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Power/Dressing: Regulation of Employee Appearance*

Karl E. Klare**

I. Introduction ............................................ 1396
II. A Doctrinal Survey of Employee Appearance Regulation ... 1399
   A. Constitutional Law .................................. 1402
      1. The liberty interest ........................... 1402
      2. Fundamental rights ............................. 1405
   B. Civil Rights Statutes ................................ 1412
      1. Race and religion ............................... 1412
      2. Gender ........................................ 1414
         a. Dress codes ................................ 1415
         b. Attractiveness requirements ............... 1421
   C. Collective Bargaining Law ........................... 1425
III. Appearance Regulation Law and the Constitution of Social Life ........................................ 1430
   A. Conformism and Discipline .......................... 1431
   B. Normalizing Gender ................................ 1432
   C. Managerial Power ................................... 1433
      1. False consciousness and embedded rationality 1434
      2. The relationship of choice and utility ....... 1436
      3. Considerations of equity ....................... 1437
      4. Market failure ................................ 1438
         a. Information deficits ........................ 1438
         b. Free rider problems ......................... 1440
         c. Agency problems ............................. 1441
IV. A Right to Appearance Autonomy? ....................... 1442
   A. The Need for Reform ............................... 1442
   B. A Rights-Based Approach ........................... 1444
V. Appearance Autonomy and Market Reconstruction .......... 1446
VI. Conclusion ............................................ 1451

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I. INTRODUCTION

This article is about the role of law in regulating personal appearance, particularly at work. With some exceptions, the law authorizes employers to determine the kinds of clothing people must, may, or may not wear on the job; which hair styles and other appearance practices are permitted and which are forbidden in the workplace; and whether to impose appearance or attractiveness standards as a condition of employment. This article concerns not only the content but the meaning of these legal rules: how they affect the people against whom they are enforced; what assumptions, fantasies, and prejudices they express; and which values are served and which are demeaned by the complex of social practices comprising appearance regulation. Finally, the article makes a proposal as to what we should do about these rules: they should be almost entirely abandoned and replaced with rules designed to promote personal autonomy and cultural diversity.

I became interested in this topic years ago. While I was still in law school, my father participated (as an officer of the defendant labor union) in a notable case in which employee resistance to a ban on wearing tank-top shirts inside a plant precipitated a lockout (the employer called it a wildcat strike).1 I had few appearance regulation cases in my own practice as a labor lawyer, but I chafed under the restrictions of the Boston bar’s conservative code of business dress. When I became a professor, doffed my suits and neckties, and subscribed to the Labor Relations Reporter, my curiosity was continually aroused by noticing the intensity and frequency with which employees challenge appearance codes through litigation and grievances. Over the years, I included this topic in my labor law courses. My thinking on the subject has been most influenced by scholarship within feminist legal theory and critical race theory. I will also draw upon law-and-economics thinking, from a radical perspective. If I have added anything, it is to blend into the mix a workers’ rights or workplace democracy perspective.

Appearance regulation is an apt subject for an essay in honor of Mary Joe Frug. Mary Joe loved clothing and style. She took chances and presented herself to the world in her own unique way, often defying the fashion conventions of her social and political circles. She wore make-up, accessories, miniskirts and high-laced boots.

Moreover, the topic relates directly to central themes of her intellectual interests and work. Mary Joe was a committed opponent of illegitimate domination, particularly sexual subordination in all of its forms.

1. Anheuser-Busch, Inc. v. Teamsters Local No. 633, 511 F.2d 1097 (1st Cir. 1975), cert. denied, 423 U.S. 875 (1975). The case is noteworthy in labor law because the employer was denied the standard injunction against the union’s mid-contract job action.
She was appalled that government and employers routinely prevent people from making their own choices about appearance, and specifically by the way dress codes enforce patriarchal attitudes about women's proper roles and behavior. She hoped and worked for the empowerment of dominated groups and for a world of enormously enlarged opportunities for all people to make choices for and about themselves, and to pursue their own life paths.

Appearance autonomy is not an insignificant aspect of the freedom to make self-realizing choices. Mary Joe deeply believed that the cares and concerns of everyday life are important sites of political contestation and that, in the enduring phrase, the personal is political. She believed that gender differences are produced, identities emerge and are renegotiated, and domination is sustained (and potentially subverted) in the course of social routines such as appearance choices and dress code enforcement. The field of appearance regulation law confirms Mary Joe's theory that:

[L]egal rules—like, other cultural mechanisms—encode the female body with meanings. Legal discourse then explains and rationalizes these meanings by an appeal to the "natural" differences between the sexes, differences that the rules themselves help to produce. The formal norm of legal neutrality conceals the way in which legal rules participate in the construction of those meanings.2

Mary Joe believed in the power of the idea of the social construction of reality, yet she had become concerned that "social construction seems like a clichéd, improbable, and unconvincing account of experience, an explanation for sex differences that undervalues 'reality.'"3 She worried about the "essentializing impulse that places particular sex differences outside the borders of legal responsibility,"4 and about the immobilizing power of legal rules and discourses that "naturalize" sex differences.5 Her work aimed to "provide an analysis of the legal role in the production of gendered identity that will invigorate the liberatory potential of the social construction thesis."6

The practices and narratives of appearance law naturalize human differences that are in fact socially constructed, in part by law itself. Appearance law generates and reinforces beliefs that help sustain a social order founded on the domination of woman in general and of specific groups of women, such as lesbians, African-American women, and others, in particular. Mary Joe would have regarded appearance regulation as eminently a terrain of political inquiry and struggle. I have no

3. Id. at 1048.
4. Id. at 1049.
5. See id. at 1050-52.
6. Id. at 1049.
doubt Mary Joe would have favored empowering law reform. I hope she would have approved some of my proposals.

I know that the topic of appearance regulation interested Mary Joe as an academic matter. Over lunch years ago—I do not remember when, exactly—we discovered that we each followed the cases regulating appearance and brought the issue into our teaching. We talked vaguely about doing a joint seminar on appearance regulation, perhaps even someday writing an article together. We never followed up, so I have only a general sense of Mary Joe's thoughts on the subject. I can only guess, based on our talks and her other work, as to the directions she would have pursued.

I am painfully aware of my wanting to hold on and not let go, of wanting to continue my dialogue with Mary Joe. No doubt that is a large part of what this article is about. Having said that, I need to add something (which will be obvious to everyone who was fortunate to have known her): what I offer here cannot compare to the rich insight and subtle observation Mary Joe would have brought to the subject. I only hope that I have fittingly honored her intellectual courage and commitment.

* * *

In Part II, I provide a general survey of the legal rules applicable to clothing and personal appearance. I then attempt in Part III to summarize what I think is really going on in this body of law. The primary social function of appearance law is to empower employers, school officials, judges, and other authority figures to enforce the dominant expectations about appearance and to discipline deviance from the approved social norms. Generally speaking, these official appearance standards denigrate cultural and religious diversity and enforce conformity to white, heterosexual, Christian images of beauty and proper grooming. The rules and standards both exploit and repress female sexuality and punish women who depart from (largely) male-created expectations about proper female behavior and roles. Perhaps the central social function of appearance regulation is to maintain the sexual subordination of women to men.

These rules are intolerable and have no place in a democratic society committed (at least in principle) to equality and to cultural and religious diversity. We should replace them. In Part IV, I advance an obvious possible basis for democratic revision of appearance law, the notion of an inalienable legal right of choice with respect to personal appearance. I am sympathetic to the spirit of this idea, but conclude that it is problematical in numerous ways. Therefore, in Part V, I propose a "market reconstruction" approach to law reform, a modification of the "inalienable right" thesis. I suggest that we achieve reform by altering the background rules of law that structure bargaining between employers and employees about appearance, dress, and grooming.
(My proposals focus particularly on employment; I leave to another day discussion of appearance and dress codes in other contexts such as education.)

II. A DOCTRINAL SURVEY OF EMPLOYEE APPEARANCE REGULATION

Legal issues with respect to clothing, style, and appearance arise in a wide variety of settings. Throughout most of American history, government discriminated on the basis of skin color with respect to entitlements, services, and employment. Such discrimination continues de facto (for example, police abuse of people of color, discrimination in sentencing, and so on), but at least in theory, our Constitution no longer tolerates official discrimination on the basis of skin color. Yet government does assert a variety of other powers to regulate appearance or to treat citizens on the basis of appearance. For example, until recently, several jurisdictions barred “ugly” or “unsightly” people from appearing in public. Likewise, many localities purport to uphold decency and decorum by requiring that intimate body parts be covered in public. In many jurisdictions it is unlawful to appear in public in dress customarily belonging to the opposite sex, with intent to conceal one’s own sex.

Appearance issues also arise in the administration of criminal justice. It is well known that a woman’s dress practices may determine the degree of protection she receives from laws designed to prevent and punish rape and sexual assault. Similar issues arise in the administration of statutory protections against sexual harassment in employment and education. There is a widespread belief, particularly—although not exclusively—among men, that if a woman adopts certain dress or appears in certain ways, she intends to signal, or should know that she is signaling, availability for or receptiveness to sexual advances. As will be discussed later, although it is “common sense”—an article of faith of our culture—that some dress is sexually provocative or inviting, curiously there is no consensus on exactly what kind of dress is provocative.


8. Indecent exposure statutes aim to prevent certain kinds of sexual abuse (for example, male exposure of genitals or masturbation in sight of a female in a public park), but they also typically have a repressive aspect penalizing conduct involving no element of sexual abuse (for example, nude and—for women—topless swimming and sunbathing).


10. See infra notes 152-56 and accompanying text.
(for example, some employers regard women wearing pants at work as provocative and therefore require skirts or dresses, whereas some employers regard skirts as too provocative and require women employees to wear pants). In any event, officials charged with enforcing sexual harassment laws or personnel policies frequently base decisions on their personal beliefs about provocative dress and, in classic blame-the-victim fashion, accord less protection to women who violate these understandings.\footnote{Julie Hatfield, Defining Appropriate Dress in the Workplace, BOSTON GLOBE, Jan. 16, 1992, at 31.}

Other aspects of appearance regulation law concern rules about what may be worn and how one may appear in certain institutional settings, such as courtrooms, schools, the military, and employment. No attempt is made here to provide a complete survey. I focus particularly on the employment context because of my labor law background and not because this context is necessarily more important or interesting than the others.

Two points are worth initial notice. First, employees often care passionately about appearance and dress issues. They feel hurt, anger, and shame when their appearance choices are rejected by authority figures, and sometimes they go to great lengths to defend their autonomy of choice. The reported cases reveal over and over again that employees are willing to risk discipline and even discharge over appearance choices. They file grievances, go to court, and even strike over such issues. A number of cases were taken all the way to the Supreme Court. I have made no attempt to develop quantitative measures of legal activity in this area. I leave it simply that appearance cases surface in the advance sheets with what seems to me to be an astonishing regularity.\footnote{Chief Justice Rehnquist gave the Supreme Court’s imprimatur to the idea that provocative dress causes sexual harassment. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986) (stating that woman’s “provocative dress” is “obviously relevant” to whether sexual advances were unwelcome and therefore harassing).}

A second, curious point involves the attitudes of judges and other...
official decisionmakers about appearance cases. There is, on the one hand, a tendency to denigrate and demean appearance claims, a faint suggestion that courts have better things to do with their time than adjudicate grooming standards. Suddenly the tone becomes somber and the message almost 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. Courts sometimes seem to believe that the foundations of civilization will crumble forthwith if men wear long hair or women wear pants. As Mary Whisner points out, 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.

It does not seem plausible that these dire consequences would actually transpire. Styles change, appearance practices formerly detested by conventional sensibility become widely accepted, and life goes on. If the social fabric is coming apart, it seems unlikely that this can be attributed to the fact that some male police officers want to wear an earring, or that some male attorneys wish to appear in court without a necktie, or that some female attorneys wish to appear in pantsuits instead of dresses, or that an Air Force psychologist wishes to wear a yarmulke. One wonders about these judges: what are they afraid of?

Employee appearance regulation cases arise under a wide range of doctrinal headings. The principal legal contexts are: constitutional guarantees of liberty, equality, free exercise of religion, and free expression; statutory protection of civil rights and equal employment opportunity; and collective bargaining law, as embodied in statutory protection for concerted activity and the enforcement of collective contracts through arbitration. The emerging common law field of wrong-


13. See, e.g., Anheuser-Busch, Inc. v. Teamsters Local No. 683, 511 F.2d 1097, 1098 (1st Cir.), cert. denied, 423 U.S. 875 (1975) (describing case—in which employees risked their jobs and engaged in concerted action over a dress code issue—as a "tempest ... brewed in a very small teapot").


ful discharge litigation is not yet but may someday become an important arena for testing appearance regulation issues.  

A. Constitutional Law

The Constitution's individual rights guarantees apply to action by government in its capacity as employer, so the nation's roughly 19,000,000 public employees have a particularly vital interest in the scope of constitutional protection of autonomy of choice regarding appearance.

1. The liberty interest

The Supreme Court assumes, although it has not unambiguously ruled, that the Fifth and Fourteenth Amendment "liberty" clauses afford at least some protection against governmental interference in personal appearance choices. This is based on a so-called "substantive due process" theory: at least in some contexts, governmental regulation of appearance is, under our Constitution, "an impermissible intrusion upon liberty." Despite promising statements, the courts have thus far accorded only the most minimal weight to the liberty interest in appearance autonomy. Judicial review of public employer grooming codes is exceedingly deferential. In the typical analysis, the opening paragraphs extol the virtue of autonomy in a free society and reaffirm that the public employee has stated a liberty interest claim. But when the liberty interest is then balanced against the public employer's managerial interests, the latter almost always prevail, often based on the most speculative and dubious claims of justification. Thus, for example, the Supreme Court in Kelley upheld a police department's elaborate regulation of sideburns (for example, sideburns may not flare beyond two inches in width, may not connect to mustache, and so on) on the assumption that enforced similarity in police officer appearance might be rationally related to the government's interests in public safety and in allowing the employer to select its own method of police organization. The theory was that enforced grooming standards would make officers recogniza-

19. Privacy and autonomy concerns play an important role in some frontier wrongful discharge cases, and perhaps in time courts will include appearance autonomy under these rubrics.

20. Kelley v. Johnson, 425 U.S. 238, 244 (1976) ("[W]hether the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance is a question on which this Court's cases offer little, if any, guidance. We can, nevertheless, assume an affirmative answer for purposes of deciding this case . . . ."); see also Pence v. Rosenquist, 573 F.2d 395 (7th Cir. 1978) (holding that, in absence of justification, suspension of school bus driver for refusal to shave neat and well-groomed mustache violates due process).


22. See id. at 247-49.
ble to the public (a patently absurd claim, since the grooming regulations at issue allowed a wide variety of appearance styles just so long as the particular rules were not violated); and, that the grooming rules would increase the force's esprit de corps (also absurd, given the deep resentment and staunch resistance the rules obviously provoked).

Another police force demoted one male officer and reprimanded a second because they each decided to wear an ear stud. They claimed a constitutional right to do so, particularly when off-duty. The employer's countervailing showing of a disruptive impact on productivity amounted to evidence that various residents of the small, conservative town disapproved of the ear studs. Residents laughed at the men, "accused" them of being gay, and thought they deserved punishment because wearing an earring detracts from the authority of a policeman. In short, the evidence of an adverse impact on police effectiveness was that narrow-minded and homophobic town residents disapproved of the earrings. The Seventh Circuit held this sufficient to outweigh the policemen's constitutional interest in liberty. The officers claimed that a valid showing of adverse impact on productivity required evidence of some problem beyond mere community disapproval. I would have thought this a powerful argument, a familiar and well-established one in First Amendment and civil rights jurisprudence. The very purpose of constitutional protection of individuality and dissent is to prevent majoritarian sentiment and prejudice from silencing or victimizing nonconformists. But the court called this an "as-

23. Id. at 248.
25. Id. at 248.
26. See id. at 255 n.6 (Marshall, J., dissenting).
28. Id. at 513-14.
29. Id.
30. Id. at 514.
31. See id. at 511-12.
32. It is a basic principle of equal employment law that the employer cannot justify race or gender discrimination on the basis of customer preference or local norms absent a strong showing that the job requires, e.g., an employee of a certain gender. See, e.g., Gerdos v. Continental Airlines, 692 F.2d 602, 609 (9th Cir. 1982) ("[G]ender-based discrimination cannot be upheld on the basis of customer preferences unrelated to abilities to perform the job."), cert. denied, 460 U.S. 1074 (1983); Diaz v. Pan Am. World Airways, 442 F.2d. 385, 389 (5th Cir. 1971) ("[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. . . . [I]t was, to a large extent, these very prejudices [Title VII] was meant to overcome."), cert. denied, 404 U.S. 950 (1971). Likewise, it is fundamental that community disapproval does not withdraw First Amendment protection from unpopular ideas. These precepts are violated in practice by the courts. It bears note, moreover, that the particular form of communal prejudice involved here, homophobia, is not one against which individuals are generally protected by law.
ounding argument” and held that the officers had no right to attempt to change the town’s political or social outlook.33

A third illustration of the courts’ treatment of the liberty interest in personal appearance is supplied by the case of a public high school teacher terminated because her supervisor did not approve of her mid-thigh length skirts.34 On the record presented, the employee was a superior, “‘energetic, imaginative, and dedicated teacher.’”35 A charge that she failed to meet certain contractual requirements regarding continuing education was rejected as pretextual.36 The trial court found that the employee’s dress “was within reasonable limits,” was not lewd or immodest, and was comparable in style to clothing “worn by young, respectable professional women” during those years.37 There was a specific finding that her dress “had no startling or adverse effect on her students or on her effectiveness as a teacher.”38 In sum, there was no credited showing that Ms. Tardif’s appearance impaired any valid governmental interest at all, save that her employer disapproved of her image. But the First Circuit held this sufficient to outweigh Tardif’s liberty interest, and her termination was sustained.39 Tardif virtually holds that constitutional freedoms regarding personal appearance are void where government as employer chooses not to honor them. One assumes the First Circuit would be troubled by a criminal statute forbidding the wearing of miniskirts in public, but this is of little assistance to public employees. Off-duty, Tardif may have a constitutional right to wear short skirts, but government in its capacity as employer can victimize her for attempting to do so on the job, simply upon the employer’s unsupported assertion of an adverse impact on productivity.

The courts’ lip-service to a liberty interest in personal appearance is better than nothing, of course, but the actual application and enforcement of the doctrine leaves public employees with almost no protection against arbitrary and abusive treatment. Here, as elsewhere, the law has extraordinary reverence for managerial authority.40 It is one thing to say that managerial interests must be weighed in a balance, where the employer produces evidence of a genuine conflict between employee appearance choices and an agency’s efficient performance of its mission (for example, if a doctor or nurse insisted on wearing unsterile,
street clothing into the operating room of a public hospital). But the cases do not call for such an inquiry. Rather, they effectively allow the employer merely to state its attitudes in order to make out a showing of "managerial interests," and then put the employee to the impossible task of demonstrating that these attitudes are wholly irrational. There is a very powerful, almost irrebuttable constitutional presumption that work rules devised by management are efficient. We are seldom told, and never convincingly, why this should be true. And the courts generally take for granted the value judgment that decreased efficiency is not a price worth paying in order to protect diversity and personal autonomy. This is not judicial review at all; this is judicial worship of managerial power, both for its own sake and, one assumes, because the courts are comfortable with what management does with its power over employee appearance.

2. Fundamental rights

Like equal protection, the constitutional law of personal appearance has two tiers. As Justice Marshall has noted, "governmental regulation of a citizen's personal appearance may in some circumstances not only deprive him of liberty under the Fourteenth Amendment but violate his First Amendment rights as well." When appearance regulation touches fundamental rights, the courts have sometimes accorded greater protection to appearance choices than shown in the liberty interest cases. Heightened scrutiny should also apply to cases involving invidious discrimination on the basis of race, gender, sexual preference, or other classifications that are or should be deemed suspect.

Sometimes a person's choice about appearance is intended to express a specific political message, and the Supreme Court has analyzed these as "speech" cases. The most famous example is the decision upholding students who claimed they were unconstitutionally disciplined for wearing black armbands to school to protest the war in Vietnam. Another case held constitutionally protected the wearing of a jacket imprinted with the legend "Fuck the Draft" in a courthouse corridor.

In other situations, the fundamental interest at stake is the free exercise of religion. Many faiths require or encourage the wearing of certain clothes or articles and/or certain grooming practices. Public employees are constitutionally protected in observing such religious duties, but only up to a point. Some difficult cases pose conflicts between free exercise and the constitutional prohibition against "establishing" religion. The balance struck by the courts often cuts against

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appearance autonomy. Thus, for example, the principle of religious neutrality in the public schools was held to allow a school board to disqualify a teacher who insisted on wearing traditional Sikh garb (white clothing and a white turban) in class.\textsuperscript{44} Interestingly, the courts assume that a schoolteacher is constitutionally protected in wearing a Christian cross on a necklace.\textsuperscript{45}

Even when no countervailing constitutional value is at stake, however, the courts often limit the scope of protection for free religious exercise in matters of dress. In the leading case, a U.S. Air Force officer who is an Orthodox Jew served as a clinical psychologist at an air base clinic.\textsuperscript{46} The Supreme Court upheld a regulation that, as applied, prevented him from wearing a yarmulke as required by his religious beliefs.\textsuperscript{47} Justice Rehnquist’s shabby analysis made short shrift of the airman’s constitutional claim. Rehnquist opined that the First Amendment does not require military authorities to alter their judgment about dress regulation or to accommodate the religious beliefs of service personnel.\textsuperscript{48} This is, of course, no argument at all but merely a statement of Rehnquist’s conclusion on the very point at issue. As in his liberty interest opinion in \textit{Kelley}, Rehnquist simply deferred to managerial authority and abdicated any responsibility to protect individual freedom.

The dissenters argued that the Government had not even proffered a credible, let alone rational explanation of the regulation. Moreover, Air Force dress regulations do permit certain religious articles to be worn, with the discriminatory and therefore constitutionally suspect consequence that only service personnel “whose outer garments and grooming are indistinguishable from those of mainstream Christians [are authorized] to fulfill their religious duties.”\textsuperscript{49} Hopefully future litigants will succeed in distinguishing \textit{Goldman} on the ground that it was a military case, and the Court consistently defers to military judgment in matters of individual rights.

One problem with constitutional appearance doctrine is the courts’ reflexive deference to employers. A different problem is posed by the indistinct boundary between “routine” appearance cases (for example, the policeman’s sideburns), warranting only minimal scrutiny, and “fundamental rights” and “suspect classification” cases, which demand more searching judicial review. In effect, prevailing constitutional doctrine calls upon the courts to draw lines between the personal and political, a highly problematic enterprise. As is well known, the initial

\textsuperscript{44} Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298 (Or. 1986), appeal dismissed, 480 U.S. 942 (1987); \textit{see also} United States v. Board of Educ., 911 F.2d 882 (3d Cir. 1990).

\textsuperscript{45} \textit{See}, \textit{e.g.}, Cooper, 723 P.2d at 312.

\textsuperscript{46} Goldman v. Weinberger, 475 U.S. 503, 505 (1986).

\textsuperscript{47} \textit{Id.} at 510.

\textsuperscript{48} \textit{Id.} at 509-10.

\textsuperscript{49} \textit{Id.} at 520 (Brennan, J., dissenting).
categorization of a case is often outcome determinative. Yet it is not as though there is any straightforward or obvious method for separating the "routine" from the "fundamental." It all depends on how one understands appearance practices, how important one thinks they are. Consider a Fourteenth Amendment challenge to a public employer's dress code requiring men to wear pants and women to wear dresses or skirts. One might analyze this as "only" about "routine" personal appearance choices, and therefore regard it as a liberty interest case deserving only de minimis review. Alternatively, one might conceive the case as about equal protection insofar as one could argue that the employer's dress regulations are grounded upon demeaning stereotypes and traditional images of women as vulnerable, modest, nonaggressive, available, nurturing, sexy, or whatever. From this vantage, the purpose of the dress code is to sustain the sexual subordination of women, entitling the challengers to more exacting judicial review. (No case has yet reached the Supreme Court testing this theory.)

At this point it might be helpful to interrupt the legal overview to provide some preliminary theoretical reflections on dress and appearance practices. The distinction in constitutional doctrine between routine conduct, on the one hand, and the exercise of fundamental rights or invidious discrimination, on the other, invites inquiry into the nature of dress practices, codes, and conventions. What are they? What do they mean? These are complicated questions of social theory. Here, I will capsulize some prominent views and debates.

Human action—our conduct, the artifacts we make, the relationships and institutions we enter and sustain, our symbols and feelings, the understandings we have, the differences we observe among us—all these are socially constructed. This means that human action occurs within and takes its significance from a particular cultural context. A cultural context consists of the collectively created and publicly available repertoire of symbols, understandings, power relationships, meanings, and beliefs through which we have and interpret our experience. These repertoires (sometimes called "codes," "systems of significations," or "discursive fields") are the medium of human action. Human action ("practice") is "meaningful" because it refers to or invokes the significations and conventions available in the cultural code.

The cultural code preexists each of us—we are born into a social situation and, learning it as we grow, we are enabled to communicate and have meaningful experience. In this sense we are constrained by the cultural context, the available repertoire of meaning conventions. On the other hand, the available code is never fixed. It is constantly changing in at least minor (sometimes dramatic) ways, precisely because "it" doesn't exist apart from human action; we incessantly bring it into being. In this sense, we can understand the cultural frame as a product of human agency or freedom. But of course that freedom is not uncon-
strained. The activity of creating and altering the cultural context does not occur on a blank, formless canvas. Human action cannot occur outside of a cultural medium. As Clifford Geertz put it, people do not enter a cultureless world and then, like a spider, spin out a system of meanings drawn from the substance of the inner self.\textsuperscript{50} Rather, the creative aspect of human activity consists of acknowledging, rearranging, recombining, and altering the bits and pieces already available within the cultural context.

Dress and appearance practices can be understood as one type of meaning-creating human action situated within cultural context. Neither human appearance, nor the human body itself, clothed or unclothed, has fixed or naturally recognizable forms. There is, for example, no natural meaning to “looking like a woman” or to “appearing like an African-American male.” What we call “personal appearance” is a set of meanings and understandings that are socially constructed. In presenting themselves, people to some extent choose among and combine items of dress and, within certain physical limits, modes of appearance (for example, hair style).\textsuperscript{51} They make constrained choices from among a complex array of options available within the culture and bearing the meanings currently attached by the cultural code.\textsuperscript{52} Even defiance of convention is an act in relationship to (or, in the medium of) the prevailing cultural code. The activity of combining, rearranging, and sometimes altering the available dress items, or adding new possibilities to the repertoire (“appearance practices”), produces “signs,” that is, socially available and meaningful expressions.\textsuperscript{53}

\textsuperscript{50} CLIFFORD GEERTZ, ISLAM OBSERVED: RELIGIOUS DEVELOPMENT IN MOROCCO AND INDONESIA 99 (1968).

\textsuperscript{51} Some aspects of personal appearance are immutable, although the immutability frontier is constantly being pushed back (for example, contact lenses to alter eye color, hair straightening technologies, skin-tanning, and sex-change procedures).

\textsuperscript{52} For an excellent discussion of appearance as social practice that, in contrast to certain postmodernist perspectives, emphasizes the embeddedness of signifying practices within the constraints of power relations, see Susan Bordo, "Material Girl": The Effacements of Postmodern Culture, in THE FEMALE BODY: FIGURES, STYLES, SPECULATIONS 106-30 (Laurence Goldstein ed., 1991).

\textsuperscript{53} See generally Kennedy, supra note 11. The idea of the social construction of reality is prominent in much postmodernist writing. For example, Judith Butler argues that personal appearance is constituted by and through “performative acts”—gestures, practices, enacted fantasies—occurring within the medium of the culturally available systems of meaning. “[T]he body is not a ‘being,’ but a variable boundary, a surface whose permeability is politically regulated, a signifying practice within a cultural field of gender hierarchy and compulsory heterosexuality.” JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 129 (1990). But the social construction idea is not original to postmodernist theory; it is a central contribution of classical social thought. For all the vast theoretical differences, much the same basic concept of social construction articulated by Butler and other postmodernist theorists can be found in work within, for example, the neomarxist tradition. Here is one formulation:
People constitute their identities, including identities of race, gender, class, sexual orientation, and so on, through social practices, including appearance practices. This notion is often captured in the deceptively simple idea that people "express who they are" through dress and style. For example, Justice Marshall once remarked: "[a]n individual's personal appearance may reflect, sustain, and nourish his personality and may well be used as a means of expressing his attitude and lifestyle." But the idea of dress as self-expression is actually more complex and the subject of interesting debate.

One complication has to do with intent. People have many motives for appearance choices besides the desire to reflect personal values. People sometimes act "strategically" in making appearance choices (for

“Society” and the “individual” are both essentialist abstractions, based on the notion that persons and institutions are closed, demarcated beings, with fixed boundaries between them. In reality, there are no such separate, autarchic beings—there is instead a continuum of human actions, which collide, converge and coalesce to form the whole personal and social world we live in. Man and society exist only as praxis, outside themselves in the fluctuating interworld their actions compose together. . . . It follows that there is ultimately no neutral area, into which the individual can withdraw from society: he is socially at stake in the whole plenitude of his life, in his work, in his art, in his sexuality.


Similarly, Justice Douglas described how appearance practices can communicate significant messages to observers (whether or not these messages were intended):

Hair growth is symbolic to many of rebellion against traditional society and disapproval of the way the current power structure handles social problems. Taken as an affirmative declaration of an individual’s commitment to a change in social values, nonconventional hair growth may become a very real personal threat to those who support the status quo . . . .

... [H]air growth is an outward manifestation by which many people determine whether to apply deep-rooted prejudices to an individual . . . .

Ham v. South Carolina, 409 U.S. 524, 530 (1973) (Douglas, J., concurring in part and dissenting in part). Ham holds, among other things, that there is no violation of constitutional rights if a trial judge conducting voir dire examination of prospective jurors refuses to inquire about possible prejudice against beards. Id. at 528. The defendant was a young, bearded, African-American civil rights activist who claimed that he was framed by local law enforcement officials.

These comments by Justices Marshall and Douglas were foreshadowed by several lower court decisions finding First Amendment protection for appearance practices, notably in beard cases. In sustaining a public employee’s right to wear a beard, one court noted that “[a] beard, for a man, is an expression of his personality[,]” that beard-wearing may be symbolic of “masculinity, of authority, and of wisdom. . . . [or] of nonconformity and rebellion[,]” and that “symbols, under appropriate circumstances, merit constitutional protection.” Finot v. Pasadena City Bd. of Educ., 58 Cal. Rptr. 520, 528 (Cal. Ct. App. 1967). Another court upheld on First Amendment grounds a public school teacher’s desire to wear a beard to express his heritage and pride as a black man. Braxton v. Board of Pub. Instruction, 303 F. Supp. 958, 959 (M.D. Fla. 1969).
example, they dress in a way that violates their values but will spare them the costs of nonconformity). Sometimes people lack competence in deploying the cultural code, and so dress in a way that sends a different message than what was intended.

A more fundamental and controversial issue has to do with how we understand the human subject. Some theories hold or are thought to hold that a person has or can acquire a relatively stable and coherent core or "inner" identity that is "represented," "externalized," or made manifest to the world through dress, speech, and other objectifying practices. Sometimes the phrase "self-expression" is meant to connote this process. An opposed view is that there is no inner or core identity. Rather, identity is generated through or constructed or constituted by signifying practices. This philosophical dispute—whether appearance practices reflect and represent a person's inner identity, or whether they constitute identity—sometimes has important ramifications for understanding dress and appearance and for thinking about law reform. However, although I lean strongly to the latter view, it is not necessary to resolve the controversy in order to approach most of the issues at the level at which they are discussed in this paper, so no attempt will be made to do so. The notion of dress as expression is often associated with an essentialist understanding of core identity, but that connection is not logically required. (I do not actually know whether Justice Marshall has an opinion on the need to deconstruct the transcendental subject.) For the moment it is enough that, whatever the theory of identity, dress and appearance are signifying practices: they involve meaning-creation and communication (albeit within a constrained discursive field).

Let us return in this light to the question of constitutional protection. It should be clear that the theory of dress and appearance as signifying practices undermines the routine/fundamental distinction central to the legal doctrine. All dress and appearance practices create and communicate meaning, not just special dress items like the black protest armband. From this perspective, it is difficult to sustain the categorical distinction between routine dress practices cases and fundamental rights or suspect classification cases, upon which the level of constitutional protection depends. Absent an articulated theory as to why they are of trivial significance, it is not obvious why routine dress practices should not be entitled in many contexts to substantial constitutional protection.56

55. See generally Butler, supra note 53, at 142-49 (taking the latter and criticizing the former view).

56. In some respects, established doctrine itself blurs the routine/fundamental distinction. For example, the Supreme Court has ruled: "Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to . . . beliefs the critical constitutional inquiry." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977).
Nonconforming appearance choices can be highly subversive of the status quo and therefore particularly in need of legal protection. Appearance practices sometimes disrupt and shake-up settled understandings and roles, and they may dramatically suggest ("dramatically," in both senses) the need for new discursive possibilities and altered power relationships. As Paulette Caldwell has argued, appearance practices and expectations are "related to the perpetuation of social, political, and economic domination of subordinated racial and gender groups"; judgments about appearance "determine who and what is valued, beautiful, and entitled to control." The enforcement of prevailing appearance standards is therefore institutionally and ideologically linked to social and economic opportunities and outcomes. Accordingly, something so seemingly mundane as choice of hair style—for example, African-American women braiding their hair, or African-American men and women wearing "natural" or "Afro" hair styles—may be a "political act," an "assertion of the self that is in direct conflict with the assumptions that underlie the existing social order," or a "celebration of self-esteem, a rejection of the shackles of racist oppression, or a claim to cultural identity."

Unfortunately, the law has not been terribly receptive to this point of view. Few courts have acknowledged the communicative significance of appearance practices (apart from special cases like protest armbands), and therefore most have declined to accord heightened constitutional protection. In one poignant case, for example, a court found no substantial constitutional issue in the refusal of local school authorities to permit Pawnee Indian pupils to wear long, braided hair as an expression of deep-felt religious duty and ethnic or racial pride. The long, braided hair did not disrupt any school programs. The cited government interests were the need to instill school spirit, and the need to instill pride and initiative among students. Because of the feeling that an "integrated school system cannot countenance different groups and remain one organization," it was thought necessary to impose mid-

58. Id. at 393.
59. Id. at 379.
60. Id. at 384.
61. Cf. Stuart Cosgrove, The Zoot-Suit and Style Warfare, RADICAL AMERICA, Nov.-Dec. 1984, at 39, 40 ("The zoot-suit was... an emblem of ethnicity and a way of negotiating an identity. The zoot-suit was a refusal: a subcultural gesture that refused to concede to the manners of subservience."). Cosgrove's article examines the connection of the zoot-suit style to the urban riots of the summer of 1943, particularly in Los Angeles.
63. Id. at 697.
64. Id. at 698 (emphasis omitted).
dle-class, white, Christian notions of grooming on everyone. A school superintendent also voiced the attitude that "students who are not well-groomed generally create trouble."\textsuperscript{65} While the court did not specifically credit all of these asserted interests in discipline, it strongly approved the general need for deference to school authorities.\textsuperscript{66} For anyone whose notion of democracy includes a commitment to multiculturalism and diversity, this case is a tragedy even apart from the historical background of genocidal conquest of Native American peoples by white Americans. The case is dated, but I am by no means confident it would come out differently today.\textsuperscript{67}

B. Civil Rights Statutes

Fair employment statutes, rather than the Constitution, have provided the primary legal context for challenging dress codes, particularly as regards gender issues. Unlike the Constitution, civil rights laws reach into the private sector workplace. The most important, Title VII of the 1964 Civil Rights Act,\textsuperscript{68} governs both private and public sector employers (with exceptions). But like the Constitution, civil rights laws protect appearance autonomy only up to a point.

1. Race and religion

Unjustified dress and appearance requirements that effectively deny employment opportunity on the basis of race-linked physical traits, or of appearance practices reflecting racial identification or reflecting religious belief, are unlawful. The employer’s grooming rules may be struck down or the employer may be required to accommodate the employee’s religious preference. Thus, an early case held that a black employee was unlawfully discharged because his “natural” or “Afro” haircut did not comply with the employer’s dress code, which prohibited “bushy” hair or hair “extend[ing] in line of sight beyond the ear.”\textsuperscript{69} There were two theories: the rule adversely affected African-Americans because of the distinct texture of their hair; and, because wearing an “Afro” had become a cultural symbol, suppression of the style was deemed a badge of racial prejudice.\textsuperscript{70}

Other plaintiffs have been less successful. One employee failed to persuade the court that long sideburns, beards, and mustaches were

\textsuperscript{65} Id. at 697.
\textsuperscript{66} Id. at 700.
\textsuperscript{67} See generally Laurence H. Tribe, American Constitutional Law 1386 (2d ed. 1988).
\textsuperscript{69} EEOC Decision No. 71-2444, 4 Fair Empl. Prac. Cas. (BNA) 18 (1971).
\textsuperscript{70} Cf. EEOC v. Trailways, Inc., 530 F. Supp. 54 (D. Colo. 1981) (holding that employer failed to rebut prima facie Title VII case challenging no-beard rule; plaintiff suffered from skin disorder aggravated by shaving that affects 25% of black males but less that 1% of white males).
protected as symbols of black pride. Likewise, a Sikh employee lost a challenge to the employer’s refusal to consider his bid for a management position because of his religiously based refusal to shave his face hair. Valid business necessity was found because the employee’s beard was inconsistent with the employer’s desire to project a “clean-cut” image, and because customers might be offended, due to sanitation concerns, by a bearded manager. The employer also had sanitation concerns, but there was no showing that the beard in question posed a sanitation problem. Violating the well-established principle that customer preference cannot justify otherwise unlawful discrimination, the court effectively held that customer prejudice allows the employer to penalize religious belief.

Another disturbing case is located at the intersection of race and gender concerns. The court held that an airline commits neither forbidden race nor forbidden gender discrimination by prohibiting passenger-contact employees from wearing an all-braided, “corn row” hair style. The employee contended that the corn row style reflects the “cultural, historical essence of Black women in American society.” A significant recent development in legal scholarship has been to call attention to the law’s apparent inability to deal with “interactive claims,” claims premised on the interdependent and mutually reinforcing relationship of sexism and racism (and other forms of invidious discrimination) that together constitute the existing system of hierarchy and domination. Thus, courts have been unable to appreciate or respond appropriately to the distinct historical experience and victimization of such groups as African-American women.

Rogers exemplifies the problem. The court proved unable to grasp the plaintiff’s claim and therefore failed to focus on the cultural significance of corn rows and how the corn row prohibition operates to de-

73. Id. at 89.
74. Id.
75. See supra note 32 and accompanying text.
78. Caldwell, supra note 57, at 371-72, 377.
value African-American women, exclude them from employment opportunity, and maintain their group subordination. Treating the sex and race discrimination claims separately, the court found no discrimination because the anti-braid policy applied to both genders and to all races; because the policy did not regulate on the basis of an immutable characteristic; and because the ban on wearing corn rows negligibly affects employment opportunity and "concerns a matter of relatively low importance in terms of . . . constitutional interests . . . rather than involving fundamental rights."80 The court's first point is unconvincing—while the dress code was even-handed in form, the relevant question is whether it differentially disadvantaged one particular group, African-American women. The other points also missed the mark. African-American women's hair style options and choices are in fact linked to hair texture characteristics that are not entirely or easily mutable, and the corn row style is historically and culturally linked in very powerful ways with a certain group in society. Thus, in any sensible view, the employer's rule operates in a discriminatory manner. The court's final point is simply a conclusory and wholly unsupported denigration of Black women's claims that the corn row style expresses a deeply felt sense of race/gender identity. Behind all this is the value judgment that American Airlines is entitled to enforce its view that it might lose sales if some flight attendants or ticket agents wear corn rows, despite the consequences to African-American women in hurt, shame, and impaired employment opportunity. The Rogers decision, too, is deplorable in a society that is (at least in principle) committed to equality and multicultural diversity.

2. Gender

Perhaps the appearance issues most frequently litigated under the civil rights laws have to do with grooming regulations premised on assumptions and expectations about gender differences. These cases typically arise under equal employment statutes such as Title VII of the 1964 Civil Rights Act, which forbids sex or gender based discrimination in employment.81 The cases raise two broad sets of issues. In one cate-

80. Rogers, 527 F. Supp at 231. The court was here reviewing certain aspects of the so-called "sex plus" doctrine. Discrimination against or disparate treatment of employees on the basis of gender plus another, ostensibly neutral characteristic, that is, disparate treatment of a subset of women (such as, for example, African-American women who wear the corn row hair style) may constitute unlawful sex discrimination. See International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1202-04 (1991); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam). The courts have struck down employer practices under the "sex plus" theory particularly where the employer's rule implicated an immutable characteristic or a fundamental right, or where the employer's rule significantly burdened employment opportunities. See EEOC v. Sage Realty Corp., 507 F. Supp. 999, 609 n.15 (S.D.N.Y. 1981).

gory, plaintiffs challenge employer rules enforcing gendered assumptions, expectations, and norms about appearance, for example, that women but not men should dress in a certain way or vice versa. A second question is whether a "pleasing," "attractive," or "beautiful" appearance can be required as a condition of employment. A cross-cutting set of cases involves the question whether employers can force women to appear in a manner that exploits their sexuality for business purposes, for example, by requiring a revealing uniform.

As we shall see, Title VII and related fair employment laws establish certain very important protections for women employees. Title VII has therefore significantly advanced appearance autonomy and appearance diversity in American life. However, the courts have placed numerous limiting interpretations on Title VII, so that, in the end, it has proved inadequate to the task of fundamentally transforming appearance law. Indeed, in some respects Title VII powerfully reinforces gender stereotypes and makes socially constructed gender differences appear to be natural and unchangeable. To this extent, civil rights law provides an ideological legitimation of the dominant, sexist understandings of gender difference and, hence, of gender inequality.

a. Dress codes

As an initial proposition (subject, as we shall see, to significant qualification), Title VII renders unlawful two types of employer appearance regulation: grooming requirements applied to one sex that are not imposed on the other or that impose a greater burden on one sex than the other, and grooming requirements based on impermissible stereotypes "lookism," discrimination based on personal appearance in general. There is widespread discrimination in employment based on appearance factors such as weight, size, and facial features. People are routinely evaluated (positively and negatively) on the basis of their personal appearance and the degree to which they approach the prevailing (socially constructed) standards of beauty. This is true for both men and women, although, for the reasons discussed in the text, the burden of lookism falls more heavily on women. That is, lookism and sexism are inextricably linked.

about women. It is well-settled that Congress intended to prohibit not only overt and explicit gender discrimination (for example, exclusion of women from traditionally male job categories or wage discrimination against women), but also employment practices adversely affecting women that are based on traditional stereotypes.82

In a leading case illustrating these principles, the employer, a bank, required female employees to wear a uniform ("career ensemble"), whereas men were permitted to wear any customary business attire (jackets, leisure suits, and the like).83 This was held to violate Title VII on the ground that separate dress requirements constitute disparate treatment demeaning to women and encourage the view that women rightfully occupy a lower professional status than their male colleagues.84 The court noted that the grooming code was premised on the offensive stereotype "that women cannot be expected to exercise good judgment in choosing business apparel, whereas men can."85 Other courts have followed Carroll in striking down uniform or costume requirements applied only to women.86

The cases establish another very important principle, an application of the ban on discriminatory sex stereotypes.87 The stereotypes in question are the widespread beliefs that women are available to be sexually exploited and abused at the whim of men, and that a woman consents to abuse by wearing "provocative" clothing (even as a condition of employment).88 It is now settled that the employer violates the Civil

82. See, e.g., Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (stating that statute " 'intend[s] to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes' ") (quoting Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)); Id. at 707 ("[E]mployment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females.") (footnote omitted); accord, Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) ("[I]t is impermissible... to refuse to hire an individual... on the basis of stereotyped characterizations of the sexes...") (footnote omitted).


84. Id. at 1032-33.

85. Id. at 1033 n.17. Whisner, supra note 9, at 87, interprets the employer's decision to impose the uniform on women as based on a fear that, left to their own choices, female employees would dress in too sexual a manner (the employer seemed to be particularly concerned about slit skirts).


88. Id. at 609-10 & n.16 (citations omitted).
Rights Act by requiring employees to wear a uniform or costume subjecting them to sexual harassment, verbal or physical. Many employers compel women to wear skimpy or revealing uniforms or outfits, with the consequence that male customers, employees, or passersby feel entitled to harass the women. This is particularly common in restaurants and bars, but occurs in many other industries. Sometimes it is explicit that wearing a sexually revealing costume is part of the job; indeed, it is part of what the customers are supposedly paying for, as in, for example, a Playboy Club or some airlines during the 1960s. But often the requirement of sexually revealing dress is not made explicit in advance, and in any case causes deep hurt to, and resentment from, women employees. It is now illegal to require a woman to wear a sexually revealing outfit that has or likely will result in unwelcome verbal or physical harassment. The leading case was brought by a woman lobby attendant discharged for refusing to wear an extremely revealing costume that subjected her to repeated verbal abuse.

Cases like Carroll might lead one to think that disparate treatment of men and women with regard to appearance is presumptively suspect and will be held unlawful unless sufficiently justified by some business need. Unfortunately, there is a catch, a loophole wide enough through which to drive the proverbial truck. The employer surely acts illegally if it imposes dress requirements on women but not on men. However, as long as the employer applies grooming regulations to both sexes, the specific content of the rules and the specific expectations about appearance may distinguish on the basis of gender. Under this doctrine, it is lawful to impose gender-specific appearance codes and, as we shall see, the doctrine opens the door to the imposition of onerous and discriminatory “attractiveness” standards upon women.

The rule is that dress codes may distinguish between men and women on the basis of “commonly accepted social norms” or “generally accepted community standards of dress and appearance.” In using these phrases, the courts are of course referring to mainstream or common
ventional norms, which in our society are thoroughly sexist and patriarchal. Thus, as the law stands, an employer may hold women to different standards from men, as long as it does not impose a greater burden on one sex than the other and as long as it "merely" enforces prevailing prejudice. The employer is not required to adduce evidence that productivity requires gender-based appearance discrimination.

These principles derive in part from, and are illustrated by, cases challenging two common grooming standards: that men, but not women, keep hair length above the collar; and that men wear pants but not skirts or dresses, and women wear skirts or dresses but not pants. The courts have uniformly upheld the right of employers to insist on these grooming standards.

Thus, certain forms of gender discrimination are lawful under Title VII. A variety of rationales are offered, of which three are most com-


If a general grooming code was uniformly imposed on all employees, and the code reflected societal norms in style and appearance, differences as to the precise details between male and female hair length, attire, and clothing styles were not deemed discriminatory. Whether a grooming code is illegal turns upon whether the code imposes on a protected class a significant employment burden not suffered by other classes.

Id. at 424-25 (footnotes omitted).

As noted, the employer's dress code may not incorporate offensive or demeaning stereotypes and may not involve "gross" discrimination such as a female-only uniform requirement or a requirement that women appear in a costume likely to induce sexual harassment. See generally Leslie S. Gielow, Sex Discrimination in News-casting, 84 Mich. L. Rev. 443, 451-53 (1985).


[The judge who imposed the rule] cannot reasonably be charged with impermissible sex discrimination. He is saying no more, and no less, than that a male attorney appearing without a necktie is lacking in decorum, whereas a female attorney who does not wear a necktie is not subject to that criticism.

Id. at 897.
mon. The first is that reasonable, "community standards" dress codes are not terribly burdensome and so create no real barrier to or impairment of employment opportunity. This argument is singularly unconvincing, given how strongly employees feel about these matters and how staunchly the courts defend employer prerogative. The second argument is that productive efficiency requires deference to managerial discretion. This is casually stated as a premise, with little effort being made in the cases to persuade that it is actually true.

The third rationale is the most important for gender ideology. The argument is that gender-based appearance requirements do not really constitute disparate treatment of the genders but equal treatment. Both sexes are held to the same, sex-neutral standard, namely the standard of what the community expects of each sex, respectively. This argument is laughable. Presumably not even today's conservative Supreme Court would permit an employer to defend segregating women into less intellectually demanding jobs by offering to prove a "commonly accepted opinion" that women are less intellectually capable than men. Yet women can be forbidden to wear pants—which many prefer to skirts and dresses—because of an alleged community norm that properly attired working women wear skirts or dresses. Of course, there is a supposed distinction between the cases: viewing women as intellectually inferior is an offensive stereotype, whereas the view that a proper working woman wears a skirt or dress is not a stereotype, it's a...well, it's just what right-thinking people think. To state the purported distinction is to reveal its hollowness. In fact, employer bans on women wearing pants to work are based almost entirely on sex stereotypes: that women are less capable than men, that they are better suited for less active or assertive roles, that women must do more than men to appear serious and business-like, that a woman in pants at work is sexually provocative and therefore disruptive, that women's clothing (skirts) should enhance their allure as sex objects, and so on.

This body of law is obviously based upon and reinforces stereotypi-

98. See Willingham, 507 F.2d at 1092 ("both sexes are being screened with respect to a neutral fact, i.e., grooming in accordance with generally accepted community standards of dress and appearance") (emphasis added).

99. A recent case raised but did not resolve an interesting question about "community standards." In 1991, Continental Airlines required female ticket agents to wear make-up. A brave employee named Teresa Fischette was fired for challenging the rule. The employer eventually backed down, revised its dress code, and reinstated Fischette after she had sought legal assistance from the Civil Liberties Union and received very positive, national publicity. Had the case proceeded to litigation two issues that might have been posed are: whether today's "community standards" require women employees to wear make-up, and whether it is an offensive stereotype to hold that a woman, as she is, without make-up, cannot present an acceptable, professional appearance. On the other hand, an employer might defend a make-up requirement for women if it imposed some purportedly equivalent obligation on men (use of after-shave cologne? toupees to
cal, gendered views about appearance. To put it another way, this part of civil rights law has the significant social function of delegating to employers the power and authority to police and reinforce gender lines. Appearance law is *disciplinary*—it enforces (usually indirectly, through employer power) social norms regarding proper behavior.\(^{100}\)

In particular, the law empowers employers to insist that employees conform to socially constructed norms and expectations about how the sexes should act and look. Employers may punish people who challenge or deviate from prevailing norms.\(^{101}\) For example, discrimination against male job applicants who appear "effeminate" is generally lawful,\(^{102}\) as is employment discrimination against cross-dressers.\(^{103}\)

The "community standard" doctrine is a potent source of discrimination against people who are, or who are perceived to be, bisexual, lesbian, or gay, insofar as it is believed that such people favor androgynous appearance and clothing styles that reject or mock dominant expectations about gender and sexuality. (Some bisexual, lesbian,
and gay people do indeed favor such dress, as do some heterosexual people.)

Men have worn and continue to wear long hair and/or skirt-like garments in many cultures. It is only a peculiarity of prevailing taste that contemporary American society regards male skirt-wearing (except for traditional kilts) as a sign of deviance, mental illness, or, in some jurisdictions, criminal activity. In recent years, it has become more acceptable for women to wear pants. In fact, pants may now meet “community standards,” but, at least until the courts reach this conclusion, employers can still forbid women to wear pants to work. In this specific sense, an employer can fire a woman for not “looking like a woman.”

It is not obvious why a statute intended to loosen the grip of sexist stereotypes should so powerfully sanctify patriarchal and heterosexist sensibilities.

b. Attractiveness requirements

Our culture devotes enormous attention and energy to matters of personal appearance. Attractiveness (in reference to the prevailing, socially constructed images of beauty) is a significant asset in social and personal life, just as unattractiveness (again, by reference to prevailing, socially constructed standards) can be a serious detriment. Discriminatory attitudes regarding personal appearance can be a source of considerable injury to men, but I take it as obvious that the burdens of societal appearance expectations fall most heavily on women. In the world of employment, women are routinely and reflexively evaluated and stringently judged on the basis of their appearance and dress, regardless of other, legitimately job-related qualifications. Employers in every type of industry will prefer and advance women who are more “attractive” and disadvantage “unattractive” women. This phenomenon is pervasive in American life. It can be and frequently is profoundly destructive to women’s economic fortunes, social opportunities, and self-esteem.

104. It is unlawful to fire a woman because she does not “look like a woman” if what is involved is the imposition of a stereotyped view of “feminine appearance.” See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 235-37, 250-52, 256 (1989) (stating superior’s view that employee should “dress more femininely” evidences sex stereotyping and discriminatory attitude). Of course, a female employee who fails to present the (employer’s) desired appearance may receive negative ratings on ostensibly neutral job-related criteria, or indeed, suffer adverse employment action for failure to meet lawful standards of grooming or “attractiveness.” See infra notes 118-20 and accompanying text.

105. See generally Note, Facial Discrimination, supra note 7, at 2037-40 (surveying data on appearance discrimination).

106. An extensive feminist literature discusses the pervasiveness and often destructive consequences of societal expectations regarding female appearance. See, e.g., SUSAN BROWNMILLER, FEMININITY (1984); WENDY CHAPKIS, BEAUTY SECRETS: WOMEN AND THE POLITICS OF APPEARANCE (1986); NAOMI WOLF, THE
Is it legal? The notion that women, more than men, should be valued on the basis of attractiveness, and the idea that women's worth as people or as employees turns on their attractiveness, are classic sex stereotypes. Adverse employment action premised on such attitudes would seem clearly to be unlawful under Title VII.107 Surely it is illegal to require female employees, but not male employees, to meet an attractiveness or beauty standard.108 There is considerable law on the subject, much of it developed in cases challenging the long-standing and tenacious efforts of the American airline industry to impose beauty requirements on female flight attendants.109

Indeed, some cases go beyond attractiveness requirements as such and establish, at least in principle, that ordinarily it is unlawful for the employer to attempt to sell "femininity" or "feminine allure," flirtation, or sex appeal. Airline attempts to defend a policy of hiring only female flight attendants on "image" and customer (that is, male business-traveler) preference grounds were rebuffed by the courts.110 In one case,111 the airline built its marketing strategy around an image of youthful, feminine sex appeal.112 Only women were employed in customer contact positions (such as flight attendant and ticket agent), and they were dressed in high boots and hot pants.113 In light of its "love image," the airline claimed female sexual allure was a bona fide occupational qualification.114 The court rejected the defense, holding that the airline had failed to make its case that feminine sex appeal is really required to perform airline jobs.115 Significantly, the court left open that in the future an employer might succeed in persuading that "an established customer preference for one sex is so strong that the business would be undermined if employees of the opposite sex were hired"116

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107. If it can be proved that such attitudes caused the adverse action. Not so easy.
108. I distinguish here between grooming standards, which concern such issues as neatness, hygiene, and the "appropriateness" of clothing and hairstyle for the job, from attractiveness standards, which have to do with whether the employee presents an appealing, desirable, enticing, or sexually alluring appearance.
112. Id. at 294.
113. Id. at 295.
114. Id. at 295-96.
115. Id. at 302-04.
116. Id. at 303.

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or that "vicarious sexual recreation is the primary service provided" and hence of the essence of the job.

This line of cases questioning and limiting the employer's power to impose beauty requirements on women workers, even where the employer claims it must do so in order to cater to customer preference and competitive pressures, is a significant development. Some of the leading cases, like Wilson, arose in the context of a refusal to hire male applicants, and this may blunt their precedential force. But the cases at least suggest that attractiveness requirements may be unlawful even absent overt discrimination against men because they perpetuate offensive stereotypes about and images of femininity. Laudable as many Title VII decisions have been, however, it simply goes too far to say that the statute outlaws or has eliminated attractiveness requirements in American industry. Employers impose such requirements all the time, implicitly and even explicitly. There are just too many gaps and shortfalls in the doctrine and enforcement. The law does not unam-

117. Id. at 301. The court cited the jobs of social escort and topless dancer as examples that presumably allow exclusive hiring of one sex.

118. For example, an employer may not hold women to a maximum weight requirement, not applied to males in comparable jobs. Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982). The employer's motive had been to foster a business image of service by thin, attractive women (known to the employer as "girls"). Id. at 604. However, the case stops short of holding that it is unlawful to compete by selling female sex appeal. Key facts in Gerdom were that the weight maximum was applied exclusively to women, and that the flight hostess job category was only open to women (until this practice of job-segregation was declared illegal). Id. An employer without a history of job-segregation and which ostensibly demanded "attractiveness" from both sexes might therefore distinguish Gerdom, even if de facto this employer's "attractiveness" requirements unequally burdened women. Some courts have indicated that a "trimness" requirement applied to both males and females would pass Title VII muster. See, e.g., Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 457 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978) (enjoining female flight attendant weight restrictions in context of grossly disparate treatment of male pursers and female stewardesses; however, court states that "nondiscriminatory" weight restrictions might be lawful). For an excellent overview of the weight cases, see Whitesides, supra note 109, at 204-16. Whitesides summarizes the law as follows:

[F]light attendant weight policies have thus far usually been upheld. Some courts validated the programs as grooming standards, outside Title VII's protection regardless of any difference in treatment of male as compared to female flight attendants. Other courts validated the weight maximums only if they were applied substantially equally to male and female flight attendants. These courts accept the airlines' lighter maximums for women than for men. Finally, in dictum, one court stated that it would validate flight attendant weight maximums only if the airline applied its policies to other employees who serve the flying public. As yet, no court has reached the true Title VII wrong: that airlines insist their female employees adhere to the stereotype of the slim, sexy flight attendant or lose their jobs. Id. at 216; see also Player, supra note 96, at 425 (gendered weight tables not per se unlawful).
biguously forbid employers to take account of such criteria as "pleasing personal appearance" in personnel decisions. And a crucial loophole is that some courts expand the lawful category of grooming standards to include "attractive" or "pleasing appearance." Thus, so long as both sexes are at least nominally regulated, the law allows the employer to act on the basis of women's appearance. De facto, attractiveness standards for women sneak in under the guise of "gender-neutral" grooming codes.

In the television industry, for example, on-camera personnel are stringently judged on appearance grounds. Both sexes are scrutinized for attractiveness, at least in theory, but it strains credibility to imagine that women are not held to higher standards of attractiveness, beauty, and youthfulness than men. Indeed, the courts permit employers to evaluate personnel on the basis of viewer surveys that incorporate prevailing gendered images of beauty and proper behavior, even though viewer attitudes are based on sex stereotypes that would be impermissible if relied on directly by the employer.

A highly publicized case illustrates the problem. Christine Craft lost her television news anchor job because of negative management and viewer reactions to her clothing and appearance, despite the fact that the station's ratings and profits improved during her time in the anchor spot. The court rejected Ms. Craft's contention that, while on-air personnel of both genders were evaluated for appearance and grooming, the employer applied its expectations much more strictly to females. The appellate court found that management was concerned about the appearance of all on-air personnel, and that its emphasis on Craft's appearance (and that of other women) reflected measures appropriate to "individual situations, characteristics, and shortcomings."

119. Whitesides, supra note 109, at 210:
Willingham created another loophole for employers faced with Title VII challenges. . . . [T]he Willingham court, and other courts since, failed to recognize that "grooming" standards have the potential to force employees to adhere to the same negative sexual stereotypes that Congress attempted to combat. Willingham enables employers to insist that female workers adhere to traditional female grooming stereotypes, many of which portray females as sex objects rather than as workers.

Id.

120. See Cox v. Delta Air Lines, 14 Empl. Prac. Dec. (CCH) ¶ 7600 (1976), aff'd mem., 553 F.2d 99 (5th Cir. 1977) (treating and upholding flight attendant weight maximums as "grooming requirements" analogous to hair-length rules rather than accurately categorizing weight maximums as "attractiveness standards").

121. The problem of viewer surveys is thoughtfully analyzed in Gielow, supra note 96.


123. Id. at 1212-14.

124. Id. at 1213.
appearance standards intrinsically discriminated against women by requiring women to conform to stereotypical images preferred by viewers.\textsuperscript{125} On-air women were to have "feminine touches" such as bows and ruffles, to avoid appearing too aggressive (or too soft), to be elegant, and to change their outfits more frequently than men.\textsuperscript{126} But the court held that any employer reliance on sex stereotypes was at most incidental, pursuant to a focus on lawful considerations such as the "conservatism thought necessary in the Kansas City market," and technical matters such as color coordination and studio lighting effects.\textsuperscript{127} The court concluded that the employer's appearance requirements did not impose a special burden on women and did not reflect an impermissible expectation that appealing appearance is a more important asset for women than men.\textsuperscript{128}

The categories "attractiveness" and "pleasing appearance" are not and cannot be gender-neutral in our culture. When utilized as a criterion of personnel action, personal appearance necessarily incorporates stereotyped expectations and judgments about women's behavior and worth. If personal appearance is a valid grounds of employment decision at all, which can be questioned,\textsuperscript{129} surely legal rules need to take account of and neutralize these gendered expectations.\textsuperscript{130}

C. Collective Bargaining Law

Although not typically thought of in this context, collective bargaining law and processes have significant implications for employee appearance. Unionized employees enjoy rights not found in the unrepresented sector: statutory rights to participate in determining

\textsuperscript{125} Id. at 1214-16.
\textsuperscript{126} Id. at 1214.
\textsuperscript{128} Craft, 766 F.2d at 1214-17.
\textsuperscript{129} See Note, Facial Discrimination, supra note 7, at 1039.
\textsuperscript{130} For example, Gielow argues that courts should accord less deference to viewer surveys commonly used in the TV industry. Gielow, supra note 96, at 458-59, 475-74. For more general discussions of how civil rights law should counteract sex stereotypes that corrupt personnel decisions, see Mary F. Radford, Sex Stereotyping and the Promotion of Women to Positions of Power, 41 HASTINGS L.J. 471 (1990); Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 HARV. L. REV. 1749 (1990); Nadine Taub, Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination, 21 B.C. L. REV. 345 (1980). How sex-role stereotypes hinder employment discrimination laws from eliminating obstacles to the labor-market advancement of women is explored in the cases and materials collected in MARY JOE FRUG, WOMEN AND THE LAW 236-307 (1992).
the content of dress codes, and contractual protections against arbitrary employer discipline. The most attractive features of collective bargaining—employee voice, limits on managerial power, notions of due process—derive from its general structure rather than any specific feature of how collective bargaining law treats dress and appearance regulation. Therefore I will only discuss collective bargaining briefly here, and return to its potential to enhance employee autonomy in subsequent portions of this article which deal with my proposals for law reform.

To begin, the National Labor Relations Act (NLRA)\(^{131}\) and parallel statutes protect one very specific appearance practice, the right to wear a union button or similar insignia.\(^{132}\) This is a statutory analog to First Amendment protections for public sector employees. Moreover, dress codes constitute a mandatory subject of collective bargaining.\(^{133}\) This means that employers may not unilaterally institute or alter dress code rules without good faith negotiations with the union. Also, employees may use concerted activity to affect the substantive content of dress code rules.\(^{134}\) Perhaps most importantly, employees can bargain collectively to conclude an agreement with the employer governing dress and appearance questions. The right to bargain over mandatory subjects can be waived, however, and frequently unions will cede unilateral control over dress matters to management through the device of a "management rights clause."\(^{135}\) Collective bargaining agreements are typically interpreted and administered through grievance procedures in which unresolved disputes are decided by a third-party neutral (usually called an "arbitrator"). In appearance cases, the arbitrator will inter-

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132. The right derives from the protection of employee concerted activity as guaranteed by NLRA § 7, 29 U.S.C. § 157. See generally Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), and its progeny. There is extensive case law on union buttons. In fact, this may be the single most frequently litigated appearance issue in American law, although the basic principles have been settled for a generation. See generally Charles J. Morris, The Developing Labor Law—The Board, the Courts, and the National Labor Relations Act 96-98 (2d ed. 1983). There are limitations on the right, and employers may in "special circumstances" ban union buttons for reasons of productivity, discipline, or safety. See, e.g., Fabri-Tek, Inc. v. NLRB, 352 F.2d 577, 583-87 (8th Cir. 1965) (holding that it is lawful to ban large "vari-vue" buttons which disturb concentration). A current concern is whether employers may ban buttons on uniformed customer-contact employees. See, e.g., Burger King Corp. v. NLRB, 725 F.2d 1053, 1055 (6th Cir. 1984) (in apparent departure from precedent, court answers affirmatively).
134. As always, there are limitations. For example, an employee protesting the employer's ban on wearing jeans in the office forfeited statutory protection due to the disloyal and disparaging tone of a leaflet. American Arbitration Ass'n, Inc., 233 N.L.R.B. 71, 71 n.1 (1977).
pret the contractual dress code or, more commonly, the employer's powers to establish appearance rules under the management rights clause and its powers to discipline employees under the usual clause requiring "good cause" for discipline. This interpretive activity is the source of the arbitral jurisprudence of appearance.

Absent specific contractual restrictions, arbitral law permits employers to regulate employee appearance, but the power is not unlimited. Arbitrators recognize a valid employee interest in appearance autonomy and therefore frequently require employers to justify appearance regulations by demonstrating a reasonable relationship to a legitimate managerial interest (such as safety or chosen company "image"). Of course, arbitrators accord great deference to managerial judgment and prerogative, but in the unionized sector there is at least this threshold burden upon employers actually to justify the exercise of power regarding appearance matters. This vests represented employees with significant rights not enjoyed in the nonunion workplace.

Here are a few examples from my files. A Canadian employer prohibited a male flight attendant from wearing an earring. The arbitrator found the rule unreasonable, there being no evidence that the earring would adversely affect the employer's business interests. A court sustained this ruling. Another airline had a no-beard rule for flight attendants, pursuant to its marketing strategy of fostering an image of competence and reliability. The arbitrator barred enforcement of the rule absent an actual showing that neatly trimmed beards would detrimentally affect business. In other cases, management succeeded in showing justification and/or the arbitrator took a less generous view of the employee interest in appearance autonomy. Thus a no-beard rule for pilots was upheld because of the safety risk of oxygen mask failure, and a no-beard/no long hair (for men) rule was sustained on company image grounds because under then current mores, beards and long hair were associated with irresponsibility.

Arbitral jurisprudence embraces due process notions unknown to the unorganized workplace, and in numerous cases this has enhanced

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141. Id. at 1213-14.
appearance autonomy. An employee received a week’s suspension for wearing a dress to work because of the summer heat, instead of jeans as required by the employer. The employer’s purported justifications for prohibiting dresses were safety near operating equipment, and “decorum” and “morals.” The employee’s grievance was sustained, and reimbursement of lost pay was ordered. The arbitrator stated that the employer had the unquestioned right to require women to wear jeans for safety and/or decorum reasons, but that the suspension could not be upheld in this case because management’s rules had not been clearly communicated to employees prior to enforcement, and the jeans requirement had not been uniformly applied in the past. Likewise, two women who were sent home for wearing “short shorts” successfully challenged the discipline on the ground that shorts had been permitted under the past practice of the plant (in effect, the employer would have to bargain for a change in this aspect of the dress code).

I will end this survey by discussing how management has adapted to changing female appearance practices, as disclosed to us by arbitral opinions over the years. The Elkouris have summarized the historical evolution:

As mores change and the acceptability of given attire and hair styles is no longer questioned by the general public, industry has likewise accepted changes. This is effectively illustrated by the evolution of acceptability of certain attire of female employees: in the 1930s women were not permitted to wear slacks in some plants because of a possible production hazard in distracting male employees; in the 1940s many plants required women to wear slacks to avoid danger involved in working around industrial machinery; in the 1950s and 1960s, slacks for women gained wide acceptability; by 1970 slacks, often in the form of “pant suits” or “pant dresses,” came to be viewed by many employers as the preferable attire . . . .

This history reflects and illustrates several general and recurring themes of appearance law and employer appearance practice. One is that women’s appearance autonomy has been restricted by employers (under the rubrics of productivity and safety), not because their dress interfered with their own job performance, but because of fears or assumptions about how male co-employees would or might react to their

145. Id. at 87.
146. Id. at 88.
147. Id. at 87.
149. ELKOURI & ELKOURI, supra note 136, at 767-68 (footnotes omitted). The authors note that an additional reason for employer acceptance of or insistence upon pants for women was “modesty.” Examples cited include welders on platforms in the 1940s, and, more recently, employer preference for pant suits instead of miniskirts and minidresses. Id. at 768 nn. 236-37.
dress. There is no record of comparable regulation of male appearance out of a concern for how female co-workers might react.\footnote{150} This aspect of personnel practice reinforces the tendency of the employment system to treat women as sexual objects.\footnote{151}

A second point concerns prevailing attitudes toward so-called “provocative” dress. I should make absolutely clear what I hope is understood: I do not mean to suggest for one instant that a woman’s dress ever justifies abusive or harassing behavior or gives men any right of sexual access. My point here is only to explore the mainstream view and its adverse consequences for women employees. Many employers and other authority figures (judges, school administrators) are confident in their ability to identify certain dress styles as inherently distracting to men, sexually provocative, or otherwise inappropriate. They claim to know it when they see it, and to act accordingly (discipline women employees, dismiss their harassment claims, etc.). But there is this curious dissonance in the mainstream view: there is not and never has been anything even approaching a settled and shared understanding among authority figures as to exactly what dress practices are provocative or inappropriate. In fact, employers disagree wildly on this question.\footnote{152} Yesterday’s forbidden, dangerous provocation (for example, working women in pants) becomes mundane and unremarkable to-

\footnote{150}{Some readers of the manuscript have suggested that employer rules designed to subdue on-the-job appearance and clothing for both men and women might be justified as a way of relieving people of inappropriate distractions and discomforting pressures to compete. That is, arguably dress regulation has some role to play in getting people to work together and treat each other with respect. An example might be requiring men to wear shirts on the shop floor. I agree with some aspects of this argument and can imagine circumstances in which employees themselves might favor such rules. My point here is that employers frequently act with less defensible motives and often abuse their power in sexist and exploitative ways.}

\footnote{151}{\textit{Cf.} Whisner, \textit{supra} note 9, at 77-78, 93-94, 117-18.}

\footnote{152}{The semiotic theory of dress practices suggests the impossibility of a clear-cut definition of provocative dress. Here the debate between “representational” and “constructive” theories of identity becomes critical to the analysis. \textit{See supra} notes 54-55 and accompanying text. \textit{Cf.} Kennedy, \textit{supra} note 11, at 1355-56 (noting in connection with problems of sexual harassment and abuse and myths about provocative dress that “some men will eroticize any form of female dress [and] there is no uniform that categorically repels unwanted sexual attention. . . . [Slinging out dress from the complex context of abuse is [a] patently ideological” aspect of currently dominant attitudes on gender questions). \textit{See also} Whisner, \textit{supra} note 9:}

What items of clothing are deemed sexual depends upon each viewer’s perception in a given context: school, street, workplace, beach. What is shared is the idea that some way of appearing makes a woman too sexual for the given context and that it is proper to control whether and when women appear that way.

\textit{Id.} at 108 (describing mainstream view).
day, or even the "modest" way to dress. In a famous and bizarre case, a female employee of the Ford Motor Company was disciplined and suffered pay loss for wearing bright red slacks into the plant. Women were required to wear pants at this company at that time, but the employer claimed that the color of these particular pants was so provocative and distracting to male employees as to constitute a production hazard. A renowned arbitrator eventually reversed the discipline and exonerated the employee. What was the employer's supervisor thinking? What fantasy or myth prompted the discipline? Should employers have that kind of power to control women's (and men's) lives, even on the job?

III. Appearance Regulation Law and the Constitution of Social Life

In this part, I will briefly present several conclusions (perhaps I should say assertions) about the meaning and social significance of appearance regulation. Because I write as a critic of this body of law and a partisan of appearance autonomy and cultural diversity, I want to acknowledge plainly and unambiguously that in many common situations employers have legitimate interests in regulating employee appearance. A stylishly tailored uniform can be a design feature of the enterprise's presentation to the public. Health care providers may need to wear sterile clothing. A social service employer may think conservative dress necessary to allay the concerns of a wary client population (for example, social worker visits to home-bound elderly). A pilot's beard might impair oxygen mask functioning in an emergency. A school board may wish to protect its captive audience of pupils from forced exposure to offensive symbolism (a teacher wearing a Nazi swastika). And so on, in a myriad of actual and imaginable cases.

My point is not that employers have no valid interest in appearance control. My concern is that employers routinely abuse their power and impose restrictions that cannot be justified on productivity, safety, or any other legitimate grounds. The proposals for reform presented here do not call for the

153. In the 1920s, bobbed hair was considered too great a provocation or distraction for men, so women industrial workers were forbidden to wear that style into the plant. See Mitchell-Bentley, 45 Lab. Arb. Rep. (BNA) 1071, 1073 (1965) (Ryder, Arb.).
156. The arbitrator ruled that red-colored female garments do not constitute a particular production hazard in the following language, which he no doubt thought clever: "it is common knowledge that wolves, unlike bulls, may be attracted by colors other than red and by various other enticements in the art and fit of female attire." Id.
157. See also supra note 150.
complete elimination of employer involvement in regulating employee appearance, but rather seek to use legal rights, employee participation, and market pressure as counterweights to curtail employer abuse and to purge employer appearance policies of discriminatory treatment of women and minority groups.

A. Conformism and Discipline

To a degree beyond any plausible productivity justification, the rules enforce conformity to dominant social norms, attitudes, and images of beauty. Appearance law is in large part a mechanism of social control in the service of dominant groups—men, heterosexuals, whites, mainstream religious denominations. This body of law serves to homogenize social life and to inhibit cultural pluralism. Appearance regulation performs these functions in two specific ways: by limiting individual autonomy and choice (a self-realization or self-determination problem); and by erecting or sustaining barriers to equal employment opportunity for women and members of minority racial and religious groups (an equality problem).

This is not to say there is a monolithic and all-powerful dominant culture with a fully worked out, detailed dress code. Nor do I believe there is an elite conspiracy to impose the dominant values on others. The claim that appearance law functions as normalizing discipline (enforces social norms) does not entail belief in a high degree of coherence in the dominant culture. One need not assume total male control over all aspects of social life, for example, in order to believe that appearance regulation functions in part to reinforce a certain gender politics and certain patriarchal norms. Nor do I assume that particular appearance practices or items of dress have fixed meanings (for example, neckties are "conservative"). What matters is the changing meanings of fashion signs to participants in and observers of appearance practices, in social context; how dress signs reflect, add to, or alter the available symbolic repertoire or cultural code; and how these meanings interact with people's intentions, strategic behavior, and competence in deploying the code and creating signs.158

The genius of appearance law as discipline lies in indirection and decentralization. We have no government or clerical commissions that lay down directives for proper dress. We have "freedom" in America—with some exceptions (for example, public cross-dressing), people can buy (if they have money) and wear whatever clothes they want. However, employers generally have the countervailing right to set grooming standards and to punish nonconformists. That is, usually the law does not operate by forbidding deviance from centrally promulgated norms. Rather, by delegating power to employers (and other authority figures),

158. See generally Kennedy, supra note 11.
appearance law raises the cost of nonconformity. There will be play in the system, because some employers will compete in labor markets by relaxing dress regulation (and because unionized employees can bargain collectively over appearance).

So the system is decentralized, variegated, and flexible. Yet over the long run the system consistently generates what, to my taste anyway, are powerful forces of dress conservatism and conformity in the world of work, a regrettable narrowness of prevailing taste and sensibility. And precisely because appearance regulation is so decentralized, even obscure, this persistent conformism is experienced as "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." The influence of law on appearance is almost entirely effaced in popular consciousness.

B. Normalizing Gender

Although appearance law affects other identities, its most powerful role is in shaping gender consciousness. (To reemphasize, law does this mostly indirectly, by empowering employers and other authority figures.) The rules and also the narratives of appearance law normalize gender and punish deviance from social expectations about gender roles. The law teaches that proper men and women dress in certain ways, that, for example, a garment open at the bottom is a sign of the female sex, and men don't wear such things. When law normalizes gender, when it teaches or acts on the assumption that men and women "are" or behave this particular way or that, law legitimates the existing allocation of gender roles and expectations. By normalizing gender, law therefore reinforces gender inequality, male domination, and the subordination of women. Moreover, in the particular way it emphasizes and reinforces conventional understandings of gender difference, appearance law "policesthe gender line. That is, it reinforces compulsory heterosexuality as the dominant norm. Real people, law teaches, dress this way or that, but not both; they don't "cross" gender lines. Accordingly, identification of oneself according to one's "proper" gender and in relation to the other gender is socially expected. It is for this reason that cross-dressers, people who disrupt gender complacency and "contest the rigid codes of hierarchical binarism,"159 are so

threatening to mainstream sensibility,\textsuperscript{160} and why the law treats them so harshly.

Appearance law (the authorization of employer power) has the double effect of exploiting and repressing women's sexuality. The law allows employers to require women to dress as suits the employer to present a pleasing, feminine appearance. That is, within certain important limitations, the employer can cash in on women's sexual allure (dress codes justified by the need to please the customer). Again within important limits, managers can compel women to present an appearance which to some extent may flatter the managers' own sexual self-image, conduce to their fantasy, or even add to their erotic gratification. At the same time, the employer can impose restrictions on women employees' appearance autonomy and erotic gratification through dress practices. Employers can prevent women from dressing in ways they might choose to adopt if the real or imagined effect on male co-workers would (in the employer's opinion) be too provocative. Appearance law conveys the deeply ideological message that female sexual autonomy (as expressed in dress) is or can interfere with productive efficiency because of its so-called natural effect of distracting men.

C. Managerial Power

Appearance law enhances and ideologically legitimates employer power. Here we have a fundamental link between issues of class and issues of race, gender, and heterosexist domination, and a potential common focus for workplace democracy theory\textsuperscript{161} and feminist, gay/lesbian, and critical race theory.

In the neoclassical paradigm, as in mainstream judicial attitude, the employer (meaning corporate officers and executives who are or who represent the residual claimants) is entitled to direct the enterprise because the profit incentive drives the employer to act in ways that serve the general societal interests in productive and allocative efficiency. A subpoint is that competitive labor markets yield wage bargains (covering such fringe benefit items as grooming and appearance rules) that coordinate employee preferences about wages and working conditions with management profit-seeking strategies so as to supply each enterprise with a suitably skilled and efficient workforce compensated at a rate commensurate with its productive contribution. In principle, the wage bargain should contain a premium or compensating wage differential reflecting any unusual degree of employer control over employee dress and appearance.

As the reader might guess, I have serious doubts about this theory,

\textsuperscript{160} See generally Marjorie Garber, Vested Interests: Cross-Dressing & Cultural Anxiety (1992).

but this is not the place for a thorough review. I propose simply to list some problems with the "free market" approach to bargaining over appearance as a prelude to an argument advanced later, namely, that we should restructure labor markets to increase employee appearance autonomy. My claim will be that efficiency and equity considerations suggest that significant market reconstruction will enhance autonomy, welfare, and fairness regarding appearance practices.

1. False consciousness and embedded rationality

Mainstream theory assumes that appearance choices reflect exogenous appearance preferences. For a variety of reasons, this is frequently not the case. There is a well-known theory that in advanced capitalist societies consumers' tastes are manipulated and managed by advertising, films, TV, and so on. The sociological theory of "consumerism" converges with certain branches of feminism, particularly with respect to consumer tastes in clothing and personal care products. Sometimes the notion of managed tastes is but a journalistic observation; sometimes it has a place in a grand theory (for example, the idea that, because monopoly capitalism chronically produces underconsumption, the elite seeks to counteract this by getting people to obsess about buying new commodities). The idea is, in short, that much of people's concerns about and experience of fashion reflects false consciousness. There corresponds an idea of employer false consciousness: that personnel management is systematically distorted by pervasive prejudice and sexism, attitudes so deeply ingrained that labor market competition and profit incentives cannot easily dislodge them.

I think there is much to be said for these ideas, particularly with respect to employer attitudes. The heartbreaking, restrictive, and destructive consequences of lookism and gendered appearance expectations for women are well-known. They are thoroughly documented in an impressive literature. Some feminists argue that women's concern with style, fashion, and appearance is a tragic reflection of women's powerlessness within a system of male domination, and that women's fixation on such matters merely diverts attention from the need for social change, thereby reproducing the system.

But the idea of false consciousness with respect to appearance and fashion is a complicated and, for me, problematic one, and for purposes of this paper I prefer not to rely on it or on global notions of "managed taste." Among other problems, it is difficult to square these ideas with a theory of female agency with respect to appearance prac-

162. For a classic discussion, see Paul A. Baran & Paul M. Sweezy, Monopoly Capital: An Essay on the American Economic and Social Order 112-41 (1966); see generally Herbert Marcuse, One-Dimensional Man (1964).

163. See supra note 106.
Feminist writing on the disciplinary and repressive aspects of gendered appearance expectations is not uniformly committed to the false consciousness interpretation of women's interest in fashion and appearance. Some versions of the critique acknowledge local possibilities of agency and sexual power for women within an overall system of resolute male domination. Some theorists go even further and assert that appearance practices offer possibilities of enjoyment, pleasure, and even resistance and disruption. Some feminists and others believe that nonconforming dress can disrupt and subvert the "naturalness" of gender and sex-role expectations; that women can assert sexual autonomy and power through dress practices; that cross-dressing can challenge the tyranny of heterosexism; and that butch-femme role-playing and dress constitute a parody and living deconstruction of the prevailing, suffocating gender ideology. In sum, the thought is that dress practices can be a medium (a medium, not necessarily the only or most important one) in which to "challenge the conventional meanings of 'woman' that sustain the subordinating conditions of women's lives." One can give credence to this argument without ignoring male domination of the fashion industry and all of the ways in which the choices available to women are socially and culturally constricted.

I think this is a central and important debate for feminist theory and for theories of social change, but I do not pretend that I am in a position to resolve it in the context of this paper. I simply note that I find the second view—that there are interstitial possibilities of agency, resistance, and disruption within the constrained and gendered appearance regime—more convincing. More to the point, this view has significant support and interest in contemporary feminist theory, so I want to avoid a theoretical approach that would foreclose these possibilities. For this reason, and for the entirely separate purpose of engaging the dominant law-and-economics paradigm, rather than taking false consciousness as a starting point, I will provisionally adopt choice as a premise and then seek ways to link the concept of choice to the ideas about social control and cultural reproduction discussed elsewhere in this paper.


165. But see Butler, supra note 53, at 139 ("[p]arody by itself is not subversive").

166. Frug, supra note 2, at 1059.

167. For two sociological approaches to understanding human action and choice as embedded in social context and structure, see Mark Granovetter, Economic Action and Social Structure: The Problem of Embeddedness, 91 Am. J. Soc. 481, 486-87 (1985) (purposive action is embedded in on-going systems of social relations that shape
2. The relationship of choice and utility

In the conventional paradigm, choice and utility (welfare maximization) are related in an unproblematic way. Within their budget constraint, people make choices in order to and with the effect of realizing welfare gains (experiencing utilities and avoiding disutilities). But the idea that people's choices or preferences are necessarily welfare enhancing can been doubted, not only in general, but specifically with reference to matters of dress and appearance. To put it another way, it seems highly likely that people's appearance preferences are not entirely exogenous, and that therefore disruption of the existing structure of preference and choice by altering the background legal and institutional regime might enhance utility.

Some appearance choices are "adaptive" in the technical sense that they are shaped by legal rules. These include direct interferences with free choice (for example, criminal prohibition of public cross-dressing) and indirect interferences (delegation to employers of the power to sanction nonconformity). In many other cases there is a close analogy to the problem of adaptive preferences. Appearance preferences and choices are shaped by powerful social forces (for example, racial prejudice, patriarchal attitudes, homophobia, pervasive male violence against and abuse of women). The costs of nonconformity can be so high (discharge from employment; public ridicule; gay bashing; violence against women who wear "provocative" clothing) that many people do not even consider nonconforming choices that might yield them high satisfaction in a safer environment. A particular nonconforming preference may not be impossible or illegal to satisfy (for example, dungarees in the office), it's just that, well, sensible people usually don't do it. In some cases, the nonconforming option may even seem "unnatural" because of (law-sustained) attitudes and expectations.

Thus it seems likely that powerful "endogenous" (regime-internal) forces shape preferences and choices in ways that diminish welfare—whether because people don't want what they can't have, or because

and are shaped by actors); Ann Swidler, Culture in Action: Symbols and Strategies, 51 Am. Soc. Rev. 273, 284 (1986) (strategies of action as cultural products).
168. See generally Mark Kelman, Choice and Utility, 1979 Wis. L. Rev. 769.
169. Women workers are exposed to considerable risks of on-the-job violence. Homicide may be the highest cause of occupational death among females: among women killed on-the-job, homicide accounts for 42.0% of such deaths. (Although the vast majority of occupational deaths are accidental injuries to men, the on-the-job homicide rate for men is 11.2%). See Traumatic Occupational Fatalities—United States, 1980-1984, 36 Morbidity & Mortality Wkly. Rep. 461, 462 (1987); Miners Found to Have Highest Death Rate on Job, N.Y. Times, July 27, 1987, at A15. There is no way of knowing how many of the crimes against women reported by these appalling statistics involved a man obsessed with a female co-worker in part (he reports) because of what she wore. Sadly, one can assume that at least some cases did.
they go with the flow. Social forces (sustained in part by law) affect people's perceptions of their range of options; create pressures to conform that may be too costly or dangerous to thwart; and inhibit people's willingness to experiment with appearance. If a wider range of appearance possibilities were perceived genuinely to be available, preferences and choices might change in ways that would enhance welfare (not to mention autonomy). To put it another way, in the area of appearance, very powerful legal and law-sustained social forces induce people to make different choices than they might otherwise select. People do not reach their highest indifference curve consistent with their budget constraint. This is not a claim about false-consciousness; it is a claim about coercion.170

A related issue (perhaps a variation on the theme) is that appearance choices seem a conspicuous example of the problem that sometimes a consumer does not possess a discrete utility function. When the welfare consequences of a particular transaction depend significantly on the wants and preferences of the trading partner or third parties, merely respecting the actor's choice may not maximize welfare.171 For example, radical feminists argue that patriarchal culture generally and the legal system in particular eroticize relationships of domination; the system gets women to dress as men want and to take enjoyment from compliance. Even if this only partly explains contemporary appearance practices, it would seem to follow that disruption of the system by changing the background rules with the goal of loosening the interpersonal dependence of utility functions (that is, giving women more room to decide for themselves) might not only increase autonomy but also lead to deeper and more rewarding satisfaction of preferences.

3. Considerations of equity

Appearance law distributes power. It delegates coercive power to

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170. See generally Cass R. Sunstein, Legal Interference With Private Preferences, 53 U. CHI. L. REV. 1129, 1146-58 (1986). True, loosening the grip of appearance regulation might result in welfare losses, specifically to people who enjoy defying convention and more generally to those who are highly satisfied with the current structure and for whom changes (for example, more androgynous clothing) would cause disutilities and/or unsatisfied preferences (for example, preferences for observing conventionally gendered appearance practices). While no one really knows for sure how the gains and losses would compare, I am comfortable with the inference that gains would exceed losses. Even were this not so, equity considerations would still justify reform.

171. This point is explored in the work of Robin West. See, e.g., Robin West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 WIS. WOMEN'S L.J. 81 (1987); Robin West, Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner, 99 HARV. L. REV. 584, 390 (1985) ("arguments for the morality of wealth-maximizing transfers fail[ ] [because] Posner has not shown that the presence of consent either entails an increase in well-being or fosters one's sense of autonomy").
employers, administrators, and other authority figures, who tend to be mainstream types and men. That is, appearance law laces through the system of domination. Employees have some countervailing power to exit from enterprises that impose unacceptable dress codes and to take their skills and productivity to more congenial employers.

For most employees, the power imbalance is grossly and unfairly stacked in favor of the employer, and therefore distributive considerations alone justify revision of the background rules. The costs of exit from employment are frequently very high, particularly for long-term employees who have invested human capital in a job. As a practical matter, employee power to influence appearance codes is much too limited, especially in the nonunion sector. Even in collective bargaining, workers routinely waive the right to participate in determining the enterprise's appearance rules. Perhaps traditional union leaders devalue appearance issues because of patriarchal attitudes, but I think it rather more likely that unions deploy their limited bargaining advantages to gain ground on other issues that are deemed to be even more urgent priorities such as job security.

I readily acknowledge another possibility, that employees do not care as much about dress codes as I think they do. This, too, could explain the extent of management power regarding appearance. I am not able to refute this interpretation of the status quo except by anecdotal evidence of employee resistance and protest. Still, it seems obvious to me that many employees, and particularly many women workers, have far too little power in wage bargaining to adequately protect appearance autonomy. If I am correct about this, equity suggests a revision of the background rules of dress code bargaining. Reconstruction of the ground rules regarding bargaining over appearance would redistribute power in a modest but meaningful way from men to women, from employers to employees, from dominant groups to racial and religious minorities.

4. Market failure

The case of appearance regulation involves several categories of conventionally recognized market or bargaining failure, such as information deficits, free rider problems, and agency problems.

a. Information deficits

It is probably common knowledge that employers can regulate employee appearance, so what are the information problems? One issue is posed by changing tastes. Some people have relatively stable appearance tastes over their careers at work, but others experience considerable changes in taste, sometimes dramatic changes that are exceedingly difficult to predict. At an early stage in a career, one might not even be able to foresee that appearance questions will matter later in life. Ap-
pearance changes may follow from a religious conversion, a change in income or in political or sexual identity, a change in the general social and cultural climate (as during the sixties), or more commonly because of changing relationships and friendships. And while most people take employer control for granted, they never really can believe how much power employers assert until disaster strikes. The problems of taste-volatility and the obscurity of employer authority are akin to classic information problems grouped under the rubric "myopia" (inaccurate ex ante evaluation of low level risks, here, the risk of someday wanting to wear something your employer will fire you for wearing).

If compensating wage differentials or premiums are actually offered in return for unusual employer control over dress, this fact is probably invisible to most workers. If a firm seeks to attract employees in part through offering an informal work environment, or a laissez-faire dress code, it has good reason to call this to the attention of prospective recruits. But if the employer does or may someday want to enforce arbitrary or narrow-minded dress requirements (without offering a compensating wage differential), it may be disinclined to advertise the fact. Managers may not even know that someday they will be turned off by a male earring, or offended by an Afro haircut, or regard red pants as a production hazard. This problem of employer inability to predict could be solved by prospectively granting the employer carte blanche to establish and enforce appearance rules, but then the converse information problem arises, that many employees simply do not and cannot accurately evaluate the likelihood that they will someday want to wear dress the employer finds unacceptable or that they might actually risk their job for doing so.

Finally, information problems are generated by the fact that appearance practices entail significant gains and losses due to the attitudes of "third parties." (A "third party" is someone not a party to the contract; in this case, third parties are those other than the employer and employee.) The problems previously mentioned of social pressure to conform and the existence of nondiscrete utility functions aggravate the difficulty of making long-term predictions about party preferences so as to incorporate appropriate cost/benefit analyses into the wage bargain. The potential future costs and benefits of conforming or choosing not to conform to third-party desires in the matter of dress and appearance must particularly defy accurate ex ante evaluation. For example, appearance autonomy that meant little at the outset might become highly valued years into a job after one has undergone a personality transformation and pried loose from peer pressure or psychological dependence on dominant figure approval.

172. In fact, many jobs for which an appearance control wage premium might be appropriate, for example, cocktail waitressing in a skimpy outfit or secretarial work in stylish business attire, are often non-unionized and poorly compensated.
b. Free rider problems

There is also a particular kind of free rider problem associated with appearance practices. The utility of enjoying one's dress practices depends in part on defining oneself *in relation to* prevailing styles. Utility can be produced by dressing in a way that is appreciated or enjoyed *because* it is new and daring, or *because* it is a skillful exemplar of a popular or prestigious style, or *because* it defies convention. That is, to get some of the important satisfactions available through appearance practices, people have to experiment and invent in relation to prevailing tastes and preferences. Many people obtain utility by being observers of this process of incessant transformation in fashions.

The problem is that the costs of a misstep, the costs of error or nonconformity, can be extraordinarily high. People can lose pay or jobs by wearing the wrong thing to the office, shop, or plant. People can suffer embarrassment or ridicule if an experiment "doesn't work." There are some extreme cases. People may be victims of racial violence or gay bashing because of their dress practices. With considerable community approval, men sometimes attempt to justify harassment or abuse of and violence against women because of what women wear. No such justification is possible, ever, but the fact that it is so commonly attempted, and the legal system and society so often blame the victim, inevitably adds injury, shame, and self-doubt to the original violation.

Thus, the situation is that, on the one hand, many people gain satisfactions from a system of appearance experimentation in relation to prevailing norms and tastes. There really could not be fashion (or culture, for that matter) without this process of experimentation. Yet, on the other hand, the risks associated with appearance experimentation can be serious, even fatal. Thus, people who enjoy fashion change and who might gain from adopting novel appearance modes have reason to be reluctant to do so. They wait, hoping others will take the first steps and suffer the start-up costs, so that eventually marginal or taboo styles will become safer to enjoy.

This is a free rider problem. Fashion experimentation and novel appearance modes are underproduced. Many people might be better off if the range of options were expanded. Many people might experience welfare gains by wearing certain garments or hair styles *if other people did so too.* These welfare gains are lost because the potential costs of being the first to nonconform are so high. It therefore seems highly plausible that aggregate welfare would be enhanced by loosening the grip of appearance regulation. This would reduce the costs of experimentation and might help to shatter dangerous myths about dress.173

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173. I again concede that loosening regulation might cause some utility losses (reduction in the thrill of defying convention), but my guess is that these losses would be far outweighed by gains.
c. Agency problems

Finally, appearance regulation raises agency or monitoring problems. Assume that efficiency is served by employer (residual claimant) control over appearance, and that employers devise rational appearance strategies which are attentive to the legitimate preferences of consumers, to productivity concerns, and to the desires of the type of workforce the employer seeks to attract. The problem is that these appearance strategies must be effectuated and administered down a chain of command by managers and supervisors who may possess and pursue agendas of their own (vicarious sexual enjoyment of female appearance, enjoyment of the exercise of arbitrary power over vulnerable people, racial and religious prejudice, and so on). These managers and supervisors must be motivated by top personnel to insure that pursuit of supervisor self-interest does not interfere with the employer’s overall profit-seeking strategy.

My intuition is that proper monitoring is exceedingly difficult to achieve in the area of appearance regulation. The standards are too nebulous and volatile, and the necessary judgments too speculative and ideologically grounded. Moreover, because employees are often resigned to employer control over appearance, the harm that over-regulation causes to people, productivity, and human capital is very difficult to register; it is nearly invisible.

Take the case of the woman disciplined for wearing red pants.174 Who knows what motivated the supervisor to act as he did? It seems highly doubtful that he was rationally implementing the employer’s appearance strategy. Certainly he failed to persuade the arbitrator that productivity was threatened. Yet along the way he caused at least some embarrassment to the employee, and probably also the shame and hurt of being treated as a sexual object and forced to submit to male authority. Surely it would have been better for the enterprise (it would have served efficiency) if he had respected the woman’s appearance autonomy and warned or disciplined any male co-workers who were out of line.

Now, in that particular case, higher level management could rely on a functioning monitoring system to alert it to irrational and arbitrary behavior by its front-line supervisors and to working conditions problems (such as unfair and sexist administration of the dress code or harassing behavior by male employees) in need of correction. That monitoring system was the collectively bargained grievance procedure.175 Unfortunately, despite their important contribution, one can

174. See supra notes 154-56 and accompanying text.
175. The theory of collectively bargained grievance procedures as monitoring systems derives from David E. Feller, A General Theory of the Collective Bargaining Agreement, 61 Cal. L. Rev. 663, 766-69 (1973). It bears mention that even though the grievance procedure was “functional” for the Ford Motor Company, the
doubt that grievance procedures perfectly perform monitoring functions. Moreover, in the typical American case (nonunion), there is no grievance procedure. Most companies have inadequate substitutes (at best) with which to monitor the administration of dress codes by low level supervisors. It seems likely that the lack of adequate monitoring systems in the nonunion sector and the general inefficacy of employee bargaining power as a counterweight to employer abuse combine to produce a suboptimal appearance regulation regime.

IV. A RIGHT TO APPEARANCE AUTONOMY?

A. The Need for Reform

The law of appearance regulation should be reformed. If for no other reason, reform is needed because the existing rules intolerably burden equal employment opportunity. A democratic society should not permit an employer to exclude members of a social group from the benefits of employment unless they are willing to surrender an appearance practice central to the group’s cultural identity (for example, the corn rows case). More generally, weakening the grip of employer control will enhance welfare and personal autonomy. This kind of reform will alter power relations in a desirable way by increasing the power of employees as against employers, women against men, subordinated racial and religious groups as against dominant groups. To be sure, any power shift will be marginal and interstitial, leaving most structures of domination intact. The changes are still worth trying to achieve. Perhaps if conformity and subordination are relaxed regarding personal appearance, this will raise questions, consciousness, and hopes, and will challenge our imaginations in ways that invite and conduce to other changes.

The political consequences of appearance regulation reform are unpredictable, of course. My optimism may be unjustified. Reform may bring co-optation and petty diversion, rather than greater tolerance and heightened expectations. There are no guarantees. It still strikes me that we would be better off with less control and more space for experimentation and play.

Just as the feminist and critical race critiques of appearance regulation converge with criticisms of managerial power from a workplace democracy perspective, so too the call for appearance regulation reform on feminist and cultural diversity grounds converges with democratic employer in the red pants case, that employer had tenaciously and violently resisted unionization.

176. Some “advanced” nonunion employers do have elaborate, centralized personnel procedures and (nonarbitral) grievance mechanisms that give them at least some handle on the monitoring problem.

177. See supra notes 76-80 and accompanying text.

perspectives on workplace reorganization. In the context of postindustrial transition, it is possible to conceive of less rigid and less hierarchical forms of workplace organization. Democratic work organization would seek to advance productivity by drawing upon and developing the learning, creative, problem-solving, and interpersonal capacities of employees. To the extent possible, work operations, the governance of enterprises, and access to paid employment opportunities should be restructured to provide all workers opportunities for learning, self-discovery, growth, and expression.

One aspect of postindustrial transition in work organization that might release creative powers in employees and lead to more productive use of human capital would be to encourage an idea of the workplace as an arena for disruption and rethinking of stereotypes about people, about human potential, and about gender, race, class, sexual preference, and disability. To some extent, equal employment law has already nudged us in this direction, although infinitely more needs to be done. Programs for workplace democratization, whether through enhanced collective bargaining, worker ownership, or participation schemes, disrupt the traditional image of workers as unthinking command followers. Without meaning to overstate the case, reform of employee appearance regulation may have a role to play in this movement of creative destabilization aimed at affording all employees maximal opportunities to realize their personal and productive capacities.

Another aspect of postindustrial transition might be an increasing "eroticization" of the workplace in the specific sense that work becomes understood as an arena of personal gratification and self-discovery and particularly a locus for encountering, communicating with, and in some cases forming personal relationships with other people. In this view it would be appropriate that the rules of workplace dress and appearance be relaxed to permit greater on-the-job experimentation, imagination, play, enjoyment and expression of sexual autonomy.

I make this point with great hesitation, and I hasten to add qualifications so as to avoid misunderstanding. As things stand now in the hierarchical, "industrial" workplace, with its conservatism and conformity, there is plenty of erotic energy and sexual expression. The problem is that much of it is aggressive, abusive, dominating, and even violent or murderous. Loosening the texture of interpersonal relations in work poses grave risks for women and offers no guarantee that abuse

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Any program for egalitarian workplace reform must have as a centerpiece substantial provisions to protect women from harassment and abuse by employers and co-workers. The challenge, as many feminist theorists have noted, is to devise systems to protect women employees from abuse with as little restriction as possible on their own autonomy and self-determination.

In the area of “expression of self” through appearance and dress, it seems obvious that many employers have gone about this in exactly the wrong way. They have focused on restricting women’s appearance autonomy, rather than on restricting men who harass. Surely any woman employee who dresses “defensively” in order to reduce the chance of harassment or abuse should be validated in that choice. But the choice should be the woman’s, and the goal should be to alter fundamentally societal attitudes and, particularly, male attitudes, so that it becomes understood that no dress practice, not even one that is intended by a woman to be sexually appealing, authorizes unwanted sexual advances, much less abuse.

So I do not imagine that eroticizing the public sphere of work in a positive, affirmative way is an easy or risk-free program. Many feminists have called attention to the dilemma that new forms of sexual exploitation can emerge as society becomes more sexually permissive. As Ellen Willis has noted, “[t]he freedom to be sexual [should not be] the obligation to be sexual on male terms.” At the same time, the sexual repression of women has been an age-old and central feature of the patriarchal system of male domination, and workplace regulation at least in part contributes to the sexual repression of women. Perhaps I am overly optimistic, but I read in the transformations of our culture generally, and of the world of work in particular—the growing feminization of the workforce and labor movement; heightened expectations of American workers about growth and self-realization in work—at least some genuine possibilities to begin to move toward forms of work organization that affirm and nurture people’s autonomy and capacity for self-determination, including their autonomy in the erotic dimensions of life.

B. A Rights-Based Approach

One obvious proposal for reform would be to promulgate (by statute, constitutional interpretation vis-à-vis public employees, or common law decision) a “right” to appearance autonomy. An example of

182. Moreover, even if the workplace were safer and less controlled with respect to appearance, many women might still avoid dress experimentation as a partial strategy to reduce harassment on the streets and in transportation to and from work.

this approach is the District of Columbia statute barring employment discrimination on personal appearance grounds.

In our political culture, calling an interest a "right" or, better yet, an "inalienable right," is one of the traditional and often very important ways of validating and protecting the interest. Rights rhetoric and concepts have great symbolic and mobilizing power. They provide an idiom in which to critically assess the status quo and to project images of justice. Human rights concepts, if disseminated in the political culture, can encourage tolerance and acceptance of social difference, and they breed a healthy instinct that power must justify itself.

For these and many other reasons, I support the idea of enacting rights to appearance autonomy. If well-designed, such legal rights might provide significant protection to employees in general and minority racial and religious groups in particular. The enactment of appearance rights would shake things up in a productive manner and get people talking about, and hopefully reconsidering, prevailing attitudes about appearance. But the idea of an "inalienable right to appearance autonomy" is not unproblematic, and I therefore also propose another approach (perhaps I should say a modification) in the final section. My difficulties with the rights approach recapitulate some of the themes of the recent literature on rights-skepticism. I have reviewed these issues elsewhere, and so my discussion here will be quite brief.

An obvious issue is the commonplace problem that, for many reasons, rights-on-the-books do not always translate into rights-in-practice. Second, there is what is known in the literature as the problem of "indeterminacy." The concept of a right to appearance autonomy is very general and open-ended. It refers to a general problem and perhaps some of the surrounding concerns about cultural diversity and gender equality. But, by itself, the idea of the right does not actually tell us what legal protections are intended. Nor does the idea of the right tell us how it is to be weighed against competing rights and interests, for example, the more securely established right of employers to manage. The consequence of indeterminacy is that the actual meaning of the right, its lived and experienced content, will turn in large part on the course of judicial and/or administrative interpretation, which may or may not be faithful to the egalitarian concerns prompting reform. This is true of all legal rights, and is not a reason to abandon the rights form. The point is simply that we ought to be skeptical that we can accomplish meaningful legal reform merely by promulgating new rights.

This leads to two further difficulties. One is that appearance and clothing tastes change all the time, both in dramatic ways and in subtle details. While the rights form itself is excellent for announcing general

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principles, administration and enforcement of rights requires complex interpretive processes and approaches. Could a regulatory system really keep up with fashion changes? How much can government be trusted to show tolerance for appearance experimentation? The irony of the rights approach is that it transfers decisionmaking from one set of authority figures (employers) to another (judges, officials). While the law should provide bedrock protection against appearance discrimination and an avenue to appeal arbitrary employer actions, decentralization seems desirable with respect to an infinite array of practical details of appearance regulation. (The problem with our current system of decentralized delegation to employers is that the power relations at the local level are undemocratic and biased to the status quo.)

Finally, because rights concepts are not self-defining or self-executing, the interpretation and application of rights and the resolution of rights conflicts inevitably turns on considerations of philosophy and politics external to rights discourse. To put it another way, what the right to appearance autonomy would mean, how broad its protections and contribution to equality would be, would depend on judges' and officials' theoretical and political understanding of appearance practices and appearance autonomy. This is worrisome. Not a reason to abandon the rights approach, but worrisome. Even those most committed to gender equality and cultural diversity have reached no consensus on the meaning and significance of appearance practices. The fact is we do not possess a neutral standpoint to resolve such questions. Most judges have never even pondered them and cannot be counted upon to bring a broad-minded and sensitive outlook to bear on matters of cultural diversity, gender equality, or personal appearance.

For these and other reasons, we need to supplement the rights approach with other techniques, particularly institutional reforms that will give employees more direct control over appearance choices. This seems in keeping with the feminist commitment to empowerment and with the diversity and division of views on many appearance matters even among people working for social change.

V. AppearanCe AutonOmy AND marKET reCONSTRUCTION

This paper concludes with a suggestion for a market reconstruction approach to appearance law reform. I offer only a sketch of a proposal, designed primarily to raise questions about how to proceed and hopefully to stimulate discussion.

Market reconstruction reform works in tandem with the promulgation of new rights, but it has a somewhat different focus. The assumption is that inevitably many of the details of appearance regulation (what can or must be worn, who sets the rules, how they are enforced,
and so on) will not be established by law but by bargaining in labor markets. A collectively bargained dress code is an obvious example of how this would work, but analogous processes can and do occur in the nonunion sector.

An example will illustrate why rights approaches may need to be supplemented. My own view is that men should have a vested right ordinarily to wear earrings or beards to work, and that women should have a vested right to wear pants. If we established a statutory entitlement to appearance autonomy, I would hope that, in terms or by interpretation, the statute would strike down no-beard and no-pants rules (at least where such rules cannot be stringently justified by, for example, safety considerations). But it is quite possible that a jurisdiction could decree a general right to appearance autonomy and yet interpret the right in such a way as to allow employers without adequate justification to insist on shaving and skirts. Thus, even in a legal regime that grants appearance autonomy rights, countless residual issues will remain to be contested and determined through bargaining.

Bargaining solutions have several valuable advantages. They tend to be more flexible and accessible than bureaucratic or judicial determinations, particularly when, as with appearance, the question involves very subtle details and variations and constant changes. Bargaining systems may provide greater scope for self-determination and participation (for example, through collective bargaining) than centralized regulation. The problem with a bargaining regime is, of course, that bargaining outcomes depend on bargaining power. There are exceptions, but as a general rule the employer is in a superior, often vastly superior, position to the employee in bargaining about terms and conditions of employment. Congress has even said so.

In bargaining regimes, the scope of one's rights, powers, and opportunities (including, for example, one's appearance autonomy) depends in part on one's class position. From an egalitarian perspective, this is unjust. Market reconstruction is designed to respond to this equity concern. The idea is to revise the background rules of law and institutional arrangements that structure and shape the bargaining process with the goal of redistributing power and enhancing equality. The market reconstruction approach to appearance law reform would be to restructure labor markets so as to increase the effective power of employees to bargain over appearance regulation. This can be done “di-

186. Title VII has been interpreted to allow employers to require skirts for women, as we have seen. See supra notes 94-99 and accompanying text. Likewise, the courts have generally rebuffed Title VII challenges to rules prohibiting men from growing beards. See BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 411 (2d ed. 1983) (citing cases). But see supra note 54.

rectly," by declaring that certain, pro-employee protections regarding appearance regulation are nonwaivable or nondisclaimable in the employment contract. Here market reconstruction connects with the rights-based approach to law reform. Or, the changes can be accomplished "indirectly" by altering a variety of rules that affect bargaining outcomes but that do not substantively determine the content of contracts. Examples would be rules about the power of the employer to discharge a worker, rules that facilitate collective as opposed to individual bargaining, and rules governing the construction and enforcement of employment contracts.188

The most straightforward (although not necessarily politically feasible) approach to enhancing appearance autonomy would be generally to enhance employee bargaining power. There is no guarantee that employees would deploy their enhanced power to obtain concessions on appearance regulation (as opposed to other terms and conditions of employment), but the possibility would be there. This would require an across-the-board program of employment law reform, both for the individual employee and in the collective bargaining sector. I have made a lengthy case for such a program elsewhere, and so here I will simply leave the suggestion.189

My specific proposals regarding bargaining over appearance take the following form. The rules proposed could be promulgated by statute or through elaboration of the common law of wrongful discharge.190 As an initial matter, I would make it unlawful for an employer, absent a valid "waiver" as described below, to discriminate against, discipline, or discharge an employee or applicant on grounds of personal appearance or dress. I would then permit the employer to purchase a right of control over employee appearance under certain ground rules. The idea is to promote competition between employers over appearance terms191 and to try to force employers to pay a wage premium if they wish to exercise unusual or unreviewable control over employee appearance. My hope is that employers would eventually learn it isn't worth it.

An employer seeking to control appearance would actually have to obtain from employees an express, written waiver of the core right to

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188. In Klare, supra note 161, I describe the market reconstruction approach to employment law reform in greater detail and defend it against the charge that is necessarily inefficient.

189. See id.

190. These proposals were developed with the unrepresented employee in mind. Obviously, modifications would be required to mesh the proposals with federal collective bargaining law in the unionized sector.

191. Some employers, particularly white collar and service-sector firms, now offer the job benefit of casual dress codes as a way of competing in labor markets, particularly for highly educated employees. See Louis Trager, American Workers Rewrite Dress Codes, BOSTON HERALD, June 1, 1992, at C7.
appearance autonomy. Employers would have to disclose their proposed appearance policies in a document, and discipline or discharge unauthorized by a valid, written dress code agreed to by the employee would be unlawful. The employer would be required to advise the employee if he or she has an option to retain personal control over appearance by accepting a lower wage. The disclosure document would also set forth the enforcement procedures. The employer might have a dispute resolution system akin to arbitration; or the employer might be willing to submit disputed cases to juries of managers and/or co-employees. If the employer chooses to retain all enforcement powers under the dress code, this would have to be disclosed. To constitute a valid waiver, an employer appearance policy would have to include some system of employee participation in periodic review and revision. Finally, certain rules of construction would apply to judicial interpretation and administration of the waivers. Waivers and dress codes would be strictly construed against the employer. The risk of gaps or ambiguities in the waivers would fall upon the employer. An employer seeking to discipline an employee on appearance grounds pursuant to general standards in a dress code (such as, “employees shall wear appropriate clothing and be well groomed”) would be required to adduce rigorous, performance-related proof of the need for discipline. I would accord somewhat greater deference to dress codes adopted by democratically organized enterprises (such as worker-owned cooperatives) and, perhaps, to collectively bargained waivers.

Although I would allow the employer to purchase the power to control appearance, I would place strict limits on the scope of allowable bargains. To put it another way, I would make certain rights of appearance autonomy nonwaivable in the wage bargain. (Some of the proposed restrictions recapitulate the stated principles—if not always the actually enforced content—of existing law.) I would hold unenforceable any dress code that did not make appropriate provisions for accommodation to religious or political conscience. Waiver or no waiver, I would not permit appearance regulation based on invidious racial or gender stereotypes or those having race or gender discriminatory intent or effect. Customer preference should never justify discriminatory treatment. The employer would not be permitted to regulate one but not the other sex, nor to impose more burdensome conditions on one sex. I would not permit a valid waiver of the right employees should have to be immune from dress or appearance requirements that have a tendency to subject them to sexual harassment or abuse. The risk of liability for harassment related to costume should fall strictly on the employer. And I would not permit the employer to base personnel action on requirements of, or expectations about, employee attractiveness or physical characteristics, unless these could be shown to be job-related apart from customer preference (for example, excessive weight
interferes with safe performance of job). Further categories of nondisclaimable rights could be added as experience dictates.

These rules leave a residual range of appearance issues for employer/employee bargaining within what would now be a reconstructed (and hopefully more politically conscious and charged) market. Some readers will respond that, because employee bargaining power is so weak, market solutions offer little or no advantage to employees and leave the quality of working life hostage to the employee's class position. There is force to this criticism, as I trust my earlier comments have shown. For this reason, I support expanded legal rights and drastic reconstruction of labor markets. But, for the reasons given, rights solutions are also imperfect. Although I have supported egalitarian revision of market structures in my writings, it is not obvious to me that there is any alternative to leaving at least some of these issues to labor market determination.

Now other readers will react that I have left too little to the residual, bargainable area, so that I am not really proposing a market solution at all. But I think the questions left to bargaining are in fact quite significant. My proposed rules would allow the employer to purchase the right to set grooming standards, to require gender-specific attire and grooming, to require a uniform or particular costume, and to control other aspects of employee appearance. True, I have withdrawn from the bargainable area requirements of attractiveness or physical characteristic that cannot be shown to be job-related (on a basis other than customer preference). That is, the proposed market reconstruction is designed to deprive employers of the ability and/or incentive to compete on the basis of selling conventionally attractive employee appearance or sexuality. But issues of attractiveness are destined to resurface in personnel management and labor bargaining. For example, attractiveness issues will always appear in cases at the borderline between grooming and attractiveness standards, or where the employer claims a valid job-relation of attractiveness requirements (such as for the sales staff of a fashion products concern?). Employers have ways of attempting to promote the sexual allure of staff that fall short of the extreme tactics employed by the airlines in the 1960s (hot pants and "love image"). Examples would include requiring latest-fashion attire for big law firm receptionists or miniskirts for waitresses.

Should bargaining prevail in these cases, or should gender-specific clothing and grooming codes, and attempts to project conventionally attractive, stylish, or sexualized images be barred? Some people would indeed advocate a ban, arguing that employees, particularly women, who agree to work under these conditions do so because of economic necessity or as prisoners of false consciousness. I feel strong sympathy with the first point; I do not feel entirely confident to make the latter judgment. I am also wary of authorizing officials to determine what is
suitably modest attire, a power that sooner rather than later will be abused. That employers should not be able to require conventional attractiveness or to market female sexual allure does not mean that employees should be barred from attempting to appear conventionally attractive or alluring should they desire to do so. Accordingly, my tentative view—but with considerable ambivalence—is that at least at the present stage, many such appearance issues need to be and can productively be left to negotiation in a reconstructed market.

VI. Conclusion

As noted, I have presented only a sketch of a law reform proposal, my primary motive being to stimulate discussion of how we might move forward on the question of appearance regulation. I hope I have said something interesting about the problem, something that would have interested Mary Joe. I am profoundly aware of the limitations and inadequacies of what I have written, and how much deeper Mary Joe’s insights on the topic were and would have been. I end where I began, wishing she were here so that our dialogue could continue, and hoping that we can all carry forward in our lives and our work Mary Joe’s passion for social justice, her commitment to equality and diversity, and her intellectual courage.
Representing Identities: Legal Treatment of Pregnancy and Homosexuality*

Dan Danielsen**

To bring the subject to recognize and name his desire, this is the nature of the efficacious action of analysis. But it is not a question of recognizing something that would have already been there—a given—ready to be captured. In naming it, the subject creates, gives rise to something new, makes something new present in the world.1

It is not a question of knowing whether I speak of myself in a way that conforms to what I am, but rather of knowing whether I am the same as that of which I speak.2

I. INTRODUCTION

This article explores some of the ways in which judges treat pregnancy and homosexuality in discrimination cases.5 In examining

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3. Throughout this paper, I will use the term pregnancy as a metaphor for the locus of social, personal and legal relations of and to women’s biological sex, gender, reproductive desires, capacities or conditions. Though much of the paper is devoted to beginning to unpack the complex meanings of pregnancy as it is represented in legal opinions, I want to make clear from the outset that I am not simply referring to the physical condition of carrying a fetus or to women’s biological reproductive capabilities.

4. As with pregnancy, I hope to use the terms homosexual and homosexuality as shorthand for representing a complex set of desires, self-understandings, social and legal relations, and sexualities. Unfortunately the terms are not entirely satisfactory in that they suggest a sexual system of binary oppositions—of male and female and of same sex or opposite sex object choice. If feminism and psychoanalytic theory have taught us anything it is that sex and sexuality cannot be reduced to how you have sex and with whom you have it. On the other hand, I am
some of these cases, I map some of the doctrinal maneuvers and political strategies which courts employ in representing these traits, and explicate some of the images of gender or sexual identity which the judicial opinions contain. My sense is that looking critically and systematically at the complex and multiple modes in which judges represent pregnancy and homosexuality may improve our capacity for understanding for legal doctrine's potential to embody richer and more satisfying conceptions of selves or identities.

5. In this essay, I focus exclusively on cases involving allegations of discrimination based on pregnancy or homosexuality. This is primarily because discrimination is one context in which we commonly think about these traits in legal discourse and because there is a body of case law substantial enough to make a comparison academically feasible. I have deliberately chosen not to discuss the pregnancy cases in the context of abortion or the homosexuality cases in the context of criminal sodomy statutes. This is partly because, at least in my view, pregnancy can be meaningfully discussed independent of the abortion debate and homosexuality is something other than just (criminal) sodomy. More importantly, it seemed to me that engaging people's emotional and intellectual views on abortion and sodomy would actually impede people's abilities to think about pregnancy and homosexuality in perhaps new or different ways. Thus, I made a considered judgment that I would risk "incompleteness" in the hope of broader scholarly effect.

6. Throughout this paper, I will refer to pregnancy and homosexuality as "traits" rather than "identities" or identity constituting. The term identity, when used in relation to one of the many possible variables which converge in the self, seems, at least potentially, to over-emphasize the centrality of one trait in the constitution of one's self-understanding. The term "trait," on the other hand, while it suffers from a certain emptiness of feeling, neither implies the privileging of one aspect of self over another nor forecloses the possibility of a wide range of subjective relations to the trait over time.


8. While a more traditional analysis of these issues might measure doctrinal images of traits or identities against their referents or "reality," I seek to explore legal representation independent of its relationship, if any, to social or political reality. I do this by focusing on judicial strategies of representing homosexuality and pregnancy in judicial opinions. In doing so, I analyze opinions as narratives without presuming to determine the nature of such narratives in any fundamental
As an initial matter, this paper juxtaposes judicial representations of what might be construed as social opposites: pregnancy (hope of the race, social good, woman as woman, signification of women's power, signification of women oppressed, sexual difference) and homosexuality (abnegation of the race, social decline, man as woman as man, the ultimate victory of will over gender, the end result of gender hierarchy, deviance). Given the considerable differences in social perceptions of homosexuality and pregnancy—pregnancy being perceived generally as a social good and homosexuality as a social evil (or perhaps more benignly as deviance or abnormality)—one might expect that courts would treat these traits quite differently. In fact, the cases dealing with pregnancy and homosexuality use quite similar modes of argument in assigning legal significance to the traits, and quite similar legal consequences flow from these modes of argument for the individuals involved in the disputes.

Building from these common modes and strategies of legal argument in the cases, I analyze the cases in two ways in the hope of developing a strategy to improve the legal treatment of women and homosexuals. In the first, I articulate some of the doctrinal positions and political strategies which seem to animate the cases by examining their reasoning, rhetoric and outcomes. In this mode, I try to develop from the doctrinal positions and political strategies used in cases with outcomes I like, a consistent matrix of doctrinal positions and political strategies which might be more generally employed to achieve progressive results for women and homosexuals in future cases. Interestingly, although the cases express a limited number of doctrinal positions and political concerns, my analysis shows that associating these positions and concerns with case outcomes is of limited usefulness either to the sense. In other words, my assertion is that my method of reading cases is equally valid (or invalid) regardless of whether judicial narratives are "fundamentally" understood as descriptive of existing world facts, as mythic gestures, as rhetorical tropes, or as analogous to the therapeutic discourse of an analysand. Thus, in saying that I seek to analyze judicial opinions as narratives I do not mean to suggest that the opinions and my analysis are purely rhetorical, bear no relation to "reality," or are different or independent from social experience. Rather, my method is an attempt to analyze the opinions while remaining agnostic as to any fixed position on the nature of narrative, the "real," or experience.

Obviously, these characterizations are gross generalizations, but I do not think they inaccurately express the general social consciousness in present day American society. Of course, such views might vary quite radically depending on the circumstances. For example, pregnancy may take on a wholly different significance in the common consciousness if we are talking about pregnancy among single mothers or teenagers. Cf. Michael M. v. Superior Court, 450 U.S. 464 (1981) (holding that a statutory rape statute that punished only men and not young women did not violate the Equal Protection Clause because the stigma and fear of pregnancy were deterrent enough for women). Similarly, homosexuality may be understood quite differently in urban as opposed to rural areas, or in relation to different religious traditions.
judge seeking to reach consistent results or to the activist seeking to develop strategies to lead the courts to progressive case outcomes. Rather, the outcomes of cases and the doctrinal or political rationales offered by the courts are only loosely related. Hence it is quite difficult for the judge or the activist to analyze, decide, strategize for, or predict the outcome of the next case by reference to doctrinal rationales or political strategies he or she understands to have been employed in prior cases. While understanding the cases by reference to any one set of fixed doctrinal categories or political strategies might be useful as a descriptive matter, I argue that such a practice is insufficiently determinate to be helpful as a means of strategizing or affecting positive change in the legal treatment of women and homosexuals.

In my second method of analysis, I move away from a focus on the outcomes of specific cases, and look instead to the images of traits and identities the cases seem to embody independent of their outcomes. In so doing, I articulate a critique of all the cases based upon the impoverished and wooden images of traits and identities the cases seem to contain. The goal here is to identify a common flaw or defect in the mechanisms of legal representation which might be impeding representations of traits and identities in ways which comport more fully with our lived experience of these traits. In principle, doing so would permit the development of an identity politics which might produce more authentic legal representations of women and homosexuals. However, this approach also proves ultimately unsatisfactory because the images of women and homosexuals one finds in the cases are not so very different from the approaches to these "identities" one sees in one's experience. In fact, seeing the ways in which the simplistic cartoon-like images of pregnancy and homosexuality in the cases relate to a number of diverse and complex approaches to identity which we see in our everyday lives enriches our understanding both of legal representation of these traits and of the multiplicity of gender or sexual identities.

Through these two modes of analysis, I try to suggest the limits of either a single progressive doctrinal or political strategy or a single progressive approach to identity politics to the goal of achieving progressive legal treatment of gender or sexual identity. Rather I suggest that we should re-think our strategizing about gender and sexual identity in light of the indeterminacy of both judicial attempts to treat our identities as fixed and of our own efforts to understand judicial interpretation as rigid or out of touch with experience. In my view, it is the very multiplicitousness of our selves and our identities which defies easy classification, simple explanation, or crude categorization either in law or in life. Thus, as theorists and activists, we must keep cognizant of our multiple life strategies, in their simultaneous irreducible complexity and predictable banality and work to keep open the interpretive struggle over the meaning of our identities in law. It is by openness rather
than by closure, even "progressive" closure, that we may really begin to affect positive change in law.

II. Legal Representations of Pregnancy

In several of the leading cases dealing with pregnancy, the courts have manifested ambivalent or contradictory images of women and pregnancy and of the relationship between pregnancy and gender. As a preliminary matter, the courts rely heavily on an asserted distinction between gender and the physical condition of pregnancy. Sometimes the cases treat pregnancy and gender as separate, portraying pregnancy as chosen and gender as irrelevant. Other cases portray gender and pregnancy as inseparable and treat women, for all intents and purposes, as pregnant. Further, in one instance, the Supreme Court treated gender and the capacity for pregnancy as inextricably related, but did not express a view on the relationship between reproductive capacity and the condition of pregnancy. Exploring the ways in which courts come to express these images will be the focus of this analysis.

In the leading constitutional case in this area, Geduldig v. Aiello, the Supreme Court held that for the purposes of the Equal Protection Clause, pregnancy discrimination is not gender discrimination. The Court reasoned that excluding disabilities resulting from "normal" pregnancy and childbirth from the California disability insurance program "does not exclude anyone . . . because of gender . . . . The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."

The Court's distinction between pregnant women and nonpregnant persons implies two divisions: first, the stated division between pregnant women and everyone else; and second, the division between women and pregnant women. This second division is necessary in order to see pregnant women as a subset of and thus not the same as women generally. By implication, the Court suggests a distinction between pregnancy as a condition (pregnant women), and gender.

10. 417 U.S. 484 (1974). This case has been effectively overruled in the employment context by Congress through the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1992) [hereinafter PDA]. In the PDA, Congress decided that discrimination by employers based upon pregnancy must be treated as gender discrimination for the purposes of Title VII. However, Geduldig remains the law of the land in terms of women's protection from pregnancy discrimination under the Federal Constitution.


12. Id. at 496 n.20.

13. By the term "gender" I mean to suggest a Title VII-like notion which at minimum seeks to recognize biological distinctions between men and women, and perhaps slightly more broadly, to establish something like a status of "man" and "woman." Thus, in segregating the condition of pregnancy from the concept of
While this division between pregnancy and gender might seem to make intuitive sense at one level, because clearly not all women are pregnant, the distinction itself incorporates certain assumptions about the nature and meaning of pregnancy. First, the distinction suggests that pregnancy is not necessarily or even intimately connected with biological sex. At a minimum this suggests that the court views pregnancy not as a biological imperative but rather as a physical condition that some people get and some people don’t. More broadly, the Court suggested that to be “woman” is not necessarily to be (or want to be) pregnant.

By distinguishing between pregnancy and gender, the Court also begins to eliminate certain conceptual links between pregnancy and need or desire. If the condition of pregnancy is not biologically or socially determined or compelled, what are its origins? One logical possibility is that pregnancy is in some sense a voluntary condition. In this conception, there are many people (women) in the world and only some of them are pregnant; hence, they must, in some sense, want to be that way.\(^\text{14}\) Once pregnancy is posited as a voluntary condition, one can easily assert that the State should not have to pay for a condition women choose to undertake. Thus, the “voluntariness” of the condition suggests the justification for its exclusion from the insurance plan. Though this is not the only conclusion one could draw from the Court’s distinction, it is a plausible one for several reasons.

First, \textit{Geduldig} was decided the year after \textit{Roe v. Wade}.\(^\text{15}\) Thus, the availability of abortion and birth control methods to women must have been present in the Court’s consciousness as available ways of “controlling” pregnancy. Second, the Court framed the issue in the case in a terse, even impatient way, suggesting that the plaintiff’s position was unreasonable—perhaps because her pregnancy was her own fault. The Court stated:

\begin{quote}
The essential issue in this case is whether the Equal Protection Clause requires [the goal of providing disability benefits at low cost to everyone] to be sacrificed or compromised in order to finance the payment of benefits to those whose disability is attributable to normal pregnancy
\end{quote}

gender, the Court would be suggesting both that the condition of pregnancy is distinct from the capacity to become pregnant and that pregnancy is not necessarily related to the status of “woman.”

\(^{14}\) An alternative view might be to treat pregnancy as more like a disease which falls involuntarily upon some people and misses others. Pushing this analogy too hard would have been problematic for the Court’s conclusion in \textit{Geduldig} that disability from normal pregnancy, despite the fact that it only affects women, need not be covered by the California disability plan even if men’s sex-linked diseases were covered. It seems that the Court here has a background notion of pregnancy as something other than disease. The issue of whether pregnancy is voluntary or more like disease is addressed more explicitly in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), and \textit{infra} notes 20-29 and accompanying text.

\(^{15}\) 410 U.S. 113 (1973).
The word "normal" in this passage refers, at a minimum, to a distinction made in the California disability plan between coverage for difficult or complicated pregnancies and no coverage for unproblematic "normal" pregnancies. However, "normal" could also be read to connote regular, run-of-the-mill, voluntary pregnancies, or perhaps more perniciously, just something that happens to women. In his dissent, Justice Brennan picked up on this ambiguity in arguing that the plan discriminated against women for pregnancy while "compensation is paid for virtually all [other] disabling conditions without regard to cost, voluntariness, uniqueness, predictability, or 'normalcy' of the disability."\(^\text{17}\)

Thus, the *Geduldig* Court's doctrinal image of pregnancy seems to stake out a specific vision of the nature of pregnancy, its relationship to women and gender, and women's relationship to it. Through the Court's creation of the distinction between gender and the condition of pregnancy, the Court conceptualized pregnancy as independent from biological sex and social or self understandings of womanhood. In the same distinction, the Court suggested that pregnancy is not biologically driven or socially compelled. Rather, it is the product of women's choice.

In *General Electric Co. v. Gilbert*,\(^\text{18}\) the Supreme Court made its notion of pregnancy as a chosen condition more overt by once again asserting a distinction between pregnancy and gender. In considering the exclusion of pregnancy from the disabilities covered by a private employee disability program, the Court held, following *Geduldig*, that pregnancy discrimination was not gender discrimination for the purposes of Title VII.\(^\text{19}\) Deploying many of the *Geduldig* premises, Justice Rehnquist, for the Court, stated:

"Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."\(^\text{20}\)

From here, Justice Rehnquist was able to conclude that:

Pregnancy is, of course, confined to women, but it is in other ways sig-

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17. *Id.* at 499 (Brennan, J., dissenting).
18. 429 U.S. 125 (1976). This case was expressly overruled by Congress in the PDA. Newport News Shipbuilding & Dry Dock v. EEOC, 462 U.S. 669, 684 (1983). However, *General Electric* remains useful for study both because of its explication of *Geduldig* and because of its particular treatment of the meaning of pregnancy and gender for Title VII purposes.
20. *Id.* at 134-35 (quoting *Geduldig*, 417 U.S. at 496-97 n.20) (emphasis added).
nificantly different from the typical covered disease or disability. The District Court found that it is not a "disease" at all, and is often a voluntarily undertaken and desired condition. We do not therefore infer that the exclusion of pregnancy disability benefits from petitioner's plan is a simple pretext for discriminating against women.21

Thus, by asserting the distinction between the "objectively identifiable physical condition" of pregnancy and the capacity to get pregnant, the Court was able to distinguish pregnancy from gender. Further, by suggesting that pregnancy is a condition which is "voluntary," rather than a presumably involuntary "disease," the exclusion of pregnancy-related disabilities isn't only about women.

For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks.22

The Court's uneasy distinction between pregnancy and disease on the basis of voluntariness is by no means self-evident or unproblematic. As the Court acknowledged, and Justice Brennan pointed out in dissent, the district court had found that "'a substantial incidence of negligent or accidental conception also occurs.'"23 This point led Brennan to conclude that the Court's "proposition that pregnancy is a voluntary condition is overbroad," though he went on to assume "for the purposes of [his] argument, that the high incidence of voluntary pregnancies and the inability to differentiate between voluntary and involuntary conceptions, except perhaps through obnoxious, intrusive means, could justify the decision-maker's treating pregnancies as voluntarily induced."24 Brennan argued that because the disability plan didn't exclude other so-called voluntary ailments, it discriminated on the basis of sex.25 However, the point remains, albeit for different reasons, that the entire Court assumed the voluntariness of pregnancy.26

21. Id. at 136 (citation omitted).
22. Id. at 139.
23. Id. at 151 n.3 (Brennan, J., dissenting) (quoting Gilbert v. General Elec. Co., 375 F. Supp. 367, 377 (1974)). It is interesting to note here that the terms "negligent" and "accidental" imply a basic presumption of will, not in the sense of an affirmative choice, but in the sense of a choice foregone. In other words, the pregnancy might have been controlled. Thus, the Court's implicit justification for the exclusion of pregnancy from disability benefits applies equally either way—either she deserves to be excluded because she chose to be pregnant, or she deserves to be excluded because she failed to control or exercise her choice.
24. Id.
25. Id. at 151 (Brennan, J., dissenting).
26. Though Justice Stevens challenged the soundness of the whole distinction between the physical condition of pregnancy and the capacity to become pregnant, see id. at 160-62 (Stevens, J., dissenting), neither the majority nor Justice Brennan in dissent made any reference to this point. Further, Justice Stevens seems not to have doubted the "neutrality" of a distinction made between voluntary versus
The Court's notion of pregnancy as a voluntarily assumed objective physical condition distinct from gender yields confusing and ambivalent messages. On the one hand, seeing pregnancy as an "objective physical condition" both clinicalizes and generalizes the experience. This characterization denies, or masks over, any subjective relationship between the pregnancy and the individual woman outside some, as yet, contentless notion of choice. Completely absent is any reference to the intimacy or sexuality which produced the child; any sense of desire, or compulsion to conceive; any notion of the dismay, excitement, trauma or ambivalence about the pregnancy. This conception focuses exclusively on the physicality of the process. Thus, though pregnancy may not be a "disease" from the standpoint of voluntariness, it seems like a disease in its attendant physicality—it is a medical condition like many others. This image generalizes pregnancy as a common experience comprised only of certain physical conditions.

At the same time as the Court generalized the physical experience of pregnancy, it asserted the subjective voluntariness of the condition. This conjunction simultaneously generalized the experience of pregnant women and segregated each pregnant woman from non-pregnant women and men—while each pregnancy is physically the same, each incidence is unique in that it is presumptively chosen. The Court could then assert, with no apparent sense of contradiction, both that "'maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees,'"27 and that "pregnancy-related disabilities constitute an additional risk" which raises no issue of gender discrimination when excluded from a company's disability plan.28

The Court's treatment of pregnancy as at once unique and mundane, individual and "to be expected," presents an unclear image of the Court's notion both of voluntariness and of women, to the extent that women are making the choices. Does the Court envision an individual woman (subject) who consents to pregnancy as one might consent to a contract? If so, must she accept all the consequences of the deal? Or does the Court posit some less subjective notion of voluntariness?

The implication of Gilbert seems to be that women choose pregnancy—either affirmatively or implicitly through their failure to exercise choice. Justice Brennan, in dissent, took issue with the majority's idea about voluntariness, but not in a way which undercut the majority's image of pregnancy as chosen. In making the point that General Electric's disability plan did not exclude other "'so-called 'voluntary' involuntary absenteeism because of pregnancy. Rather, he objected to the singling out of pregnancy from other disabilities.

27. Id. at 142 (quoting an EEOC opinion letter).  
28. Id. at 139.
In most of these examples, the relationship between the condition and the individual is only tangentially related to the subjective choice of the person. At most, the relationship seems to be something like "assumption of the risk." With so loose a conception of voluntariness, almost any condition could be understood as voluntary. For example, cancer could be seen as voluntary if the person smoked, or heart disease if one ate too many eggs. Thus, the Court’s notion of the content of voluntariness may fall anywhere between subjective “choice” and something only tangentially related to the intent or consent of individual women.

In Geduldig and General Electric the Court treated pregnancy and gender as distinct things related only indirectly by an uncertain image of subjective “choice” on the part of individual women. Once the Court had distinguished pregnancy from gender, it focused on the condition of pregnancy itself, articulating it as a cognizable list of physical manifestations. By contrast, in some of the “fetal protection” cases, where employers prohibited or conditioned women’s employment in certain toxic environments to protect the fetus or fetus to be, the courts have not asserted any distinction between the condition of pregnancy and capacity. The doctrinal focus in those cases shifted from the condition of pregnancy to women as a class of potential childbearers, and from pregnancy as chosen to an image of pregnancy as beyond the subjective control of women.

For example, in Wright v. Olin Corp.,30 the United States Court of Appeals for the Fourth Circuit considered a “fetal vulnerability” program which involved restrictions on employment by women age five to sixty-three, unless they could present proof that they could not bear

29. Id. at 151 (Brennan, J., dissenting). Whatever Justice Brennan’s motives for analogizing this list of disabilities to pregnancy, the list conjures up a number of negative associations. What seems to tie this disparate list together are images of stigma, frivolity, irresponsibility and blame as well as “voluntariness” of course. Perhaps Justice Brennan was aware of these associations and sought to use them to demonstrate their incongruity with our social regard for pregnancy, the notion being that it is clearly discrimination to deny pregnant women coverage while protecting these more “unworthy” ailments. Or, perhaps he simply articulated what seemed to him an apt analogy.

30. 697 F.2d 1172 (4th Cir. 1982); see also Oil, Chem. & Atomic Workers Int’l Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984) (barring all women of “childbearing age” from employment unless they could prove they had been surgically sterilized). The Supreme Court recently overruled these cases in International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991). See infra notes 49-76 and accompanying text. Once again these overruled cases are useful for study both because they shed light on the meaning of Johnson Controls and because they present a competing, and perhaps if the dissent in Johnson Controls has its way, a still viable conception of women and pregnancy.
children. In deciding the case the court had to determine the way in which such a "fetal vulnerability" program should be analyzed under Title VII. Since the program explicitly excluded nearly all women (except those who could not bear children) from certain jobs, the court reasonably concluded that "the existence and operation of the fetal vulnerability program established as a matter of law a prima facie case of Title VII violation."31 Yet the question remained whether the program fell within the statutorily recognized exception of a "business necessity."32 The court's analysis of the framework for this "necessity" defense did not recognize any distinction between gender and pregnancy and implicitly denied women control or autonomy over pregnancy.

While the Wright court recognized that the common application of the "business necessity" defense was to justify intelligence tests or diploma requirements relating to the "job-related 'necessity' of being able effectively to perform the job," the court also suggested that "the necessity contemplated has been held to run as well to considerations of workplace safety."33 The problem then became how to extend the concern for workplace safety to unborn and even unconceived fetuses without impermissibly trouncing on women's employment opportunities. The court pointed out:

Among the most obvious targets of the sex-discrimination prohibitions of Title VII were those stereotypical assumptions about women workers' special societal role and physical and emotional vulnerabilities which had generated both "protective" laws and private practices restricting their employment opportunities.... Accordingly, the general view when these defenses have been raised by employers has been that they must be rejected because "it is the purpose of Title VII to allow the individual woman to make [the] choice for herself."34 Thus, protection of the women themselves would not suffice to justify the exclusion. Yet the court resolved that these same "overriding considerations" did not apply to the safety of persons other than the women employees. Citing Burwell v. Eastern Airlines,35 which held that mandatory maternity leave for pregnant stewardesses was justified by concerns for passenger safety, the Wright court asserted that sometimes discrimination against women is justified by a concern for others. Finally, the court analogized unborn fetuses to "personal service customers of the business," and held, "that under appropriate circumstances an employer may, as a matter of business necessity, impose otherwise impermissible restrictions on employment opportunity which are reasonably required to protect the health of unborn children of women.

31. Wright, 697 F.2d at 1187.
32. Id.
33. Id. at 1188.
34. Id. (quoting Dothard v. Rawlinson, 433 U.S. 321, 335 (1977)).
35. 633 F.2d 361 (4th Cir. 1980).
workers against hazards of the workplace." 36

The court's reasoning here has interesting implications. First, at the very moment the court asserted that it was following Title VII's mandate "to allow the individual woman to make [the] choice for herself" regarding workplace risks, it effectively took that choice away in the name of protecting unborn, and though the court glosses over this fact, unconceived fetuses. 37 Second, the court did not distinguish between pregnant women, or those who think they might want to become pregnant at some point, and women in general. The capacity to become pregnant and the condition of pregnancy collapse as "business necessity" permits the employer preemptively to protect the unborn by excluding all "fertile women." Third, the court chose not to address the possibility that women might control pregnancy in other ways, such as through birth control, abstinence, non pregnancy-inducing sex, or abortion. This omission might be read to suggest that any attempt by women to control pregnancy themselves is either ineffective or irrelevant, at least in this context.

In addition, the court's analogy between unborn fetuses and "business customers" denies any special relation between mother and child-to-be. Allowing a business to exclude women to protect the unborn presupposes that the fetus is independent and distinct from the mother, that the mother is incapable of determining what is best for the unborn fetus, and that the fetus needs protection from the mother herself, whose judgement cannot be trusted. Further, the court seems to have conceived of the mother as merely a vessel in which the fetus must grow. Her needs, desires or decisions are irrelevant, her subjectivity ignored, while the law steps in to protect the fetus.

Many of the Wright court's presuppositions about women, will and pregnancy were buried in its reasoning. However, in Oil, Chemical & Atomic Workers International Union v. American Cyanamid Co., 38 these issues are addressed more overtly. In that case, the court considered the validity of a citation issued by the Secretary of Labor, allegedly under the Occupational Safety and Health Act of 1970 (OSHA), 39 against American Cyanamid for giving women the option of sterilization or dismissal under the company's fetus protection program. 40 While the case

36. Wright, 697 F.2d at 1189-90.
37. The fact that the court's analysis does not depend upon the presence of an actual fetus—the possibility of a fetus apparently will do—seems important given the doctrinal focus on capacity and condition in Geduldig and General Electric. See supra note 10-26 and accompanying text. In those cases, it was the individual woman's decision to carry a fetus which distinguished her from other women. In the Wright court's analysis, all women are for all intents and purposes attributed with a fetus—a fetus to be.
38. 741 F.2d 444 (D.C. Cir. 1984).
40. American Cyanamide, 741 F.2d at 445.
turned on whether the "sterilization option" was a "hazard" for OSHA purposes, once again the court's analysis did not adopt any distinction between capacity and pregnancy,\footnote{Id.} and ignored any control that women might have had over pregnancy (with the exception of sterilization).

\textit{American Cyanamid} considered a fetal protection program very similar to the one in \textit{Wright}. Under its policy, American Cyanamid excluded all women of "childbearing capacity"—deemed by the company to be to all women between sixteen and fifty—from the plant’s inorganic pigments department, unless they could present medical evidence that they had been sterilized.\footnote{Id. at 445-46.} The justification for this exclusion was the company’s inability to keep the levels of lead in its work environment at a safe level for unborn fetuses.\footnote{Id. at 446.} What was unique in this case was the company’s decision to provide their female employees with the option of surgical sterilization as a means of avoiding dismissal from the plant:

\begin{quote}
[The company doctors] explained to the women [employees] that such "buttonhole surgery" was simple and that it could be obtained locally at several places. The women were also told that the company’s medical insurance would pay for the procedure, and that sick leave would be provided to those undergoing the surgery.\footnote{Id. (citations omitted).}
\end{quote}

Reviewing an administrative decision which had found the fetal protection policy outside the purview of the Act, the court reasoned that "[t]he policy may be characterized as a 'hazard' to female employees who opted for sterilization in order to remain in the Inorganic Pigments Department, though it requires some stretching to call the offering of a choice a 'hazard' to the person who is given the choice."\footnote{Id. at 447-48.} The court then adopted the findings of the administrative law judge that "[t]he decision to be sterilized 'grows out of economic and social factors which operate primarily outside the workplace, and hence the fetus protection policy 'is not a hazard within the meaning of the [Act].'"\footnote{Id. at 449 (citations omitted).}

The assumptions in this analysis become clear when one examines the options the D.C. Circuit court did not consider. For example, while the court is prepared to see being surgically sterilized to preserve one's job as an "unhappy," albeit voluntary "choice,"\footnote{Id. at 450.} it refused to credit women with any amount of control over their own pregnancies. The court states as pure fact, [[i]t is clear that American Cyanamid \textit{had to prevent exposure to lead of women of childbearing age}, and, furthermore, that the company could have not been charged under the Act if it had accomplished that by discharging the women or by simply closing the De-

\begin{thebibliography}{9}
\bibitem{41} Id.
\bibitem{42} Id. at 445-46.
\bibitem{43} Id. at 446.
\bibitem{44} Id. (citations omitted).
\bibitem{45} Id. at 447-48.
\bibitem{46} Id. at 449 (citations omitted).
\bibitem{47} Id. at 450.
\end{thebibliography}
Implicit in this statement is the notion that the women could not have protected themselves or their potential unborn through control over pregnancy—exclusion was a necessity. If this is true, then pregnancy could not be “voluntary” in the same sense as in Geduldig and General Electric. Presumably, if pregnancy were voluntary, it could also be controlled. Thus, in addition to the presumptions of maternal/fetal autonomy and conflict discussed in Wright, the court here also adopts the notion of the ineffectiveness or irrelevance of any alternatives to blanket exclusion based upon women’s autonomous control over pregnancy. For example, the policy could have been tailored to each individual woman’s desire or intent to have children, her use of effective birth control, her engagement in non pregnancy-inducing sex, or abortion. Thus, unlike Geduldig and General Electric, which treat pregnancy as chosen, Wright and American Cyanamid treat pregnancy as essentially inevitable.

The Supreme Court recently considered the relationship between pregnancy, gender and fetal protection programs in International Union, UAW v. Johnson Controls, Inc.49 In determining that fetal protection programs which excluded only fertile women employees from toxic work environments violated Title VII, as amended by the Pregnancy Discrimination Act (“PDA”),50 the Supreme Court’s majority opinion employed reasoning quite different from that used in Wright or American Cyanamid. Rather than equating the condition of pregnancy with capacity, and thereby treating all women as in effect pregnant, Justice Blackmun held for the majority that fetal protection programs exclude women based upon their capacity to become pregnant.51 By treating fetal protection programs as exclusions based upon women’s reproductive capacity, the Court reasserted the “necessary” relation between pregnancy and gender, at least as it is manifested in women’s ability and potential to bear children. However, although the Court concluded that discrimination based upon women’s capacity to become pregnant is per se gender discrimination,52 it did not articulate a clear vision of the relationship between women’s capacity for and the condition of pregnancy. In fact, the decision in Johnson Controls can be reconciled with either a “choice” or a “constraint” view of pregnancy as conduct.

While Johnson Controls involved a fetal protection program similar in all relevant respects to the programs in Wright and American Cyanamid, the Johnson Controls Court asserted its different perspective in the opening lines of its opinion: “In this case we are concerned with an em-

48. Id. (emphasis added).
51. Johnson Controls, 111 S. Ct. at 1203.
52. Id. at 1203-04.
ployer’s gender-based fetal-protection policy. May an employer exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might conceive?”  

First, the Court made clear that it understood fetal protection programs which exclude fertile women to be “gender-based.” While such a conclusion might seem obvious, one cannot presume, given the analysis in Geduldig and General Electric, that discrimination based upon pregnancy is necessarily the same thing as discrimination based upon gender. Second, the Court seems to have immediately recognized what the courts in Wright and American Cyanamid rejected in upholding the exclusion of women from toxic work environments: a distinction between the capacity to become pregnant and the condition of pregnancy. In other words, excluding all women who have the potential to become pregnant from toxic work environments based upon the rationale of protecting “the fetus” which is not yet conceived in essence treats all women as pregnant because it presumes that women who can be pregnant will be.

Thus, in the opening lines of its opinion the Court made two distinct points. By shifting the focus of its analysis from the condition of pregnancy (either actual or imputed) to the capacity for pregnancy, the Court reasserted a connection between pregnancy and gender. Further, by reasserting a distinction between capacity and pregnancy, the Court was able to recast the discrimination involved as based upon women’s “status” as women (potential child bearers) rather than upon conduct (pregnancy). Thus, the Court was able to avoid any imputation of blame, or the justifiability of discrimination based upon the “voluntary” condition of pregnancy, by shifting its discussion from pregnancy as an “objectively identifiable physical condition” to women’s capacity to bear children.

The Court reached its conclusion that fetal protection programs involve per se gender discrimination through two interrelated steps. The first was to suggest that the program was biased against women because it didn’t exclude men and women equally based upon risk to a potential fetus. As the Court put it: “The bias in Johnson Controls’ policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job.” The Court reasoned that since there was substantial evidence suggesting the damaging effects of lead exposure on male reproductive capacity, and men were not subject to the exclusion policy, “Johnson

53. Id. at 1199.
54. Id. at 1202.
55. Id. at 1203.
57. Johnson Controls, 111 S. Ct. at 1202.
Controls' policy classifies on the basis of gender and childbearing capacity, rather than fertility alone. Implicit in the Court's reasoning is the notion that discrimination based upon "fertility," or the potential to conceive children, would be "neutral" to the extent it was applied without relation to sex. For example, presumably, a policy which sought to exclude all persons who were fertile would not run afoul of Title VII because the discrimination would be based upon the child-producing potential of each sex. However, the Court reasons, since Johnson Controls' policy "requires only a female employee to produce proof that she is not capable of reproducing" it follows that "[Johnson Controls] does not seek to protect the unconceived children of all its employees." In other words, Johnson Controls' exclusion policy was not based upon fertility but upon women's fertility. Thus, it discriminated based upon sex.

The second step of the Court's analysis focused on the fact that Johnson Controls' policy treated all fertile women as "potentially pregnant." The Court first asserted that the PDA alleviated any doubt "that, for all Title VII purposes, discrimination based upon a woman's pregnancy is on its face, discrimination because of her sex." The Court then reasoned that since Johnson Controls "classifies on the basis of potential for pregnancy.... [Johnson Controls] has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex." The crucial leap in the Court's analysis here is its determination that since Johnson Controls' policy collapsed the distinction between the potential for pregnancy and pregnancy itself to justify total exclusion of fertile women, the Company's discrimination based upon potential to bear children is in effect "pregnancy" discrimination. The Court's particular approach was by no means predetermined by the PDA. The Court could well have said that excluding women based upon potential for pregnancy was not discrimination "because of or on the basis of pregnancy, childbirth or related medical conditions." Thus, the Court could have concluded that exclusion of women because they are pregnant is different from excluding women because they might become pregnant—one might be excluded "because of pregnancy" under the PDA, the other might not. In sum then, the Court found that Johnson Controls' fetal pro-

58. Id. at 1203.
59. Id.
60. Id.
61. Id. (quoting Newport News Shipbuilding & Dry Dock v. EEOC, 462 U.S. 669, 684 (1983)).
62. Id.
64. Had the Court decided Johnson Controls on this basis, it might have reasserted a regime like the one it articulated in Geduldig and General Electric, which
tection program was per se gender discrimination both because the policy treated women's and men's childproducing potential differently and because it treated women who might become pregnant as pregnant for the purposes of the exclusion policy.

Based upon its finding that Johnson Controls' fetal protection policy was overt gender discrimination, rather than a neutral policy with discriminatory effects, the Court determined that the policy was "forbidden under Title VII unless [Johnson Controls could] establish that sex is a 'bona fide occupational qualification ['BFOQ']." 65 This defense is much harder to establish than the "business necessity" defense articulated in Wright. 66 Under the Johnson Controls analysis, an employer may not establish a BFOQ defense based upon the potential for pregnancy "unless [a woman's] reproductive potential prevents her from performing the duties of her job." 67 In so holding, the Court rejected an invitation to create a "safety exception" to the BFOQ defense along the lines discussed in Wright. 68 Recall that in Wright, the court found that a business' concern for unborn fetuses could in some circumstances be analogized to a business' concern for its business customers. 69 Along a similar line, Justice White, concurring in Johnson Controls, argued that in certain circumstances an employer's concern for fetal safety could be a BFOQ although Johnson Controls failed to make such a showing. 70 In putting forward this argument, Justice White asserted that "the safety to fetuses in carrying out the duties of battery manufacturing [by women at Johnson Controls] is as much a legitimate concern as is safety to third parties in guarding prisons [Dothard v. Rawlinson] or flying airplanes [Western Airlines, Inc. v. Criswell]." 71 The distinguished pregnancy from capacity. The effect would have been to circumvent the intent of the PDA to overrule General Electric by treating the "because of pregnancy" language in the PDA as meaning only the physical condition of pregnancy and not the capacity to become pregnant.

65. Johnson Controls, 111 S. Ct. at 1204.
66. See Wright v. Olin Corp., 697 F.2d 1172, 1187 (4th Cir. 1982) (treating defendant's fetal protection policy as gender neutral because it was enacted for the benign purpose of protecting unborn fetuses and therefore deciding that the policy could be upheld on a showing of business necessity); see also Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1549 (11th Cir. 1984).
67. Johnson Controls, 111 S. Ct. at 1207.
68. See supra notes 32-37 and accompanying text for a discussion of the court's analogy in Wright between a business taking account of the safety of unborn fetuses and the business providing for the safety of its customers.
69. Wright, 697 F.2d at 1189.
70. Johnson Controls, 111 S. Ct. at 1210-16 (White, J., concurring).
71. Id. at 1213 (White, J., concurring) (citing Dothard v. Rawlinson, 433 U.S. 321 (1977) (finding that an exclusion of women from prison guard positions in male prison was a BFOQ because a woman's sex would affect her ability to maintain peace and security in the prison), and Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (upholding a blanket exclusion of flight engineers at age sixty because concern for passenger safety made age sixty a BFOQ for flight engineers)).
majority responded by rejecting the analogy between unborn fetuses and business customers. As the Court put it, "[t]he unconceived fetuses of Johnson Controls' female employees . . . are neither customers nor third parties whose safety is essential to the business of battery manufacturing."72 Thus, unlike the exclusion policy in Dothard, where ensuring the safety of the prisoners and guards was a central function of the job, or in Criswell, where the essence of the employer's airline business was the safe transport of passengers, Johnson Controls' concern for third party fetuses had nothing to do with it's business of battery making.73

It is interesting to note that the Court once again focused on the fact that the objects of protection in the Johnson Controls fetal protection program were in fact "unconceived" fetuses. In suggesting that the exclusion policy, with its drastic consequences for female employees, was based upon the protection of a potentiality rather than a reality,74 the Court emphasized the harshness of the program. However, the reminder that the policy was based upon the potential for pregnancy, rather than pregnancy itself, drove home the Court's focus on the exclusion as status (gender) based rather than conduct (pregnancy) based.

The Court's focus on status as opposed to conduct in Johnson Controls worked in very much the same way the Court's focus on conduct—the physical condition of pregnancy—did in Geduldig and General Electric. In both of those cases, a focus on the physicality of pregnancy as a medical condition with identifiable and generalizable traits enabled the court to deemphasize the women behind the condition. Pregnancy became just another voluntary condition, whose relation to gender must be recognized but not considered. Gender (or status) faded into the background, as the court's gaze rested on pregnancy as a condition or conduct. We might paraphrase that whatever the nature of gender relations or sexual difference, "we know a pregnant woman when we see one." After all, the world in Geduldig and General Electric was populated by "pregnant persons" and "non-pregnant persons"—categories which don't coincide with the categories of male and female.

The Court's approach in Johnson Controls worked similarly, but in the reverse. By focusing exclusively on the potential for pregnancy rather than its physical manifestation, the Court was able to transform the (potential) fetus from a being, with interests independent of and perhaps contrary to the mother, to a potentiality which must be recognized but not taken into account. Women's status as potential childbearers took center stage, while the condition of pregnancy, as represented by the fetus, faded into the background. In fact, the Court's consistent refer-

72. Id. at 1206.
73. Id.
74. Id.
ence to the fetuses as "unconceived" gave them an almost illusory quality—all this concern and protection is really unnecessary here because there are simply no babies to protect. But how can the Court be so sure? On what theory does the Court rest its sense that the potential for pregnancy does not correlate with, if not often lead to, the condition of pregnancy?

The quick answer to these questions is that the Court treated the likelihood of actual pregnancy as doctrinally irrelevant. In response to Johnson Control's argument that it must exclude all fertile women because it cannot tell which ones will become pregnant, the Court responded that "[t]his argument is somewhat academic in light of our conclusion that the company may not exclude fertile women at all." Considering these questions more broadly—in terms of the Court's theory of the relationship between gender and pregnancy—the Court's opinion seems consistent with a notion of pregnancy as either voluntary or involuntary as conduct.

Recall that under the Court's analysis of Johnson Control's fetal protection program the problem with the program was that it was sex-specific in its exclusion, not that it excluded based upon fertility. Hence, were the Court to adopt an involuntary view of pregnancy, the Court could reason that an exclusion of all fertile persons (male and female) from a toxic environment would be permissible because the desire to reproduce is too powerful to assume that employees would or could control it. However, without denying the involuntary nature of reproduction, the Court could still strike down the program in Johnson Controls because the program's exclusion was based upon women's sexual capacity and not men's. In other words, it would be impermissible because it was sex-specific. In this sense, the holding in Johnson Controls is consistent with an involuntary conception of pregnancy.

On the other hand, one could argue that implicit in the Court's analysis is a rejection of discrimination on the basis of reproductive capacity. This would be true because the law forbids assigning negative consequences to reproductive capacity by presuming that capacity means pregnancy. The next step would be to assert that pregnancy is a

75. The Court took this position overtly in one portion of its opinion. The Court reasoned that Johnson Control's belief that its fetal protection policy was necessary to protect fetuses was overstated because a very small percentage of women would get pregnant anyway. The Court stated:

Even on this sparse record, it is apparent that Johnson Controls is concerned about only a small minority of women. . . . The record does not reveal the birth rate for Johnson Controls' female workers but national statistics show that approximately nine percent of all fertile women become pregnant each year. The birthrate drops dramatically to two percent for blue collar workers over age thirty.

Id. at 1208.

76. Id.
choice which must be left to the individual woman. However, this brings us back to the place where we started: did the Court in Johnson Controls suggest that pregnancy is voluntary or that it is somehow beyond the subjective control of the individual woman?

In short, the Court’s exclusive focus on capacity for pregnancy, and its lack of attention to pregnancy itself except by vague references to chance, leaves the Court’s image of the relationship between pregnancy and capacity quite open. Despite women’s sexual difference from men, the condition of pregnancy might be chosen freely or be the product of something other than subjective choice. Further, if pregnancy is understood as chosen, then it may still be possible to rationalize differential treatment based upon the condition of pregnancy as willed conduct, even if such discrimination based upon women’s reproductive capacity is prohibited. Thus, while Johnson Controls and the PDA might proscribe discrimination based upon women’s reproductive capacity as gender discrimination, the case leaves us with an uncertain notion of the Court’s conception of the relationship between pregnancy as conduct and gender as status.

Explicating the pregnancy discrimination cases and the fetal protection cases provides some sense of the ambivalent and contradictory ways in which courts treat pregnancy. Sometimes courts treat pregnancy as separate and distinct from gender. To the extent that courts conceptualize a connection between pregnancy and gender, they sometimes use a notion of voluntariness to provide the bridge. Women are sometimes attributed with both the power to choose pregnancy and the responsibility for that choice to the extent that it affects their personal or working lives. Voluntariness is also sometimes used to distinguish pregnancy from disease and from other sex-related conditions which might implicate gender but for choice.

In other cases, courts treat pregnancy as conceptually indistinguishable from gender. Under this treatment, the capacity to become pregnant has been treated as legally synonymous with the condition of pregnancy, at least for certain purposes. Further, in the strongest reading of these cases, pregnancy is conceived as beyond the subjective control of women. Or, to the extent a woman’s will is acknowledged in relation to pregnancy, it is disregarded as irrelevant or untrustworthy. Finally, in Johnson Controls, the Supreme Court suggested that pregnancy and gender are inseparable to the extent pregnancy is viewed as the capacity for conception. This follows from the Court’s focus on capacity to conceive rather than on the condition of pregnancy. However, the Johnson Controls Court left open its notion of the relationship between gender and pregnancy understood as a physical condition or chosen conduct.

These quite different images of pregnancy seem to bear some relationship to the courts’ resolution of the cases. For example, the treat-
ment of pregnancy as willed conduct separate from gender in *Geduldig* and *General Electric* seems to have lead those courts to the conclusion that discrimination based upon pregnancy was appropriate, or at least benign, because it was based upon a chosen or desired condition. By contrast, in *Wright* and *American Cyanamid*, the courts’ treatment of pregnancy as synonymous with gender seems to have enabled them to rationalize the exclusion of all fertile women from toxic work environments because women’s ability to choose (or not choose) pregnancy was seen as inadequate or irrelevant to the need to protect the imputed fetus from potential harm. In *Johnson Controls*, the Supreme Court overturned a fetal protection policy which excluded fertile women based upon its finding that the capacity for pregnancy was inseparable from gender. Yet the Court left uncertain its notions about the relationship between pregnancy and identity by not focusing on pregnancy as conduct.

III. LEGAL REPRESENTATIONS OF HOMOSEXUALITY

As with pregnancy, the courts have had a difficult time defining and taking account of homosexuality. Indeed, the doctrinal mechanisms and strategies courts use when encountering homosexuality are very similar to those used when considering pregnancy. As in pregnancy cases, the courts’ conceptions of homosexuality can be roughly divided into three categories. Some courts deploy a distinction between homosexual status and homosexual acts or conduct which works in ways similar to the distinction between gender and pregnancy. This distinction results in a similar presumption that homosexual conduct is chosen. In such opinions, the courts describe or imagine homosexuality as willful deviance, with the homosexual person choosing and responsible for his or her acts and their legal consequences. In other cases, or sometimes elsewhere in the same case, the courts disregard any distinction between status and conduct. Instead, homosexual acts and homosexuality are treated as synonymous. As in the fetal protection cases, the collapse of the status/conduct distinction brings with it a notion that homosexuality is outside the control of the individual—that homosexual proclivities necessarily lead to homosexual acts. Finally, at least in one case, the court focused exclusively on sexual orientation as status, treating it as stable and virtually unalterable. Yet, despite a conception of homosexual orientation as essentially different from heterosexual orientation, the court did not articulate an account of homosexual conduct. Thus, while homosexual status may be constant, homosexual conduct may nevertheless be chosen deviance or driven compulsion.

In *Padula v. Webster*, a distinction between homosexual status and conduct is invoked by the Federal Bureau of Investigation and the court

77. 822 F.2d 97 (D.C. Cir. 1987).
to create a conception of homosexuality as chosen. In *Padula*, a female applicant challenged the constitutionality of the FBI's exclusion of homosexuals from employment. In describing its hiring policies to recruitment coordinators at various law schools, the FBI had asserted that its "focus in personnel matters has been and continues to be on conduct rather than status or preference and we carefully consider the facts in each case to determine whether the conduct may affect the employment." 78 Recognizing this statement as an expression of the FBI's hiring practice, the circuit court found:

> [T]he FBI conducted a routine background check. In addition to revealing favorable information about the applicant's abilities and character, the background investigation disclosed that appellant is a *practicing homosexual*. At a follow-up interview, Padula confirmed that she is a homosexual—explaining that although she does not flaunt her sexual orientation, she is unembarrassed and open about it and it is a fact well known to her family, friends and co-workers. 79

While this passage might be read as denying any distinction between status and conduct (the phrase "she is a homosexual" might incorporate both), such a reading would make the court's use of the phrase "practicing homosexual" quite strange. The qualifier "practicing" suggests its opposite—that some homosexuals are not "practicing" and do not engage in such "conduct." The court recognized this at several points in the opinion, stating "[s]exual preference per se is not a basis for hiring decisions, but sexual conduct is relevant" 80 and noting, "[A]rguably, the FBI has committed itself not to consider the sexual orientation of an applicant who can show he does not engage in sex, but it clearly has done no more." 81 Acknowledging the difference in perspective between the parties—the FBI claiming a distinction between status and conduct, and the plaintiff claiming that "'homosexual status is accorded to people who engage in homosexual conduct, and people who engage in homosexual conduct are accorded homosexual status,'" 82—the court came to an interesting resolution. Leaving aside the question of whether homosexual status "attaches to someone who does not engage in homosexual conduct," the court claimed that in this case, "'[t]he issue presented us is only whether homosexuals, when defined as persons who engage in homosexual conduct, constitute a suspect or quasi-suspect classification.'" 83 Having formulated the issue as such, the court upheld the FBI's practice of excluding homosexuals

78. *Id.* at 98-99 (quoting a letter from FBI legal council) (emphasis added).
79. *Id.* at 99 (emphasis added).
80. *Id.* at 101 n.4.
81. *Id.* at 101.
82. *Id.* at 102.
83. *Id.*
from employment. Citing *Bowers v. Hardwick*, the court asserted that "[i]t would be anomalous, on its face, to declare status defined by conduct that many states may constitutionally criminalize as deserving of strict scrutiny under the Equal Protection Clause."  

The court's use of the status and conduct distinction, and its discourse on "status defined by conduct," function in similar ways to the gender and pregnancy distinction implicit in *Geduldig* and *General Electric*. For example, the invocation, at least for some purposes, of homosexuals who might not engage in "homosexual conduct," evokes similar inferences as did the *Geduldig* court's distinction between pregnant women and non-pregnant persons. As with the *Geduldig* distinction, the *Padula* court's invocation of a homosexual status independent of conduct subdivides the world in two distinct ways. First, it divides homosexuals into homosexuals and practicing homosexuals. Secondly, it suggests a distinction between practicing homosexuals and everyone else (straight people and non-practicing homosexuals).  

Suggesting that there might be some homosexuals who do not engage in "conduct" imputes to those who do a degree of volition—since some do not act, those who do must want to. Thus, just as with pregnancy, the distinction between homosexual status and homosexual conduct seems to be one of choice by the individual actors rather than a distinction imputed by the law. Moreover, the presumed voluntariness of the "conduct" allows the courts to further subdivide "practicing homosexuals" from non-practicing homosexuals and heterosexuals. Thus, the difference in legal treatment is not about sexuality (like gender in the pregnancy cases), but about certain specific physical activities (like the objective physical condition of pregnancy).  

Much like the characterization of pregnancy as an "objective physical condition," the *Padula* court's general reference to homosexual "conduct" has a number of implications. First, it suggests that, like a physical condition, homosexuality is something that can be known, recognized, and generalized in some objective way. Homosexuality has certain clear indicia, and one need only look for them. Thus, although without any specific content, the term "conduct" suggests a certain laundry list of physical manifestations. As with descriptions of pregnancy which focus only on its physicality, this description generalizes and physicalizes homosexuality to acts, while emptying it of subjective content. There is no suggestion here of longing, intimacy, ambivalence, passion, "natural" drives, or individualized desires.  

As with the court's treatment of pregnancy and capacity, distinguishing orientation from conduct allows the courts to generalize and aggregate homosexual experience, yet enables them to individualize  

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84. 478 U.S. 186 (1986) (holding that state statutes which criminalize homosexual conduct do not violate the right to due process).  
85. *Padula*, 822 F.2d at 103 (emphasis added).
each instance of homosexual conduct as an act of will. Thus, the genius of the structure in both contexts is that it locates responsibility for the separation from the “status” groups (homosexuals and women) in the individual actor, rather than in the relationship between the actor and the law, while simultaneously justifying differential legal treatment based on the voluntary nature of the conduct (homosexual acts and pregnancy).

Accepting for the moment the distinction between status and conduct, some courts seem to express an ambivalent conception of the nature of the volition which moves persons from orientation to conduct. In some of the cases, the courts have adopted a position of unencumbered choice—homosexuality is a matter of mere preference or choice of sex partners. In other cases, the conception has been closer to compulsion—the drives are so much a part of the person, be they the product of disease or desire, that all will to the contrary, he or she is still a homosexual. Sometimes these seemingly contradictory conceptions appear in the same case.

The conception of homosexuality as “status defined by conduct” in Padula is an example of the choice position. Though the court seems uncertain about how the law might treat someone who has a homosexual orientation, but has never done the deed, that was not Padula’s situation as the court saw it. Her conduct—presumably some form of sexual relationship with another woman, though the court never articulated it—has determined her homosexuality. With the court’s doctrinal gaze focused squarely on Padula’s “conduct,” having put aside the question of a more essential connection between that conduct and her “being” a homosexual, the status defined by her conduct is beyond legal protection. In Padula, one’s conduct is not part of one’s essence, but is separately chosen—its voluntariness justifies differential treatment.

A similar conception of homosexuality as choice informs at least part of the opinion in Rich v. Secretary of the Army. The court characterized this case as a challenge by Rich to his discharge from the Army for fraudulent enlistment. Specifically, Rich was discharged for falsely claiming not to be a homosexual. In considering Rich’s claim that the Army’s policy of excluding homosexuals violated his rights under the Equal Protection Clause, the court baldly responded: “We cannot agree. A classification based on one’s choice of sexual partners is not suspect.”

Packed into this statement are a number of comparisons and assumptions. First, and most overtly, it implies that homosexuality is chosen and not the product of some more essential difference between heterosexuals and homosexuals. In other words, the court’s

86. 735 F.2d 1220 (10th Cir. 1984).
87. Id. at 1222.
88. Id. at 1229 (citations omitted).
statement asserts some notion that unlike race or gender, homosexuality is independent of one's being because it involves choice. Second, the court's use of the word "choice" suggests a simple option—one chooses the gender of one's sexual partners as one chooses the style of one's shoes. Lastly, the statement suggests that homosexuals must suffer the consequences of their "choice," at least for the purposes of the Constitution. The message is that Rich has his preferences and the Army has its.

Yet the same case displays the seemingly contradictory notion that homosexuality is so much at the core of Rich's being that no amount of will on his part could overcome it. Indeed, this notion lies at the very heart of the case in the claim that Rich is a homosexual and falsely denied it. The idea of fraud or falsehood suggests an idea of homosexuality that is more than mere will—if it were simply chosen one could also choose otherwise. The Court therefore suggests, in some very essential sense, that Rich is a homosexual.

This idea is strengthened by the handling of evidentiary issues in the case. The only evidence the Army had of Rich's homosexuality was his own statements. As the court acknowledged:

Despite plaintiff's numerous admissions of homosexuality [six months after enlistment], he contends that dismissal for fraudulent entry was inappropriate. He argues that his denials of homosexuality were truthful because he did not know that he was a homosexual at the time he enlisted. Not until after his enlistment did his sexual identity crystalize so that he knew he was a homosexual.

Nonetheless, the court determined:

In concluding that plaintiff's denials of homosexuality in the enlistment process were not truthful, General Dirks [the commanding officer] relied on plaintiff's admissions of homosexuality. While on active duty, plaintiff admitted that he was "gay" or a homosexual on at least six occasions. On one such occasion, he did so in the presence of patients and staff. Like the trial court, we believe that this was sufficient for General Dirks to conclude that plaintiff was homosexual before enlisting.

The implication is that "homosexuality" could not involve subjective

89. See also Watkins v. United States Army, 847 F.2d 1329, 1356-57 (9th Cir. 1988) (Reinhardt, J., dissenting). In arguing that Bowers v. Hardwick, 478 U.S. 186 (1986), bars the conclusion that homosexuals are a suspect class for the purposes of the Equal Protection Clause, Reinhardt asserted that homosexuals are different from other protected groups because their group membership is defined by conduct. Watkins, 847 F.2d at 1356-57 (Reinhardt, J., dissenting). Presumably the distinction asserted is that blacks and women are defined by certain immutable traits and that homosexuals are not. Since homosexual conduct can be constitutionally prohibited, then the status defined by such conduct may not be afforded constitutional protection.

90. Rich, 735 F.2d at 1225.

91. Id. (citations omitted).
confusion because it is at some objective level more fixed. Perhaps the court concluded that Rich was lying about his sexual confusion, but even this notion presupposes some background “truth” against which it can be measured.

Finally, despite Rich’s statement that “the ‘gay’ side of his life was totally separate from his military life,” the Court concluded “that even if privacy interests were implicated in this case, they are outweighed by the Government’s interest in preventing armed service members from engaging in homosexual conduct.” Independent of the validity of the constitutional analysis here, the implications of the court’s images of homosexuality and homosexual identity are important. Despite its alternative notion that homosexual conduct is chosen, the Court concluded that homosexual conduct necessarily follows from “homosexuality.” Although there had been no evidence of any homosexual conduct by Rich in the Army, and he claimed that his sexuality was separate from his military duty, and the Court adopted the notion, at least at one level, that homosexuality is a “choice,” Rich still may be excluded from the Army. From this perspective homosexuality looks much more like compulsion. Much as with pregnancy in Wright and American Cyanamid, any control Rich might have had over his sexuality was treated as either ineffective or irrelevant—orientation and conduct were collapsed into one. This “control problem” justified the Army’s preemptive intervention to protect individuals from themselves or from others—or perhaps to protect others from the homosexuals. Here the court’s view seems to be that homosexuality emanates from a source too essential and is too much a part of a person to imagine that it might be controlled by choice.

In Jantz v. Muci, the court took quite a different approach to homosexuality than the Padula and Rich courts. Jantz alleged that he was denied a teaching position based upon the school principal’s perception that he had “homosexual tendencies.” In determining that the complaint could not be dismissed on summary judgment, the court held that homosexual status was a suspect classification under the Equal Protection Clause. The court reasoned that if the factual allegations in Jantz’s complaint were true, the school’s refusal to hire him based on the suspicion that he was homosexual would violate his constitutional rights. In reaching that conclusion, the court focused exclusively on the school principal’s alleged discrimination based upon Jantz’s suspected homosexual orientation. Since Jantz was a married man with children, who was qualified to teach several subjects and to coach several sports, the court neither suspected nor implied that homosexual conduct was at issue. By focusing on the fact that the alleged discrimin-
nation was based upon Jantz's (perceived) homosexual tendencies, the
court sought to distinguish this case from cases involving homosexual
acts—this man was discriminated against because of who he was (or
wasn't), not what he did. Further, the court's focus on status enabled
it to discuss at great length its views on the immutable nature of homo-
sexuality and its relationship to the identity and personhood of homo-
sexuals. Thus, much as the court's reassertion of the relation between
capacity for pregnancy and gender in Johnson Controls enabled the court
to find that discrimination based upon reproductive potential was gen-
der discrimination, the Jantz court's assertion of a relation between sexual
orientation as status and personhood allowed it also to assert the
connection between sexuality and being. In other words, the exclusive
focus on homosexual status assisted the court in asserting something
like an irreducible and stable difference between heterosexuals and
homosexuals. However, the court's avoidance of any discussion of ho-
mosexual conduct provides no stable theory of the relationship be-
tween the protected status and conduct. As in the Johnson Controls
decision, which was compatible with either a voluntary or involuntary
vision of the condition of pregnancy, the Jantz decision is compatible
with either a voluntary or an involuntary theory of homosexual acts.

In the facts section of its opinion, the court went to great lengths to
present Jantz as a "normal," red-blooded, White American straight
male. After a discussion of the law of summary judgment, the court
began as follows:

Vernon Jantz graduated from high school in Newton, Kansas in
1963. He graduated cum laude from Wichita State University, receiv-
ing a bachelor's degree from Wichita State University in 1972 and a
master's degree in 1978. After serving in the United States Air Force,
Jantz completed course work in secondary education at Western New
Mexico State University, and obtained a New Mexico secondary school
teaching permit in 1985.

During the 1985-86 school year, Jantz taught social studies in the
New Mexico Schools. Jantz and his wife moved to Wichita, Kansas in
the summer of 1986.96

The court continued in this way for some time, also noting that while
"Jantz did no coaching" in his prior teaching posts, he "had experience
in basketball, baseball, soccer, and tennis, [and] was able to coach and
would have done so if he had been asked."97 Since the position which
Jantz was denied was a joint coaching/teaching position, these facts

95. As will be discussed at some length, since the court assumed that Jantz was
straight, and therefore not a homosexual by status or conduct, it is somewhat ironic
that his case brought the court to the conclusion that discrimination based upon
homosexual orientation is discrimination based upon a trait fundamental to one's
(Jantz's) personhood. See infra notes 96-99 and accompanying text.
97. Id.
could be understood as relevant to Jantz’s qualifications for the position. However, the fact that they open the court’s discussion of this case, that they present an almost catalogue-like (and stereotypical) (re)assurance that nothing in this man’s past suggests “homosexual” or deviant, and that the court did not rely on them for its holding, suggests that they serve another purpose. For example, the court emphasized that Jantz was from Kansas, was degreed, was a veteran, was a secondary school teacher, was married and played sports. One can imagine these traits being asserted by a good-hearted and disbelieving friend in response to an allegation that Jantz had “homosexual tendencies.” Thus, the court from the outset attempted to cast Jantz as a fine, upstanding, regular, “straight” guy. The foil to this picture can only be the deviant/homosexual person he is accused of being.

Such a reading of the court’s purpose is strengthened by the fact that immediately following the court’s recitation of the evidence supporting Jantz’s case—that he was not hired because the principal suspected he was a homosexual—the court again asserted Jantz’s upstanding nature and his apparent heterosexual orientation. The court stated:

After being denied the social sciences position at Wichita North, [which gave rise to this action,] Jantz worked during the 1989-90 school year as a (half-time) social studies teacher and a (half-time) facilitator for gifted students at Jardine Middle School. Jantz currently is employed full-time as a facilitator for gifted students at Hadley Intermediate School. Jantz is a 45-year-old white male. He is married with two children.98

While once again these facts serve the purpose of demonstrating that Jantz is qualified and an employable teacher, the court’s need to engage in this kind of recital seems to have been fueled by more, especially since the court twice mentioned that Jantz was married, a fact of no relevance to Jantz’s claims.99 In fact, the court’s characterization of Jantz as a heterosexual normal person, who was mistakenly treated as a homosexual and denied a job because of it, serves several functions.

First, and most simply, the court’s characterization raised a presumption of irrationality and injustice by the school if Jantz’s allegations are true. This presumption works on two levels. The first involves the general injustice of being badly treated because of a mistake. The court’s portrait of Jantz as a fine upstanding man and teacher makes the injustice all the more intense because Jantz did not deserve

98. Id. at 1545.

99. The court’s emphasis on Jantz’s marital status as an important indicator of Jantz’s (hetero)sexual orientation is somewhat ironic given the circumstances underlying Jantz’s claim of discrimination. In essence, Jantz based his claim on an off-hand comment made by the school principal’s secretary, Sharon Fredin, to Principal Muci about Jantz. In that comment, Fredin allegedly suggested that “Jantz reminded her of her husband, whom she believed to be a homosexual.” Id.
to be treated badly. The second level works differently. Here, the injustice of Jantz's treatment is inextricably linked to his being treated badly; that is, being treated like a homosexual when he wasn't a homosexual. One could imagine this situation as a straight man's worst fear—he is not only accused of "homosexual tendencies" but is also excluded from a job because he was suspected of being a homosexual. In response to such an accusation, one could picture Jantz standing up straighter, lowering his voice, grabbing his wife and talking about sports. In essence, the court achieved the same affect through its portrait of Jantz. Thus, the court's characterization of the injustice done to Jantz is both the (benign) injustice of mistaken exclusion, and the (invidious) injustice of being presumed to be something no heterosexual person would want to be—a homosexual person.

The court's characterization also laid the groundwork for its later recognition of the stable and "immutable" character of sexual orientation. With its focus on the apparently stable and traditionally masculine aspects of Jantz's life—his background, his marriage, his time in the Air Force, his interest in sports—the court suggests not only that Jantz was not a homosexual, but also that he couldn't be a homosexual. Once again, building from stereotypes, Jantz's marriage and his children and his lifestyle suggest a stable (and immutable) heterosexual orientation. The implication is that just as Jantz's heterosexuality seems stable and ingrained, so must homosexuality be for those who are. The court's set-up of the case and portrayal of Jantz provided the heterosexual foil for its assertion of homosexual identity.

Finally, the court's pains to present Jantz as heterosexual allowed it to treat this case as one involving what might be understood as pure status. Since Jantz is "straight" and straight people don't engage in homosexual conduct because sexuality is fixed, one might conclude the discrimination against Jantz was purely based upon his suspected homosexual status. Thus, the court simply eliminated homosexual conduct from the picture and with it the attendant need to attribute qualities of will or blame to such conduct. What better case to assert the immutable nature of homosexual orientation than in a case where one can be sure there was no homosexual sex to complicate the analysis?100

In its equal protection analysis, the court strongly asserted that this case is about sexual orientation and not about sexual conduct. As the court put it, "[t]he distinction between conduct and orientation is both proper and useful in analyzing the constitutional rights of homosexu-

100. The court's ability to put sex aside in Jantz functions in quite similar ways to the court's insistence in Johnson Controls that the fetuses were as yet "unconceived." See supra notes 74-75 and accompanying text. In both contexts the isolation and exclusion of any "conduct" made the discrimination based upon the remaining (and inert) status seem indefensible.
Reasoning from the "proper and useful" nature of the orientation/conduct distinction, the court asserted a division in the case law between cases based upon conduct and those which considered status discrimination. For example, the court distinguished this case from *Bowers v. Hardwick* by reference to conduct. The court stated that *Bowers* "presented the limited issue of whether homosexual conduct could be regulated by the states. Whether a state or its agents may discriminate among citizens on the basis of their sexual orientation was not at issue." The court also asserted that *Bowers* merely established that homosexual conduct was not a recognized historical liberty [under the Due Process Clause]. The case does not deal with the issue of whether societal bigotry against private homosexual orientation or tendencies legitimizes governmental discrimination against homosexuals under equal protection." The court's reference to "private homosexual orientation or tendencies" drove home the distinction between conduct and status in metaphoric form.

The linking of "homosexual orientation" with "tendencies" suggests a hint of desire or potential for action, and that the desire stops short of actual sex. One might tend toward such deeds, but . . . . The addition of the adjective "private" suggests that such desire or orientation remains unseen or discrete. Thus, the persons portrayed in the court's characterization not only do not act on their tendencies, they also do not make them known (through manner, expression, or self-identification). In fact, these persons do not act at all (at least in relation to the thing that is later postulated as central to their being and personhood, their homosexuality).

Referring to other decisions arising under the Equal Protection Clause, the court asserted, "[d]ecisions which have refused to impose a heightened scrutiny analysis have done so with an emphasis that persons engaging in homosexual conduct do not constitute a suspect class." One might understand the court's forceful assertion of the status/conduct divide as a good lawyer's attempt to get around difficult precedent. However, the purpose of the court's focus here seems to have been more than that. By isolating the cases dealing with homosexual conduct, the court asserted a sort of moral and/or philosophical divide between being and acting. Courts have (of course?) recognized that mere acts do not warrant protection, perhaps because they carry an implication of choice. Yet, unlike conduct, homosexual orientation as

101. *Id.* at 1546.

102. 478 U.S. 186 (1986) (holding that state statutes which criminalize homosexual sodomy do not violate the right to due process).


104. *Id.*

105. *Id.* at 1546-47 (citing Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987)) (other citations omitted).
being remains pure—a potentiality untainted by action whether chosen or compelled.

Having isolated the variable at issue—homosexual orientation—the court reasoned that under current law, sexual orientation is no different from other status traits protected under the Equal Protection Clause, such as race or gender. This is because, the court asserted, sexual orientation is an "immutable characteristic" as that term is defined in the relevant precedent. In this section of the opinion, the court addressed what it conceived as the essential nature of homosexuality.

First, the court turned to "science," pointing out the flaws in the analyses of other courts which had considered the issue of homosexuality and immutability. The court stated:

In [High Tech Gays], the Ninth Circuit, without citation to any evidence in the record or to a single medical authority, announced that: "[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes." In [Woodward], the Federal Circuit also opined that "[m]embers of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in character." As with the Ninth Circuit in High Tech Gays, the court offered not the slightest support or authority for the position that homosexuality is a mutable characteristic.

In response to that lack of "authorities," the Jantz court asserted that "in view of the overwhelming weight of currently available scientific information[,] . . . sexual orientation (whether homosexual or heterosexual) is generally not subject to conscious change." The court continued, "[s]exual orientation becomes fixed during early childhood, 'it is not a matter of conscious or controllable choice.'" The court's references to science and to choice raise several interesting issues.

While one might imagine that references to scientific authority would pervade the cases dealing with homosexuality, the Jantz opinion is one of the only cases in which a court has attempted to take on the question of homosexual "origins" by reference to scientific studies. This may be, in part, because the focus of other courts on homosexual conduct, and the propriety of such conduct, has enabled them to avoid exploring directly the issue of that conduct's relation, if any, to homo-

106. See id. at 1547-48.
107. Id. at 1547 n.3 (quoting High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989)).
108. Id. at 1547 (citing numerous medical journals and authorities on homosexuality).
109. Id. at 1547 (quoting High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 377 (9th Cir. 1990) (en banc) (Canby, J., dissenting)).
sexual orientation. The \textit{Jantz} court hinted at this notion when it impugned the Ninth Circuit and the Federal Circuit for treating homosexuality as "primarily behavioral in character." Since the \textit{Jantz} court's notion of orientation did not incorporate any element of conduct, the circuit courts which have asserted that homosexuality is "behavioral" couldn't be talking about the same orientation. Rather, the whole notion of sexual orientation as "behavioral" seems to collapse any distinction between status and conduct. Unless, of course, the courts were asserting that homosexual status is chosen.

Thus, the court also had to address the issue of choice. The \textit{Jantz} court did this, in part, by referencing scientific studies which suggest that homosexuality is "not subject to conscious change." However, the court also heavily relied on what it seemed to regard as basic common sense. The court noted:

Judge Norris has put the issue in terms the ordinary person (whether heterosexual or homosexual) can appreciate. If the government began to discriminate against heterosexuals, how many heterosexuals "would find it easy not only to abstain from heterosexual activity but also to shift the object of their desires to persons of the same sex?"

The court's notion here resonates with its earlier attempts to suggest the stability of heterosexuality by portraying Jantz as stable and married. Since heterosexuals do not express desire for same sex partners, why would homosexuals ever desire opposite sex partners? The reader is supposed to conclude that the object of one's desire is fixed. Further, the court seems to have implied that this is true regardless of whether acting on one's desire is chosen or compelled.

Yet, presumably recognizing the "it is because it seems that way" quality of its common sense argument, the court next attempted to redefine the notion of "choice" in relation to traits traditionally treated as "immutable" for equal protection purposes. The court stated:

Aside from the available scientific evidence, which strongly supports the view that sexual orientation is not easily mutable, complete and absolute immutability simply is not a prerequisite for suspect classification. Race, gender, alienage, and illegitimacy can all be changed, yet discrimination on the basis of any of these categories compels heightened scrutiny by the courts. Aliens may obtain citizenship, gender may be altered by surgery, lighter-skinned blacks may pass as white. Discrimination on the basis of race would not become permissible merely

\begin{itemize}
\item \textsuperscript{110} See \textit{supra} notes 77-85 and accompanying text for a discussion of Padula v. Webster, 822 F.2d \textit{97} (D.C. Cir. 1987), and the way the court avoids addressing homosexual status without homosexual sex by suggesting that any status Padula had was "status defined by conduct."
\item \textsuperscript{111} See \textit{supra} notes 107-09 and accompanying text.
\item \textsuperscript{112} \textit{Jantz}, 759 F. Supp. at 1547.
\item \textsuperscript{113} Id. at 1547-48 (quoting Watkins v. United States Army, 875 F.2d \textit{699}, \textit{726} (9th Cir. 1989) (en banc) (Norris, J., concurring)).
\end{itemize}
because a future scientific advance permits the change in skin pigmentation.114

The court further asserted:

While traits such as race, gender, or sexual orientation may be altered or concealed, that change can only occur at a prohibitive cost to the average individual. Immutability therefore defines traits which are central, defining traits of personhood, which may be altered only at the expense of significant damage to the individual’s sense of self.115

In these passages, the court asserted that the “choice” of sexual orientation, to the extent any such choice exists, is really no choice at all because sexual orientation, like race and gender, is posited as a “central, defining trait[] of personhood.”116 Thus, to suggest to someone that they change their sexual orientation would be like asking them to change their very being.

Having established that homosexual orientation is an immutable status, the court completed its equal protection/suspect class analysis by arguing that much like persons of color or women, homosexuals are victims of pervasive discrimination and have insufficient political power to change social attitudes. Therefore, the court concluded:

There is . . . no way to analyze the present issue under the guidelines set down by the Supreme Court and reach any conclusion other than that discrimination based on sexual orientation is inherently suspect. Sexual orientation is not a matter of choice; it is a central and defining aspect of the personality of every individual.117

However, perhaps as a precaution to distinguish potentially relevant precedent, or perhaps based upon a sense that the decisions were correct, the court also analyzed the alleged discrimination by the school against Jantz under rational basis review. The court acknowledged a number of decisions which found a rational basis for discrimination against homosexuals based upon homosexual conduct—for example, maintaining morale in the armed services, or protecting top secret data from being exposed through blackmail.118 However, it found no rational basis for discrimination against school teachers. As the court put it, “[h]omosexual orientation alone does not impair job performance, including the job of teaching public schools.”119 Thus, taking Jantz’s allegations as true, the court held that there could be no rational basis for refusing to hire him based upon the principal’s suspicion of his homosexual tendencies.

The Jantz court did a heroic job of negotiating a sea of difficult pre-

114. Id. at 1548 (footnote omitted).
115. Id. (citations omitted).
116. Id. (citations omitted).
117. Id. at 1550-51.
118. Id. at 1551 (citing Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987)) (other citations omitted).
119. Id. (citations omitted).
cedent. One can't help but admire the judge for attempting to take on really tough questions about homosexuality and its "origins." However, in reading the opinion, it is difficult to say what vision of homosexuality the court had in mind. Since the court focused exclusively on homosexual status and excluded homosexual conduct from its analysis and consideration, an obvious question arises as to who, besides Jantz and other apparent heterosexuals who are "mistaken" for homosexuals, the court believed it was describing and protecting? Further, what relationship did the court imagine to exist between a person's sexual orientation and his or her sexual conduct? One might presume that the court's notion of the inextricable relationship between a person's sexual orientation and a person's "personhood" would lead to a conclusion that sexual orientation and sex have everything to do with one another. In fact, one major goal of the court's discussion appears to have been to reassert strongly and definitively the "immutable" difference between homosexuals and heterosexuals. Thus, unlike a theory based upon will or choice of sexual objects, which blurs the lines between status and action, the court's theory of fixed and virtually unchangeable sexual categories reasserts a world based upon a background notion of essential difference. Since persons do not choose their orientation, they cannot be accountable for their blameless status. Yet the court's analysis provides no mechanism for discerning the moral implications of homosexual conduct.

For example, the court's conclusion that discrimination based upon sexual orientation is inherently problematic could be consistent with either a voluntary or an involuntary image of sexual conduct. Despite the fact that one's desired object choice is fixed, one's sexual acts could nevertheless be chosen. The element of choice at the level of conduct could give rise to a presumption of moral blame and perhaps justify exclusion in certain circumstances.\textsuperscript{120} Or, the implicit connection between one's sexuality and one's personhood could give rise to a level of desire which is too powerful to control by will.\textsuperscript{121} In sum, then, while the Jantz analysis asserts homosexual orientation as immutable, it provides no basis upon which to rest a stable vision of the relationship between homosexual status and conduct.

An analysis of the cases dealing with discrimination against homo-

\textsuperscript{120} See, e.g., Padula, 822 F.2d 97 (finding that regardless of the legal implications of homosexual status without homosexual conduct, the fact of the conduct justified the FBI's exclusion of Padula), discussed supra at notes 77-85 and accompanying text.

\textsuperscript{121} See, e.g., Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984) (suggesting that despite the fact that the Army had never implicated Rich in any homosexual conduct, and the fact that Rich claimed his sexuality and his Army life were totally separate, exclusion was nevertheless warranted because one could infer conduct from Rich's orientation), discussed supra at notes 92-93 and accompanying text.
sexuals begins to provide a picture of judicial treatment of homosexuality. As with the treatment of pregnancy, the opinions dealing with homosexuality are ambivalent and contradictory. Sometimes the courts treat homosexuality as separate and distinct from the person accused of it, and other times they treat it as inextricably linked to that person's personhood. Sometimes persons are treated as in control of their homosexual desires and other times those desires are imagined as beyond subjective control. Sometimes homosexual desire is treated as inextricably linked to homosexual acts, and other times there seems to be no such thing as desire; sometimes there seems to be no such thing as sex.

As with the pregnancy cases, the courts' ambivalent images of homosexuality have some relationship to the outcomes of the cases. For example, the Padula court was able to rationalize Padula's exclusion from the FBI based upon the voluntary nature of her sexual conduct. In Rich, despite the fact the court treated Rich's sexuality as chosen for some purposes, it justified Rich's exclusion from the Army upon the indisputable and necessary relation between homosexual orientation and conduct. Since Rich's sexuality was by definition beyond his subjective control, the Army had no choice but to protect the other troops and its own integrity by excluding Rich. By contrast, it is precisely the immutable nature of homosexuality and its relationship to personhood that lead the Jantz court to conclude that exclusion based upon homosexual status is irrational.

IV. Strategies of Interpretation

The form of doctrinal analysis I have pursued thus far only begins to provide a framework for the legal activist seeking to devise a reliable strategy for helping women or homosexuals or the judge attempting to decide cases before her concerning pregnancy or homosexuality in a "principled" way. The next question for both the activist and the judge (although for different reasons) is one of interpretation: how to make political and doctrinal sense out of the rhetoric, rationales and outcomes of specific legal cases? It is by isolating and applying the doctrinal theory of prior opinions that judges attempt to develop consistent legal rationales and outcomes in the cases before them. The legal activist, while perhaps most interested in the bottom line (did the women or the gays win?), also seeks to discern the theory of prior cases so as to develop a political strategy for achieving desirable rationales and outcomes in subsequent cases. Both doctrinal consistency and effective political strategy require a means of discerning good reasoning from bad, just as judges and activists both need a mechanism for the interpretation of prior cases and a strategy for future cases which is more sophisticated than merely looking to who won or who should win.

Interpreting the contradictory and uncertain material from the cases seems a daunting task when we begin to try to relate the doctrinal
images of women and homosexuals in the cases to the outcomes of these cases. Initially, several cases which adopt what might be considered positive (albeit inconsistent) conceptions of women or homosexuals do not necessarily reach good outcomes—that is, discrimination was upheld. For example, in some of the cases, the courts justified the exclusion of women or homosexuals from desired employment while at the same time validating a conception of women or homosexuals as being in control of their sexualities. In other cases, courts treated sexuality or pregnancy as intimately related to identity or gender, yet excluded women or homosexuals from desired employment precisely because the trait was so intimately related to the person’s being. Let’s face it, there are lots of contradictory images of pregnancy and homosexuality in the leading cases dealing with these issues. Hence it is hard to feel confident that a particular doctrinal rationale which seemed to have led to a good result in one case will lead to a similar result in the next case. Whether we can succeed in overcoming these interpretive difficulties raises a question not only as to the limits of our critical methods either as legal activists or as judges, but also as to the efficacy of our efforts toward achieving more desirable political and legal outcomes.

One common strategy for interpreting the cases is to determine through analysis the doctrinal and political positions taken in cases with outcomes we like. We can then seek to press those same positions in future cases either as a matter of strategy for activists or of doctrinal consistency for judges. As an activist seeking to improve legal treatment of women and homosexuals, I prefer the outcomes in Johnson Controls and Jantz to the outcomes in the other cases. To put this preference in its most crude terms, I prefer Johnson Controls and Jantz because the women and the homosexuals won—employers could not exclude based upon those traits. Thus, pursuing the proposed strategy, if we could identify the doctrinal and political positions taken in Johnson Controls and Jantz and compare them to the positions taken in cases with “bad” outcomes, we could begin to develop a strategy of action for future cases.

Such an interpretive strategy could be useful in two ways. First, if courts in prior, controlling decisions have adopted a particular doctrinal position, the activist or judge must try to discern what that doctrinal position is and how to adapt a litigation strategy or a subsequent decision to that doctrinal position. Second, when a court is trying to choose among several available doctrinal positions, the activist and the sympathetic judge may seek guidance from doctrinal positions taken in prior cases that have good outcomes.

Identifying the positions taken in Johnson Controls and Jantz requires that we develop an analytical framework with which to interpret the cases. Looking back to the cases, there appear to be three key doctri-
nal/political dilemmas which dominate the courts’ analyses in *Johnson Controls* and *Jantz*.

The first dilemma with which the cases struggle is whether pregnant persons and homosexuals are moral agents responsible for their actions, or whether their actions are the result of fixed proclivities for which they are not responsible. From the perspective of the activist, the position a court has adopted or might adopt on this issue would suggest different political strategies for change in the legal treatment of women and homosexuals. For example, if a court in a favorable or controlling decision adopts a position which treats women as responsible for their pregnancies, the activist might choose a political strategy of arguing for state deference to women’s freely made childbirth decisions. By contrast, if in a favorable or controlling decision the court treats women as not responsible for their pregnancies or pregnancy potential, the activist might take the position in future cases that since women can’t help getting pregnant and pregnancy is necessary for the propagation of the race, we should not allow negative consequences to attach to pregnancy. Similarly, from the perspective of a judge, the position a favorable or controlling case took on this issue would affect the court’s judgment in future decisions. For example, if discrimination against homosexuals had been permitted by a court which treated homosexuals as moral agents responsible for their actions, one would expect the judge to feel more comfortable denying future protection to homosexuals on the grounds that they knew what they were getting into.

A second dilemma raised in the cases is whether homosexuality and pregnancy are the result of “natural” desires or differences, or whether one’s relationship to pregnancy or homosexuality is the product of social “convention.” The positions courts generally take on this issue might suggest different strategic political positions for the activist. For example, if the courts treat homosexuality as “natural,” the activist would likely try to persuade the courts to see homosexuality as a “just

122. Such a strategy might have been pursued in *Johnson Controls* where the Court found that a woman’s decision to continue working in a toxic work environment, despite potential harm to unborn or unconceived children, had to be honored even if the result might be harm to some number of future children. See *supra* notes 40-50 and accompanying text. This strategy also appears to be at work in the “pro-choice” position with regard to abortion. As the Court suggested in *Roe v. Wade*, 410 U.S. 113 (1973), until the end of the second trimester, a woman’s decision to terminate her pregnancy or to carry her child to term must be honored.

like heterosexuality”—equally valid and equally immutable. If the courts treat homosexuality and its social consequences as "conventional," the strategist would argue for the recognition of the arbitrariness of social/sexual categories which result in the negative treatment of some groups.

A third dilemma in the cases is whether homosexuality and pregnancy are treated as chosen traits subject to change or control by persons, or as traits inextricably linked to fixed identities. Deciding whether homosexuality and pregnancy are chosen traits or fixed traits would also suggest particular strategies for activism in future cases. For example, if a favorable or controlling decision treats homosexuality as chosen, an activist might argue in future cases for respect for individual private choices, along the general lines of "all sexuality is chosen and my choices are as valid as yours." By contrast, if a favorable or controlling decision treats homosexuality as fixed, or not subject to meaningful change by homosexuals, the activist might choose a political strategy similar to civil rights strategies based upon immutable characteristics.

It would seem that if we could figure out the “right” position with regard to each of these three doctrinal/political dilemmas—responsible or not responsible; natural or conventional; and choice or constraint—that together these positions would provide a framework for assessing the “goodness” or “badness” of each case as it came down, other than only by reference to who won. The framework would provide a set of positions from which to strategize for the future case outcomes we desire. Since from an activist point of view, we have already decided that

124. Such a strategy should be quite familiar as it provides the basis for a civil rights-type analysis. In other words, negative consequences should not attach to circumstances which occur as a result of one's birth. If there are different kinds of "naturally" occurring sexuality, the law should not discriminate, or allow others to discriminate, based upon such differences. This strategy appears to have been at work in Jantz, as exemplified by the court's immutability analysis.

125. The battle between those who adopt the "natural" immutability strategy and those who argue that sexuality is a product of social and historical convention and consequence still rages on in the scholarly literature dealing with both sexuality and gender. For the debate concerning sexuality, see, e.g., Steven Epstein, Gay Politics and Ethnic Identity: The Limits of Social Constructivism, 17 SOCIALIST REV. 9 (1987); John Boswell, Revolutions, Universals, and Sexual Categories, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST (Martin Duberman et al. eds., 1990); for the debate concerning gender, see, e.g., Catharine A. MacKinnon, Feminism Unmodified: Discourses in Life and Law (1987); Carol Gilligan, In a Different Voice (1984).

126. While this choice/constraint dilemma might seem similar to the responsible/not responsible dilemma, it remains distinct. In the responsible/not responsible dilemma, the focus is on the moral or normative consequences of the trait at issue. By contrast, the choice/constraint dilemma focuses on whether the courts understand the trait to be subject to the control of or to meaningful change by the person related to the trait.
in terms of outcomes, we like Johnson Controls and Jantz more than the other cases, it would seem to make sense to begin by identifying doctrinal positions taken in those cases with respect to our categories. Presumably, we could then reason from the doctrinal positions and political strategies which seem to have animated Johnson Controls and Jantz to establish a basis for obtaining better outcomes for women and homosexuals in subsequent cases.

Unfortunately, things are not that simple. Despite the fact that the doctrinal positions and the correlative political strategies I have articulated seem central to the bases for the courts' decisions, I will demonstrate that these doctrinal categories and the political strategies they evoke are insufficiently determinate to be useful to either the judge or the activist. This conclusion follows from two related findings. First, cases with directly opposite outcomes can be meaningfully explained by reference to the same doctrinal configurations. Second, cases which seem to reach their conclusions by deploying a particular doctrinal configuration can be equally meaningfully explained by reference to an opposite configuration. Thus, the indeterminacy of these core doctrinal positions makes it difficult for judges as a doctrinal matter or activists as a political matter to decide, predict, or strategize the outcomes of future cases by reference to the doctrinal or political positions taken in prior ones.

Let us begin with the Johnson Controls and Jantz decisions. As a first cut, it would seem that Johnson Controls and Jantz reach their outcomes by adopting the position that homosexuals are not responsible for their traits, that homosexuality and pregnancy are the result of natural desires or differences, and that reproductive capacity and sexual orientation are not subject to meaningful change. Recall that in these cases, the courts were able to assert an essential difference between men and women or heterosexuals and homosexuals by focusing on the trait only as a potentiality. In Johnson Controls, pregnancy discrimination was not permitted because pregnancy, when understood as the potential for pregnancy, was considered inextricably linked to gender. In Jantz, the court employed a number of strategies to suggest the immutable nature of sexual orientation, but the key factor was the court's ability to separate sexual orientation from sexual conduct. So long as there were no sexual acts, discrimination based upon homosexuality looked like impermissible status discrimination.

Thus, Johnson Controls and Jantz, with their emphasis on essential difference, seem to adopt a "not responsible" position. This is because in these courts' conception, one's potential for pregnancy or homosex-

127. As will be discussed below, it may well be the case that while persons are not held responsible for their capacity for pregnancy or homosexual conduct, they would be held responsible for getting pregnant or engaging in homosexual conduct. See discussion infra pp. 1494-96.
uality is beyond one's control, and hence women and homosexuals do not act as moral agents with respect to their fixed potential for pregnancy or sexual orientation. Further, these cases seem to adopt a "natural" position by suggesting that persons seeking to change their reproductive capacity or their sexual orientation are not merely encumbered by social convention. Rather, it appears that one's gender and one's reproductive capacity, or one's sexuality and one's identity, are linked in some sense essential sense. Finally, while neither of the courts are explicit about their views of a person's sexual or reproductive status when that status is exercised or transformed into conduct, one might reasonably speculate that given the courts' view of a stable background status and the natural relation of that status to one's being, a person would be constrained to act in accordance with their "nature."

To the extent we are correct in asserting that Johnson Controls and Jantz adopt not responsible, natural and constraint positions, the cases would suggest to the activist a civil rights strategy based upon notions of immutable characteristics. Yet one cannot say with any certainty that the not responsible, natural and constraint positions led to the "good" result in Johnson Controls and Jantz, because cases reaching opposite conclusions might as easily be read as having adopted the same not responsible, natural and constraint positions. Further, we cannot say with any certainty that the civil rights strategy of portraying pregnancy and homosexuality as stemming from immutable status positions led to the "good" results in Johnson Controls and Jantz. After all, treating homosexuality or pregnancy as the result of immutable difference might have the down side effect of denying individual actors any subjective or differentiated relationship to their traits. In other words, under such a

128. While it might seem obvious that women's potential for pregnancy is fixed as a biological fact, the "fixed" nature of that potential seems more uncertain the more one reflects on it. For example, as a first cut, women might choose sterilization or they might be born infertile. Further, while they might be technically capable of pregnancy, some women might choose never to engage in pregnancy-inducing sex, or they might desire to have sex but not be afforded the opportunity by choice or circumstance. Finally, women might choose to control their pregnancy potential by always taking precautions to ensure that pregnancy does not occur. Thus, the potential for pregnancy, when imagined as the interstices of a set of lifestyle questions, circumstance and chance, becomes less stable as a "biological fact" and more open to question—perhaps more like sexual orientation.

129. By drawing this conclusion, I do not mean to suggest that "convention" will be personally experienced or even socially perceived as less binding upon one's ability to change one's trait than a "natural" conception of the trait. Rather, my claim that Johnson Controls and Jantz have adopted the "natural" position is based upon my intuition that the courts were thinking more along the lines of biological determinism than social convention. Of course, I could be wrong.

130. For an analysis of Johnson Controls and Jantz as adopting a "choice rather than a "constraint" position, see infra notes 74-76, 115-19 and accompanying text.
strategy, homosexuality or pregnancy would always be presumed to be central to the identity of the homosexual or woman regardless of those persons' individual experience of their traits as chosen or compelled. Interestingly, it is precisely this second potential spin on the immutability strategy which seems to have animated the courts' unfavorable decisions in Wright, American Cyanamid and Rich. Indeed, though Wright, American Cyanamid and Rich reach exactly opposite conclusions to those reached in Johnson Controls and Jantz, they can equally meaningfully be understood to have adopted the same not responsible, natural and constraint positions.

Recall that in Wright, American Cyanamid and Rich, the courts treated status and conduct as inseparable. In fact, in Wright and American Cyanamid, the courts treated pregnancy and capacity for pregnancy as virtually identical—all fertile women were treated as pregnant for the purposes of exclusion from toxic work environments. Similarly, in Rich, while the court treated Rich's homosexuality as chosen for some purposes, it justified Rich's exclusion from the Army by treating his homosexual orientation as conduct.

Since in these cases the courts treated people's reproductive capacity or erotic orientation as effectively coextensive with pregnancy or sexual conduct, status and conduct were inseparably linked. In this sense, these courts seem to have adopted a not responsible orientation. Further, since the cases seem to preclude or ignore any possibility of choosing to engage or not to engage in sexual or reproductive conduct, these cases also seem to have a constraint view of pregnancy and homosexuality. Finally, while the courts appeared indifferent as to whether the source of the apparent irrepressible urge to procreate or engage in homosexual sex is natural or the product of social convention, it seems likely that the courts would have opted for a natural approach—that persons seem to have no choice but to act out the necessary conclusion of their "natures"—as a vision of the origins of the traits.

We must conclude that the courts' opinions in Johnson Controls and Jantz prohibiting employment discrimination against women and homosexuals, and the opinions in Wright, American Cyanamid and Rich upholding the same employment discrimination, might all be interpreted as having reached their conclusions based upon exactly the same set of doctrinal positions: not responsible, natural and constraint. As a result, the political strategy of treating traits and identities as immutably


132. In fact, it seems it is precisely because women and homosexuals are "not responsible" with regard to their reproductive activity or sexual conduct that they must be excluded from the workplace or the armed services.
linked might lead to protection of women and homosexuals or it might justify their exclusion.

A similar analysis can be made if we understand the *Johnson Controls* and *Jantz* courts to have reached their conclusions based upon the positions of not responsible, natural and *choice*. Recall that the courts in *Johnson Controls* and *Jantz* did not speak definitively as to whether independent of the courts' views on status, conduct was chosen or constrained. The opinions are fully compatible with either reading. I suggested that the *Johnson Controls* and *Jantz* courts adopted a constraint view of homosexuality and pregnancy by reasoning from the courts' reference to fixed notions of reproductive and sexual status. Were we to read these cases to have viewed pregnancy and homosexuality as chosen conduct, a different political or strategic tilt is possible. For example, treating the courts' decisions in *Johnson Controls* and *Jantz* as adopting not responsible, natural and choice positions might be understood as better from the point of view of the activist because the "choice" element would seem to alleviate some of the difficulties with the immutability strategy. Specifically, a doctrinal theory which treats one's background status as immutable while treating one's conduct as chosen recognizes a person's control over the trait, and, at the same time, places the choice in a stable context. In this sense, the activist might argue that women and homosexuals are not entirely free actors who can make all choices. Rather, they make their choices within the context of a stable or fixed status. Thus, the activist might seek to protect women and homosexuals from status discrimination while at the same time suggesting that pregnancy or homosexual conduct, while chosen, is not culpable. On the other hand, a strategy which posits a background of stable status difference might provide the basis for treating chosen conduct as morally culpable or as unnatural deviance. For example, a heterosexual person, whose orientation was presumed to be fixed and who nevertheless engaged in same-sex conduct, might be accused of willful deviance which justifies punishment. Or women, who might have the capacity for pregnancy, might, by choosing to become pregnant, be understood to have brought any negative consequences upon themselves.

In fact, once again it is precisely this second possible spin on this strategy which the courts seem to have employed in *Geduldig*, *General Electric* and *Padula*. Further, while these cases also come to conclusions regarding the lawfulness of discrimination against women and homosexuals opposite to *Johnson Controls* and *Jantz*, they can be equally meaningfully interpreted to have done so by adopting the same doctrinal approaches to pregnancy and homosexuality as found in *Johnson Controls* and *Jantz*.

Recall that *Geduldig*, *General Electric* and *Padula* determined, by focusing on the chosen nature of conduct, that discrimination against women
based on pregnancy and homosexuals based upon homosexual conduct is permissible. For example, in the pregnancy context, in *Geduldig* and *General Electric* the distinction between status and conduct divided the world between pregnant persons and non-pregnant persons. Since the class of non-pregnant persons included men, what separated pregnant persons from non-pregnant persons was not gender difference, but will. In other words, though pregnancy may only be biologically possible for women, each pregnancy is not biologically determined. In deciding to become pregnant, women know and can weigh the consequences for themselves. Thus, for this purpose men and women are the same until some women decide to become pregnant. Thereafter, pregnant women are different by choice. Similarly, in *Padula*, the assertion of a distinction between homosexual status and homosexual conduct resulted in a division of the world into practicing homosexuals and everyone else. Since the class of “everyone else” included some non-practicing homosexuals, this division resulted in a presumption of homosexual conduct as chosen—everyone is the same until practicing homosexuals have sex and then they are different by choice.

At first glance, it would seem that these three cases would best be characterized as adopting the view that pregnant women and homosexuals are responsible for their traits as behaviors because they choose these traits by selecting from a set of possible conventional categories. Since pregnancy and homosexual conduct are freely chosen, pregnant women and homosexuals are morally culpable and therefore responsible for their situations. Further, since the pregnancy, or the homosexual conduct being proscribed, results from the decision to leave a stable class of sameness by choosing to be different, the categories would be a product of choice and convention rather than of any more essential notion of stable status difference.

At the same time, however, these decisions seem to rely on an unstated background premise of stable status to justify their policies of blanket exclusion of fertile women from certain employment benefits or homosexuals from security-sensitive jobs. Recall that the focus on conduct in these cases never allowed the courts to explore reproductive capacity or sexual orientation as status. Instead, pregnancy and homosexuality were reduced to physical acts which could be objectively known. This focus on conduct, understood as independent physical acts, in turn enabled the courts to treat such conduct as the result of free and unencumbered choice. The fact that the acts were chosen justified the discrimination. Yet herein lies the difficulty. If each pregnancy or homosexual act is truly understood as the result of a free choice, then the exclusion could not be based upon prior conduct unless that conduct could be linked in some necessary way to future conduct. This is because each new pregnancy or homosexual act would
require an independent choice. Only against a backdrop of a more stable status can a single instance (or no instance) of chosen conduct be interpreted as predictive of future behavior. Thus, we see that even as the courts treat homosexuality or pregnancy as freely chosen, they rely on a notion of the trait which is much deeper and more continuous to give the chosen conduct its moral force.

To the extent that this approach characterizes the decisions in Geduldig, General Electric and Padula, these cases would seem to have adopted a not responsible position. Due to a presupposed notion of a stable status—real gender difference or fixed sexual object choice—the courts were able to treat prior “chosen” acts of conduct as predictive or determinative of future acts of conduct. These cases could also be read as employing an (unstated) natural conception of gender status or sexual orientation and a choice conception of conduct.

In sum, then, the courts’ rationales in Geduldig, General Electric and Padula can be interpreted identically to those in Johnson Controls and Jantz under the doctrinal positions of not responsible, natural and choice. Further, the political strategy of asserting that persons make conduct choices against a background of stable status, which might have animated Johnson Controls and Jantz, might as easily have provided the rationale for the courts’ conclusions in Geduldig, General Electric and Padula.

From this analysis, we can draw three important conclusions. First, presuming for the moment that it is possible for the judge or the activist to interpret previously decided cases as having been decided by reference to a particular set of doctrinal positions, there is no way to be sure that adopting the same set of doctrinal positions in the next case will lead to a consistent or desired outcome. Cases with contradictory outcomes are equally explainable under the same set of doctrinal positions. For example, Johnson Controls and Jantz could be understood doctrinally as just like Wright, American Cyanamid and Rich, or they could be just like Geduldig, General Electric and Padula. Hence, this sort of analysis does not provide any stable basis for the judge to decide the next case or for the activist to strategize more desirable outcomes in future cases.

Second, there is no meaningful way for either the activist or the judge to tell whether a case or set of cases has been properly inter-
interpreted under the doctrinal categories. As we saw, the same set of cases could equally well be understood to have adopted conflicting doctrinal positions. For example, Johnson Controls and Jantz could be understood as adopting either a "choice" or a "constraint" position. Geduldig, General Electric and Padula could be interpreted as having adopted the doctrinal positions of responsible, conventional and choice or the positions of not responsible, natural and choice. It would seem that there is no stable way of deciding whether a particular case outcome is consistent with any one doctrinal line.

Finally, the indeterminacy of our attempts to interpret the cases in terms of doctrinal positions is not ameliorated by adopting or arguing for correlative political strategies. In fact, adopting a particular political strategy based upon an assumed relation between a good case outcome and the court's apparent doctrinal position does not necessarily lead to good results. For example, the immutability strategy, which seemed to have animated the courts' decisions in our "constraint" reading of Johnson Controls and Jantz, could also have provided the foundation for the courts' contradictory conclusions in Wright, American Cyanamid and Rich. Or, the strategy based upon partially encumbered choice, which might have explained Johnson Controls and Jantz in our "choice" reading of those cases, could also have supported the courts' contradictory conclusions in Geduldig, General Electric and Padula. We must conclude that this type of doctrinal analysis is not helpful, either as a means of explaining case outcomes by reference to stable doctrinal theories drawn from the case materials, or as a mechanism for identifying doctrinal theories or political strategies which will help us to guide the law to better treatment of women and homosexuals.

V. Strategies of Representing Traits and Identities

In the previous section I sought to identify a set of doctrinal positions and political strategies in the cases with good outcomes which might, in turn, have provided the basis for a legal or political strategy for better outcomes in future cases. In so doing, I looked at the cases from both the perspective of the judge seeking consistent results and the activist seeking to improve the lot of women and homosexuals. However, in the end I had to conclude that the doctrinal positions which seemed responsible for the outcomes in the cases I analyzed were insufficiently determinate to be useful to either judge or activist. In short, this strategy of case interpretation provided neither a helpful means of determining whether the rationale or reasoning of a case was good or bad, other than by reference to who won, nor an effective—i.e. determinate—basis upon which to strategize, predict, decide or affect the outcomes of future cases.

Perhaps the error in that approach was to focus on the outcomes of the cases to develop a set of doctrinal positions or political strategies.
rather than focusing upon the mechanisms for representing traits and identities in the cases. It could be, as many feminists have suggested, that legal rhetoric, "rationality" or representation is flawed at its core because it does not or can not capture the complexity of authentic experience. If this were true, it would not be surprising that the activist lawyer could not predict or achieve good results in future cases by relying on legal logic or reasoning. Under this theory, the goal of the activist should be to critique and influence legal representation in order to achieve more real or authentic representations of traits and identities. The theory being that more authentic representations of women and homosexuals will result in better legal outcomes. Further, it could be that more positive representations of identity will be good in themselves because people will feel that at least they were accurately represented in the legal materials rather than feeling alienated by the cartoon-like images that legal analysis produces.

In this section I focus on mechanisms for representing traits and identities common to the cases I have analyzed. Specifically, I suggest that all the cases represent women and homosexuals or pregnancy and sexual conduct in ways which might be collectively termed "objectification." In this sense, all the cases, regardless of outcome, might be understood as "bad" because they adopt cartoon-like or objectified images of people's traits and identities. By "cartoon-like" or "objectified" images, I mean to suggest that the cases might be understood as always conceptualizing either the trait or the identity, or both, as object. Further, when we compare these static images of traits and identities with the complexity and diversity of our experience, the images seem alienated, artificial, untrue.

Yet again, while I find many aspects of this analysis attractive, and I would hope that legal cases could represent persons in ways which comport more with the complexity of human identity and experience, I will demonstrate that this form of analysis is also unsatisfying. I think this is true for two reasons. First, if we must conclude that all the cases are "bad" because there are alienating, we are still without any more sophisticated means of distinguishing between cases than we had before, namely, who won. Second, if we compare the images adopted in the cases with our own experience, it is not clear that the persons, traits and identities represented in the cases do not actually exist in our world. In fact, it seems to me quite plausible that the "objectified" or

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135. For a discussion of the pain and alienation of legal representations which treat things which are fundamental to one's personhood as separate from it, see Radin, supra note 7, at 1907-09.
"cartoon-like" images of women and homosexuals that appear in the cases could also be understood as representative of various strategies or approaches to identity and self-understanding we see in our daily lives. To the extent that this is true, the critique that legal mechanisms of representation are flawed because they cannot represent the complexity of experience must be rethought.

My initial analysis of the cases demonstrated that they embody often contradictory conceptions of pregnancy and homosexuality, of the relation between these traits and the self claiming them or that self's identity, and of the social/legal consequences which should attach to these traits. While the cases can not be understood as embodying one definitive notion of pregnancy or homosexuality, it is possible to conceptualize the cases in terms of certain common structural patterns or strategies.

For example, the dominant pattern in the cases is the assertion, manipulation and/or denial of a distinction between gender and pregnancy or homosexual status and conduct. In Geduldig, General Electric and Padula, the courts focused upon the physical condition of pregnancy or homosexual conduct without investigating or describing the relationship of this conduct to gender or sexual orientation as status. The courts thus treated pregnancy and homosexual conduct as chosen and therefore culpable conduct. In Wright, American Cyanamid, and Rich, the courts treated status and conduct as synonymous in the sense that all fertile women could be excluded from toxic work environments, and all homosexuals could be excluded from the Army because one's status as a women or a homosexual necessarily led to pregnancy or homosexual conduct. Finally, in Johnson Controls and Jantz, the courts again asserted a distinction between status and conduct, but in these cases, the courts focused exclusively on homosexual status or the ability to become pregnant, and did not address conduct. These cases treated the relationship between the potential for pregnancy and gender or between sexual orientation and identity as necessary and irreducible, but did not articulate a theory of the relationship between the fixed statuses the courts identify and pregnancy or homosexual conduct. In sum, Johnson Controls and Jantz treat pregnancy and homosexuality as fixed as status but uncertain as conduct.

All the cases together might be described as evidencing three strategies for understanding the relationship between traits and persons. In the first strategy, the courts assert a distinction between status and conduct, and focus only on conduct. In the second strategy, the courts deny any distinction between status and conduct. Finally, in the third strategy, the courts treat status and conduct as separate, but focus only on status. By focusing closely on these strategies, a commonality emerges, despite the apparently contradictory images of the traits the strategies produce. Indeed, each strategy seems to incorporate a differ-
ent method of conceptualizing either the trait or the person or both as object.

The first strategy distinguishes between status and conduct and then focuses exclusively on conduct. In the pregnancy context, the assertion of a distinction between the condition of pregnancy and gender, with the subsequent focus on pregnancy as conduct, serves a number of functions. The distinction divides pregnant women from everyone else. It divides pregnant women from non-pregnant women and each individual women from her reproductive capacity. It works to raise a presumption that pregnancy is chosen while severing it from biological, social or individual need, desire or compulsion.

In the homosexuality context, the assertion of a distinction between homosexual status and conduct, with an exclusive focus on conduct, works in similar ways. It divides practicing homosexuals from everyone else. It also divides practicing from non-practicing homosexuals and suggests that each homosexual act is an individual act of will, mere conduct, profligate deviance.

As we saw in our analysis of Geduldig, General Electric and Padula, an important element of this strategy was to separate the self (as women, as homosexual, as potentiality) and the traits (as pregnancy, as homosexuality, as actuality). In positing such a divide, the doctrine raised the presumption of will as the mediator between self and conduct. The focus of the inquiry then became the nature of the conduct, its manifestations and how it could be known. For example, in the pregnancy cases the courts focused on the physical characteristics of pregnancy: its temporal nature, its biological effects, its disabling potential. In the homosexuality cases the courts focused on an unspoken list of specific behaviors: certain kinds of sexual acts, certain specific manifestations of desire. To the extent that these traits could be physicalized, generalized, and categorized as conduct, the courts were willing to attribute to the self subjective control over them. Another way of saying this would be that to the extent that the courts were able to objectify the traits, they could imagine a willing self acting upon those traits as objects.

Aligning this strategy with the outcome of the cases reveals certain consistent results. First, since the strategy posits no relation between the objectified trait as conduct and the person as subject, except through the act of choice, the discrimination involved in the cases is treated as not based upon status. Since pregnancy is not gender, pregnancy discrimination is not gender discrimination. Similarly, since homosexual conduct is not the same as homosexual status, discrimination based upon conduct is not status discrimination. Further, since the person as subject can control the trait as object, discrimination based upon the trait can be justified. Since the trait represents a voluntary condition, the actor can be presumed to have chosen the consequences.
along with the conduct. In other words, there is no reason employers or other actors can't take account of a voluntary condition.

In sum, then, under this strategy, the trait is conceptualized as separate from any individual subject—all subjects may make all choices. Further, to the extent the trait can be isolated, physicalized or categorized, it is objectified as a finite set of identifiable conduct elements. Thus, by engaging in some or all of these conduct elements, the subject chooses the trait. Finally, the subject may be identified as a subject by recognizing its capacity to choose the trait as object.

By contrast, in our analysis of *Wright* and *American Cyanamid* and *Rich*, the key doctrinal maneuver was to deny any distinction between the self and its conduct and to treat the self and the trait as coextensive. This, the second strategy, is managed by rejecting any distinction between status and conduct. In the pregnancy context, this played out by treating the potential to become pregnant as equivalent to the condition of pregnancy, at least for the purposes of a prophylactic rule of exclusion from toxic work environments. The courts' focus turned away from any physical manifestations of pregnancy or even pregnancy as desired conduct. Rather, their concern was with the need to exclude women (those that could get pregnant) because their relation to preg- nancy was in some sense outside their control. To the extent that the doctrine recognized any subjectivity in women, it was only in the denial of women's ability to distinguish themselves from the trait through an act of will.

Similarly, in *Rich*, despite the fact that the Army had no evidence of homosexual conduct in the service, that Rich claimed that his sexuality and his Army life were totally separate, and that the court claimed to consider homosexuality as choice, Rich was still excluded from the Army. The implicit rationale of the court was that Rich was incapable of exercising any meaningful control over his sexuality—that he was in some sense his sexuality. Thus, in these cases we see the doctrine objectify the trait by objectifying the self. To the extent that the self is inseparable from the trait, the self cannot act in relation to the trait. To say it another way, the trait is somehow too essential, too central, too dangerous to leave to the control of mere will. The courts intervene as subject, treating women and homosexuals as objects—substituting their ability to control the compulsion for pregnancy or homosexuality which the persons/trait cannot control themselves.

The third strategy we observed in the cases once again involved the assertion of a distinction between status and conduct. However, in this strategy, the courts focused on status and ignored or disparaged conduct. We saw this strategy employed in *Johnson Controls* and *Jantz*. In both of these cases, as in *Wright*, *American Cyanamid* and *Rich*, the courts sought to assert an inseparable connection between the person and the trait. However, in *Johnson Controls* and *Jantz*, the courts achieved this
goal by treating the discrimination involved as based upon the person's potential for conduct rather than upon conduct itself.

For example, the Johnson Controls court asserted the inseparable connection between pregnancy and gender by focusing on the way the company's fetal protection program excluded fertile women based upon their potential for pregnancy. Since women's potential for pregnancy (unlike the condition of pregnancy itself?) necessarily implicates women as women, discrimination based upon women's potential for pregnancy is discrimination based upon status. Similarly, the Jantz court asserted, through its analysis of immutability, that sexual orientation is inextricably bound to one's being. Reasoning from its premise that one's sexual orientation is, for all meaningful purposes, fixed, the court concluded that discrimination based upon one's sexual orientation alone is discrimination based upon one's being itself, and therefore based upon status.

This strategy works by isolating status as the absence of conduct. In other words, while the capacity for pregnancy may be inextricably linked to a woman's gender, the condition of pregnancy may not. Pregnancy may be chosen, thereby giving rise to exclusion based upon a chosen condition, as in Geduldig and General Electric. Alternatively, pregnancy may be compelled, giving rise to exclusion because pregnancy can be presumed from female gender, as suggested in Wright and American Cyanamid. Similarly, while sexual orientation may be inextricably linked to one's personhood, sexual conduct might not. For example, homosexual conduct may be chosen, thereby giving rise to exclusion as a willful deviance, as in Padula and certain parts of Rich. Alternatively, homosexual conduct may be compelled because homosexual conduct can be presumed from homosexual orientation, as in other parts of Rich.

This strategy, then, seems to incorporate a theory of the coextensiveness of traits and beings but only as those traits/beings are expressed as potentiality. Pregnancy is seen as indistinguishable from gender only to the extent that pregnancy is conceived of as the potential for pregnancy. Similarly, homosexuality is treated as indistinguishable from personhood only to the extent that homosexuality is conceived of as unexpressed desire. In other words, the trait/being is objectified as existing in potentiality but never acting as subject.

The use of this strategy in the cases also reveals certain common legal outcomes. For example, the focus on status results in the court treating the persons and traits involved as expressive of some essential difference: women are essentially different from men when that difference is expressed in the capacity to bear a child; homosexuals are essentially different from heterosexuals in the fixed nature of their object choice. Since the differences asserted are essential in nature, and not meaningfully subject to change, discrimination based upon these status
differences is inappropriate. Thus, as a formal matter, women are treated the same as men to the extent that their special reproductive capacity must be acknowledged and then ignored when distributing certain employment opportunities. Similarly, homosexuals must be treated the same as heterosexuals to the extent that their difference in sexual proclivities must be recognized and then ignored when deciding whether they are suitable for certain jobs.

Yet the moment the objectified potential for pregnancy or homosexual sex is expressed or transformed into acts, the status of these traits/being becomes unclear. To the extent the acts are treated as chosen, they might then be repatriated as wholly external to the person, as in the cases which focused upon conduct. To the extent the acts are treated as compelled, they might be reobjectified as inseparable from the person, as in the cases which denied a distinction between status and conduct. In sum, this strategy seems to work by objectifying the person and trait as inseparably linked in eternal potentiality for action. To the extent such a strategy implies a theory of action, the objectification mechanisms in the other two strategies might apply—traits may objectified as external to the subjects who act upon them or they might be treated as coextensive with the person, and thus the person is objectified as the trait.

Looking at the cases this way, we begin to see that the courts recognize these traits through objectification either by positing the traits as external to the self or as inseparable from it. Treating the traits as chosen seems to allow the courts to avoid grappling with the meaning(s) of homosexuality or pregnancy as otherness. For example, by treating homosexuality as chosen conduct, the court need never explore the nature of homosexual status, whether it be the product of difference or desire or both. Similarly, by treating pregnancy as a chosen physical condition, the courts need never explore the relationship between pregnancy and being a woman whether in social, biological or personal terms. Thus, strategy one enables courts to treat all selves as the same except to the extent that a self chooses to be other. Even then the self is not truly other because it is only other through its conduct. Thus, all such conduct can be understood as deviance, and deviance can be deterred, controlled, shamed, and punished.

When the courts do examine what they conceive as the inescapable otherness of women and homosexuals, they seem to do so by objectifying women and homosexuals as coextensive with the traits. For example, employing strategy two, the courts in *Wright, American Cyanamid* and *Rich* focused on what they understood to be "real difference" between fertile women and men or homosexuals and heterosexuals by treating women and homosexuals as embodiments of their traits. In this conception, women and homosexuals were so "other" that they had to be controlled, by external means, through law. Thus, strategy
two seems to represent the otherness of pregnant women and homosexuals, but only by denying persons any distance from or subjective control over their traits. Similarly, the Johnson Controls and Jantz courts, employing strategy three, identified what they understood to be the irreducible otherness of fertile women or homosexuals, but only by objectifying the person as the trait forever frozen in the status of potential for conduct. Thus, otherness is represented in the abstract, but denied any subjective reality, as women or homosexuals only “are” but never “act.”

In sum, regardless of how we might feel about the particular outcomes of these cases, the images of pregnancy and homosexuality the cases employ, and the relationships between these traits and identities they suggest, remain unsatisfying. Each strategy seems to offer a different dehumanized caricature of traits and identities in which persons can only “act” as alienated subjects in relation to their traits, or “be” as objectified embodiments of their traits.

Much of the power of this critique comes from the seeming alienated insufficiency of legal representation when compared with the rich complexity and diversity of human experience. However, when one actually does compare the images in the cases with the people we know from experience, the force of the critique becomes less clear. Specifically, it would seem that the courts’ conceptualizations of traits as separate from persons or inseparable from persons, or as compulsive or chosen, or as natural or socially constructed, can be meaningfully understood either through the prism of objectification or as theories of subjectivity.

For example, strategy one, which focused on conduct and ignored status, could be described as expressing an image of persons who experience themselves as independent of their traits. In the pregnancy context, this strategy might include women who experience pregnancy as choice and understand decisions about childbearing, sex and reproduction to be within their control. Similarly, in the homosexuality context, this strategy might be characterized as describing persons who treat sexuality as open and chosen. Included in this conception of homosexuality or pregnancy might be a number of persons we might recognize from experience: the woman who chooses to forego children to pursue her career; the woman with two boys who tries again to have a girl; the new age man who believes bisexuality to be the norm and all sex to be beautiful; or the lesbian separatist who sees her decision to live with and love women as both a political and a sexual choice.

Strategy two, which treated conduct and status as synonymous, might be understood as invoking the experience of persons who understand themselves as their traits. This image might include the ACT-UP activist who understands his or her life as constituted around sexuality, the compulsive cruiser who knows sex is a habit but can’t quite manage
to give it up, the earth mother who understands herself through her womb, and the PTA mom who literally is her children.

Strategy three, which recognizes status only as the potential for conduct, might capture the experience of persons who understand their relationship to their traits as potentiality. This would include, for example, women who experience pregnancy as tied to their self-understanding as women and feel the ticking of a biological clock; or, men or women who experience the longing or desire for sex of one kind or another as stable or fixed, and yet never act on those desires. Several possible persons come to mind here. For example, this strategy might include the married homosexual who desires same sex partners, but chooses to stay with his or her spouse; or the closet homosexual who prefers just to imagine what gay sex might be like; or the forty year-old woman who really wants children but hasn’t found the right man; or the priest who has desires but never acts on them out of religious conviction.

Thus, it would seem that just as our attempts to describe the cases in terms of fixed doctrinal positions or political strategies led us to recognize the inadequacy of that reasoning process, so too must we conclude that our attempts to treat the cases as flawed due to their objectified images of traits and identities is also inadequate. Since the “objectified” images of women and homosexuals which inhabit the cases are also recognizable as persons we know from our experience, there would seem to be no reason to think that legal representation is less capable than other forms of discourse to capture or miss our identities and experiences. In fact, to the extent that life and identity are themselves ongoing practices of interpretation and strategy, it is difficult to distinguish, in any meaningful way, lived experience from the legal representations of identity and experience we find in the cases.

Further, it seems problematic to critique legal representation for being unable to express the diversity of experiences of homosexuality and pregnancy when each objectified image, whether created by treating the trait and the self as separate or as unified, could meaningfully describe a diverse and complex set of personalities and identities. Each image could be understood to describe a broad spectrum of people, often people who we would not otherwise think of as having anything at all in common, for example the PTA mom and the ACT-UP activist, or the married homosexual and the local priest. It would seem, then, that our critique of legal representation as being in some sense incapable of capturing experience, or less authentic than experience, must be rethought.

VI. CONCLUSION: LIFE STRATEGIES

By juxtaposing discrimination cases dealing with pregnancy and homosexuality, two quite distinct bodies of doctrine, certain commonali-
ties in the courts' conceptualizations of traits and identities became apparent. The courts treated both pregnancy and homosexuality as consensual and non-consensual, as separate from identity and central to it, and as willful deviance and natural difference, by focusing on each trait as status or conduct or both. The fact that the two bodies of doctrine produced contradictory images of the traits in similar ways suggested the possibility of identifying common mechanisms in legal reasoning about, or legal representation of, identity—mechanisms which might hold the key to achieving better legal treatment of women and homosexuals. In exploring this possibility, I employed two common ways of thinking about legal cases dealing with issues of identity—one focused on legal interpretation and the other on legal representation.

The first method involved an effort to reason from good case outcomes to consistent doctrinal positions in the hope of theorizing or identifying a progressive doctrinal and political approach to identity. This strategy of interpretation, whether employed by the judge or the activist, took judicial reasoning at face value and sought to interpret the cases, both good and bad, in their own terms. The goal was first to identify good and bad doctrinal positions and political strategies based upon the outcomes of good and bad cases, and then to determine the outcomes of future cases by employing or arguing for the good doctrinal positions.

The second method shifted from a direct focus on legal outcomes and legal reasoning to the impoverished ways in which the cases represented traits and identities. Central to this method was the notion that legal outcomes would not improve until legal discourse became capable of representing authentic experience. The critique focused on identifying a common mechanism or flaw in the process of legal representation, which, if corrected, might lead to images of women and homosexuals which comported more with the complexity of lived experience. These more positive or authentic representations would in turn enable judges and activists employing legal discourse to produce better legal outcomes for women and homosexuals. Further, the argument went, these more authentic legal representations might be validating in themselves by decreasing the alienation caused by the gap between lived experience and legal representation.

Yet neither of these methods turned out to be helpful to our efforts to understand and critique past cases, to strategize about future cases or to improve legal treatment of women and homosexuals. The method which attempted to reason from case outcomes to doctrinal strategies was dissatisfying for three reasons. First, since the same set of doctrinal positions could be used to explain contradictory cases, there was no way to tell whether adopting or arguing for those positions in the next case would lead to consistent or desired outcomes.
Second, since each case could be meaningfully interpreted by reference to conflicting doctrinal positions, there was no way to tell whether any given case had been properly interpreted under the doctrinal categories. Finally, adopting a particular political strategy based upon a supposed relation between a good case outcome in a prior case and a particular set of doctrinal positions did not necessarily lead to good results in future cases.

The next method sought to identify a progressive identity politics based upon a general critique of legal representation as alienated from or unable to capture authentic experience. This method was also problematic, because the objectified images of women and homosexuals which we identified in the cases did seem to describe or relate to persons we knew from our experience. In this sense, there was no reason to conclude that legal representation was any more or less capable of representing lived experience than other modes of discourse. Indeed, it was difficult to distinguish in any meaningful way so-called lived experience from legal attempts to represent it. In addition, since each strategy of objectification we identified, whether treating the trait and the self as separate or as indistinguishable, could itself represent or describe a broad diversity of identity strategies and lived experiences, there was no reason to conclude that legal representation was unable to embody the diversity of identities we experience in our lives.

The fact that these common ways of thinking about legal identity turned out to be unhelpful to our efforts to improve the lives of women and homosexuals through law suggests that whether we understand our roles as academics, activists or progressive jurists, we must begin to approach these issues and our thinking about them differently. In fleshing out the images of traits, selves and identities contained in the courts' images of homosexuality and pregnancy, we found a world populated by persons and identity strategies which seemed as complex as our experience. We know people who understand their sexuality and reproduction as chosen. We know closet homosexuals and hopeful future mothers and walking wombs and compulsive cruisers. These diverse images suggest to me that perhaps there is no single doctrinal combination or political strategy or identity politics or mode of representation which captures the “reality” of our identities or that necessarily leads to social acceptance or fair legal treatment. Rather, we might take our cue from the apparently irreducible diversity, complexity and banality of the life strategies we see around us. Perhaps we must recognize that legal discourse is itself a site for ongoing interpretive struggle over the meaning of identity, rather than an independent system of fixed images and rhetorical tropes which merely describes and distorts our experience. To do so might involve a legal practice which seeks to understand and strategize about the ways in which legal discourse, through its very indeterminacy, might be able to provide the space for
our complexity and differentness to be represented but not determined.

While more work must be done on how and in what ways a strategy of legal openness might be pursued, Mary Joe Frug, speaking in the context of gender identity and sex differences, suggests where such a practice might lead us:

In their most vulgar, bootlegged versions, both radical and cultural legal feminisms [read also the courts] depict male and female sexual identities as anatomically determined and psychologically predictable. This is inconsistent with the semiotic character of sex differences and the impact that historical specificity has on any individual identity. In postmodern jargon, this treatment of sexual identity is inconsistent with a decentered, polymorphous, contingent understanding of the subject.

Because sex differences are semiotic—that is, constituted by a system of signs that we produce and interpret—each of us inescapably produces herself within the gender[/sexuality] meaning system, although the meaning of gender[/sexuality] is indeterminate or undecidable. The dilemma of difference, which the liberal equality guarantee seeks to avoid though neutrality, is unavoidable.136 [However, t]his is not a proposal that we try to promote a [more] benevolent and fixed meaning for sex differences. . . . Rather, the argument is that continuous interpretive struggles over the meaning of sex differences can have an impact on . . . legal power.137

137. Id. at 1046.