, and piercings).

7. ATKINSON, *supra* note 1, at 4. Prof. Atkinson discusses Shilling's earlier sociological research which "conceptualized body modification as intentionally designed 'projects'" that "are integral in formulating identity over the life course." *Id.* He added that Shilling viewed bodies as existing "in a continual process of becoming—as their sizes, shapes, appearances, and contents are subject to ongoing transformation." *Id. See also supra* note 5 and accompanying text.

8. Natasha Chilingerian, *Fashion replaces rebellion as motive for body piercing*, OR. DAILY EMERALD, Nov. 26, 2003, *available at* http://www.dailyemerald.com/media/storage/paper859/news/2003/11/26/Pulse/Fashion.Replaces.Rebellion.As.Motive.For.Body.Piercing-1982697.shtml (last visited Oct. 15, 2006); Marilyn Rauber, *Tattoos finding wider appeal*, MEDIA GEN. NEWS SERV., June 26, 2005, *available at* http://www.potomacnews.com/servlet/Satellite?pagename=WPN%2FMGArticle%2FWPN_BasicArticle&c+MGArticle&cid=1031783508783&path= (last visited Oct. 15, 2006); Regina M. Robo, Body Art in the Workplace, http://www.salary.com/advice/layoutscripts/advl_display.asp?tab=adv&cat=nocat&ser=Ser64&part=Par140 (last visited Oct. 15, 2006).

manipulation.[11] Body modification has traditional roots in the spiritual and cultural practices of many ancient and present-day civilizations.[12] Often viewed as primitive and barbaric in Western society, body modification has long been relegated to lower-status or "out" groups in the United States.[13] Yet, the current revival in body modification cuts across a broad range of socio-economic classes and age groups,[14] with many individuals desiring to express their personal,

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9. *See generally* ATKINSON, *supra* note 1, at 30–50 (providing a historical overview of tattooing in Western culture); KARL GRÖNING, BODY DECORATION: A WORLD SURVEY OF BODY ART (1998) (detailing body painting and tattooing in global cultures); SANDERS, *supra* note 1, at 9–20 (offering a summary of tattooing and piercing practices from ancient times to 1980s); TATTOO HISTORY, A SOURCE BOOK (Steve Gilbert ed., 2000) (providing an anthology of historical records about tattooing throughout world). Of the 1.3 million college graduates in 2005, about one in four have a tattoo. Rauber, *supra* note 8. According to a Mayo Clinic study, approximately twenty-three percent of university students have up to three tattoos. *Id.*

10. A Mayo Clinic research report found that over fifty percent of university students have at least one piercing that is not an ear piercing. Rauber, *supra* note 8. *See also* Chilingerian, *supra* note 8; SANDERS, *supra* note 1, at 8 (discussing tribal cultures and extensive infibulation or piercings of nose, cheeks, nipples, and genitals as not only decorative, but also as symbolizing social status). *See supra* note 8 and accompanying text. *See infra* notes 11, 76, 82 and accompanying text.

11. *See* SANDERS, *supra* note 1, at 8–9 (author notes scarification (cutting and subsequent keloid formation) as symbols of tribal membership, adult maturity, preventive medicine, beauty, courage, or endurance). Scarification is still practiced in some African nations, signifying one's social, spiritual, and political status. Helen Coleman, Scarification among African cultures (November 2002), http://www.randafricanart.com/Scarification_and_Cicatrisation_among_African_cultures.html (last visited Oct. 15, 2006); University of Penn. Museum of Archaeology and Anthropology, Bodies of Cultures, A World Tour of Body Modification, http://www.museum.upenn.edu/new/exhibits/online_exhibits/body_modification/bodmodpierce.shtml (last visited Oct. 15, 2006) [hereinafter Bodies of Cultures].

Another form of body modification is tongue splitting in which the tongue appears in a forked manner. Chilingerian, *supra* note 8. In *Cloutier v. Costco*, 311 F. Supp. 2d 190 (D. Mass. 2004), *aff'd on other grounds*, 390 F.3d 126 (1st Cir. 2004), the District Court discussed other body manipulation practices in considering a religious discrimination claim. The court stated that "[a]mong the practices of members . . . are body modifications such as piercing, tattooing, branding, transdermal [piece of metal that goes underneath and comes through skin] or subcutaneous implants, [stainless steel inserted under skin] and body manipulation, such as flesh hook suspensions and pulling." *Id.* at 193 (citations omitted and alterations added). *See infra* notes 160–182 and accompanying text.

12. *Bodies of Cultures*, *supra* note 11. Nose rings were common in ancient Mexico and India while the indigenous Alaskans pierced their lips with lip-plugs called labrets. *Id.* Chilingerian, *supra* note 8. *See supra* note 8 and accompanying text. *See infra* notes 105–129, 160–201 and accompanying text.

13. *See infra* notes 59–74 and accompanying text.

14. Body modification, especially tattoos and piercings, has broadened its appeal to more diverse age and social ranges in the United States. Anthony Jude Picchione, *Tat-Too Bad for Municipalities: Unconstitutional Zoning of Body-Art Establishments*, 84 B.U. L. REV. 829, 833 (2004); Chilingerian, *supra* note 8; Rauber, *supra* note 8. In a 2003 Harris Poll, it was determined that sixteen percent of all United States. adults having at least one tattoo, with thirty-six percent of adults aged twenty-five to twenty-nine and twenty-eight percent of adults aged thirty to thirty-nine possessing at least one tattoo. Laurel A. Van Buskirk, *New Developments on Tattoos and Body Piercing in the Workplace*, N.H. BUS. REV., Dec. 2005, at n.1, *available at* http://www.gcglaw.com/resources/employment/tattoos2.html (last visited Mar. 6, 2006). *See also* Paul Andrew Burnett, *Comment: Fairness, Ethical, And Historical Reasons For Diversifying The Legal Profession With Longhairs, The Creatively Facial-Haired, The Tattooed, The Well-Pierced, And Other Rock And Roll Refugees*, 71 UMKC L. REV. 127 (2002) (recommending promotion of and greater tolerance for appearance diversity in legal profession, including lawyers with visible tattoos and piercings, to better serve diverse public).

cultural, religious, or gender identities through body modification.[15] Some body-modified women see their practices through a gendered lens as a mechanism for personal liberation from patriarchal standards of acceptable female beauty and sexuality.[16]

In seeking to maintain control over employee appearance, employers have adopted formal and informal "body art work rules" in workplace dress and grooming codes that restrict or prohibit body modification.[17] Typically, courts have given employers great latitude in adopting dress and grooming codes, elevating the regulation of employee appearance to a fundamental part of the employer's prerogatives or discretion in operating the business.[18] In an effort to avoid legal challenges, employers typically claim neutral reasons, such as maintaining a professional image, for their dress and grooming codes.[19] Employees often chafe at these restrictions, which appear to have almost no meaningful connection to the successful performance of their jobs, with some

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15. Chilingerian, *supra* note 8; Rauber, *supra* note 8; Robo, *supra* note 8. *See infra* notes 105–29, 160–201, 238–81 and accompanying text.

16. *See* ATKINSON, *supra* note 1, at 16–17. In summarizing feminist research, Prof. Atkinson states that "the female body is socially constructed, monitored, regulated, and maintained according to dominant notions of femininity" that emphasize the notion that woman's bodies are "both passive and powerless." *Id.* at 16. Therefore, women who undertake body modification are often seeking "to subvert dominant gender codes" and to empower themselves through "self-exploration and personal emancipation" from patriarchal control over their bodies. *Id.* at 16–17. *See infra* notes 85–94 and accompanying text.

17. *See* Randy Dotinga, *Branded in the workplace*, CHRISTIAN SCI. MONITOR, Sept. 13, 2004, *available at* http://www.csmonitor.com/2004/0913/p13s02-wmgn.html (last visited Oct. 15, 2006); Louis Pechman, *Tattoos and Piercings in the Workplace*, N.Y.L.J., Dec. 15, 2005, at 4; Andrea K. Johnstone & Laurel A. Van Buskirk, *Tattoos & Body Piercing: Avoiding Employment Discrimination Claims*, N.H. BUS. REV., Oct. 2004, *available at* http://www.gcglaw.com/resources/employment/tattoo.html (last visited Oct. 15, 2006); Van Buskirk, *supra* note 14. *See infra* notes 111–23, 160–69, 185–94, 241–59, 269–81 and accompanying text.

18. *See* Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 350–52 (1997); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1244–47 (2004); Karl E. Klare, *The Politics of Gender Identity: Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1400–01 (1992); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, NW. U. SCH. OF L.: PUBLIC LAW AND LEGAL THEORY PAPERS 1, 62 http://law.bepress.com/nwwps/plltp/art15 (last visited Oct. 15, 2006). *See infra* notes 98–104 and accompanying text.

19. *See* Engle, *supra* note 18, at 329–30; Rich, *supra* note 18, at 1136–39, 1207, 1249; Yuracko, *supra* note 18, at 62, 65. In the past, some employers would contend that their codes were based on their neutral desire to appeal to and improve their revenues from their customers, which courts have rejected at times when protected classes, especially gender, are at issue. *See, e.g.*, Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) (finding that customer preference cannot justify female over male flight attendants); Hylind v. Xerox Corp., 380 F. Supp. 2d 705 (D. Md. 2005) (holding that an assignment of female salesperson to customer who preferred females and openly discussed hobby of photographing partially nude women as gender discrimination); Ames v. Cartier, Inc., 193 F. Supp. 2d 762 (S.D.N.Y. 2002) (finding that employer claims of customer preference for "pretty blonds" over male Filipino salesperson as adequate basis for gender and national origin discrimination case); EEOC v. Joe's Stone Crab, Inc., 15 F. Supp. 2d 1364 (S.D. Fla. 1998) (restaurant may not hire only male waiters based on traditional perceptions of customer preference). *See infra* notes 99–102, 105–06, 116, 165 and accompanying text.

bringing discrimination claims under federal and state laws.[20] Unlawful discrimination actions over body art work rules[21] are the newest round in the battle over dress and grooming codes, following in the footsteps of more traditional legal actions based on gender attire, hair and beard lengths, and religious garb.[22]

The social rewards and punishments for body modification practices are now being played out in the courts. Those people whose actions reflect and reaffirm dominant views of beauty and conformity to social roles are rewarded with public approval along with better jobs and pay scales in the workplace.[23]

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20. Kelly Lucas, *Should employers regulate appearance? While it is legal, many Americans do not believe employers should consider appearance when hiring*, THE IND. LAW., May 4, 2005, *reprints available at* http://www.theindianalawyer.com; Rich, *supra* note 18, at 1245–46; Johnstone & Van Buskirk, *supra* note 17; Jerry Shottenkirk, *Companies face social, legal challenges over evolving employee appearance policies*, THE DAILY RECORD (Balt.), Apr. 15, 2005, *reprints available at* http://www.mddailyrecord.com; *Get That Ring Out of Your Nose and Cut Your Hair—Can the Employer Legally Make Such Demands?*, HR MANAGER'S LEG. RPTR., April 2002, *available at* http://www.rbpubs.com (last visited Oct. 15, 2006). There is a clear difference between employee and supervisor views on dress and grooming codes as found in a 2005 America at Work survey. In that poll, sixty-one percent of employees indicated that employers should not be allowed to deny employment based on appearance, including visible tattoos and piercings. However, forty-seven percent of supervisors held that employers should be able to deny employment based on appearance. Lucas, *supra*; Shottenkirk, *supra*. *See infra* notes 111–23, 160–82, 241–59 and accompanying text.

21. In a number of cases, employees have lost challenges to body art work rules based on illegal discrimination. *See, e.g.*, Kleinsorge v. Eyeland Corp., No. Civ. A. 99-5025, 2000 WL 124559 (E.D. Pa. Jan. 31, 2000) (upholding policy prohibiting males from wearing earrings; finding no gender discrimination), *aff'd*, 251 F.3d 153 (3rd Cir. 2000) (unpublished table decision); Riggs v. City of Fort Worth, 229 F. Supp. 2d 572 (N.D. Tex. 2002) (holding that a police officer loses a challenge to department dress code requiring him to cover tattoos as race, gender, and national origin discrimination); Pecenka v. Fareway Stores, Inc., 672 N.W.2d 800 (Iowa 2003) (finding that employee fails in challenge to policy prohibiting males from wearing earrings as gender discrimination); Sam's Club, Inc. v. Madison EEOC, 668 N.W.2d 562 (Wis. App. 2003) (court sustains employer's prohibition of nose rings against claim of appearance discrimination under state anti-discrimination law); Capaldo v. Pan Am. Fed. Credit Union, No. 86-CV-1944, 1987 WL 9687 (E.D.N.Y. Mar. 30, 1987) (court upholds employer policy prohibiting males from wearing earrings finding no gender discrimination), *aff'd*, 837 F.2d 1086 (2d Cir. 1987) (unpublished table decision); In re Motion Picture & Television Fund & Hosp. SEIU, 103 Lab.Arb. 992 (1994) (Gentile, Arb.) (in arbitration, employee loses dispute with employer about removing nose ring, despite claims of national-origin discrimination and harassment). In only a handful of cases have employees won discrimination challenges to body art work rules. *See also, e.g.*, Ciafrei v. Bentsen, 877 F. Supp. 788 (D.R.I. 1994) (finding for federal government when employee claims gender discrimination, due in part to her tattoos, in failure to promote dispute); EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005); Hub Folding Box Co., Inc. v. MCAD, 750 N.E.2d 523 (Mass. App. Ct. 2001) (holding that a female employee wins challenge to employer mandate that female, but not male employee, cover tattoos in workplace).

22. *See generally* Gregory M. Baxter, *Employers Beware, The Workplace Religious Freedom Act of 2000*, 2 RUTGERS J. LAW & RELIG. 6, at 14–18 (2000/2001), http://org.law.rutgers.edu/publications/law-religion/articles/RJLR_2_2_6.pdf; Marianne C. DelPo, *Never on Sunday, Workplace Religious Freedom in the New Millennium*, 51 ME. L. REV. 341, 342, 344–46 (1999) (reviewing case law on traditional religious discrimination challenges based on hair, beard, and dress). *See infra* notes 111–23, 160–82, 241–59 and accompanying text.

23. In general, people rank attractive people as having a host of positive qualities, including being perceived as smarter, healthier, more likeable, more honest and of higher moral character, often winning greater praise and remuneration for their work. Elizabeth M. Adamitis, *Appearance Matters: A Proposal To Prohibit Appearance Discrimination In Employment*, 75 WASH. L. REV. 195, 196–97

Those individuals who seek to define their own sense of beauty and identity are punished both socially and economically,[24] with the assistance of the courts.[25] Except in rare instances, courts have played a key role in yielding virtually unilateral authority to employers to adopt dress and grooming codes, including prohibitions about various forms of body art and modification that exert social control over dress and grooming based on dominant views of acceptable appearance.[26]

Despite properly performing their job tasks, employees find that employers and courts constantly demean and reject their efforts at racial, ethnic, and religious performance through body art and modification in the workplace, demanding a façade of cultural neutrality. Conversely, courts uphold employer mandates that require employees to follow dominant expectations of gender performance that emphasize gender differentiation. Rather than balance the interests of employers and employees, courts have primarily caved in to employer demands for proper gender roles, with gender performance now trumping job performance in the workplace. Courts need to refocus their analyses in discrimination cases dealing with dress and grooming codes to insure that these policies relate to actual job performance and provide fair opportunities for employees to choose whether or not they wish to perform their gender, racial, ethnic, or religious identities in the workplace.

This article will consider the confluence of social constructions of race, gender, culture, class, sexuality, and religion that underwrite the terms of body art work rules. Part I will summarize the main social constructs associated with body modification in different cultures.[27] The varied socio-historical constructions of body modification[28] provide an important context for the consideration of current disputes over body art work rules. Part II will review the judicial tensions over whether to safeguard protected classes solely on the basis of biological or immutable traits or based on social constructions of protected classes.[29] While courts have had little difficulty dismissing the performance of racial, cultural, and religious identities,[30] the picture for gender claims is more mixed in disputes centered on body art work rules.[31] In the context of a gendered workplace, this article will review how courts seem confused about whether to uphold or strike down body art work rules

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(2000); SANDERS, *supra* note 1, at 1; Karen Zakrzewski, *The Prevalence of "Look"ism in Hiring Decisions: How Federal Law Should be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. PA. J. LAB. & EMP. L. 431, 433 (2005). It is estimated that "attractive" employees earn about five percent more than "average"-looking employees and ten to fifteen percent more than "plain"-looking employees. Adamitis, *supra,* at 198. Applicants considered good-looking received salary offers that were eight to twenty percent higher than other applicants. *Id.*

24. *See infra* notes 241–59 and accompanying text.
25. *See infra* notes 111–23, 160–82, 241–59 and accompanying text.
26. *Id.*
27. *See infra* Part I and accompanying notes.
28. ATKINSON, *supra* note 1, at 56–57.
29. *See infra* Part II.
30. *See infra* Parts II.A–B.
31. *See infra* Part II.C.

grounded in social norms about "proper" gender performance.[32] Part III will discuss how the differential judicial treatment of gender performance in body modification disputes buttresses dominant views of appropriate appearance and perpetuates the promotion of the traditional workplace hierarchy that prizes the gender performance of dominant masculine traits, while subordinating the feminine.[33] Part IV will call for a renewed judicial focus on job performance, rather than gender performance, in the review of dress and grooming codes, including body art work rules.[34]

I. SOCIO-HISTORICAL OVERVIEW OF SOCIAL CONSTRUCTIONS OF BODY MODIFICATION

Body modification is believed to date back to the late Stone Age with prehistoric tattoo practices.[35] As body modification spread globally, these acts have fluctuated between positive and negative societal characterizations through the centuries.[36] In the United States, body modification has traditionally been socially encoded as lower-status, deviant, or rebellious behavior;[37] other cultures, however, take more positive views of body modification.[38] Negative cultural associations on body art and modification in the United States are often derived from discrimination against "out groups" based on race, ethnicity, gender, and class.

Body modification in the United States generally signifies one's lower social status, a socio-historical perspective largely inherited from encounters of

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32. *Id.*

33. *See infra* Part III.

34. *See infra* Part IV.

35. SANDERS, *supra* note 1, at 9. Subsequently, tattooing became primarily associated with the Pacific cultures, such as the Maori and Samoan peoples, as well as native Alaskan cultures. *Bodies of Cultures*, *supra* note 11.

36. Sociologists contend that whether body modification practices are normative or deviant is "subject to social constructions and definitions (deviant or otherwise)" and are "influenced by the personal biographies of, collective world views held by, and contextual interpretations of individuals." ATKINSON, *supra* note 1, at 56; SANDERS, *supra* note 1, at 20–21. In considering past sociological research, Prof. Atkinson suggests there is a need for more sociological research on social constructions of normative and deviant behavior in body modification practices. ATKINSON, *supra* note 1, at 56–57. *See supra* note 8 and accompanying text.

37. Chilingerian, *supra* note 8; Rauber, *supra* note 8; Silja A. Tavi, *Keeping Up Appearances*, THE CHRISTIAN SCI. MONITOR, Sept. 11, 2000, *available at* http://www.csmonitor.com/2000/0911/p11s1.html (last visited Oct. 15, 2006). In reinforcing these stereotypes, courts have consistently upheld prosecutorial preemptory juror challenges of individuals with tattoos and piercings as nondiscriminatory, viewing these items as valid signs of nonconformity and liberal attitudes toward criminal behavior. *See, e.g.*, United States v. Smith, 324 F.3d 922 (7th Cir. 2003) (female with visible tattoos and lip piercing); Wilson v. State, Nos. 05-01-00999-CR, 05-01-01000-CR, 2003 WL 203470 (Tex. App. Ct. Jan. 31, 2003) (African-American juror with visible body piercing); Lee v. State, 949 S.W.2d 848 (Tex. App. Ct. 1997) (male juror with pierced earring); Gambel v. State, 835 S.W.2d 788 (Tex. App. Ct. 1992) (male juror with pierced earring). In addition, a state appellate court upheld a school ban on male students' wearing earrings, finding that earrings are appropriate attire only for females and that the rule prohibiting male earrings "discourages rebelliousness." Hines v. Cason Sch. Corp., 651 N.E.2d 330, 335 (Ind. Ct. App. 1995).

38. *See infra* notes 75–84 and accompanying text.

European explorers with tribal groups in the late 1700s.[39] Europeans were both fascinated and repelled by the body art of tribal groups, especially that of Polynesian cultures.[40] Coming from societies in which dress and grooming were tightly controlled, Europeans were shocked and frightened by these displays of exuberant self-expression and sexuality.[41] European cultures viewed these societies as primitive and backward, and therefore their body modification practices as lower status within the social hierarchy.[42]

From late 1700s to the early twentieth century, many native people were enslaved and displayed as "live savages," freaks and oddities, initially for the racist entertainment of European aristocracy,[43] and then eventually to the masses in museums, fairs, circuses, and carnival sideshows in Europe and the United States.[44] In these settings, these indigenous peoples often served as a lower status contrast with the claimed higher status virtues of modern Western lifestyles marked by industrialism, scientific and technological development, and conservative moral codes about the proper display of the body.[45]

Eventually, female tattooed attractions became hugely popular as a form of erotic peep show in the United States.[46] In these shows, heavily-tattooed females partially stripped before huge crowds to display their tattoos, concocting wild stories of "savage" kidnappings and forced tattooing to explain their appearance.[47] Embedded in these fanciful back-stories were the false assumptions that no woman would intentionally tattoo herself and that her own "natural" frailty would make her unable to fend off the attacks of dangerous primitives.[48] These tattooed women created dual challenges to societal norms by

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39. ATKINSON, *supra* note 1, at 32–34; SANDERS, *supra* note 1, at 14–15.

40. ATKINSON, *supra* note 1, at 32–34; SANDERS, *supra* note 1, at 14–15.

41. ATKINSON, *supra* note 1, at 30–31; SANDERS, *supra* note 1, at 14.

42. ATKINSON, *supra* note 1, at 31, 33–34; SANDERS, *supra* note 1, at 14–15. Tattooed native peoples were often killed, their heads taken as souvenirs of exotic travels in the 1800s. ATKINSON, *supra* note 1, at 32.

43. ATKINSON, *supra* note 1, at 31; SANDERS, *supra* note 1, at 14–15. In an effort to dabble in the exotic, some members of European nobility got tattoos to mark their travels to the east in the late nineteenth century, including the Czar of Russia, the kings of Greece, Sweden, and Germany, and all of the males in the British royal family. SANDERS, *supra* note 1, at 15. The trend was short-lived and American social elites snubbed the practice stating that tattooing "may do for an illiterate seaman, but hardly for an aristocrat." *Id.* at 17–18. *See infra* notes 59–63 and accompanying text.

44. ATKINSON, *supra* note 1, at 31, 33–35; SANDERS, *supra* note 1, at 14–15, 18. *See* ROBERT W. RYDELL, ALL THE WORLD'S A FAIR 64–68 (1984) (looking at United States World's Fairs, especially the racial hierarchies inherent in the layout of the Midway at the 1893 World's Columbia Exposition, and the entertainment strip where "exotics" were displayed).

45. ATKINSON, *supra* note 1, at 33–34 (discussing enslaved tribal peoples with tattoos being put on carnival and sideshow stages to represent "the savage tribal world" as "antithesis of modernity"). Heavily-tattooed non-native sailors soon followed suit, seeking to cash in on public fear of and fascination with tattoos, embellishing heroic tales of capture and forced tattooing in exotic lands. During the Depression, many poor non-native men and women tattooed their bodies in hopes of making money in circuses and freak shows. *Id.* at 34–35; SANDERS, *supra* note 1, at 15, 18.

46. ATKINSON, *supra* note 1, at 37; SANDERS, *supra* note 1, at 18.

47. ATKINSON, *supra* note 1, at 33. Prof. Atkinson states that tattooed women ultimately became the most profitable and highly-attended exhibitions. *Id.*

48. *See infra* notes 52–58, 85–90 and accompanying text.

both possessing tattoos normally associated with masculinity and by exposing, in a sexually titillating manner, so much of their bodies to audiences.[49]

These shows provided an opportunity for the audience to explore "culturally repressed desires and emotions," and "to experience subversive pleasures with and tortures of the flesh without sacrificing commonly held cultural understandings of corporeal responsibility" while affirming "dominant cultural ideas about sanctity of the body."[50] These carnival show settings also helped to embed negative stereotypes about women with tattoos as "loose" or "tramps," labels that still persist in contemporary United States culture.[51]

The circus show era, while a significant one, merely reinforced rather than originated the sexualization and subjugation of body-modified women in world cultures.[52] While tattooed females in carnival sideshows intertwined female sexuality with female submission, other cultures have utilized practices that send these same messages in different ways. For example, for centuries, the Chinese aristocracy undertook the excruciatingly painful practice of binding each foot of a noblewoman so that it would fit into a man's palm.[53] Until the practice was outlawed in 1911,[54] the bound foot, also called a "lotus foot," was considered an "erogenous zone" for a male partner's sexual pleasure. At that time, female aristocrats with unbound feet were considered unmarriageable

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49. ATKINSON, *supra* note 1, at 33.

50. ATKINSON, *supra* note 1, at 36.

51. *See infra* notes 242, 251, 255 and accompanying text. *See* Mairs v. Gilbreath, No. Civ. A. 01-9981-ABC (C.D. Cal. 2002) (court orders landlord to pay damages for refusing to rent to couple in which female partner had tattoos which landlord believed indicated that she was woman of low moral standards), *cited in CA landlord who said tattoos are okay on male but not female tenants is ordered to pay $30,900*, NAT'L FAIR HOUSING ADVOCATE, Nov. 2002, at 2, *available at* http://www.fairhousing.com/index.cfm?method=page.display&pagename=advocate_november02_page2 (last visited Nov. 22, 2006); *see also* Press Release, National Fair Housing Advocate Online, *Landlord Who Refused to Rent to Woman with Tattoo Must Pay $30,990* (Oct. 18, 2002), http://www.fairhousing.com (last visited Oct. 15, 2006).

Prof. Sanders undertook extensive interviews of tattooed people to understand their motivations and the impact of their body art on their relationships with others. One female interviewee discussed the stereotypical response from her father upon learning about her tattoo.

> My father's reaction was just one of disgust because women who get tattoos to him are . . . I don't know . . . they just aren't nice girls. They aren't the type of girl he wants his daughter to be. He let me know that. He let me have it right between the eyes. He said, "Do you know what kind of girls get tattoos?" and he just walked out of the room. That was enough. He thought tramps get tattoos or girls that ride on the back seats of motorcycles.

SANDERS, *supra* note 1, at 55–56.

52. SANDERS, *supra* note 1, at 9. In ancient Egypt, only women were tattooed, especially concubines, singers, dancers, and other female entertainers to signify their status as sexual or gaze objects of pleasure. *Id.* This group of females were typically tattooed with the symbol of the goddess Bes, who served to protect female entertainers. *Id.* Furthermore, in various cultures, body modification of females often served as a symbol of a woman's sexual maturity and sexual availability. *Id.* at 6, 8–9.

53. *Id.* at 6–7; Marie Vento, *One Thousand Years of Chinese Footbinding: Its Origins, Popularity and Demise* (1998), http://academic.brooklyn.cuny.edu/core9/phalsall/studpages/vento.html (last visited Oct. 15, 2006).

54. Vento, *supra* note 53.

outcasts in Chinese society.[55] The erotic importance of the bound foot in early Chinese society led prostitutes, concubines, and transvestites to adopt the practice.[56] The lotus foot intertwined the real physical incapacitation of women with the symbolic view of women as powerless objects of men's sexual desires.[57] The bound foot also symbolized the need for women to suffer physically in order to attain dominant standards of physical beauty.[58]

The lower status view of tattoos continued and fell into further disrepute when they gained popularity amongst lower-status or "out groups," such as working-class men, prisoners, motorcycle gangs, and political protestors in the United States. During the 1920s–1950s, tattoo parlors became social centers for working-class men,[59] with tattoos becoming further identified with lower-status behavior,[60] especially given that tattoo parlors were usually located in the less-desirable urban neighborhoods.[61] Tattoos garnered some respectability during this time period, however, when the markings displayed symbols of jingoistic patriotism in the face of two World Wars.[62] That respectability was short-lived. After World War II, the push in United States society for middle-class values and conformity repositioned tattooing as base and undesirable lower-status behavior.[63]

The persistent connection between tattoos and lower social status also can be traced to the long history of tattooing as a punitive and involuntary practice that permanently marks the bearer as a social deviant.[64] The markings were intended to be punitive, a painful process that set an individual apart from respectable society with indelible symbols.[65] As a sign of resistance, many prisoners remade the tattoos into their own designs, thereby reclaiming individual control over the punitive marking of their bodies.[66] The popularity of tattoos still remains amongst prisoners today who voluntarily brand themselves

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55. SANDERS, *supra* note 1, at 6–7; Vento, *supra* note 53.

56. SANDERS, *supra* note 1, at 7.

57. *Id.* at 6; Vento, *supra* note 53.

58. SANDERS, *supra* note 1, at 6; Vento, *supra* note 53.

59. ATKINSON, *supra* note 1, at 36–38; SANDERS, *supra* note 1, at 19.

60. ATKINSON, *supra* note 1, at 36.

61. *Id.*; SANDERS, *supra* note 1, at 18–19.

62. ATKINSON, *supra* note 1, at 37.

63. *Id.* at 38, 41; SANDERS, *supra* note 1, at 18–19; Picchione, *supra* note 14, at 833. In summarizing the working class era, Prof. Sanders indicated that the middle-class negatively viewed tattoos "as a decorative cultural product dispensed by largely unskilled and unhygienic practitioners from dingy shops in urban slums." Customers of tattoo parlors were denigrated as being "drawn from marginal, rootless, and dangerously unconventional social groups" that were seen as direct challenges to the "law-abiding, hard-working, family-oriented, and stable" members of the middle class. SANDERS, *supra* note 1, at 18–19. Consequently, tattoos were viewed as vulgar and immoral, with "the art of tattooing . . . [being] left up to the lower class; so it is a degraded art . . . gross and vile like every despised art." Picchione, *supra* note 14, at 833 (alteration added).

64. In ancient Greece, Rome, England, France, and Japan, prisoners were branded with tattoos to mark them permanently as criminals and social deviants. *Id.* at 832; ATKINSON, *supra* note 1, at 38; SANDERS, *supra* note 1, at 11–12. It is interesting to note that the Greeks referred to criminal tattoos as "stigma," a term that often reflects western views of body modification practices. ATKINSON, *supra* note 1, at 38.

65. ATKINSON, *supra* note 1, at 39.

66. *Id.*

to indicate gang affiliations or to signify their contempt for the prison experience.[67]

Starting in the 1950s and 1960s, many motorcycle clubs or gangs, some members of whom had been imprisoned, also used tattoos to forge a group identity, their markings typically symbolizing rebellion against mainstream United States society.[68] During that era, other disaffected groups began to embrace the outlaw image of body art to communicate their opposition to dominant codes of conduct in the United States.[69] The image of body modification was further eroded by highly-questionable psychological and medical studies which painted those seeking tattoos as psychologically unstable.[70] These biased studies also made the then "scandalous" assertion that those providing tattoos were either latent or openly homosexual men who sought out the erotic use of phallic needles as well as the "almost constant close proximity to the male body, which they can feel, stroke, and fondle without arousing suspicion."[71]

There is a historical association between tattooing and social protest in other world cultures, with the United States anti-war fervor and social consciousness initiated in 1960s reflecting the traditional role of tattoos as signs of discontent with prevailing political and social controls.[72] During the Vietnam War era, those opposing the war marked themselves with peace signs or other emblems of the counter-culture movement, such as marijuana leaves, while those supporting the war sported patriotic tattoos.[73] During this period, dominant views of race, ethnicity, gender, and class were questioned and subverted, and those individuals seeking to free themselves from oppressive cultural norms often engaged in self-expression and self-exploration through body modification practices.[74]

Unlike the prevalent disdain in mainstream United States society, many ancient and contemporary world cultures view body art and modification as constructive and beneficial social practices. In these other cultures, tattoos and piercings are envisioned as positive symbols that exhibit group identity and define an individual's place in a group's social hierarchy.[75] Oftentimes, the body

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67. ATKINSON, *supra* note 1, at 39.

68. *Id.* at 39–40. *See also generally* Ciafrei v. Bentsen, 877 F. Supp. 788 (D.R.I. 1994) (although dismissed based on sovereign immunity grounds, plaintiff asserted gender discrimination and harassment which included disparaging remarks such as referring to plaintiff as "Big Harley Mama with tattoos all over her body").

69. *Id.* at 41.

70. SANDERS, *supra* note 1, at 36–38. Many early psychological studies lacked proper methodology with researchers, who had low regard for these practices, studying body modification amongst patients in mental institutions and then concluding that such behavior is deviant. *Id.* at 37.

71. *Id.* at 38–39.

72. *Id.* at 42–43; Picchione, *supra* note 14, at 833. The notion of tattoos as social protest dates back to ancient Greek history. SANDERS, *supra* note 1, at 42–43; Picchione, *supra* note 14, at 833.

73. Picchione, *supra* note 14, at 833.

74. ATKINSON, *supra* note 1, at 42–43.

75. For example, in the Maori culture of New Zealand and the Dayaks of Borneo, both men and women were tattooed, with the most heavily-tattooed members being those with high social rank within the tribe. ATKINSON, *supra* note 1, at 51–52; SANDERS, *supra* note 1, at 10–11. Subsequently,

modification process also signaled a rite of passage into adulthood and full membership into a tribe.[76] In many tribal cultures, those becoming adults underwent arduous tattoo rituals, as the display of one's tattoos signified an individual's courage and endurance in undertaking the painful process. Tattoos became a source of personal and family pride as well as group identity.[77] Whether intended as recognition of one's social status or a rite of passage, body modification was considered normative, not deviant, behavior in these tribal cultures.[78]

Drawing on notions of courage and stoicism in the face of the physical pain associated with body modification, warrior or military groups during many historical periods have used tattoos as symbols of heroism, bravery, and patriotism.[79] Body art has reemerged numerous times throughout military history,[80] including as a staple practice among United States soldiers and sailors beginning in the Civil War era.[81] Subsequently, military personnel have often used tattoos to identify their affiliations with a particular branch of the armed forces or, similar to earlier tribal cultures, to prove their masculinity in handling the painful process.

Body modification has also been traditionally linked to sacred or religious devotion, with the wearer often seeking the protection of spiritual forces in this life and the afterlife.[82] Tattoos were also often thought to be sacred talismans of

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Danish nobility tattooed their family crests on their arms as a display of their lineage. Picchione, *supra* note 14, at 831.

76. ATKINSON, *supra* note 1, at 51–53; SANDERS, *supra* note 1, at 10–11. The Tchikrin culture of central Brazil, for example, pierced the ears of all children at birth and the lips of the males, replacing the latter in adulthood with more elaborate lip and penis piercings. SANDERS, *supra* note 1, at 8.

77. ATKINSON, *supra* note 1, at 52–53.

78. ATKINSON, *supra* note 1, at 52–53; SANDERS, *supra* note 1, at 6. Prof. Sanders noted that "[p]ermanent body alteration and non-permanent corporeal adornment in both tribal and modern cultures share the rigorous social support of the bearer's significant reference group." SANDERS, *supra* note 1, at 6.

79. SANDERS, *supra* note 1, at 13–14; ATKINSON, *supra* note 1, at 30, 36; Picchione, *supra* note 14, at 832–33. Pre-dating the Roman Empire, the tribes of the British Isles used tattoos to offer a more fearsome appearance to potential attackers. SANDERS, *supra* note 1, at 13; ATKINSON, *supra* note 1, at 30. Roman soldiers who fought the early Britons took on the practice of tattoos until in the third century Emperor Constantine banned tattoos as violating God's creation. SANDERS, *supra* note 1, at 13. *See* Christine Braunberger, *Sutures of Ink: National (Dis)Identification and the Seaman's Tattoo*, 31 GENDERS (2000), http://www.genders.org/g31/g31_braunberger.html (charting the history of the seaman's tattoo, arguing that it represented both conformity to and transgression of militaristic codes. As the seaman's tattoo represented the performance of masculinity, it also suggested and anxiety about masculinity as a natural category. *Id.* By having to mark themselves to signify their masculinity, the men are admitting that their "maleness" is not readily apparent to the casual observer. *Id.*

80. SANDERS, *supra* note 1, at 13–15; ATKINSON, *supra* note 1, at 36–37; Picchione, *supra* note 14, at 832.

81. Picchione, *supra* note 14, at 832. At the turn of the twentieth century, it was estimated that approximately ninety-five percent of the United States infantry and ninety percent of sailors on United States battleships possessed tattoos. *Id.*

82. ATKINSON, *supra* note 1, at 30; SANDERS, *supra* note 1, at 6, 11. The Aztecs and the Mayans pierced their ears to repel demons and their tongues to enhance communication with the gods. Chilingerian, *supra* note 8. Incan, Aztec, and Mayan mummies dating from the first century C.E.

good luck and integral to preserving one's health, safety, youth, and attractiveness to potential mates.[83] Even today, facial and hand tattooing is still common amongst nomadic Yemeni women to protect against diseases and to promote fertility.[84]

Seizing on the positive connotations of these practices in tribal cultures, women turned, in the battle over identity politics in Western cultures, to tattoos and other forms of body modification to oppose dominant negative conceptions of women as frail and powerless.[85] Examining extensive sociological research, Prof. Atkinson contends the following:

> Stressing the emancipatory nature of the tattoo, women highlighted how tattoos might be used as a means of permanently redesigning identity in a culture. The tattooed female form (outside of the highly sexualized, male-oriented circus show) articulated a voyage of empowerment and self-reclamation precisely because the tattoo was a pre-existing signifier of masculine deviance. . . . Like a pebble dropped in the middle of a placid pond, women's involvement in the practice stirred ripples across the entire tattoo figuration. Indeed, women challenged but similarly breached the integrity of cultural associations between the tattoo and the working class male, the criminal, the sailor, the circus performer, the gang member and the biker.[86]

Contravening the social constructions of lower class status and male deviance in the United States, middle-class suburban females are the fastest-growing demographic for tattoos today.[87] It is unclear whether this trend is precipitated by the desire for gendered emancipation or merely represents an overall need for greater self-exploration and self-expression, not limited to gender identity.[88] Yet, even if women use body modification practices solely as

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show that tattooing was also a common practice in those societies. SANDERS, *supra* note 1, at 10. In the cultures of Fiji and Borneo, women wore tattoos to ensure immortality through a pleasant afterlife. *Id.* at 11. Fijian women believed that if they died without tattoos they would be beaten in the afterlife by other women and fed to the gods. *Id.* In Borneo, tribal women believed that, the more extensive their tattoos, the better tasks they would be assigned in the afterlife, such as collecting pearls from a heavenly river. *Id.* Those females without tattoos would be excluded from the afterlife. *Id.* Prior to and during the Crusades, Europeans used tattoos with religious imagery—i.e., crucifixes—to identify their religious affiliation and desires for a Christian burial should they die in battle. *Id.* at 13–14; ATKINSON, *supra* note 1, at 30. Prior to the Crusades, the Catholic Church, since the time of the Emperor Constantine in the third century, had intermittently banned tattoos as signs of the devil and as desecrations of God's corporeal handiwork. SANDERS, *supra* note 1, at 13. Some Christians remain hostile to tattoos and piercings as contravening the Old Testament admonition against cuttings and markings of the flesh. *See Leviticus* 19:28 (King James) ("Ye shall not make any cuttings in your flesh for the dead, nor print any marks upon you: I am the LORD."). *See infra* notes 160–94 and accompanying text.

83. SANDERS, *supra* note 1, at 3, 6; ATKINSON, *supra* note 1, at 32. One of the earliest indications of sacred tattoos was excavated in the mummified body of an Egyptian priestess of Hathor, dated about 2000 B.C.E., with line markings on her stomach for medicinal and fertility purposes. SANDERS, *supra* note 1, at 9.

84. *Id.* at 11.

85. *Id.* at 16, 43. *See supra* notes 46–58 and accompanying text.

86. SANDERS, *supra* note 1, at 43.

87. Picchione, *supra* note 14, at 833.

88. *See* ATKINSON, *supra* note 1, at 47–48 (asserting that current era focuses on self-expression and exploration rather than gendered identity politics); SANDERS, *supra* note 1, at 41–43 (contending

opportunities for further self-exploration and expression, untethered from gendered identity politics, such practices have an important value in the overall struggle of women to control their own bodies and determine their own choices in a society that often seeks to limit their options for self-determination.[89] As body modification practices move toward more diverse audiences, it is unclear whether this trend will ultimately result in broader social acceptance or slip back into disrepute in the United States.[90]

Disturbingly, women have also become the main consumers of more dramatic forms of body modification, involving a host of elective plastic or cosmetic surgeries.[91] In some instances, women may undertake these elective procedures as part of a desire for control over their own bodies and self-exploration with alternative selves,[92] but this conduct is often aimed at appealing to dominant male views of physical beauty.[93] Rather than being emancipatory or challenging the status quo, these surgeries may often reinforce either the historical subjugation of women as merely sexual or gaze objects—like tattooed

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that those seeking tattoos strive to define themselves with tattoos as part of their "personal identity kit").

89. *See* ATKINSON, *supra* note 1, at 16–17, 42–43; David Cruz, *Pursuing Equal Justice in the West: Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L.J. 240, 250 (2004) (criticizing those who overemphasize false dichotomy of individual autonomy over inequality and subordination in discriminatory workplace dress codes; suggesting that liberty and equality are complementary goals).

90. *See* ATKINSON, *supra* note 1, at 57. Quoting Canadian commentator John Gray, Prof. Atkinson suggests we heed Gray's warning against reading too much into the recent popularity of body modification practices, especially tattooing: "[A]ccording to the media, tattooing is about to go permanently mainstream. Don't believe it. Rumours of imminent respectability have been chasing the tattoo for a century." *Id.*

91. Women account for over ninety-one percent of cosmetic procedures with men trailing behind at a mere nine percent. *Id.* However, a 2005 survey of women and men indicated that they overall approve of cosmetic surgery, fifty-five percent and fifty-two percent, respectively, responding positively. Cosmetic Surgery National Data Bank, *supra* note 3, at 16. Furthermore, women (eighty-two percent) and men (seventy percent) indicated that they would not be embarrassed if people outside of their circle of family and close friends knew about their cosmetic surgery. *Id. See supra* notes 1, 3 and accompanying text. In the United States, reality TV provides evidence for this point, as the willing participants do not mind having the large TV audience witness their surgical transformation. *See supra* note 4 and accompanying text.

92. ATKINSON, *supra* note 1, at 16–17. *See also* Kathryn Morgan, *Women and the Knife: Cosmetic Surgery and the Colonization of Women's Bodies*, 6 HYPATIA 51–52 (1991) (noting that plastic surgery is only a choice for those with financial means). Morgan implies that conformity to normative body assumptions is sometimes class-inflected, and hence is not always a "choice" open to everyone. *Id. See supra* note 7 and accompanying text.

93. Morgan, *supra* note 92, at 51–52; Anne Balsamo, TECHNOLOGIES OF THE GENDERED BODY: READING CYBORG WOMEN 78 (1996) (contending that women are pressured to turn their bodies into remodeling projects and to transform their bodies to comply with traditional notions of femininity); Suzanne Fraser, COSMETIC SURGERY, GENDER, AND CULTURE 23 (2003) (examining the role of plastic surgery in producing the "properly" gendered body); SANDERS, *supra* note 1, at 7. In analyzing feminist sociological research, Prof. Atkinson indicates that conduct such as excessive dieting and breast augmentation "are best viewed as exaggerated or caricatured expressions of dominant ideals of the female body . . . and existing relations of power in excess." ATKINSON, *supra* note 1, at 16. Prof. Sanders also notes that individuals most often engage in plastic surgery either to meet a socially-approved range of physical beauty or to distance themselves from identification with lower status ethnic groups, or both. SANDERS, *supra* note 1, at 7.

women in carnival sideshows—or the notion that women must suffer physically in order to attain dominant standards of physical beauty—similar to earlier foot-binding practices in China. In these instances, female body modification is viewed as socially acceptable conduct because it complies with dominant ideals of female beauty and perpetuates the existing power relations in society.[94] While United States society may support body modification practices for women that conform to dominant standards of female beauty, females displaying their piercings and tattoos certainly do not receive the same level of social approval; their body modifications are often categorized as masculine signifiers and consequently, as a deviance from their expected gender roles.

II. SOCIAL CONSTRUCTIONS OF PROTECTED CLASSES AND BODY ART WORK RULES

Although body modification typically serves decorative functions,[95] these practices also historically play important roles in the identity politics of race, ethnicity, and gender.[96] Clearly, many employers view body modification as a voluntary act that subverts the status quo, leading to the adoption of restrictive body art work rules. Challenges to these rules have become intertwined with issues of race, ethnicity, religion, and gender. In these cases, the courts have wrestled with traditional anti-discrimination jurisprudence about whether or not to safeguard only immutable or natural traits (status) or broaden protections to mutable or voluntary characteristics (conduct). Within this context, courts struggle with the application of same or different treatment in either upholding the status quo or allowing anti-discrimination law to challenge it. Some of the earlier stereotypes concerning body modification discussed in Part I reemerge when these disputes become interwoven with social constructions of protected classes.[97]

A. Rejecting Racial and Ethnic Performance in Body Art Work Rules Cases

In dress and grooming disputes involving race and ethnicity, courts have been largely unwilling to allow employees to perform their racial and cultural identities through voluntary choices (conduct) in grooming and dress, unless the conduct can be attached to some biological or immutable trait (status).[98] For example, courts have routinely upheld employer grooming codes that ban all-braided hairstyles as expressions of racial or cultural identity deferring to the employer's contention that this style does not project a professional or

94. *See supra* note 93 and accompanying text.

95. *See* SANDERS, *supra* note 1, at 6; Picchione, *supra* note 14, at 832.

96. *See* SANDERS, *supra* note 1, at 6; ATKINSON, *supra* note 1, at 42–43. In sociological terms, "identity politics' involves "the process of aligning oneself with others who intersubjectively share feelings of marginality and oppression." *Id.* In the contemporary world, Prof. Atkinson contends that the body has become "a popular billboard for 'doing' identity politics" grounded in issues of race, gender, and sexuality. *Id.* at 42. For these groups, the body is a basis for "cultural exploration [for] those ultimately committed to challenging dominant social codes found in the body a highly political means of expressing and recreating identity." *Id.*

97. *See infra* Parts II.A–C.

98. Engle, *supra* note 18, at 323, 329–30; Rich, *supra* note 18, at 1138–40; Yuracko, *supra* note 18, at 65.

"business-like" image.[99] Without assessing underlying stereotypes, courts in these cases have declared that employer grooming codes are neutral since they are being applied equally to all races and sexes.[100] However, courts have remarked that efforts to ban "natural" hairstyles, such as an Afro would be impermissible discrimination since these traits are natural and not volitional.[101] Therefore, unless a "natural" hairstyle or morphological marker is at issue, courts reject employees' desires to perform their racial or ethnic identities as merely personal preferences that are not safeguarded under anti-discrimination law.[102]

Issues of racial and ethnic performative acts have been raised in cases questioning employer body art work rules. In both cases that follow, the employees are associating piercings and tattoos with tribal identity or membership; in one instance, Mayan, and the second, Celtic. As indicated in Part I, body modification has positive connotations in many tribal cultures, emphasizing tribal membership and identity.[103] Both cases involve employees who are properly performing their jobs, but are nonetheless punished for their body modification, which the employers view as lower-status behaviors.[104]

In *Motion Picture and Television Fund*,[105] an arbitrator considered an employee's claim that her employer's body modification rules violated Title VII as to national origin. The employee, a PBX operator who also served from time to time as a receptionist with public contact, was of Mexican descent with roots

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99. Engle, *supra* note 18, at 329–30; Rich, *supra* note 18, at 1136–39; Yuracko, *supra* note 18, at 62, 65. *See* McBride v. Lawstaf, No. 1:96-CV-0196-CC, 1996 WL 755779, at *1 (N.D. Ga. 1996) (upholding employment agency ban on braided hairstyle as not race discrimination); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (finding no racial discrimination on braided hairstyle ban, because that style was artificial and not a product of natural hair growth, as found with "Afro/bush style"); Carswell v. Peachford Hosp., 27 Fair Empl. Prac. Cas. (BNA) 698, 700 n.2 (N.D. Ga. 1981) (upholding workplace ban on beaded hair against claim of race discrimination contrasted with natural afro or braided styles).

100. Engle, *supra* note 18, at 320, 327, 332–35; Rich, *supra* note 18, at 1194–96; Yuracko, *supra* note 18, at 61–64.

101. Engle, *supra* note 18, at 329–30; Rich, *supra* note 18, at 1136–39.

102. Engle, *supra* note 18, at 335; Klare, *supra* note 18, at 1400–01; Rich, *supra* note 18, at 1224–25. Prof. Klare argues that there is a disconnect in judicial decisions between employee choices in dress and grooming being viewed as trivial as contrasted with employer prerogatives to regulate dress and grooming as critical. He notes that judicial decisions become "eerily apocalyptic when judges get to the part of their opinion where they uphold, as they usually do, the power of employers, school administrators, and others to visit severe penalties on people who wear nonconforming dress or hairstyles." He adds that civilization will not fall to pieces merely because a man might wear long hair or a woman might wear a pair of pants. He concludes that "judges create a peculiar dissonance by trivializing appearance claims while at the same time asserting the need for the authorities to possess vast powers to enforce conventional attitudes and prejudices." Klare, *supra* note 18, at 1400–01.

103. *See supra* notes 75–84 and accompanying text.

104. *See supra* notes 39–74 and accompanying text.

105. 103 Lab. Arb. 992 (1994) (Gentile, Arb.), *cited in* Carey R. Butsavage, *Application of "External Law" to Contractual Arbitration, A Survey of Recent Cases* 9–10, 2001 ABA SEC. LAB. & EMP. L., http://www.bna.com/bnabooks/ababna/eeo/2001/butsav.doc (last visited Nov. 22, 2006). *See also* Sam's Club, Inc. v. Madison EEOC, 668 N.W.2d 562 (Wis. App. 2003) (upholding employer's prohibition of nose rings for all employees based on company's conservative image against claim of appearance discrimination under state anti-discrimination law).

that could be traced to the Mayan culture. She wore a small silver nose ring as an expression of her Mexican culture—Stingray Spine Paddler, a Mayan god, also traditionally wore such a piercing. The employer claimed that her facial piercing violated the company dress code and sought to bar her from wearing the piercing, claiming it was "inappropriate" for the workplace. In addition, the employer made repeated demands that she provide evidence of the historical and cultural symbolism of her piercing. There was no claim that the employee was deficient in performing any of her job tasks, only concerns about her performing her national origin identity.[106]

She complained that the grooming policy was national origin discrimination and included a claim of ethnic harassment based upon the employer's treatment of her regarding the cultural value of her piercing.[107] Relying on prior case precedent, the arbitrator stated that Title VII "does not protect the ability of workers to express their cultural heritage at the workplace."[108] Based on grooming cases concerning racial performative acts, the arbitrator also asserted that Title VII "is concerned only with disparities in the treatment of workers; it does not confer substantive privileges."[109] In addition, the arbitrator found that the employer's conduct did not amount to harassment.[110]

In *Riggs v. City of Fort Worth*,[111] a bicycle police officer, a white male of Celtic descent, challenged, based on gender, race, and national origin (as well as a violation of his First Amendment rights), his employer's efforts to require him to cover up his tattoos[112] with long sleeves and pant legs.[113] At the time of his action, the city had no policy banning tattoos and the employee had been successfully performing his job as a bicycle patrol officer in short pants and shirt sleeves.[114] Originally, the department had no issue with the officer's tattoos, but things

106. 103 Lab. Arb. at 992, *cited in* Butsavage, *supra* note 105. *See supra* notes 75–84 and accompanying text.

107. 103 Lab. Arb. at 992.

108. *Id.*

109. *Id.* at 992 (quoting Garcia v. Spun Steak Co., 998 F.2d 1480, 1487 (9th Cir. 1993)). The arbitrator cited cases that found that racial performative acts are not protected under Title VII. The arbitrator also cited *Brown v. D.C. Transit System, Inc.*, 523 F.2d 725 (D.C. Cir. 1975) (upholding discharge of male employees who refused to comply with facial hair policy, which they viewed as an "extreme and gross suppression of them as black men and a badge of slavery") and *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981) (finding that ban on all-braided hairstyles was not race discrimination, despite employee contentions of African-American cultural and historical identification).

110. 103 Lab. Arb. at 992.

111. 229 F. Supp. 2d 572 (N.D. Tex. 2002).

112. *Id.* at 574–75. Riggs's tattoos included Celtic tribal symbols from wrist to shoulder on both arms, his wife's name on his right arm, a mermaid from knee to his waist, his family crest on his chest, the Cartoon character Jessica Rabbit on his forearm, and a two-foot by two-foot full-color illustration of St. Michael slaying Satan on his back. *Id.* at 577.

113. *Id.* at 577, 581. In *Riggs*, it is interesting to note that the plaintiff did not claim religious discrimination for the employer's grooming policy, perhaps because the religious tattoo—St. Michael slaying Satan—was already covered on his back regardless of shirt-sleeve length. *Id.* at 578.

114. *Id.* at 574, 577.

changed when the officer had properly towed an illegally-parked car that turned out to be the mayor's vehicle.[115]

About a month after the towing incident, the plaintiff received a letter from the chief requiring him to wear long sleeve shirts and pants to cover his tattoos, which were now viewed as detracting "from the professionalism of a Fort Worth police officer."[116] Complying with this new-found concern, he wore long-sleeved shirts and long pants and three times suffered from heat exhaustion.[117] His physician ordered that he not wear long sleeves in temperatures over ninety degrees.[118] While assigned to desk duty, he claimed that the chief told him he would never be allowed off desk duty or promoted because of his tattoos.[119] He was transferred off the bike unit, which he believed was a form of demotion; he asserted that later promotional opportunities were denied him because of his tattoos.[120]

The officer supplied the court with a list of fifteen other police officers with their sexes, races, and the locations of their tattoos.[121] These other officers had not been required to cover their tattoos, and the plaintiff claimed gender, race, and national origin discrimination.[122] Even though the unwritten policy was not applied to other officers, the court determined that the plaintiff had failed to show that the chief had intentionally discriminated against him based on any protected classes.[123]

Regarding his First Amendment rights, the plaintiff has asserted that his "tattoo of Celtic tribal design is an expression of his heritage and a statement of his ethnicity."[124] He also contended that his other tattoos are protected forms of "artistic expression."[125] The court found that tattoos, in general, are not protected speech under the First Amendment.[126] Even if tattoos could be classified as protected speech, the court stated that, as a public employee, his speech must address a matter of "legitimate public concern" to receive First Amendment protection.[127] Using the language of preference, the court concluded that his tattoos were merely "a way for him to express his personal views and beliefs and are not speech addressing a 'legitimate public concern,' as might be the case if the tattoos were to state, for example, some political message."[128] Therefore, the court concluded that the plaintiff had not shown that he had been

115. *Id.* at 574. At that time, his superiors told him "that he had done nothing wrong." *Id.*

116. *Id.* at 575.

117. *Id.* at 575.

118. *Id.*

119. *Id.*

120. *Id.* Along with his other claims, the plaintiff indicated that the chief had sought to retaliate against him through the bans on his tattoos because of the towing of the mayor's car. *Id.* at 580.

121. *Id.* at 579.

122. *Id.*

123. *Id.* at 579.

124. *Id.* at 581.

125. *Id.*

126. *Id.* at 580–81.

127. *Id.*

128. *Id.* at 581.

unlawfully discriminated against "because of the massive number of tattoos on his body."[129]

Unwritten rules about covering tattoos became operative to punish a bike officer who upset a powerful politician, and a nose ring became problematic because of the employee's intermittent public contact. In both cases, the employees were adequately performing their job responsibilities. Despite these employees' proper job performance, the employers blocked their respective forms of body modification, denigrating their piercings and tattoos as "inappropriate" and lacking in "professionalism," based on dominant group views of appearance. In each case, the courts largely dismissed the employee concerns under the rhetoric of preference, used in other cases involving ethnic and racial performative acts that conflict with dominant group grooming and dress codes.[130]

Legal commentators have long criticized restrictive judicial interpretations that consider race and national origin only through the lens of claimed biological or immutable traits, such as racial or ethnic morphology and geography.[131] Past court reliance on "natural" morphology or visible physical features to determine race or ethnicity is both confusing and inaccurate as to one's race and ethnicity,[132] while geography is under inclusive in protecting ethnicity.[133] Legal analysts contest the emphasis on purported natural or immutable traits for race and national origin, asserting that these classifications need to be considered in the broader context of social constructions.[134]

Prof. Camille Gear Rich contends that racial and ethnic identity "can only be claimed through speech, acts and behaviors—'performative acts,'" because "physicality is not entirely determinative" of race and ethnicity.[135] Prof. Rich and other legal theorists call upon courts to protect racial and ethnic performative acts, such as hairstyles, dialect, language, and accent, to help prevent employers

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129. *Id.* at 583.

130. *See supra* notes 98–102 and accompanying text.

131. Engle, *supra* note 18, at 323, 328; Klare, *supra* note 18, at 1412–14; Rich, *supra* note 18, at 1136–43.

132. Franke, *supra* note 5, at 26–29; Rich, *supra* note 18, at 1176–78. Prof. Rich noted that race and ethnic morphological markers are not "objective" and "unchanging," and that through life experience one comes to recognize the limits and inconsistencies of morphology. Further, an individual will see that other ethnic and racial groups share similar traits. Collectively, these experiences counsel that there are no definitive morphological markers for a particular race or ethnicity. Rich, *supra* note 18, at 1146–47. Prof. Rich reviews cases in which courts struggled to apply the morphological marker of white skin to determine race; finding a Chinese man white in one case and a Syrian man non-white in another. In another case, the light skin of multiracial slave was viewed as insufficient to find white identity when coupled with "a flat nose and woolly head of hair." *Id.* at 1152–54. Similarly, Prof. Franke considers cases in which a Chinese female was considered "colored" and Mexican males were declared white, as showing the inadequacy of morphological markers and the view that race is a natural, rather than a political, category. Franke, *supra* note 5, at 27–28.

133. Engle, *supra* note 18, at 323, 329.

134. Engle, *supra* note 18, at 323, 329; Franke, *supra* note 5, at 28–29; Rich, *supra* note 18, at 1176–78.

135. Rich, *supra* note 18, at 1176–78.

from discriminating by proxy.[136] The performative approach to race and national origin has been criticized because of the difficulties in determining group-identifying traits,[137] as well as the potential dangers of judicial determination and protection of socially-coded racial and ethnic behavior which can both establish and reinforce stereotypical views of race and ethnicity.[138]

Furthermore, cases on racial and ethnic performance in the workplace indicate that allowing employees to express their racial or ethnic identities is viewed as some kind of preference under Title VII, and thus rejected discrimination claims based on identity performance as attempts to improperly grant "substantive privileges" to protected classes.[139] This approach flips the plaintiffs' desires to express their racial or ethnic backgrounds into a demand for preferential treatment. This perspective fails to recognize that (1) employer dress and grooming codes are already privileging dominant white groups,[140] and (2) racial and ethnic minorities are only seeking the equal opportunity to express their own views on acceptable appearance.[141] Without examining the social constructs that inform the grooming policies, the courts thus allow an employer's claimed neutral application of their code to provide legal cover for discrimination against minority groups and those who participate in "out group" behaviors in the workplace.[142]

The individual employee's desire to perform her racial or ethnic identity is therefore reducible to a mere personal preference rather than being properly understood as part of broader "cultural contests" in our society.[143] Therefore,

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136. Engle, *supra* note 18, at 329–33, 353; Rich, *supra* note 18, at 1192–96. *See* Yuracko, *supra* note 18, at 61–64 (discussing various theorists who support the notion that performative racial and ethnic acts would be protected under Title VII).

137. Rich, *supra* note 18, at 1167; Yuracko, *supra* note 18, at 71.

138. Rich, *supra* note 18, at 1167, 1238–29; Yuracko, *supra* note 18, at 72–73.

139. *See, e.g.*, Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980) (upholding English-only rule against claims of national-origin discrimination, as Title VII does not grant substantive privileges to express ethnic identity), *cert. denied*, 449 U.S. 1113 (1981); Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (relying on *Gloor*, the court upheld English-only rule despite employee claims that the rule barred the performance of their cultural heritage and reinforced a workplace environment "of inferiority, isolation, and intimidation"). *See supra* notes 99–102 and accompanying text.

140. *See infra* notes 293–300, 341–44 and accompanying text.

141. *See* Rich *supra* note 18, at 1181–82. Prof. Rich states that racial and ethnic performance of identity provides people "with a sense of agency. There is no 'self' before one attempts to assert one's existence seizing the identity categories offered by language." *Id.* at 1181. *See infra* notes 153, 305 and accompanying text.

142. Engle, *supra* note 18, at 329–30; Rich, *supra* note 18, at 1194–96; Yuracko, *supra* note 18, at 63. Courts, grounded in their own racial and ethnic biases, often fail to recognize that these "neutral" employer grooming codes are products of dominant white culture. Engle, *supra* note 18, at 339. Based on inaccurate assumptions about "cultural universality and neutrality," Prof. Engle contends that "American institutions reflect dominant racial and ethnic characteristics, with the consequence that race reform has proceeded on the basis of integration into 'white' cultural practices—practices that many whites mistake as racially neutral." Unfortunately, she indicates that even organizations that strive for greater neutrality end up producing "only bland institutional forms whose antiseptic attempts at universalism have ensured the alienation of anyone with any cultural identity at all." Engle, *supra* note 18, at 339. *See infra* notes 293–310, 341–44 and accompanying text.

143. Rich, *supra* note 18, at 1225. In racial and ethnic performance cases, Prof. Rich states that courts have diminished these disputes into "individual squabbles between employer and employee instead of symbolic cultural contests." By concentrating on the individual's claims, the courts fail to

employees who seek to exhibit their racial or cultural affinities are left unprotected, their choices diminished as unimportant preferences. Even though the employee is successfully performing her job, she can be discharged for attempting to perform her racial or ethnic identity, often in workplace environments that outwardly extol the virtues of diversity.[144]

B. Limited Accommodation of Religious Performance in Body Art Work Rules Cases

Religious discrimination is the only area where Title VII explicitly recognizes an individual's need to perform her identity. The language of Title VII requires employers to make a reasonable accommodation for religious garb and appearance in the workplace,[145] illustrating that dress and grooming codes need not be impenetrable employer prerogatives. In theory, the broad language of this accommodation requirement allows for greater religious performance in the workplace, but in practice, courts have deliberately blunted the statutory limitation as to "undue hardship" for the employer.[146] The Supreme Court has severely limited the religious accommodation provision by holding that nothing more than a "de minimis" cost to the employer is required to trigger the undue hardship exception.[147] The Supreme Court subsequently further eased demands on employers as to reasonable accommodation,[148] finding that employers could choose any reasonable accommodation without having to select the employee's requested accommodation, even if the employee's proposal did not create an undue hardship.[149] While religious accommodation cases undermine the judicial

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recognize the broader "repercussions for entire classes of workers, resulting in decreased opportunities for those who find it hard to abandon these behaviors and exacting a high dignitary cost on those who are compelled to give them up." *Id.*

144. Prof. Rich contends that employers do not like employee displays of ethic or racial identities because they view such traits as associated with low status groups, raising fears about the potential for outward minority displays to challenge or disrupt the dominant group's hegemony in the workplace. Rich, *supra* note 18, at 1141–42, 1160–61. *See* McGlothin v. Jackson Mun. Separate Sch. Dist., 829 F. Supp. 853 (S.D. Miss. 1992) (dismissing racial-discrimination claim based on school policy banning a teacher's aide from wearing Rastafarian dreadlocks and African head wraps, despite school's adoption of diversity policies and programs in wake of Black History month).

145. 42 U.S.C. § 2000e(j) (2000). Under the 1972 amendment to Title VII, the "term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." *Id. See* Engle, *supra* note 18, at 323, 357–62 (discussing tensions between anti-discrimination law's emphasis on neutrality and Title VII language requiring reasonable accommodation or preferences for religious practices and observances). *See supra* note 22 and accompanying text.

146. 42 U.S.C. § 2000e(j).

147. Trans-World Airlines v. Hardison, 432 U.S. 63, 84 (1977).

148. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986). *See* Engle, *supra* note 18, at 391–92; Susannah P. Mroz, *NOTE: True Believers?: Problems of Definition in Title VII Religious Discrimination Jurisprudence*, 39 IND. L. REV. 145, 149–50 (offering a superb review of the struggle to define religion in relation to Title VII employment discrimination claims).

149. 479 U.S. at 68–69. The Court indicated that the employer's offer of unpaid leave for religious observances was a reasonable accommodation, even though this accommodation had been tried and then rejected by the plaintiff as unsatisfactory. *Id.* at 64–65, 70.

assumption that employers cannot provide reasonable opportunities for performative dress and grooming in the workplace, the courts have thwarted these efforts through their narrow interpretations of these Title VII provisions.

Because the courts perceive religion to be a voluntary choice, courts have struggled with whether to view the religious accommodation requirement as protecting immutable characteristics versus safeguarding mutable or voluntary choices.[150] To bridge this divide, courts often view the established requirements of a religious practice as similar to immutable characteristics, while an individual's interpretations of her religious duties are viewed as volitional choices or personal preferences not worthy of protection.[151] Despite Title VII's language, and in light of the fundamental First Amendment rights at issue, employees still find themselves regularly challenging employer dress and grooming codes in hopes of obtaining reasonable accommodations,[152] especially when minority religions are involved.[153] Employees often lose these cases under

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150. Engle, *supra* note 18, at 343. *See generally id.* (providing an excellent analysis of development of religious discrimination in employment and the often contradictory judicial review of such claims); Mroz, *supra* note 148 (providing a superb review of struggle to define religion in relation to Title VII employment discrimination claims).

151. *See* Engle, *supra* note 18, at 323, 357–62, 373 (discussing tensions between anti-discrimination law's emphasis on neutrality and Title VII language requiring reasonable accommodation or preferences for religious practices and observances).

In discussing the split in courts over religious mandates versus personal preference, Prof. Engle stated:

> In particular, the courts that . . . deployed the institutional religion-personal preference distinction to refuse to protect belief and observance that was not decreed by the church (compelled) but was seen as merely a matter of personal preference (volitional). Thus, the institutional religion requirement functioned in the same way as the immutability requirement in the race, national origin, and sex cases: it defined what courts considered volitional out of the protected category. . . . [T]he courts assume that, once one becomes a member of an organized religion, conduct is dictated by the church. To the extent that the claimed religious conduct is seen to represent only a preference, it is not beyond the individual's control, and is therefore not protected by the statute.

Engle, *supra* note 18, at 373–74.

152. *See, e.g.*, Flowers v. Columbia Coll. Chi., 397 F.3d 532 (7th Cir. 2005) (finding that allowing Rastafarian to wear a khofi religious head wrap over dreadlocks did not create undue hardship for college); Booth v. Maryland, 327 F.3d 377 (4th Cir. 2003) (finding religion discrimination where employer refused reasonable accommodation for correctional officer's Rastafarian dreadlocks despite other religious exemptions for Jewish and Sikh employees); EEOC v. United Parcel Serv., 94 F.3d 314 (7th Cir. 1996) (determining that offering Muslim employee with beard another similar position without public contact was not reasonable accommodation); EEOC v. Red Robin Gourmet Burgers, Inc., No. C04-1291JLR, 2005 WL 2090677, at *1 (W.D. Wash. Aug 29, 2005) (finding that employer had failed to provide sufficient evidence of undue hardship in accommodating employee's religious tattoos); Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000) (finding that public employer had failed to use least restrictive means when it failed to permit Native American correctional officer to pin up hair rather than cut it); DeVeaux v. Philadelphia, 75 Pa. D. & C.4th 315 (2005) (granting preliminary injunction finding that city had failed to show no-beard policy for firefighters enforced against Muslim increased job safety), *available at* 2005 WL 1869666, at *1.

153. Klare, *supra* note 18, at 1404–12 (discussing how appearance law favors mainstream white Christianity over minority religions with distinct and visible dress or grooming practices); Mroz, *supra* note 148, at 172 (discussing view that courts struggle with proper recognition of "less traditional belief systems"). *See* Goldman v. Weinberger, 475 U.S. 503, 521 (1986) (Marshall, J., dissenting). Justice Marshall stated:

the undue hardship exception when faced with their employers' claims that the accommodation compromises workplace safety,[154] disrupts workplace homogeny,[155] or harms the company's professional image,[156] or that the accommodation would merely serve the employee's preference in observing her religious beliefs.[157] Regardless of the accommodationist language of Title VII, courts sometimes find undue hardship solely on the basis that requiring any exemption to the dress and grooming codes would not be neutral and might provide an unfair preference to employees seeking accommodations.[158] It is clear that despite the accommodationist provisions of Title VII, employers are quite resistant to religious performance as to dress and grooming, and not just racial and ethnic performative acts in the workplace.[159]

Two recent and similar cases on body modification rules in employment re-emphasize the confusion among judges as to whether or not to protect religious performative acts. Both cases concern employees who were once again properly

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> I am also perplexed by the related notion that for purposes of constitutional analysis religious faiths may be divided into two categories—those with visible dress and grooming requirements and those without. . . . The practical effect of this categorization is that, under the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths. This dual category analysis is fundamentally flawed . . . .

Id.

154. *See, e.g.*, Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382 (9th Cir. 1984) (affirming summary judgment for employer who required Sikh employee to be clean-shaven to insure gas-tight face seal for respirator for protection against potential exposure to toxic gases); EEOC v. Heil-Quaker Corp., No. 1-88-0439, 1990 WL 58543, at *1 (M.D. Tenn. Jan. 31, 1990) (holding that a Muslim woman's long skirt was a safety hazard in manufacturing environment).

155. *See, e.g.*, *Goldman*, 475 U.S. at 521 (upholding Air Force grooming policy against request by Orthodox Jew to wear yarmulke indoors as disruptive of military discipline); Wilson v. U.S. West Commc'ns, 58 F.3d 1337 (8th Cir. 1995) (finding that an employee's graphic anti-abortion button worn as vow to her religious beliefs was a form of religious harassment of co-workers).

156. *See, e.g.*, Cloutier v. Costco, 390 F.3d 126 (1st Cir. 2004) (determining that exemption from grooming code for religious facial piercing would place undue hardship on employer by harming professional image), *aff'g on other grounds* 311 F. Supp. 2d 190 (D. Mass. 2004); EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86 (N.D. Ga. 1981) (holding that exempting Sikh job applicant from restaurant's no-facial-hair policy would constitute undue hardship on company's image).

157. *Cloutier*, 311 F. Supp. 2d at 190 (determining that visible eyebrow piercing was unprotected preference, not religiously mandated), *aff'd on other grounds*, 390 F.3d at 126; *Wilson*, 58 F.3d at 138 (finding that an employee's wearing of graphic anti-abortion pin was personal preference, not religiously mandated).

158. Holmes v. Marion County Office of Family & Children, 349 F.3d 914 (7th Cir. 2003) (indicating in dicta that requested accommodation for religious head wrap would disrupt religious neutrality and raised establishment clause concerns); United States v. Bd. of Educ. for the Sch. Dist. of Phila., 911 F.2d 882 (3d Cir. 1990) (finding undue hardship in requested exemption from school dress-code for Muslim teacher; stressing importance of religious neutrality in applying ban on religious dress); *Sambo's*, 530 F. Supp. at 92 (finding that requested exemption would amount to religious preference).

159. Many employers are struggling with the evolving demands for increased respect of religious diversity in the workplace. *See* DelPo, *supra* note 22, at 345–47; Richard T. Foltin & James D. Standish, *Your Job or Your Faith? Under the Workplace Religious Freedom Act, Americans would not have to choose*, LEGAL TIMES, July 21, 2003, at 36; Sue Reisinger, *Getting Religion*, CORP. COUNS., Mar. 2005, at 74. *See also* Art Lambert, *God Goes to Work*, WORKFORCE WEEK, June, 2005 (provides questions-and-answers on dealing with divisive religious issues in the workplace), *available at* www.workforce.com/archive/article/24/09/55.php.

performing their job tasks, but were discharged for refusing to comply with an employer's grooming and dress code. Not unlike other cultures discussed in Part I, both employees viewed their body modification as reflective of their religious or spiritual beliefs.

In *Cloutier v. Costco*,[160] Kimberly Cloutier, an employee with four years of service, challenged Costco's revised grooming code that prohibited facial piercings as religious discrimination against the Church of Body Modification (CBM).[161] Since 1998, Cloutier, a cashier and front-end assistant, had worn an eyebrow piercing to work and over time engaged in more piercing, tattooing, cutting, and scarification.[162] She believed these practices held spiritual meaning for her. In June 2001, Cloutier joined the CBM and interpreted their beliefs as consistently mandating the display of one's piercings.[163]

Under a revised policy in March 2001, Costco prohibited any "visible facial or tongue jewelry," allowing only earrings.[164] The company indicated that it had instituted the neutral dress code in order to present a professional image to its customer base.[165] At the time of the revised code, Cloutier wore eleven visible ear piercings, four hidden tattoos, and one eyebrow piercing.[166] In June 2001, Costco began to enforce the policy and Cloutier was sent home on several occasions for refusing to remove her eyebrow piercing.[167] Ultimately, Cloutier filed an EEOC complaint, and missed work shifts on her manager's orders until Costco could address her claim.[168] Finally, Costco fired her for violating their grooming code, asserting that the CBM was not a real religion, and that her absences were therefore unexcused since they were due to her violation of the company's grooming code.[169]

In the subsequent EEOC conciliation, Costco offered to let her return if she covered her eyebrow piercing with a bandage or inserted a clear plastic retainer instead of her eyebrow ring. Cloutier rejected these demands and brought an action in federal court.[170] Granting summary judgment to Costco, the District Court found that the company had offered reasonable accommodations to Cloutier regarding the plastic retainer or bandage. In addition, drawing from earlier rhetoric on religious preference rather than mandated tenets, the court determined that the CBM did not require the full-time display of her piercing, but that Cloutier merely preferred such a display.[171]

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160. 311 F. Supp. 2d 190 (D. Mass. 2004), *aff'd on other grounds*, 390 F. 3d 126 (1st Cir. 2004).

161. *See* Church of Body Modification, http://www.uscobm.com (last visited Oct. 23, 2006).

162. *Cloutier*, 311 F. Supp. at 192.

163. *Id.* at 193.

164. *Id.* at 193 n.8.

165. *Id.* at 193.

166. *Id.* at 192–93.

167. *Id.* at 193.

168. *Id.* at 193–94.

169. *Id.* at 194.

170. *Id.* at 195. Cloutier brought her federal action for religious discrimination under Title VII. *Id.* at 195–200. She also brought a state claim under Massachusetts' anti-discrimination law, MASS. GEN. LAWS ch. 151B, § 4(1A) (1997). *Cloutier*, 311 F. Supp. at 200–02.

171. *Cloutier*, 311 F. Supp. at 199. *See supra* notes 102, 143–44 and accompanying text.

After losing in District Court, Cloutier appealed,[172] with the First Circuit refocusing the analysis on whether or not Cloutier's demand for an exemption from the new policy caused an undue hardship on Costco.[173] Cloutier contended that she had been successfully performing her job, and that no customers or co-workers had ever complained about her facial piercing.[174] She argued that any claimed hardship on Costco would be purely hypothetical.[175] The opinion also noted that the EEOC had found that Cloutier's actions were religiously based and that Costco had failed to show that allowing her facial jewelry presented undue hardship.[176]

Conversely, the appeals court determined that personal appearance was essential to Costco's image, particularly for employees, like Cloutier, who had regular customer contact.[177] The decision stated that employers had the discretion to institute codes "to promote a professional public image" or "to appeal to customer preference."[178] The court indicated the following:

> It is axiomatic that, for better or for worse, employees reflect on their employers. This is particularly true of employees who regularly interact with customers, as Cloutier did in her cashier position. Even if Cloutier did not personally receive any complaints about her appearance, her facial jewelry influenced Costco's public image and, in Costco's calculation, detracted from its professionalism.[179]

The court did not probe for illegal stereotypes that might underlie the new code,[180] nor did it distance its judicial reasoning from suspect employer claims based on illegal discrimination grounded in customer preference,[181] but instead merely accepted at face value Costco's contention that her piercings detracted from the company's professional image. The court concluded that exempting Cloutier from the policy would cause an undue hardship, affirming the grant of summary judgment.[182]

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172. Cloutier v. Costco, 390 F.3d 126, 128, 135 (1st Cir. 2004).

173. *Id.* at 134–37.

174. *Id.* at 135.

175. *Id.*

176. *Id.* at 130.

177. *Id.*

178. *Id.* at 135–36. *But see supra* note 152 and accompanying text.

179. *Cloutier*, 390 F.3d at 135.

180. *See supra* notes 51, 97, 100, 219–231 and accompanying text.

181. *See* U.S. Equal Employment Opportunity Comm'n, Questions and Answers About the Workplace Rights of Muslims, Arabs, South Asians, and Sikhs Under the Equal Employment Opportunity Laws (2002), http://www.eeoc.gov/facts/backlash-employee.html (last visited Oct. 23, 2006) (stating that employer reliance on customer preference or uncomfortable customer or co-worker feelings on religious attire is illegal discrimination under Title VII); U.S. Equal Employment Opportunity Comm'n, Questions and Answers About Employer Responsibilities Concerning the Employment of Muslims, Arabs, South Asians, and Sikhs (2005), http://www.eeoc.gov/facts/backlash-employee.html (last visited Feb. 9, 2006) (explicitly holds that customer preference on religious dress attire not acceptable workplace justification, requiring potential exemptions from dress and grooming codes). *See supra* note 19 and accompanying text; *infra* notes 272–75 and accompanying text.

182. *Cloutier*, 390 F.3d at 136.

Soon after *Cloutier*, another federal court took a different view on visible religious tattoos in *EEOC v. Red Robin Gourmet Burgers, Inc.*[183] In *Red Robin*, the employer's new grooming policy demanded that a six-month employee, Edward Rangel, cover up small tattoos surrounding his wrists.[184] Rangel, who practiced Kemetecism,[185] received the wrist tattoos as part of a Kemetic religious ceremony.[186] The tattoos were Coptic prayers which Rangel believed he could not intentionally hide without committing a sin under Kemetecism.[187] The only time his religion would allow him to purposefully cover the tattoos was during the religious month of Mesura when Ra was believed to die and then be reborn.[188]

Before the revised code came into force, Rangel had informed his supervisor about his religious beliefs and had worked with visible tattoos for about six months.[189] At a subsequent orientation for a new restaurant, higher-level managers demanded that Rangel cover his tattoos or face discharge.[190] When he explained their religious significance, these same managers recommended that he cover them with bracelets or wrist bands, contrary to the chain's own jewelry policy.[191] When Rangel refused to cover them, he was escorted out of the building, and when he returned for his next shift, he was again ejected for not covering his tattoos.[192] Unlike Costco, Red Robin refused to offer any alternatives, claiming that Rangel's religious beliefs were merely personal preferences that the company need not accommodate.[193] Eventually, Red Robin fired Rangel for violating its company's personal appearance policy.[194]

Similar to Costco, the court considered whether an exemption from the personal appearance code would cause an undue hardship on the restaurant chain.[195] At trial, unlike Costco, Red Robin actually did supply a company profile and a customer survey that indicated that the restaurant chain was viewed as both family- and child-friendly, and that Red Robin considered Rangel's tattoos as inconsistent with that image.[196]

Noting the First Circuit's decision in *Cloutier*, the District Court refused to follow its approach, instead choosing to follow the Ninth Circuit's precedent on undue hardship. The court stated that undue hardship must be proven by

183. No. C04-1291JLR, 2005 WL 2090677, at *1 (W.D. Wash. Aug. 29, 2005).

184. *Id.* at *3. The only time his religion would allow him to purposefully cover the tattoos was during the religious month of Mesura when Ra was believed to die and then be reborn. *Id.*

185. Kemeticism dates back to ancient Egypt and focuses on communal prayer, meditation and ritual ceremonies showing "servitude to Ra, the Egyptian god of the sun." *Id.* at *2.

186. *Id.*

187. *Id.*

188. *Id.* at *2–3.

189. *Id.* at *3.

190. *Id.* at *3–4.

191. *Id.* at *4.

192. *Id.*

193. *Id.* at *10, *14.

194. *Id.* at *3–4.

195. *Id.* *14–20.

196. *Id.* at *18.

showing an "actual imposition on coworkers or disruption of the work routine."[197] In this fact situation, the court asserted that no customers had ever complained about Rangel's tattoos and doubted that many had even noticed the tiny inscriptions.[198] Despite the provision of the study and survey, the district court indicated that the company had failed to offer any evidence that Rangel's visible Coptic tattoos were incongruous with a family- or child-oriented environment, or that Red Robin customers held negative feelings about these religious tattoos.[199]

Furthermore, the court expressly rejected that allowing a religious exemption for Rangel would open up a "slippery slope" which would force the company "to allow whatever tattoos, facial piercings or other displays of religious information an employee might claim, no matter how outlandish."[200] The court concluded that potential concerns that others might rightfully seek similar religious accommodations would not support a finding of undue hardship under Title VII.[201]

Unlike the First Circuit, the *Red Robin* court went beyond accepting the employer's justifications at face value. The court was willing to require that the employer actually connect its perceived concerns with real hardships rather than abstract harms. Indeed, the District Court clearly wanted the employer to make a connection between its code and actual job performance, as signaled by its analysis of undue hardship through the lens of real third party co-worker impositions or workplace disruptions.

While the courts sometimes protect some religious performance in the workplace via body art, these opportunities are still rigidly limited despite the broad accommodationist language of Title VII. The constant resistance of employers and courts to accommodate religiously-motivated performative conduct has catalyzed both mainstream and minority religions to work together to advocate for passage of the Workplace Religious Freedom Act of 2005 (WRFA), which would expand the protections for religious expressions in the workplace, including in areas of grooming and dress.[202] The proposed WRFA expands the gamut of approaches to reasonable accommodation and requires a

197. *Id.* at *17.

198. *Id.* at *18.

199. *Id.* at *18–19.

200. *Id.* at *19.

201. *Id.* *19–20. *See also* Opuku-Boateng v. California, 95 F.3d 1461 (9th Cir. 1996) (reversing district court finding that hypothetical concerns about innumerable employee requests and potential morale problems are not sufficient for finding of undue hardship).

202. The companion bills are S. 677, 109th Cong. (2005), *available at* http://www.thomas.gov/cgi-bin/bdquery/z?d109:s.00677: (last visited Dec. 14, 2006), and H.R. 1445, 109th Cong. (2005), *available at* http://www.thomas.gov/cgi-bin/bdquery/z?d109:h.r.01445: (last visited Dec. 14, 2006). The WRFA has received broad political and religious support from a diverse range of conservative and liberal groups. Foltin & Standish, *supra* note 153, at 36. *See* James A. Sonne, *Article: The Perils of Universal Accommodation: The Workplace Religious Freedom Act of 2003 and the Affirmative Action of 147,096,000 Souls*, 79 NOTRE DAME L. REV. 1023, 1026 (2004) (discussing widespread support for previous efforts to pass prior proposal for WRFA). For examination and criticisms of earlier versions of the proposed WRFA, see generally *id.* at 1051–80; Baxter, *supra* note 22, at nn.124–223; Robert A. Caplen, *Note: A Struggle of Biblical Proportions: The Campaign to Enact The Workplace Religious Freedom Act of 2003*, 16 U. FLA. J. LAW. & PUB. POL'Y 579, 611–23 (2005).

showing of actual undue hardship, grounding the relevant inquiry in terms of job-related safety, the imposition of unfair burdens on co-workers, or disruptions in the workplace environment. These rationales could easily be extended to protect the identity-performative acts of other protected classes as well.

C. Gender Performance and Body Art Work Rules

In handling gender discrimination cases, courts have traditionally focused on sex rather than gender, looking almost exclusively at claimed biological or immutable differences.[203] Judicial inquiry has been largely limited to delineating and naturalizing sex differences as products of biology,[204] similar to the cases of race and ethnicity described above in Part II. Commentators assert that the judicial emphasis on sex as a natural difference serves largely to reaffirm dominant power groups and to continue subordination of other lower status groups in the social and workplace hierarchy.[205] Gender theorists have criticized this limited biological inquiry, arguing that gender must be viewed as a social construction rather than a biological classification.[206] Gender as a social construct moves beyond biology to consider social rules and cultural codes that impact individual human agency,[207] creating the conditions for gender discrimination. Such an approach provides opportunities for broader legal protections for individuals who do not conform to traditional gender roles and expectations.[208]

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203. Engle, *supra* note 18, at 341–42; Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 395–96, 401 (2001); Franke, *supra* note 5, at 1–2; Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 85–86 (2002).

204. Flynn, *supra* note 203, at 394; Franke, *supra* note 5, at 2–4; Klare, *supra* note 18, at 1395, 1397; Vojdik, *supra* note 203, at 85–86.

205. Nicole Anzuoni, *Gender Non-Conformists under Title VI: A Confusing Jurisprudence in Need of a Legislative Remedy*, 3 GEO. J. GENDER & L. 871, 875–76 (2002); Engle, *supra* note 18, at 339, 353; FRANKE, *supra* note 5, at 3–4, 8–9. *See* Arthur Brittan, *Masculinities and Masculinism*, *in* THE MASCULINITIES READER 54–55 (Stephen M. Whitehead & Frank J. Barrett eds., 2001) (criticizing masculinism as an ideology that seeks to justify and naturalize male dominance and power).

206. Judith Butler, *Performative Acts and Gender Constitution: An Essay in the Phenomenology and Feminist Theory*, *in* PERFORMING FEMINISMS: FEMINIST CRITICAL THEORY AND THEATRE 271, 273, 274 (Sue-Ellen Case ed., 1990); David Collinson & Jeff Hearn, *Naming Men as Men: Implications for Work, Organization and Management*, *in* THE MASCULINITIES READER 146–47 (Stephen M. Whitehead & Frank J. Barrett eds., 2001); Franke, *supra* note 5, at 2–3; Klare, *supra* note 18, at 1397; Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 369–70 (2004).

207. Franke, *supra* note 5, at 1–2, 3–4; Butler, *supra* note 206, at 278–79; Collinson & Hearn, *supra* note 206, at 146–47; Klare, *supra* note 18, at 1436–37. Prof. Katherine Franke contends that the "disaggregation of sex from gender represents a central mistake of equality jurisprudence." She adds that every anti-discrimination claim based on "sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles." Franke, *supra* note 5, at 1–2.

208. Flynn, *supra* note 203, at 395; Franke, *supra* note 5, at 8–9; Klare, *supra* note 18, at 1436–37; Vojdik, *supra* note 203, at 86–87. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) (finding illegal sex discrimination where a female was denied partnership because she failed to conform to gender expectations about behavior and dress); *see also* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2–4 (1995) (stating that protection against gender expectations under *Price Waterhouse* should extend beyond masculine female to effeminate male). *See infra* Part III.

Numerous social scientists have long asserted that our culture's agreed upon codes of masculinity and femininity teach us how perform gender roles.[209] In her groundbreaking book *Gender Trouble*, philosopher Judith Butler first spells out her influential claim that gender is performative, meaning although people are born with specific sex organs, they still must learn how to act feminine or masculine.[210] In other words, one is not born with gender, but becomes gendered "through a *stylized repetition of acts*,"[211] which "are renewed, revised, and consolidated through time."[212] Prof. Butler argues that, gender is not determined by physiology but is instead a social construction that is open to contestation.[213] Philosopher Sandra Lee Bartky formulates this concept more succinctly: "We are born male or female, but not masculine and feminine. Femininity is an artifice, an achievement."[214] Gender is socially constructed and performed, not biologically determined, feminist film theorist Teresa de Lauretis asserts: "Gender is not a property of bodies or something originally existent in human beings."[215] As body studies theorist Susan Bordo notes, "in our present culture, our activities *are* coded as 'male' or 'female' and will function as such within the prevailing system of gender-power relations."[216]

In considering anti-discrimination law, Prof. Franke supports the contention that individuals must be allowed to decide their gender, free from strict biological notions of sex.[217] She asserts that this approach will more fully

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209. *But see* Brittan, *supra* note 205, at 51 (asserting that concepts of masculinity and femininity are constantly subject to reinterpretation); Michael S. Kimmel, *Masculinity as Homophobia*, *in* THE MASCULINITIES READER 266–67 (Stephen M. Whitehead & Frank J. Barrett eds., 2001) (arguing that notions of masculinity and manhood are constantly in a state of change); Vjodik, *supra* note 203, at 92 (claiming that the process of domination is more important than any specific sociological or historical notions of masculinity or femininity).

210. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 6, 22, 139–41 (1990); *see* Brenda Cossman, *Gender Performance, Sexual Subjects and International Law*, 15 CAN. J.L. & JURIS. 281, 282–83 (2002) (discussing Butler on gender as repetition of performative acts).

211. Butler, *supra* note 206, at 271. *See* BUTLER, *supra* note 210, at 140.

212. Butler, *supra* note 206, at 274. *See* BUTLER, *supra* note 210, at 141.

213. Butler, *supra* note 206, at 273. *See* BUTLER, *supra* note 210, at 31, 138–39. As Butler explains,

> [b]ecause there is neither an "essence" that gender expresses or externalizes nor an objective ideal to which gender aspires; because gender is not a fact, the various acts of gender create the idea of gender, and without those acts, there would be no gender at all. Gender is, thus, a construction that regularly conceals its genesis . . . . The authors of gender become entranced by their own fictions whereby the construction compels one's belief in its necessity and naturalness.

Butler, *supra* note 206, at 273; *see* BUTLER, *supra* note 210 at 33, 31, 144–45. *But see* Vojdik, *supra* note 203, at 68, 89–90 (arguing that gender is a social process, and criticizing Butler's view of gender performance as susceptible to individual will in changing identities, which therefore underestimates the difficulty in subverting prevalent gender codes).

214. SANDRA LEE BARTKY, FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION 65 (Routledge 1990).

215. THERESA DE LAURETIS, TECHNOLOGIES OF GENDER: ESSAYS ON THEORY, FILM, AND FICTION 3 (1987).

216. Susan Bordo, *Feminism, Postmodernism, and Gender-Skepticism*, *in* FEMINISM / POSTMODERISM 152 (L. Nicholson ed., 1990) (emphasis in original).

217. Franke, *supra* note 5, at 8–9. *See* Flynn, *supra* note 203, at 395–96 (contending that "self-identification is the central component of sex"); *see also* Brittan, *supra* note 205, at 53 (arguing against

and fairly protect a broader range of individuals from illegal gender discrimination in the workplace,[218] stating that

> equality jurisprudence must abandon its reliance upon a biological definition of sexual identity and sex discrimination and instead should adopt a more behavioral or performative conception of sex. The wrong of sex discrimination must be understood to include all gender role stereotypes whether imposed upon men, women, or both men and women in a particular workplace. . . . [S]exual equality jurisprudence should include a commitment to a fundamental right to determine one's gender independent of one's biological sex. Such a fundamental right should exist both for the transgendered person who seeks a harassment-free workplace or the benefits of heterosexual marriage and for the male senior associate in a law firm who wants neither to be ridiculed by his male colleagues nor penalized when he comes up for partner because he requests time off from work to care for his newborn child.[219]

Based on judicial treatment of racial and ethnic performance, one would think that courts would also oppose the gendered performance of dress and grooming codes. There are no biological or immutable traits that require women and men to dress or groom certain ways. Therefore, under the judicial analysis of race and ethnicity, women and men should not be required to perform gender roles through grooming and dress. In *Price Waterhouse*, Justice Brennan optimistically stated that the case's interpretation of Title VII would see the end of gender stereotyping in the workplace for both sexes.[220] It was initially thought that *Price Waterhouse* might lead to the defeat of gendered dress and grooming codes as "sex-plus" discrimination based on unlawful stereotypes about men and women, but most courts have refused to extend the case outside of the sexual harassment context.[221] Women therefore find that the law continues to

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the view in masculine ideology that sees gender as non-negotiable). *See infra* notes 325–28 and accompanying text.

218. Franke, *supra* note 5, at 8–9. *See also* Case, *supra* note 208 (asserting that a more expansive view of anti-discrimination law should include protection of men and women who display both masculine and feminine characteristics); Flynn, *supra* note 203 (seeking greater protection of trans-gendered individuals through a broader view of sexual identity as a choice).

219. Franke, *supra* note 5, at 8–9. *But see generally* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 20–21, 37–38 (2000) (contending that anti-discrimination law cannot be sex-blind nor seek the obliteration of gender conventions, but instead should work to reshape and reformulate social practices); Yuracko, *supra* note 18, at 72–73 (arguing in favor of some gender-specific norms; calling for trait-plus sex discrimination to be illegal only if it reinforces a power / status hierarchy in the workplace).

220. 490 U.S. at 251. Justice Brennan wrote the following:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

221. Yuracko, *supra* note 18, at 23–28. In one case before *Price Waterhouse*, a court struck down a rule imposing gendered dress and grooming requirements on female workers as containing demeaning gender stereotypes. Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi., 604 F.2d 1028, 1033–34 (7th Cir. 1979) (court struck down uniform rule imposed only on female employees as perpetuating demeaning stereotypes about female fashion competition and status in workplace). *See infra* notes 266–90 and accompanying text.

allow employers to mark them through grooming codes that either exploit or repress female sexuality,[222] and men find that they must conform to dominant societal views of masculinity in these same codes.[223]

While courts routinely reject racial and ethnic performative acts and severely limit religious performative acts, courts take exactly the opposite approach when considering gender-based dress and grooming codes, often demanding that employees properly perform their genders.[224] While critics of race and ethnic performative acts worry about creating improper racial and ethnic stereotypes, courts seem largely untroubled about reaffirming and reinforcing harmful gender stereotypes which they see as natural.[225] Yet the courts have not properly articulated any test for deciding which gender stereotypes are demeaning and which are not, taking more of an *ad hoc* "I know it when I see it" approach.[226]

Courts typically try to justify differential treatment under dress and grooming codes by claiming a reliance on community standards,[227] the equal

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222. Klare, *supra* note 18, at 143; Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 203 (2004). Through these codes, patriarchal standards of beauty and sexuality continue to be imprinted on women's bodies as a means of social control. ATKINSON, *supra* note 1, at 16–17.

223. Prof. McGinley indicates:

> Masculinities research is a growing field that seeks to uncover a structure that reinforces the superiority of men over women and a series of practices associated with masculine behavior, performed by men and women, that aid men in maintaining their superior position over women. . . . [M]asculinities reinforce stereotypes of the proper role and behavior of women and men at work. Some of these practices include aggression, competitiveness, informal networking, and regarding women as sexual objects, caregivers, or "aggressive bitches."

McGinley, *supra* note 206, at 364–65 (citations omitted). *See also* Collinson & Hearn, *supra* note 206, at 147 (defining masculinities as discourses and practices of men that are grounded in social constructs instead of biological differences).

224. Engle, *supra* note 18, at 340–41, 353; Vojdik, *supra* note 203, at 92. Highlighting the contradictory treatment of race and national origin versus gender grooming codes, Prof. Engle states:

> [C]ourts have found that it is legal for employers to rely on what they see as dominant societal rules about how men and women should dress. Although courts have long held that Title VII prohibits employers from relying on stereotypes about men and women, courts in these cases overtly and unapologetically have allowed them to do just that. While assertions of cultural identity go unprotected in the race cases, they are enforced and reinforced in the sex cases.

Engle, *supra* note 18, at 340–41.

225. *See supra* notes 227–31 and accompanying text. Some legal commentators also seem unconcerned about gender-based grooming codes drawn from community standards. Rich, *supra* note 18, at 1229–30 (calling for respect of racial and ethnic performative acts in grooming codes, while viewing gendered grooming codes based on social norms as well within an employer's discretion); Yuracko, *supra* note 18, at 39, 49, 52–53, 92, (viewing discrimination against men in feminine attire as legally justified, because such behavior would be socially perceived as deviant or strange).

226. *See* Hillary J. Bouchard, Jespersen v. Harrah's Operating Co.*: Employer Appearance Standards And The Promotion Of Gender Stereotypes*, 58 ME. L. REV. 203, 213 (2006); Engle, *supra* note 18, at 353. *See supra* notes 225 and accompanying text.

227. Bouchard, *supra* note 226, at 221; Klare, *supra* note 18, at 1420–21; Serafina Raskin, *Sex-Based Discrimination in the American Workforce: Title VII and the Prohibition Against Gender Stereotyping*, 17 HASTINGS WOMEN'S L.J. 247, 249–50 (2006); Yuracko, *supra* note 18, at 52–53.

burdening of both genders,[228] or some diminished form of the BFOQ, focusing on the whether or not the proscribed traits are immutable.[229] Relying on community standards laden with gender stereotypes, courts have consistently allowed for differential treatment of females and males, broadly accepting the importance of men and women properly performing their assigned gender roles.[230] Similar to race discrimination cases based on hairstyles, courts in gender cases often try to naturalize gender differentiation based on cultural or community codes.[231] In cases dealing with gendered grooming codes, Prof. Engle indicates that courts have conflated immutability and culture, erroneously concluding the following:

> [T]here are actual differences between men and women, which are accurately represented by societal dress and grooming norms. Employers are not required to protect conduct outside those norms. Hence, courts in the sex cases deploy a natural-artificial distinction of a different type. Women and men dressing and

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228. Engle, *supra* note 18, at 341; Megan Kelly, *Making-Up Conditions Of Employment: The Unequal Burdens Test As A Flawed Mode Of Analysis In* Jespersen v. Harrah's Operating Co., 36 GOLDEN GATE U.L. REV. 45, 50–51 (2006); William M. Miller, *Lost in the Balance: A Critique of the Ninth Circuit's Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards Under Title VII*, 84 N.C. L. REV. 1357, 1358 (2006); Raskin, *supra* note 227, at 255. *See, e.g.*, Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1077 (9th Cir. 2004) (holding that it did not violate the unequal burdens test to fire an employee who refused to wear make-up), *aff'd*, 444 F.3d 1104 (9th Cir. 2006); Frank v. United Airlines, Inc., 216 F.3d 845, 855 (9th Cir. 2000) (holding that weight policy that applied different weight requirements on men and women of equal height and age failed unequal burdens test); Gerdom v. Cont'l Airlines, Inc., 692 F.2d 602, 603–04 (8th Cir. 1982) (holding that weight requirements for only female flight attendants created unequal burden).

229. In dealing with different hair length grooming policies for men and women, some courts have found that reasonable grooming requirements are necessary to the success of an employer's business environment and that hair length is purely volitional. *See, e.g.*, Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996); Barker v. Taft Broad. Co., 549 F.2d 400, 401 (6th Cir. 1977); Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976); Knott v. Mo. Pac. R.R.. Co., 527 F.2d 1249, 1252 (8th Cir. 1975); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091–92 (5th Cir. 1975); Baker v. Cal. Land Title Co., 507 F.2d 895, 898 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); Dodge v. Giant Food, Inc., 488 F.2d 1333, 1337 (D.C. Cir. 1973); Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1125 (D.C. Cir. 1973); Jahns v. Mo. Pac. R.R. Co., 391 F. Supp. 761, 762 (D. Mo. 1975). In cases involving gendered dress codes, courts have similarly given employer's broad discretion unless an immutable sex trait is in dispute. *See* Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755–56 (9th Cir. 1977) (stating a company may require that only men wear ties in the workplace); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979) (upholding a policy that banned pantsuits on women because it did not implicate stereotypes or immutable traits). However, some courts do not use a typical BFOQ analysis, which examines whether or not the challenged policy relates to the successful performance of actual job tasks. *See* Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (striking down company's claimed BFOQ for fetal protection policy because gender classifications were not related to performance of actual job tasks). Under the narrow construction of that concept most of these codes would likely fail because they have little to do with actual job performance.

230. Cruz, *supra* note 89, at 246; Engle, *supra* note 18, at 342. As regards to gendered dress and grooming codes, Prof. Cruz asserts that the courts have failed to apply the full breadth and meaning of Title VII, but have resorted "to baroque and linguistically implausible interpretations of what it is to 'discriminate' . . . in an anxious, or perhaps near completely unreflective, effort to shield employers' 'prerogatives' regarding differential treatment of men and women in the workplace." Cruz, *supra* note 89, at 246.

231. *See supra* notes 204–206 and accompanying text.

> grooming in accordance with societal norms is natural. Countering those norms is artificial.[232]

Despite differential treatment under workplace policies, the courts try to claim neutrality by arguing that these dress codes are acceptable so long as they equally burden men and women.[233]

A review of body art discrimination cases reveals that courts uphold the right of employers to equally ban women and men from displaying visible employee tattoos and piercings as part of an employer's workplace prerogatives, as was the case with the prohibitions of nose rings in the *Motion Picture* and *Sam's Club* cases.[234] Courts also allow the introduction of evidence about body modification practices in sexual harassment cases,[235] using negative sexual connotations about these practices to both support and undermine female claims of sexual harassment.[236] However, when considering gendered body art work rules outside of the harassment context, the courts take mixed views on gender performative acts.[237]

Returning to *Riggs*, the plaintiff also claimed gender discrimination in the police chief's demand that he cover his tattoos.[238] As part of his evidence, he offered an appendix that listed the sex of fifteen employees who were allowed to display their tattoos in the workplace.[239] The court found that because the list of the officers with visible tattoos included both men and women the plaintiff failed to provide proof that he had been discriminated against based on his

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232. Engle, *supra* note 18, at 342. With courts using a false dichotomy of immutable or natural (nonvolitional) versus mutable or artificial (volitional) conduct, Prof. Engle indicates that the courts believe that "[b]lacks wearing cornrows, bilingual Hispanics speaking Spanish, and men wearing earrings are behaving neither necessarily nor naturally. The only conduct that might be protected is that which the courts seem inclined to see as 'natural'—blacks wearing afros, slips of the tongue by bilinguals, and women having school-age children." Conversely, the courts liberally allow employers "to discriminate on 'artificial' characteristics—blacks or Hispanics acting in ways that they believe accord with their culture, or men acting like women." *Id.* at 353.

233. *See supra* notes 228, 230–31 and accompanying text.

234. *See supra* note 105 and accompanying text.

235. In several cases, female plaintiffs have supplied evidence about body modification to support their claims of sexual harassment. *See* Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 328 (4th Cir. 2003) (the plaintiff's co-worker showed her a picture of a pierced scrotum, and this was evidence of an overall pattern of sexual harassment against the plaintiff); Lovelace v. Fed. Express Corp., No. 1:97-cv-3267-JTC, 1999 U.S. Dist. LEXIS 17683, at *5 (N.D. Ga. Sept. 23, 1999) (to support a workplace-sexual-harassment claim, the plaintiff said that her supervisor pulled down her shirt to see her tattoo); Albertson's Inc., 115 Lab. Arb. 886 (2000) (Gangle, Arb.) (employee challenged enforcement of no-tongue-ring rule as sexual harassment, when manager required her to repeatedly stick out her tongue).

236. Alternatively, a female plaintiff's piercing was used to undermine her sexual harassment claim. *See* Ferencich v. Merritt, No. 02-6222, 2003 WL 22430394, at *3 (10th Cir. Oct. 27, 2003) (by sticking out her pierced tongue, the plaintiff may have acted flirtatious and thereby welcomed sexual advances). *See* McGinley, *supra* note 206, at 395–96 (discussing how women lose out professionally due to stereotypical views of female co-workers as "dangerous sex symbol[s]"). *See supra* notes 21, 68 and accompanying text.

237. *See infra* notes 238–90 and accompanying text.

238. 229 F. Supp. 2d at 577, 579.

239. *Id.* at 579.

sex.[240] Although tattoos are socially-encoded as male, the police chief permitted both sexes to show their tattoos, allowing women to tilt toward the masculine. The court concluded that making the plaintiff wear long-sleeved shirts and long pants was not gender discrimination because the employer allowed both men and women to show their tattoos in the workplace.

The employer in *Hub Folding Box Co., Inc. v. Massachusetts Commission Against Discrimination (MCAD)*[241] took the opposite view, trying to block a female from displaying a tattoo since the employer had socially-encoded the mark as appropriately masculine and, therefore, inappropriately feminine. In the employer's eyes the woman with the tattoo was putting her sexual immorality on display because she was marking herself with a signifier of virility, a trait that is associated with sexual as well as physical power and aggression.[242] A state appeals court examined the employer's unwritten gendered workplace rules on visible tattoos under state anti-discrimination law.[243]

Under the facts of the case, Deborah Connor, a clerk, was hired and properly performed her job duties for several months.[244] In the summer months, she began to wear short-sleeved shirts and her supervisor, Paul DiRico, noticed a heart-shaped tattoo on her forearm.[245] DiRico made repeated demands on Connor to cover her tattoo or face discharge.[246] Bob Lawrence, a salesperson in the same office, was neither asked nor required to cover up a visible United States Navy tattoo on his wrist or forearm.[247] Connor refused to cover her tattoo because Lawrence was allowed to freely exhibit his tattoo in the office.[248] DiRico advised Connor that if she did not cover up her tattoo by the end of the week, she would be fired.[249]

The supervisor's reasons for the differential treatment track the gendered historical stereotypes about tattoos in the United States, discussed in Part I, regarding the negative sexualization of women with tattoos and the male use of tattoos in warrior and patriotic settings.[250] DiRico indicated to Connor and later to the MCAD that he wanted Connor to cover up her tattoo because women with tattoos "symbolize[d] that she was either a prostitute, or on drugs, or from a broken home."[251] Also, drawing from concerns about community standards, DiRico added that "customers would have a bad feeling about [Hub] when they

240. *Id.*

241. 750 N.E.2d 523 (Mass. App. Ct. July 12, 2001) (unpublished table opinion), *available at* 2001 WL 789248. *See also* Pechman, *supra* note 17, at 4; Edwards Angell Palmer & Dodge LLP, *Company Guilty of Gender Discrimination in Forbidding Exposed Tattoo*, LAB. & EMP. REV. (2002), http://www.Eapdlaw.com/newsstand/detail.aspx?news=140#8 (last visited Oct. 26, 2006).

242. *Hub Folding Box Co.*, 2001 WL 789248, at ***1 nn.1–2.

243. *Id.* at ***1.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at ***1 n.1.

248. *Id.* at ***1.

249. *Id.*

250. *See supra* notes 46–58, 62, 79–81 and accompanying text.

251. *Hub Folding Box Co.*, 2001 WL 789248, at ***1.

saw [Connor's] tattoo."[252] Conversely, DiRico stated that Lawrence was not asked to cover his tattoo because it was a "symbol of his heroism"[253] and showed he was "a hero who had served his country."[254] Underlying DiRico's statements are assumptions that the community attributes positive connotations of patriotism and courage to men with tattoos, while women with tattoos are viewed as having "loose" morals that would tarnish the company's image.[255]

Before the week's end, Connor filed an action with the MCAD based on sex discrimination.[256] When she told DiRico that she had filed the action, he fired her.[257] DiRico followed Connor out of his office and the two exchanged profanities.[258] Subsequently, DiRico claimed that he had fired her for insubordination and for vulgar language, but the MCAD credited Connor's testimony that she was fired for her tattoo and that the verbal altercation amounted to a pretext.[259]

In *Hub Folding Box Co.*, the court did not apply the community standards approach nor did it weigh the totality of the company's dress and grooming policies under the unequal burdens test. Rather, the court used standard disparate treatment principles found in earlier precedent, requiring the employer to show a legitimate nondiscriminatory reason for Connor's discharge.[260] The court found the following:

> Hub's reason for having in essence two standards respecting tattoos, one for men and one for women, stemmed from DiRico's beliefs that (1) women with tattoos are ne'er-do-wells whereas men with tattoos are heroes and (2) Hub's customers would not like seeing tattoos on a female employee. This reasoning, which caused Connor to feel unequal to her male counterparts, is not a legitimate basis for treating men and women differently in the workplace. In fact, it is outdated gender stereotypes such as these which antidiscrimination laws were designed to eradicate.[261]

In rendering its decision, the appeals court followed past precedent that requires employers to either provide equal workplace treatment of men and women, like *Riggs*, or to offer a valid, nondiscriminatory business reason for its challenged conduct.[262] Without citing *Price Waterhouse*, the court considered the employer's claimed reasoning for its differential treatment through an examination of gender stereotypes.[263] Applying the rationale of *Price Waterhouse*, the court found that both of the employer's reasons—gendered views of tattoos and the possible

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252. *See id.*; *supra* notes 221, 230 and accompanying text; *infra* notes 307–10 and accompanying text.
253. *Hub Folding Box Co.*, 2001 WL 789248, at ***2.
254. *Id.* at ***1.
255. *See supra* notes 46–51 and accompanying text.
256. *Hub Folding Box Co.*, 2001 WL 789248, at ***1.
257. *Id.*
258. *Id.*
259. *Id.* at ***2 n.3.
260. *Id.* at ***2.
261. *Id.* (citations omitted).
262. *Id.*
263. *Id.*

negative reaction of customers—were grounded in gender stereotypes which did not support the employer's assertion of a nondiscriminatory business reason.[264] Therefore, the court held that the employer's retaliatory discharge was improper and that the Plaintiff had suffered from unequal treatment in the workplace because of stereotypical gender views of her tattoo.[265]

Under this approach, cases that involve gender-distinct treatment for piercings would be illegal either as violating the traditional disparate treatment principle of equal treatment, discussed in *Riggs*, or as deriving from stereotypical thinking about men wearing earrings, which implicates *Price Waterhouse*. However, courts uniformly require men to perform their proper gender roles as regards earrings,[266] comporting with stereotypes that real men "do not accessorize"[267] and pointing to the kind of biased community standards that the *Hub Folding Box Co.* court rejected as illegal. As is common in these cases, men are adequately undertaking their job tasks. However, once they insert an earring, they are upsetting the gendered status quo in the workplace and are risking discharge because of their failure to perform their assigned gender roles.[268]

For example, in *Strailey v. Happy Times Nursery School, Inc.*,[269] a male teacher with two years of successful service was fired when he wore a small gold earring loop to school before classes had begun.[270] He contended that the school fired him because his wearing of an earring did not comply with the school's stereotypical view that males "should have a virile rather than an effeminate appearance."[271] Strailey brought his action under Title VII as sexual orientation discrimination.[272] Based on earlier precedent, the court dismissed the claim because sexual orientation is not protected under Title VII. The court also broadened this determination by stating that "discrimination because of effeminacy, like discrimination because of homosexuality . . . or transsexualism . . . does not fall within the purview of TitleVII."[273]

Similarly, in the recent case of *Pecenka v. Fareway Stores, Inc.*,[274] a court considered a male donning an earring when neither claims of effeminacy or sexual orientation were in dispute.[275] In that case, the employee, Michael

264. *Id.*

265. *Id.*

266. *See, e.g.*, Kleinsorge v. Eyeland Corp., No. Civ. A. 99-5025, 2000 WL 124559 (E.D. Pa. Jan. 28, 2000), *aff'd*, 251 F.3d 153 (3d Cir. 2000) (finding that a policy prohibiting males from wearing earrings was not gender discrimination); Strailey v. Happy Times Nursery Sch., Inc., 608 F.2d 327 (9th Cir. 1979); Lockhart v. La.-Pac. Corp., 795 P.2d 602 (Or. Ct. App. 1990). Capaldo v. Pan Am. Fed. Credit Union, No. 86 CV 1944, 1987 WL 9687 (E.D.N.Y. Mar. 30, 1987) (upholding employer policy prohibiting males from wearing earrings finding no gender discrimination), *aff'd*, 837 F.2d 1086 (2d Cir. 1987).

267. Flynn, *supra* note 203, at 401. *See infra* notes 295–302 and accompanying text.

268. *See infra* notes 295–302 and accompanying text.

269. 608 F.2d at 327.

270. *Id.* at 331.

271. *Id.*

272. *Id.* at 331–32.

273. *Id.*

274. 672 N.W.2d 800 (Iowa 2003).

275. *Id.* at 801–02.

Pecenka, had worked for the employer in 1991 and then again starting in February 2000 as a part-time driver at the company warehouse.[276] His ability to competently handle his job responsibilities resulted in his being promoted in 2001 to a full-time position.[277] Pecenka had always worn a stud earring throughout all of his various levels of employment with Fareway.[278]

A few days after his 2001 promotion, his supervisor told him to remove or cover the stud with a bandage under an unwritten policy that allowed females, but not males, to wear earrings.[279] Pecenka refused and Fareway terminated his employment.[280] He brought an action under Title VII and Iowa anti-discrimination statutes, claiming illegal gender discrimination.[281]

Making an analogy to earlier grooming cases on hair length, the court determined that there was no gender discrimination under Title VII or Iowa law.[282] The court stated that Title VII allows "grooming codes that reflect customary modes of grooming having only an insignificant impact on employment opportunities," and therefore such codes do not amount to gender discrimination.[283] This assertion of *de minimis* impact[284] rings especially hollow because Pecenka lost his job not because of poor performance, but solely because he wore an earring, just as he had always done while a Fareway employee.[285] The court added that state and federal anti-discrimination laws were meant "to stop the perpetuation of sexist or chauvinistic attitudes in employment,"[286] suggesting that only women should be allowed to challenge gendered employment policies.

Reworking the well-trodden ground found in other cases dealing with racial, ethnic, and gender discrimination, the court determined that there was no "sex-plus" discrimination because no immutable trait was at issue.[287] The court stated flatly that "[w]earing an earring stud is not an immutable characteristic."[288] The court also indicated that Pecenka had not argued that the codes were sexist or chauvinistic or that any fundamental rights—such as child-bearing or marriage were involved[289]—to support a "sex-plus" claim.[290]

Certainly possessing a tattoo, as in *Hub Folding Box Co.*, is neither an immutable characteristic nor a fundamental right, yet protections were afforded to that female plaintiff using the *Price Waterhouse* rationale on gender stereotyping. Had Pecenka contended that the codes were based on sexist

276. *Id.* at 802.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 802.
281. *Id.*
282. *Id.* at 804.
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.* at 804.
287. *Id.* at 805. *See supra* notes 203–08 and accompanying text.
288. *Pecenka*, 672 N.W.2d at 805.
289. *Id.*
290. *See infra* notes 160–201 and accompanying text.

stereotypes about gendered roles, it is still likely that the court would have rejected his claim under the notion of acceptable community standards found in the hair length cases. Therefore, sexualized views of a woman with body art are seen as illegal stereotyping, while the prohibition of piercings for men are found to be acceptable under community standards. Despite Justice Brennan's optimistic predictions in *Price Waterhouse*, gender stereotypes persist in grooming and dress cases, as exemplified in the new round of cases dealing with body art work rules—particularly those that follow the trend of other grooming and dress cases, which elevate the masculine and subordinate the feminine. Clearly, courts continue to demand that male employees play their proper gender roles, while women are given more leeway to take on behavior traditionally coded as masculine, as evidenced by both *Riggs* and *Hub Folding Box Co.*

III. UNMASKING INCONSISTENCIES IN BODY ART WORK RULES

In addressing body art work rules, courts have split their take on gender performance: in part, requiring equal treatment as to tattoos, which are socially-encoded as male in *Riggs* and *Hub Folding Box*, while allowing men to be treated differently, with piercings being encoded as female in *Strailey* and *Pecenka*. Furthermore, the courts allow women to contravene popularly held views about females with tattoos, while blocking efforts of men to violate society's gender boundaries as to earrings. Yet stepping back, it is clear that these decisions are actually expressing two over-arching themes that apply across the board to other types of gender grooming cases, such as those involving beards, make-up, hair length, and attire. The first theme is the judiciary's implicit acceptance of the notion of "professional image" as comporting with dominant white, masculine, heterosexual, and middle-class views of proper appearance, which has implications not only for gender, but race, ethnic and religious performance cases.[291] Secondly, another thread is the courts' continued approval of employees bending their gender toward "masculine" traits, while any behavior that comports with "feminine" traits is rejected and subordinated as lacking value in the workplace.[292]

Employer dress and grooming codes are important forms of dominance in the workplace and in the society at large.[293] In a workplace saturated with

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291. Engle, *supra* note 18, at 329–30, 354; Klare, *supra* note 18, at 1404–12; Rich, *supra* note 18, at 1194–96; Yuracko, *supra* note 18, at 63. *See also* Mroz, *supra* note 148, at 172–74 (contending that courts view mainstream religions as presumptively religious and worthy of Title VII protections, while minority beliefs are subject to a more searching analysis and are less likely to receive Title VII protections).

292. Case, *supra* note 208, at 3, 33–34, 65–67; Flynn, *supra* note 203, at 399; McGinley, *supra* note 206, at 365, 409–10. Prof. McGinley notes that in the male-dominated workplace men "often denigrate women and other males who do not conform to gender norms, using gender specific language that equates inferiority with being female or feminine." These terms are intended to belittle a male victim's masculinity and dignity using words viewed as female slurs such as "bitch" or "pussy," that "conflate a lack of masculinity with homosexuality." These derogatory remarks illustrate "a symbolic blurring with femininity, [that] maintains the superiority of the masculine over the feminine, of men over women." *Id.* at 409.

293. Klare, *supra* note 18, at 1398.

masculine values,[294] male professional dress is "unmarked" and viewed as the baseline for professional appearance.[295] Conversely, women as well as racial and ethnic minorities are considered to be "marked" because of the wide range of hairstyles and clothing choices available to them.[296] Indeed, gender, dress, and body adornment (or the lack thereof) has long been part of the practices that produce "properly" gendered bodies. In the United States, women have been traditionally associated with this kind of gender marking. They are marked by degrees of "proper" performance of their gender roles through a series of choices.[297]

In an often-reprinted 1993 *New York Times Magazine* article on gender marking in the workplace, sociolinguist Deborah Tannen claimed that women were marked on a scale of femininity depending on their choices of clothing, hairstyle, makeup, and accessories.[298] Any choices they made were read by others as comments on their adherence to social and cultural expectations about femininity. Of course, "[s]ome days you just want to get dressed and go about your business," Prof. Tannen noted, "[b]ut if you're a woman you can't, because there is no unmarked woman."[299] As men had a fairly standard corporate uniform—of dark suit, flat shoes, short hair, and an absence of accessories—Tannen deemed them unmarked.[300]

Commenting on the gender marking associated with women's workplace attire and grooming choices, Prof. Tannen concluded, "[t]here is no women's style that can be called standard [or] that says nothing about her. The range of women's hairstyles is staggering, but a woman whose hair has no particular style is perceived as not caring about how she looks, which can disqualify her from many positions."[301] Indeed, all choices a woman makes about her appearance mark her:

> If a woman's clothing is tight or revealing (in other words, sexy), it sends a message—an intended one of wanting to be attractive, but also a possibly unintended one of availability. If her clothes are not sexy, that too sends a message, lent meaning by the knowledge that they could have been. There are thousands of cosmetic products from which women can choose and myriad ways of applying them. Yet no makeup at all is anything but unmarked. Some men see it as a hostile refusal to please them.[302]

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294. Collinson & Hearn, *supra* note 206, at 146; McGinley, *supra* note 206, at 364–65, 386.

295. Deborah Tannen, *Wears Jump Suit. Sensible Shoes. Uses Husband's Last Name*, N.Y. TIMES MAG., June 20, 1993, at 52. *See* Case, *supra* note 208, at 20–22.

296. Tannen, *supra* note 295, at 18, 52. *See* Case, *supra* note 208, at 21; *infra* notes 303–10 and accompanying text.

297. *See supra* notes 298–302 and accompanying text.

298. Tannen, *supra* note 295, at 18, 52.

299. *Id.* at 54.

300. *Id.* Since her article's publication in 1993, men are still more unmarked than women in the workplace, but changing norms about acceptable hair length and a booming business of male beauty products and accessories (most notably the mainstreaming of the male earring) have made men more marked than before. *See supra* note 6 and accompanying text; *infra* notes 304–05 and accompanying text.

301. *Id.* at 52.

302. *Id.*

Similarly, racial and ethnic performative acts relative to grooming and dress are also viewed as "marked" compared to the dominant white values of the workplace.[303] As Prof. Rich clearly states, "the rules employers enforce in race/ethnicity performance cases typically are designed to quash expressions of ethnic or racial difference in favor of maintaining an 'unmarked' baseline culture of the workplace, which is typically Anglo or European."[304] An employee wearing dreadlocks, all-braided hairstyles, or a headwrap challenges the cultural hegemony of dominant groups in the workplace by rejecting the "unmarked" baseline, and disrupts "the pleasant fiction that all workers share the same aesthetic values."[305] Furthermore, when dominant group members adopt "marked" racial and ethnic dress and grooming, it can become an increased source of anxiety in the workplace, since this conduct suggests the cultural penetration of subordinate or lower-status cultures into dominant groups.[306]

Consequently, unmarked grooming and dress becomes viewed as a higher status, while the marked dress and grooming associated with women as well as racial and ethnic minority groups are viewed as a lower status. Employers may push for conformity with "unmarked" norms in order to protect the workplace environment and its associated products or services from being "infected" with lower status attributes,[307] including historically-disdained tattoos, facial piercings, and male earrings.[308] Negative labels of "unprofessional," "inappropriate," or "dirty" become associated with marked dress and grooming, reinforcing perceptions of the inferiority of women and minorities.[309] These perceptions can begin to reflect themselves in an employee's internalized feelings of worthlessness, lost dignity, and self-loathing.[310]

In this environment, organizations become focused on the creation and retention of masculine identities and the power associated with them.[311] Masculine dominance is seen as "the flight from the feminine."[312] Femininity holds lower status in this hierarchy, with all things gendered as feminine being

303. Klare, *supra* note 18, at 1398, 1411–14; Rich, *supra* note 18, at 1218.

304. Rich, *supra* note 18, at 1218.

305. *Id.* at 1190–91. *See* Klare, *supra* note 18, at 1413–14.

306. Rich, *supra* note 18, at 1159–61.

307. Case, *supra* note 208, at 35; Rich, *supra* note 18, at 1190, 1249, 1253. Prof. Case states that males vigilantly "police gender boundaries against any intrusion of the feminine" to thwart the "taint" of feminine inferiority. In addition, subordinating the feminine may be the only way left "to define masculinity at all, there being little or nothing left exclusive to men in this culture." Case, *supra* note 208, at 36.

308. *See* ATKINSON, *supra* note 1, at 226–27 (discussing suppression of individual and cultural identities as to tattooing in corporate grooming policies).

309. *Id.* at 224; Rich, *supra* note 18, at 1249, 1253.

310. Rich, *supra* note 18, at 1193, 1195.

311. Collinson & Hearn, *supra* note 206, at 148; McGinley, *supra* note 206, at 364–65, 371–72. Kimmel notes that men are powerful as a group, even if they do not feel individually powerful. Kimmel, *supra* note 209, at 282. Kimmel adds that the practices of masculinity position women and minorities as the "others" against which men must project their dominant identities. *Id.* at 280. Kimmel contends that homophobia ultimately spawns sexism and racism. *Id.*

312. Kimmel, *supra* note 209, at 273. *See supra* note 292 and accompanying text.

subordinated and devalued in the workplace.[313] Transgender, gay, and effeminate men are considered to be assimilated into femininity, and thus are relegated to the bottom of the workplace hierarchy.[314] Courts protect the right of women to dress and act in a masculine manner, while upholding employer codes that penalize men for acting in feminine ways.[315] The female with a tattoo is following traditionally dominant masculine behavior, while the men with feminine accessories, like earrings, are losing status in the workplace hierarchy. As Prof. Case asserts, society fears "sissies" more than "tomboys" because "masculinity in a girl is approved while femininity in a boy is not only troublesome, but a marker of homosexual orientation."[316]

Sociologist Holly Devor also describes how, for instance, "the patriarchal gender schema currently in use in mainstream North American society reserves highly valued attributes for males."[317] She theorizes that the "ideology [underlying this schema] postulates that the cultural superiority of males is a natural outgrowth of the innate predisposition of males toward aggression and dominance."[318] Women accordingly are associated with "modes of dress, movement, speech and action which communicate weakness, dependency, ineffectualness, availability for sexual or emotional service, and sensitivity to the needs of others."[319] In contrast, masculinity is associated with "'toughness, confidence, and self-reliance.'"[320] To maintain this "'aura of aggression, violence, and daring,'" men must "conscientiously avoid anything associated with femininity."[321] Men who purposely adorn themselves with a traditionally-female accessory such as an earring unsettle the schema's binaristic gender division, especially given that in the United States fashion in general and accessories in particular have been coded most often as feminine.

If gender marking has been historically associated with femininity, the fact that it is being extended to masculinity is a source of anxiety for those for whom masculinity and femininity are assumed to be natural binaries.[322] This anxiety is

313. Case *supra* note 208, at 3, 22–23, 33–34.

314. *Id.* at 2–3, 30–31; R.W. Connell, *The Social Organization of Masculinity*, *in* THE MASCULINITIES READER 39–40 (Stephen M. Whitehead & Frank J. Barrett eds., 2001); McGinley, *supra* note 206, at 365–67, 408–10.

315. Case, *supra* note 208, at 2–3, 26–27, 30–31; McGinley, *supra* note 206, at 365–67, 408–09.

316. Case, *supra* note 208, at 27. Quoting psychologist Robert Brannon, Kimmel states that one aspect of the definition of manhood is "1. 'No Sissy Stuff.' One may never do anything that even remotely suggests femininity. Masculinity is the relentless repudiation of the feminine." Kimmel, *supra* note 209, at 272.

317. HOLLY DEVOR, GENDER BLENDING 50 (Ind. Univ. Press 1989).

318. *Id.* at 50–51.

319. *Id.* at 51.

320. *Id.* at 52 (quoting JOSEPH H. PLECK, THE MYTH OF MASCULINITY 139 (Mass. Inst. of Tech. 1981)).

321. *Id.* (quoting PLECK, *supra* note 320, at 139). *See supra* note 294 and accompanying text.

322. McGinley, *supra* note 206, at 376–77. *See generally* MARJORIE GARBER, VESTED INTERESTS: CROSSDRESSING AND CULTURAL ANXIETY (1991) (offers a historical and textual overview of the cultural function of transvestitism and examines anxieties produced when the lines between two categories, such as male/female or heterosexual/ homosexual, become blurred); STEVEN COHAN, MASKED MEN: MASCULINITY AND THE MOVIES IN THE FIFTIES (Ind. Univ. Press 1997) (uncovers the

expressed in the oft-cited *Willingham v. Macon Telegraph Publishing Co.*, reviewing a gendered hair-length policy, in which the court, in a seemingly panicked hysteria, warns about the dangers of applying Title VII to invalidate gendered grooming codes:

> If this interpretation of the Act is expanded to its logical extent, employers would be powerless to prevent extremes in dress and behavior totally unacceptable according to prevailing standards and customs recognized by society. For example, if it be mandated that men must be allowed to wear shoulder length hair, despite employer disfavor, because the employer allows women to wear hair that length, then it must logically follow that men, if they choose, could not be prevented by the employer from wearing dresses to work if the employer permitted women to wear dresses . . . . Continuing the logical development of plaintiff's proposition, it would not be at all illogical to include lipstick, eye shadow, earrings, and other items of typical female attire among the items which an employer would be powerless to restrict to female attire and bedeckment. It would be patently ridiculous to presume that Congress ever intended such result . . . .[323]

The *Willingham* court expressed a fear of men gender-bending toward feminine traits, but not of females titling toward masculine attire. These fears are exacerbated by the corporate male whose gender and sexuality are invisible until he marks them as ambiguous with the insertion of jewelry into his ear. The male earring causes the wearer's dress and body to become a distraction and, thus, marks him by gender in a way that only women used to be marked. As soon as he puts an earring in his ear, the male employee feminizes himself in that his appearance is suddenly sending a gendered message—that it is a highly-ambiguous one is even more unsettling. Once he marks his body by gender, he calls attention to the gender of all the other formerly unmarked male bodies in the office. Typically, Prof. Tannen said, male appearance "needed and attracted no attention."[324] If his earring is attracting attention, the male employee can no longer maintain an unmarked appearance.

Prof. Butler addresses this issue of how a person enacts his or her gender and puts (or does not put) his or her body on display in particular ways: "One is not simply a body, but, in some very key sense, one does one's body and, indeed, one does one's body differently from one's contemporaries and from one's embodied predecessors and successors as well."[325] Gender is not an outward expression of some interior, "natural" self. As Prof. Butler puts it, "gender cannot be understood as a role which either expresses or disguises an interior 'self,' whether that 'self' is conceived as sexed or not. As performance which is performative, gender is an 'act,' broadly construed, which constructs the social fiction of its own psychological interiority."[326]

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anxieties beneath representation of hegemonic masculinity in American film); BUTLER, *supra* note 210, at 33, 122, 141.

323. 352 F. Supp. 1018, 1020 (M.D. Ga. 1972), *aff'd*, 507 F.2d 1084 (5th Cir. 1975). *But see supra* note 220 and accompanying text.

324. Tannen, *supra* note 295, at 18.

325. Butler, *supra* note 206, at 272.

326. *Id.* at 279.

> In enacting gender in certain ways, a person is only doing what others have done before. These gendered conventions, Prof. Butler contends, are part of a history that exists independent of the person performing them: "[G]ender is an act which has been rehearsed, much as a script survives the particular actors who make use of it, but which requires individual actors in order to be actualized and reproduced as reality once again."[327] Prof. Butler thus argues that gendered identity is a kind of performance without an original.

Prof. Butler thus argues that gendered identity is a kind of performance without an original. Men and women "compel the body to conform to an historical idea of 'Woman'" or 'Man,' "materialize" themselves "in obedience to historically delimited possibility," and abide by a "tacit collective agreement to perform, produce, and sustain discrete and polar genders as cultural fictions."[328]

The problem with the male earring is that its significance in the binaristic gender schema is not immediately recognizable. Whatever the male employee intends by sporting an earring, Prof. Butler's theory suggests, is not as relevant as the way in which such gender marking has historically been interpreted. Standards are maintained by the repetition of performative acts of gender. Those who do not conform to the concept of the properly-gendered body are policed by others, especially employers and co-workers. Although gender norms are artificial constructs, they have actual effects, especially given how strictly they are enforced. Indeed, that which has come to be regarded as "natural" behavior is actually the result, Prof. Butler argues, of explicit and implicit coercion.[329]

By banning the male earring, employers and the judges who uphold their dress code policies participate in this coercion of male employees, reminding them of the expectation that they follow the repertoire of practices that mark them as "properly" gendered. The earring cases confirm that there are still social consequences of confusing gender boundaries. Employees are given a gender performance review and are penalized for not following the standard, socially-agreed-upon scripts. They are encouraged to regulate their own behaviors and appearances (as well as that of their peers) in relation to a dualistic gender system in which people are defined and define themselves according to conventional notions of what it means to be either male or female. The most desirable employee in this environment will be the one whose gender "performance complies with social expectations."[330]

Through a male-earring ban, a workplace reinforces the dominant gender assumption that women wear earrings and men leave their bodies unadorned, as well as the implicit premise that women are "naturally" penetrable and men are "naturally" impenetrable. These binaries help explain the workplace tolerance for tattoos, although at first it might not seem to do so. Tattoos are body adornments that are typically coded as masculine, associated as they are with toughness and aggression, and often evoking military associations. Yet, a woman who sports a tattoo is not read as more masculine. Instead, as Prof.

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327. *Id.* at 272.

328. Butler, *supra* note 206, at 273.

329. JUDITH BUTLER, BODIES THAT MATTER 3 (1993). *See supra* notes 344–47 and accompanying text.

330. Butler, *supra* note 206, at 278.

Tannen has noted, everything a female does to her body and appearance is read in terms of femininity. This marking is clearest in the designation of the female tattoo, especially one on the lower back, as a "tramp stamp."[331] This slang descriptor reveals that the tattoo is being read in terms of the female's display of her sexual availability to men.

According to Prof. Devor, because this association is already part of the dominant conception of femininity,[332] the female tattoo does not provoke the kind of gender anxiety the male earring does. If a male earring ban was about restricting employees from displaying a too casual appearance, then male tattoos would also likely fall under the ban. Instead, courts have upheld the male employee's right to display a tattoo in *Hub Folding Box Co.* and *Red Robin*. The difference between the two body adornments, of course, is that the male tattoo is unambiguously masculine and therefore, it functions to reinforce normative gender assumptions, particularly those about masculine toughness and impenetrability.

As Prof. Case stated,

> [w]hen individuals diverge from the gender expectations for their sex—when a woman displays masculine characteristics or a man feminine ones—discrimination against her is now treated as sex discrimination while his behavior is generally viewed as a marker for homosexual orientation and may not receive protection from discrimination. . . . This differential treatment has important implications for feminist theory. It marks the continuing devaluation, in life and in law, of qualities deemed feminine. The man who exhibits feminine qualities is doubly despised, for manifesting the disfavored qualities and for descending from his masculine gender privilege to do so. The masculine woman is today more readily accepted. Wanting to be masculine is understandable; it can be a step up for a woman, and the qualities associated with masculinity are also associated with success. . . . We are in danger of substituting for prohibited sex discrimination a still acceptable gender discrimination, that is to say, discrimination against the stereotypically feminine, especially when manifested by men, but also when manifested by women.[333]

One might argue that these dress code distinctions are merely practical matters, given that it is easier to remove an earring than a tattoo. If it is a purely practical matter, however, why is such a fuss made over this tiny accessory? Reading the cases through the lens of Prof. Butler's theories shows that the effect of male-earring removal is to return the male employee to a position of unmarked dominant masculinity; in contrast, whether the male employee with the tattoo displays or covers it, he still occupies an unambiguously masculine position. Similarly, whether displaying or covering her tattoo, the female employee's position in a gendered binary remains unchanged. Males properly performing their gender roles, through displays of masculine-encoded tattoos, do not

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331. In WEDDING CRASHERS (New Line Cinema 2005), Jeremy Grey (played by actor Vince Vaughn) establishes the continuing association between tattoo and sexual promiscuity with his comment about a woman: "Tattoo on the lower back . . . might as well be a bull's eye." *See also supra* notes 46–51 and accompanying text.

332. DEVOR, *supra* note 317, at 51.

333. Case, *supra* note 208, at 2–3.

disrupt the unmarked position of men in society and in the workplace. In contrast, males who do not properly perform their gender roles, by wearing earrings or adorning themselves with other feminine accessories, disrupt the unmarked position of men and suffer social and legal consequences for it. However, females retain their same gender marked designations, regardless of whether or not they perform in accordance with societal demands about traditional female beauty or bedeck themselves in masculine attire and accessories.

It is not likely that any dress code would explicitly legislate about female body art, given that, in acknowledging how their bodies are marked, courts have already provided females with protection from gendered discrimination in the workplace. In other words, unlike the male earring wearer, a female employee whose gender is obviously and perhaps even purposefully ambiguous is supposed to be protected by the law. Following Prof. Butler's theories, extending the protection of the law to the male earring wearer might suggest that men are in need of such protection and, therefore, are not naturally empowered.[334] To acknowledge that he is in need of gendered protection would, in turn, undercut the assumption that gender is a "woman's problem." Interpreting law to protect heterosexual males vulnerable to gender marking would feminize them and position them as weak and in need of protection. If we follow Prof. Butler's logic, creating an association between masculinity and vulnerability in law would be problematic given the ways "[j]uridical power inevitably produces what it claims merely to represent."[335] If, as Prof. Butler says, subjects are formed by the kinds of protection afforded to them, then it follows that heterosexual males are not extended gendered protection under the law.

That workplaces allow the female tattoo and ban the male earring is not surprising because such a dress code reinforces a system in which women primarily function as objects to be looked at, while men are subjects—those expected to look and to act. These judicial decisions produce as well as reinforce a division between the sexes. While the gender of female employees is always visible, according to Prof. Tannen's theory, the problem with male earring wearers is that they put the tenuousness of the construction of dominant masculinity on display. By making the employee's masculinity more ambiguous, the earring makes apparent the ways the standard corporate attire is not some expression of natural masculinity, but rather a performance of some idea of masculinity. More to the point, the male earring wearer ruins the impression that masculinity (and by extension corporate power) is natural.[336] If masculinity is not natural, then, by extension, neither is the masculine corporate ideal.[337] The male earring threatens the coherence of masculine power and makes

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334. *See supra* notes 317–24 and accompanying text.

335. BUTLER'S BODIES, *supra* note 329, at 2.

336. Brittan, *supra* note 205, at 53; McGinley, *supra* note 206, at 365, 376–77.

337. *Id.* at 375–77, 386. The association of corporations with masculinity has been examined by numerous cultural historians. *See generally* GAIL BEDERMAN, MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880–1917, at 11–12 (1995); DANA D. NELSON, NATIONAL MANHOOD: CAPITALIST CITIZENSHIP AND THE IMAGINED FRATERNITY OF WHITE MEN (1998); ALAN TRACHTENBERG, THE INCORPORATION OF AMERICA: CULTURE & SOCIETY IN THE GILDED AGE (Eric Foner ed., Hill and Wang 1982).

it "radically unstable"; the more the male earring is seized upon as inappropriate, the more it reveals such power as illusory.[338] That masculine power is, to borrow Prof. Butler's phrasing, "always in the act of elaborating itself is evidence that it is perpetually at risk[;] . . . it 'knows' its own possibility of becoming undone."[339] Of course, eradicating male earring-wearing from the workplace does not shore up male power, but it exposes the naturalness of male power as illusory. As corporate power has typically been synonymous with male power, this exposé is particularly dangerous: Instead of naturally emanating from male bodies, masculine power is revealed to be culturally constructed, to exist both in a binary with femininity and on a continuum of acceptable to unacceptable behavior codes. There cannot be an aberrant earring-wearing male without a normal non-earring wearing male.

IV. REFOCUSING ON JOB PERFORMANCE

In body art work rule disputes, gender performance often overrides concerns about proper job performance, especially when men seek to display traditionally feminine accessories. With the adoption of written and unwritten body art work rules, employees find that many employers seem more concerned with upholding dominant expectations of gender performance than evaluating the quality of an employee's job performance. Rather than balance the interests of employers and employees, courts have primarily given in to employer demands for proper gender performance instead of focusing on the adoption of dress and grooming codes that relate to actual job performance. Courts have often failed to rein in employers who reward gender performance over job performance, especially when men are tilting toward characteristics encoded as feminine.

Similar to previous decisions upholding other workplace grooming and dress policies, the judiciary has played an important role in legitimizing, rather than challenging, both discriminatory and stereotypical behavior regarding body art work rules.[340] Courts allow employers to police the boundaries of acceptable grooming and dress in ways that maintain the status quo of dominance in the social and workplace hierarchies.[341] Yet the courts do so in ways that often outwardly suggest neutrality or objectivity, but in actuality largely convey antipathy for lower-status groups.[342] These decisions consistently marginalize and subordinate women as well as racial and ethnic minority

338. Judith Butler, *Imitation and Gender Insubordination*, *in* INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES 23 (Diana Fuss ed., Routledge 1991).

339. *Id.*; Collinson & Hearn, *supra* note 206, at 148–49 (contending that masculine identity in the workplace is much more fragile and precarious than it appears on the surface).

340. Klare, *supra* note 18, at 1419–21, 1431–32; Rich, *supra* note 18, at 1156, 1170–71. Prof. Rich criticizes judges for "unarticulated knee jerk" responses to unfamiliar racial and ethnic identity practices, suggesting that they should make efforts to educate themselves about the substance and significance of these performative acts. *Id.* at 1170–71.

341. Klare, *supra* note 18, at 1431–32; Rich *supra* note 18, at 1156; Vojdik, *supra* note 2203, at 92. Fearing a loss of status, co-workers also police grooming and dress, be it racial or ethnic performances or the display of tattoos and piercings. *See* ATKINSON, *supra* note 1, at 221–23; Rich, *supra* note 18, at 1160–62, 1190, 1268–69.

342. Rich *supra* note 18, at 1193–94.

groups, transgendered persons, and gender-ambiguous men in the workplace, while reaffirming the status quo of heterosexual white male power and dominance in the workplace hierarchy.[343]

Gender, racial, and ethnic appearances that may contest the status quo by not conforming to dominant-group norms can be punished swiftly without fear of retribution through anti-discrimination litigation.[344] Therefore, employees from lower-status groups must be willing to shed their racial, cultural, and gender identities or risk losing their jobs.[345] Courts myopically view these issues as simply matters of choice: choose to follow the employer's code or choose to work elsewhere.[346] Courts conveniently ignore the coercive effect of economic pressures and the resulting constraints on human agency, making it difficult—if not impossible—to just leave a job and find another.[347]

Prof. Klare contends that "[t]he genius of appearance law as discipline lies in indirection and decentralization," which provides us with the illusion of freedom of choice. He notes that, although our society claims that we are free from government or religious edicts on grooming and dress, the law provides employers with the power to adopt dress and grooming codes and "to punish nonconformists." He states:

> [B]y delegating power to employers (and other authority figures), appearance law raises the cost of nonconformity . . . . So the system is decentralized, variegated, and flexible . . . . And precisely because appearance regulation is so decentralized, even obscure, this persistent conformism is experienced as

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343. FRANKE, *supra* note 5, at 39–40; Klare, *supra* note 18, at 1431–32; Raskin, *supra* note 227, at 265; Vojdik, *supra* note 2203, at 92. Prof. Vojdik indicated that social dominance remains at the heart of gender discrimination. Although gender social relations may be evolving, notions of masculinity and femininity "still preserve gender as hierarchy." In the workplace, she indicates that the elimination of facially discriminatory practices has simply replaced "[f]ormal exclusion . . . with another form of social control and distinction that preserves the relationship of gender domination." *Id.* Similarly, Prof. Franke posits that ultimately "bodies end up meaning less in the fight for equality than the roles, clothing, myths, and stereotypes that transform a vagina into a *she*." In assessing notions of masculinity/femininity, gender, and sexuality "uncovers the ideology and power differentials congealed in these categories." FRANKE, *supra* note 5, at 39–40.

344. Butler, *supra* note 206, at 279; Klare, *supra* note 18, at 1431–32, 1436–37; Rich *supra* note 18, at 1166–68.

345. Rich *supra* note 18, at 1163–64, 1244–45. In the context of racial and ethnic performative acts, Prof. Rich discusses how the coercive effect of grooming policies for lower-status groups is fundamentally unfair:

> Why should a person be required to shed passively acquired racially or ethnically marked mannerisms when they have no bearing on her potential performance of the job at issue? Indeed, once a heavily-marked job seeker is denied an opportunity because of these passive traits and behaviors, she faces an important decision. Now that she is aware that her community's practices are undesirable, she must decide whether to shed these attributes, a decision that may be experienced as a truly traumatic betrayal of her concept of self . . . Many may feel a need to emphasize racial/ethnic pride as a result of this dignitary injury. It should offend our basic notions of fairness to leave these individuals at the mercy of an employer's subjective views about the relative value of different ethnic communities. Indeed, after two decades of identity politics, it seems unfair to tell this worker that she must assimilate in order to fairly compete in society.

Id. at 1163–64.

346. Klare, *supra* note 18, at 1431–32; Rich *supra* note 18, at 1244–45.

347. Klare, *supra* note 18, at 1431–32, 1436–37; Rich *supra* note 18, at 1244–45.

> "natural" rather than as a socially constructed artifact deeply influenced by law. Thus, appearance law functions both *distributively* (assigning coercive power to employers) and *ideologically*—it makes contingent, alterable outcomes appear to be chosen free of coercive direction, or perhaps just inevitable, "the way things are."[348]

Just because that is the way things are certainly does not mean that is the way things must continue to be.

Courts have gyrated for decades with innumerable schemes to try to justify gender differences in grooming and dress codes—sameness versus difference, immutable versus volitional, natural versus artificial, equal versus unequal burdens, community standards versus individual autonomy, fundamental rights versus personal preferences. These same tortured dances occur whenever employees seek to perform their racial and ethnic identities in the workplace. Even with the accommodationist language of Title VII, employees must fight to be able to perform their religious identities through dress and grooming. Instead of anti-discrimination law balancing the interests of employees and employers, it has become largely a one-way street in which courts kowtow to employer demands for nearly unfettered discretion and the perpetuation of a damaging status quo.[349]

What has long been missing from the mix is a focus on individual qualifications and workplace performance.[350] It is striking that in so many of these dress and grooming cases, the discharged or demoted employees were successfully performing their jobs. Then one day their world was turned upside down because the employer decided to change the rules of the game with a new or revised policy, or to enforce some long moribund policy, or to conjure up some unwritten code. Prof. Rich notes that the judiciary has become continually out of touch with average working people who spend most of their waking hours working, and who feel unfairly constrained by dress and grooming codes that have little to do with job performance. She states,

> [f]ortunately, the common law's generous grant of employer autonomy is now fundamentally at odds with most Americans' understanding of the employer-employee relationship. Because most Americans' work experience has been during the era of federal and state employment protections for race and sex, as well as protections based on pregnancy, disability, and religion, they operate under the inaccurate perception that the employer-employee relationship provides them with some protection from random adverse treatment by employers . . . . Stated more simply, the common man no longer finds it natural, or "common sense," that employers should be permitted unilaterally to impose their will on workers when cultural interests are at stake. Rather, the new social expectation is that when an employer imposes a rule, she will justify her decision on some rational, cost-benefit analysis.[351]

Under dress and grooming codes, employer classifications should equate directly with successful performance of job tasks, not half-baked assumptions

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348. Klare, *supra* note 18, at 1431–32. *See supra* notes 343–46 and accompanying text.

349. *See supra* notes 293–97, 303–10 and accompanying text.

350. Case, *supra* note 208, at 79; Rich *supra* note 18, at 1163–64, 1199, 1203, 1241, 1244–45.

351. Rich, *supra* note 18, at 1245–46. *See supra* note 33 and accompanying text.

about the reactions of co-workers and customers or strained efforts to maintain traditional power and dominance. If workplaces and those court decisions interpreting anti-discrimination law emphasized employees' successful job performance—actually doing the job—rather than ensuring that they play their gendered roles by adhering to superficial grooming and attire standards, the needs and interests of employers, employees, and customers would be better served.[352] By freeing up long-suppressed diversity, the employers can benefit from the release of creative energies for productive purposes[353] and better serve a broader customer base.[354]

It seems a fair bargain to allow employers to expect employees to do their jobs if, in turn, employees get a reasonable chance to reflect themselves in their grooming and dress, including body modification.[355] The fact that Title VII explicitly recognizes the notion of reasonably accommodating religious performative acts means that flexibility in dress and grooming codes is not only possible, but also desirable in a diverse workplace. The parameters of grooming and dress codes should be actual and reasonable concerns about job-related safety, unlike the imposition of unfair burdens on co-workers or disruptions in the workplace environment as discussed in the religious discrimination case of *Red Robin*. The workplace could become a safer place for people to express their preferred gender identities (along with racial, ethnic, and religious identities) through dress, grooming, and body modification, if the courts keep their eyes on the true purpose of Title VII, measuring the legality of workplace policies based on their connection to actual job performance.

The judicial failure to strike a fair balance between employer and employee interests allows employers, whether intentionally or unintentionally, to reinforce limiting gender binaries. Unfortunately, in the recent body art work rules cases, the courts continue to lumber down the same dull path of rewarding gender performance over job performance at the expense of qualities culturally marked as feminine. Perhaps significant change must await a whole new generation of employees who may hold more fluid view of gender boundaries and body modification.[356] However, eradicating gender stereotypes should not be left up to

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352. *See* Mielikki Org, *Tattoos and Piercings Come Out at the Office*, COLLEGE J., Sept. 9, 2003, *available at* http://www.collegejournal.com/successwork/onjob/20030904-org.html (last visited Nov. 22, 2006) (reporting that some companies, such as Boeing and Ford, find that allowing non-offensive tattoos and piercings can enhance a company's image); Rich, *supra* note 18, at 1163–64, 1199, 1203, 1241, 1244–45.

353. Klare, *supra* note 18, at 1443; Org, *supra* note 352; Brad Wong, *Tattoos getting more common in workplace*, SEATTLE POST-INTELLIGENCE RPTR., June 28, 2005, *available at* http://seattlepi.com/business/230350_workpierced25.html (last visited Oct. 27, 2006) (article asserts that allowing tattoos and piercings helps employers to attract best-qualified candidates and reduces employee turnover).

354. Burnett, *supra* note 14, at 129–31.

355. *See* Burnett, *supra* note 14, at 145. "Accepting the long-haired and creatively facial-haired, the tattooed, and well-pierced for their talents and what they bring . . . is the civil thing to do because it 'demonstrates courtesy and dignity toward all.'" *Id.*

356. *See* Org, *supra* note 352 (contending that tattoos and piercings are becoming less associated with subculture as a younger generation of employees join the workforce); Melanie Mayhew, *Tattoo taboo: Is body art OK at the office*, RICHMOND TIMES-DISPATCH, May 16, 2005, *available at* http://www.timesdispatch.com/servlet/Satellite?pagename=RTD/MGArticle/RTD_BasicArticle&cid=1031782735275&c=MGArticle (last visited Oct. 27, 2006) (contending that tattoos and piercings

generational chance. Instead change should be firmly grounded in judicial reasoning that strikes down, rather than upholds, harmful gender stereotypes so often embodied in employer dress and grooming codes, including body art work rules.

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are more accepted in the workplace, but that older people view such practices are "trashy" and associated with "unsavory characters"). A recent survey supports the notion of a generation gap in regard to views on body art. Picchione, *supra* note 14, at 833–34. For adults over sixty-five, the survey found that fifty-seven percent viewed tattoos as "freakish" with only three percent calling them "artistic." *Id.* Conversely, of adults aged eighteen to twenty-four, about fifty-three percent consider tattoos to be "artistic" and only twenty-nine percent deemed them to be "freakish." *Id.*