

# William & Mary Journal of Race, Gender, and Social Justice

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Volume 15 (2008-2009)

Issue 2 *William & Mary Journal of Women and the Law: 2008 Symposium: Not That Kind of Girl: The Legal Treatment of WOmEn Defying Traditional Gender Roles*

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Article 6

February 2009

## When Freedom Is Not Free: Investigating the First Amendment's Potential for Providing Protection Against Sexual Profiling in the Public Workplace

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### Repository Citation

Michele Alexandre, *When Freedom Is Not Free: Investigating the First Amendment's Potential for Providing Protection Against Sexual Profiling in the Public Workplace*, 15 Wm. & Mary J. Women & L. 377 (2009), <https://scholarship.law.wm.edu/wmjowl/vol15/iss2/6>

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WHEN FREEDOM IS NOT FREE: INVESTIGATING THE  
FIRST AMENDMENT'S POTENTIAL FOR PROVIDING  
PROTECTION AGAINST SEXUAL PROFILING IN THE  
PUBLIC WORKPLACE

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ABSTRACT

This article explores the ways in which bodily expression can constitute symbolic speech that courts should protect pursuant to the First Amendment of the Constitution. In a previous article, I referred to this type of bodily speech as "body protest."<sup>1</sup> Body protest can refer to actions that individuals undertake to assert their autonomy, identity, and freedom from societal restrictions. For women, body protest may be used "to challenge gender restrictions and to activate women-centric legal reforms."<sup>2</sup> For example, women may express body protest through dance, dress, or performance arts. These individuals are often sexually profiled because of how they use their bodies. This article analyzes the sexual profiling issues inherent in grooming cases within the context of First Amendment jurisprudence in the public employment sphere and argues that the First Amendment's protection of freedom of expression offers a basis to expand upon personal rights in grooming cases.

The goal of this article is to argue that by placing body protest and other expression that occurs in public employment appropriately within the scope of the First Amendment, society can eradicate widespread gender bias in the workplace. Part I of this article discusses why the First Amendment should be strengthened as a cause of action in gender-based grooming cases. Part II presents evidence of sexual profiling in rape cases, which reflect society's attitudes towards women's grooming choices. Parts III and IV analyze sexual profiling in the workplace, the treatment of gender-based grooming policies and sex stereotyping under Title VII, and the utilization of conduct as gender-based expression under the First Amendment. Part V

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1. Michele Alexandre, *Dance Halls, Masquerades, Body Protest and the Law: The Female Body as a Redemptive Tool against Trinidad's Gender-Biased Laws*, 13 DUKE J. OF GENDER L. & POL'Y 177 (2006).

2. *Id.* at 179.

seeks to reconcile sexual profiling claims brought under the First Amendment with Supreme Court jurisprudence from *Pickering v. Board of Education*, *Connick v. Myers*, and *Garcetti v. Ceballos*. And last, Part VI considers the possibility of learning by analogy from the sexual orientation cases.

## INTRODUCTION

- I. WHY USE THE FIRST AMENDMENT AS A CAUSE OF ACTION IN THE GENDER-BASED GROOMING CASES
  - II. EVIDENCE OF SEXUAL PROFILING IN RAPE CASES
  - III. TREATMENT OF GENDER-BASED GROOMING POLICIES AND SEX STEREOTYPING UNDER TITLE VII
    - A. *General Grooming Standards Under Title VII*
    - B. *Sex Stereotyping Under Title VII*
  - IV. CONDUCT AS EXPRESSION — DECONSTRUCTING GENDER STEREOTYPES THROUGH THE FIRST AMENDMENT
    - A. *Conduct as Speech*
    - B. *The First Amendment and Freedom of Expression*
  - V. RECONCILING FIRST AMENDMENT SEXUAL PROFILING CLAIMS WITH *PICKERING*, *CONNICK*, AND *GARCETTI*
  - VI. LEARNING BY ANALOGY: THE SEXUAL ORIENTATION CASES
- ## CONCLUSION

## INTRODUCTION

While the attainment of political rights does not always solve inequalities and human rights violations,<sup>3</sup> it is also true that without the extension of fundamental political rights, significant issues and concerns are often not given the scrutiny and importance they require.<sup>4</sup> A number of political rights have been recognized in the

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3. See Gowri Ramachandran, *Freedom of Dress: State and Private Regulations of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV 11, 26 (2006) (discussing the inability of antidiscrimination laws to protect personal identity). Some scholars move from a rights discourse to an equality discourse when dealing with issues related to personal appearance:

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

*Id.* at 26-27.

4. See *id.* at 11, 27 (discussing the need to protect freedom of dress).

gender context; two of the greatest are voting rights for women<sup>5</sup> and the right to sue for gender discrimination under Title VII.<sup>6</sup> Converting these political gains into actual manifestations of equality, however, is an ongoing task.<sup>7</sup> Some important questions remain to be answered. What happens when we face issues that indicate a need to formulate solutions in terms of formal political rights, but also require us to formulate standards that tackle the root of actual and pervasive gender discrimination? How do we use existing formal structures to eradicate the foundational notions that allow actual gender inequality to fester?

Consider the following hypothetical situation:<sup>8</sup> Marcia works in a government office and regularly comes to work in a short skirt and suggestive blouse. She is a good employee who acts and works with a self-assured and direct manner. Concerned, her employer meets with her in private and mandates that she dress more “appropriately” for the office. Unwavering, Marcia retorts that her choice of clothing is an integral part of her identity that cannot be regulated by external influences.<sup>9</sup> She maintains that her dress, just like the way she talks

5. U.S. CONST. amend. XIX.

6. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006).

7. SUSAN GLUCK MEZEY, *ELUSIVE EQUALITY: WOMEN'S RIGHTS, PUBLIC POLICY, AND THE LAW* 288 (2003); see also Sylvia A. Law, *Where Do We Go from Here? The Fourteenth Amendment, Original Intent, and Present Realities*, 13 TEMP. POL. & CIV. RTS. L. REV. 691 (2004) (discussing the ongoing progression of women's rights).

8. Marcia is a fictional character used to showcase the type of scenario that could give rise to First Amendment expression issues in regard to dress and/or conduct in the employment setting. For an example of a dispute arising from self expression in the private workplace, see Bjornson v. Dave Smith Motors/Frontier Leasing & Sales, 104 Fair Empl. Prac. Cas. (BNA) (2008). In 2004, Sheryl Bjornson filed a lawsuit against her employer based on “claims of a sexually hostile work environment, gender discrimination, and retaliation under Title VII of the Civil Rights Act of 1964.” *Id.* at 66. To support her claims, Bjornson testified that her supervisor, Joe Orsi, made comments to managers and other salespersons about her personal appearance including her clothing, shoes, and nail polish. Deposition of Sheryl L. Bjornson, at 117, Bjornson v. Dave Smith Motors/Frontier Leasing & Sales, 104 Fair Empl. Prac. Cas. (BNA) (2008) (No. CV 04-285-N-MHW). Bjornson's co-worker, Mary Crawford, also testified that Bjornson's appearance had become an issue in the workplace. Specifically, Crawford stated that the dress code at work had become a “constant battle” with Bjornson and that concerns were raised regarding Bjornson's shoes, undergarments, clothing, and hair. Deposition of Mary Crawford, at 34-35, Bjornson v. Dave Smith Motors/Frontier Leasing & Sales, 104 Fair Empl. Prac. Cas. (BNA) (2008) (No. CV 04-285-N-MHW).

9. Cf. Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1111-12 (2006).

Clothes and appearance are constitutive of how we see and feel about ourselves and how we construct ourselves for the rest of the world to see. Most people give careful thought to how they dress as a part of defining who they are. We dress to establish an identity and to fit in with some subculture while rejecting others.

*Id.* at 1111.

and walks, is a form of expression that is linked to her identity. Consequently, she finds any attempts to restrict her manner of dress to violate one of her fundamental rights. In light of her blatant refusal to follow her employer's orders, Marcia is fired. Marcia then seeks legal vindication and validation of her perceived fundamental right.

This hypothetical situation captures the legal impasse that exists for anyone who seeks protection from tacit or overt restrictions on dress, grooming, and other forms of bodily expression.<sup>10</sup> In our jurisprudence, cases involving grooming issues have triggered various Title VII analyses,<sup>11</sup> which, thus far, have been inadequate to afford the desired legal protections to complainants.<sup>12</sup> This problem is exacerbated when the issue centers on gender-specific dress and conduct codes.<sup>13</sup> As difficult as it is for an individual to find legal protection for identity-inspired conduct or dress choices in general, our society and jurisprudence have been even more reticent to recognize a protected right for employees to dress and behave outside of societal gender norms.<sup>14</sup>

This problem is compounded by feminist jurisprudence's own ambiguous stance on the issue.<sup>15</sup> Third Wave Feminism, for example, has advocated and accepted agency as an essential element of any exploration of women's rights.<sup>16</sup> Thus, under Third Wave Feminism,

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10. See Ramachandran, *supra* note 3, at 61 (arguing that the state failed to protect individual freedom in the private sphere). Note that grooming choices may also be expressive of political and public values by communicating an opinion on gendered norms in the workplace.

11. Julie A. Seaman, *The Peahen's Tale, or Dressing Our Parts at Work*, 14 DUKE J. GENDER L. & POL'Y 423, 426 n.19 (2007) ("These cases arise primarily under Title VII of the Civil Rights Act of 1964, . . . which generally prohibits sex discrimination in the workplace, but they also may be brought under state anti-discrimination statutes and, in the case of public employees, § 1983 and the Equal Protection Clause.").

12. See Ramachandran, *supra* note 3, at 67.

13. See Seaman, *supra* note 11, at 426-27.

14. See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 222-23 (2d Cir. 2005) (holding that plaintiff failed to prove that she was terminated because of her failure to conform to gender stereotypes in the way she dressed); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1088 (5th Cir. 1975) (holding that discrimination based on a man's hair length is not sex discrimination); *Devine v. Lonschein*, 621 F.Supp. 894, 897 (S.D. N.Y. 1985) (holding that requiring male attorneys to wear neckties, while not requiring female attorneys to wear them, is not impermissible sex discrimination).

15. Alexandre, *supra* note 1, at 182.

[F]eminist discourse has been extremely conflicted on the idea of the body as a tool for renegotiating gender roles. While most feminists would acknowledge the traditional use of sex to oppress and dominate women, very few of them give real credence to female bodily expression as a successful and useful conduit for negotiating gender classifications.

*Id.* (footnote omitted).

16. Lynn S. Chancer, *From Pornography to Sadomasochism: Reconciling Feminist Differences*, 571 ANNALS AM. ACAD. POL. & SOC. SCI. 77, 86 (2000); Bridget J. Crawford,

women are not mere victims of patriarchal structures, but are actors and agents of change.<sup>17</sup> Their agency can take the form of subversive as well as overt acts of rebellion.<sup>18</sup> There exist, then, millions of possibilities as to what “women’s rights” actually mean for women in the Third Wave era. In light of these potentially conflicting meanings, how do we proceed to argue for universal women’s rights and how do we reconcile our advocacy for women’s rights with conflicting views of appropriate dress and behavior for women? As long as this ambiguity persists, will we ever completely eradicate gender bias? Exploring the use of “body protest” in the public employment context is a first step toward exploring the ways in which autonomy can be exercised to break gender norms.

Consequently, this article explores the ways in which an employee’s bodily expression can constitute types of speech that should be constitutionally protected by courts pursuant to the First Amendment of the Constitution. In a previous article, I referred to these types of bodily speech as “body protest.”<sup>19</sup> While this article primarily focuses on issues facing women, body protest can refer to acts by individuals of both genders that defy gender stereotypes.<sup>20</sup> This is because both males and females are burdened by societal pressure to comply with masculine ideals.<sup>21</sup> Appearance “is a . . . powerful factor affecting employment opportunities and status for those who do not comply with the dominant masculine norm; this includes both women and men who are considered to have an inferior masculine gender.”<sup>22</sup> This, however, does not mean that women and men are treated equally in the workplace.<sup>23</sup> Historically, societal barriers require women to surmount incommensurable obstacles in order to succeed in the workplace.<sup>24</sup>

Body protest refers to actions and grooming decisions taken by individuals to assert their own autonomy, identity, and freedom from

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*Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography, and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 151-52 (2007).

17. See Crawford, *supra* note 16, at 152; see also Natalie Fixmer & Julia T. Wood, *The Personal is Still Political: Embodied Politics in Third Wave Feminism*, 28 WOMEN’S STUD. COMM. 235, 237 (2005) (arguing that this movement builds solidarity among women).

18. Fixmer & Wood, *supra* note 17, at 242-44.

19. Alexandre, *supra* note 1, at 178.

20. See Catherine Harwood, *Dressed for Success? Gendered Appearance Discrimination in the Workplace*, 38 VICTORIA U. WELLINGTON L. REV. 583, 586 (2007) (discussing the idea that both women and men face sex discrimination based on a masculine norm).

21. *Id.* at 586-87.

22. *Id.* at 586 (citation omitted).

23. *Id.* (quoting NAOMI WOLF, *THE BEAUTY MYTH* 48 (Chatto & Windus 1990)).

24. See RAYMOND F. GREGORY, *WOMEN AND WORKPLACE DISCRIMINATION: OVERCOMING BARRIERS TO GENDER EQUALITY* 23 (2003); Megan Erb, *Red Light, Green Light: Assessing the Stop and Go in the Advancement of Women in the Legal and Business Sectors*, 14 WM. & MARY J. WOMEN & L. 393 (2008).

societal restrictions.<sup>25</sup> Moreover, body protest can refer to specific instances where women use their bodies:

to challenge gender restrictions and to activate women-centric legal reforms. It also encompasses the therapeutic goals of asserting dominance over one's body and of facilitating one's expression of womanhood in revolt against a patriarchal society. Instances of body protest include, but are not limited to, women's use of their bodies through dance, dressing, performance arts, etc. For example, certain women choose to dance suggestively, dress contrary to societal standards of propriety, perform sexually explicit artistic roles, bring attention to specific body parts, and adopt sexually explicit personas in order to highlight the societal restraints imposed on them.<sup>26</sup>

Recent incidents, such as the Rutgers/Don Imus controversy<sup>27</sup> as well as the current pervasive discourse surrounding non-traditional women,<sup>28</sup> confirm that women are regularly sexually profiled based on the way they use their bodies as well as stereotypes associated with their race.<sup>29</sup>

This article analyzes the sexual profiling issues inherent in grooming cases in the context of public employment. This article also analyzes the potential that First Amendment expression claims hold for grooming cases in the public employment context. The goal of this article is to argue for the placement of body protest/expression that occurs in public employment within the context of the First Amendment, as the right involved is the fundamental right to expression free of bias or coercion. Such a fundamental right must, of course, be appropriately balanced with the interests an employer in a particular case advances. Placing this debate in the First Amendment context would rightfully raise this issue to the level of scrutiny that it deserves and would signal a clear commitment to the eradication of widespread gender bias. Furthermore, this heightened treatment

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25. See Alexandre, *supra* note 1, at 179.

26. *Id.* (footnote omitted); see also DUNCAN KENNEDY, SEXY DRESSING ETC. 186 (1993) (discussing how clothing can be an expression of a woman's state of mind).

27. RORY O'CONNOR & AARON CUTLER, SHOCK JOCKS: HATE SPEECH & TALK RADIO 15 (2008).

28. See, e.g., Alexandre, *supra* note 1, at 178-79 (discussing women who use body protest to defy gender stereotypes); Harwood, *supra* note 20, at 583 (discussing workplace discrimination based on nontraditional gender expression).

29. See O'CONNOR & CUTLER, *supra* note 27, at 15; Alexandre, *supra* note 1, at 180 ("Sexual profiling is rooted in the gender stereotypes historically associated with women's bodies. The belief in the inferiority of women's bodies dates as far back as biblical writings. . . . Beliefs regarding women's physical or genetic inferiority translated into beliefs in women's psychological and mental inferiority.").

would help curtail the employer practice of pretextual termination or punishment of employees.

The scope of this article is limited to investigating the possibilities for protecting body protest in the public employment sector.<sup>30</sup> This article is divided into the following parts. The first part discusses why the First Amendment is beneficial as a cause of action in gender-based dress and grooming cases. The second part uses rape cases to illustrate evidence of sexual profiling in society. The third and fourth parts analyze the treatment of gender-based grooming policies and sex stereotyping under Title VII, and the use of conduct as a form of expression under the First Amendment. The fifth part attempts to reconcile First Amendment sexual profiling claims with the Supreme Court jurisprudence from *Pickering v. Board of Education*,<sup>31</sup> *Connick v. Myers*<sup>32</sup> and *Garcetti v. Ceballos*.<sup>33</sup> Finally, the sixth part considers the possibility for learning by analogy from the sexual orientation cases.

## I. WHY USE THE FIRST AMENDMENT AS A CAUSE OF ACTION IN THE GENDER-BASED GROOMING CASES

The First Amendment is the ideal context for litigating grooming cases because it provides the most potential for addressing and deconstructing the inherent gender bias associated with gender-based expectations of dress or conduct.<sup>34</sup> Grooming standards regulate some of the most intimate parts of a person: her body and her right to utilize and construct it as she pleases.<sup>35</sup> One's right to bodily integrity is now a familiar concept in our jurisprudence.<sup>36</sup> For instance, courts have triggered this concept when dealing with the right of privacy in abortion and contraception cases.<sup>37</sup> This right to bodily integrity is also of particular importance when dealing with grooming standards in the workplace.<sup>38</sup> Requiring women to adhere to gender stereotypes

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30. For the sake of efficiency, I chose to limit my discussion to the First Amendment implications of body protest in the public workplace.

31. 391 U.S. 563 (1968).

32. 461 U.S. 138 (1983).

33. 547 U.S. 410 (2006).

34. See, e.g., DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 10-19 (1997) (discussing various stereotypes of black women).

35. Ramachandran, *supra* note 3, at 34.

36. *Id.* at 33-34. ("The Supreme Court, as well as many commentators, has recognized a fundamental right to bodily integrity in the Due Process Clause. Additionally, many courts and commentators have discussed a right to bodily privacy." (footnote omitted)).

37. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

38. Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2557-58 (1994).



in their grooming choices infringes upon their right to bodily integrity. Yet, as evidenced by recent grooming cases, Title VII has generally been ineffective in offering redress to employees alleging harm from gender-based restrictive policies.<sup>39</sup> Deference to the employer's interest in preventing a disturbance has overwhelmingly been sufficient to counter discrimination claims under Title VII.<sup>40</sup> Thus, further legal measures are necessary to protect individual grooming choices.

I recognize that other scholars have offered different solutions to circumvent Title VII's hurdles, such as the creation of a new cause of action, "freedom of dress," as cleverly proposed by Gowri Ramachandran,<sup>41</sup> and the right to privacy construct proposed by Catherine Fisk.<sup>42</sup> Still, the First Amendment is appropriate and efficient in that it already offers protection to the forms of expression that the plaintiffs seeking reprieve from gender-based grooming cases exhibit.<sup>43</sup> In addition, using an existing doctrine of law might be more effective than the development of a new doctrine in encouraging courts to reject employers' grooming standards than the development of a new doctrine.

Additionally, using the First Amendment to address and eradicate gender bias in the public employment context is an actual as well as symbolically powerful weapon. The First Amendment is a sacrosanct, fundamental right in our jurisprudence and in our lay culture. Considering that gender-based grooming policies attack the very essence of one's right and ability to express oneself,<sup>44</sup> it would be fitting for litigants to use this cause of action. Furthermore, the judiciary's use of the First Amendment, a universally revered doctrine,

39. See Lisa Barré-Quick & Shannon Matthew Kasley, *The Road Less Traveled: Obstacles in the Path of the Effective Use of the Civil Rights Provision of the Violence Against Women Act in the Employment Context*, 8 SETON HALL CONST. L.J. 415, 425-26 ("Although egregious sexual harassment and gender-motivated workplace violence may technically be redressable under Title VII, there are both procedural and substantive limitations inherent in Title VII which render it, in certain instances, an ineffective remedy . . ."). For an example of Title VII's ineffectiveness at protecting women from gender bias at work see also *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1106 (9th Cir. 2006) (stating that Jespersen failed to show that a challenged policy requiring women, but not men, to wear makeup was "a policy motivated by sex stereotyping").

40. See Bartlett, *supra* note 38, at 2556 (stating that "[i]nstead, courts have resisted the application of Title VII to dress and appearance requirements, following a variety of approaches that incorporate and thus, in effect, legitim[ize] the community norms").

41. Ramachandran, *supra* note 3, at 13 ("Freedom of dress is the right to choose the hairstyle, makeup, clothing, shoes, head coverings, tattoos, jewelry, and other adornments that make up the public image of our sometimes private persons.").

42. Fisk, *supra* note 9, at 1112-14 (advocating the use of a privacy analysis, rather than discrimination, because such an analysis is open to everyone "significantly oppressed by an unreasonable workplace dress code").

43. See Ramachandran, *supra* note 3, at 16.

44. Fisk, *supra* note 9, at 1122.

to deal with these issues would send a much needed and belated message that the eradication of all gender biases is an important goal of our justice system.

Although the First Amendment applies to only the public employment setting,<sup>45</sup> the expansion of protection to conduct-based grooming expression in the public workplace may have broader societal implications. For instance, grooming and dress choices may be expressive of political and public values. A person's choice of dress may send a message regarding one's response to the gendered concept of what is "appropriate" in the workplace. Or, manner of dress may express a response to the commodification and homogenization of dress and grooming options in corporate America. Perhaps by recognizing women's bodies as important tools for expression in the public workplace, courts will create a persuasive argument for the protection of a person's gendered identity in other areas of law. Furthermore, breaking sex stereotypes in the public workplace, and perhaps indirectly in other spheres, may change societal and judicial attitudes as to the extent in which employers' grooming policies will be tolerated when they impose sex stereotypes on employees.<sup>46</sup>

To adjudicate grooming cases under the First Amendment, I propose that we consider these cases on a case by case basis whereby the employee's interest in bodily integrity and the First Amendment right to expression would be weighed against the public employer's interest in having an undisrupted employment setting. The balancing test created in *Pickering v. Board of Education*<sup>47</sup> and currently used in public employment First Amendment cases could be applied to employees claiming violations of their First Amendment rights based on grooming standards. Under this balancing test employees could show that their dress and grooming choices are: 1) of public concern, 2) causally related to the adverse employment action that they suffered, and 3) protected speech.<sup>48</sup> Employers would have to show how the employee's choice of grooming disrupts the work environment.<sup>49</sup> The standard for "disruption" in this context should be an objective

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45. Ramachandran, *supra* note 3, at 26.

46. For the purposes of this article, I am limiting my discussion to body protest in the public employment setting. The implications of this issue in the private sphere, including prostitution and private employment, are worth exploring in subsequent projects.

47. 391 U.S. 563 (1968).

48. *See id.* at 568-74; *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999) (emphasizing the necessity of showing a causal connection between employee speech and the adverse employment action before the *Pickering* balancing test can apply).

49. *Connick v. Meyers*, 461 U.S. 138, 150 (clarifying *Pickering's* balancing test by stating "that the speech involved [must] 'substantially interfere[]' with official responsibilities").

rather than a subjective one.<sup>50</sup> Thus, it would not be enough for the employer to show that the other employees or customers are merely uncomfortable with the plaintiff's grooming choices. Furthermore, employers should be required to show that there are no other, less restrictive, alternatives than limiting the plaintiff's grooming choices and that the plaintiff's grooming choices absolutely prevent the execution of his or her duties.

Through the use of the First Amendment, courts could limit employers' ability to create grooming standards based on gender norms. Deconstructing these biased expectations<sup>51</sup> would be crucial in furthering the goal of eradicating gender bias across all spheres.<sup>52</sup> It would also serve the equitable goal of ensuring that tacit gender-based pretexts are no longer used to terminate noncompliant employees.<sup>53</sup>

## II. EVIDENCE OF SEXUAL PROFILING IN RAPE CASES

Sexual profiling is rooted in the restrictive, biased meanings and expectations associated with actions taken by each gender.<sup>54</sup> These expectations and socially-constructed meanings permeate every aspect of life.<sup>55</sup> Yet they come to life more particularly in the rape context, which clearly illustrates society's view of what constitutes appropriate behavior and manner of dress for a woman.<sup>56</sup> In a survey conducted by Amnesty International, a quarter of respondents felt that "a woman wearing a provocative outfit is at least partly to blame — especially if she has been drinking."<sup>57</sup> This view undoubtedly captures the way

50. See *Pickering*, 391 U.S. at 572-73 (illustrating the Supreme Court's analysis of the alleged disruption based on the facts presented and determining that the employee's actions did not disrupt the proper performance of his duties); see also *Connick*, 461 U.S. at 166 (discussing that objective evidence, not mere apprehension of disruption, is necessary under *Pickering*).

51. See ARISTOTLE, *THE GENERATION OF ANIMALS* 11 (A.L. Peck trans., Harvard Univ. Press rev. ed. 1953) (discussing gender expectations).

52. See Bartlett, *supra* note 38, at 2542-43 (discussing the "gap between a law's reach and the aspirations of those who seek to accomplish substantial societal reform").

53. See Consuela Pinto & Joan Williams, *Hidden Gender Bias in the Workplace*, HR MANAGEMENT, <http://www.hrmreport.com/currentissue/article.asp?art=273512&issue=250> (last visited Jan. 9, 2009).

54. Seaman, *supra* note 11, at 461-62.

55. See *id.* at 424-25 ("Dress therefore serves various signaling and expressive functions in addition to its more mundane purposes of bodily protection and warmth. . . . For example, a business suit on a man might signal status and self-restraint . . . [however] a woman in an identical men's suit sends yet another set of signals entirely." (footnotes omitted)).

56. See Tom Parry, *Rape Victims 'Asking for It'*, MIRROR, Nov. 11, 2005, available at [http://www.mirror.co.uk/news/tm\\_objectid=16393921&method=full&siteid=94762&headline=asking-for-it-name\\_page.html](http://www.mirror.co.uk/news/tm_objectid=16393921&method=full&siteid=94762&headline=asking-for-it-name_page.html) (discussing perceptions that "[w]omen who flirt, get drunk or wear sexy clothes are asking to be raped").

57. *Id.*

some jurors view victims of rape.<sup>58</sup> These so-called myths about the relationship between women's manner of clothing and the likelihood of rape also affect the way potential rapists choose their victims.<sup>59</sup> According to recent studies, "[p]otential rapists 'are more likely than other males . . . to hold callous attitudes about rape and to believe in rape myths . . .'"<sup>60</sup> The gender bias myths about women inviting rape through clothing or behavior are also ingrained in women themselves.<sup>61</sup> Women sometimes blame a victim of rape because of her manner of dress, and as a result even victims of rape themselves are often reluctant to report the crime to the authorities because of these stereotypes.<sup>62</sup>

The reluctance and fear of judgment is even stronger when the rape is committed by an acquaintance.<sup>63</sup> In acquaintance rape situations, "[t]he victims may erroneously believe that their behavior brought about the rape and thus attribute the blame to themselves for reasons such as wearing a short skirt or letting the perpetrator walk them home."<sup>64</sup> Considering this pervasive attitude, it is not surprising that similar sexual stereotyping detrimentally impacts the workplace, where women are highly likely to experience violence

58. Robert Wilson, *Free Speech v. Trial by Jury: The Role of the Jury in the Application of the Pickering Test*, 18 GEO. MASON U. CIV. RTS. L.J. 389, 409 (2008).

The jury may sometimes disregard the judge's instructions, not by judging the law, but by passing personal judgment on one of the parties to the litigation. . . . [A] 1966 study of American juries indicated that juries convicted defendants of rape only sixty percent of the time, less than [sic] almost any other serious violent crime. . . . This trend was apparently based in sexist assumptions prevalent in society at large . . . that "women who are victimized are themselves to blame for their own fate because they are either seductive or unresisting."

*Id.* (footnotes omitted).

59. Robert Z. Hazelwood & Janet I. Warren, *The Serial Rapist*, in PRACTICAL ASPECTS OF RAPE INVESTIGATION: A MULTIDISCIPLINARY APPROACH 337, 353 (Robert R. Hazelwood & Ann Wolbert Burgess eds., 2d ed. 1995).

60. Elizabeth Harmer Dionne, *Pornography, Morality, and Harm: Why Miller Should Survive* Lawrence, 15 GEO. MASON L. REV. 611, 631 (2008) (quoting Neil M. Malamuth, *Aggression Against Women: Cultural and Individual Causes*, in PORNOGRAPHY AND SEXUAL AGGRESSION 19, 23 (Neil M. Malamuth & Edward Donnerstein eds., 1984)).

61. Scott D. Carman, *Commonwealth v. King's "First Complaint Doctrine": The Voice of Injustice May Speak Loudly When Rape Victims are Silenced*, 42 NEW ENG. L. REV. 631, 654 (2008).

62. *See id.* at 653-54 (discussing victims' fear of tarnishing their reputation and belief that their behavior caused the rape).

63. *Id.* at 654.

64. *Id.* (footnote omitted).

[T]he vast majority of rapes are actually committed by someone that the victim is acquainted with, related to, or intimately involved with. . . . The victims often do not report rapes committed by acquaintances because they feel that they gave the perpetrator a false impression that they consented to the sex and, therefore, they take responsibility for this misunderstanding.

*Id.* (footnote omitted).

from acquaintances.<sup>65</sup> Violence against women affects businesses as well as the women themselves.<sup>66</sup> For example:

"Fear of gender-motivated violence restricts the hours during which women can engage in a variety of activities and seriously curtails their participation in the commerce of our nation." With women representing such a large part of the American workforce and of American consumers and producers, the effect violence against women has on the national economy cannot be ignored.<sup>67</sup>

Dismantling the gender-based stereotypes about women, including acceptable behavior and manner of clothing, is thus one of the important areas to target in trying to curtail violence against women.<sup>68</sup>

Violence against women will not be diminished simply by dealing with the after-effects of the violent act or by mere punishment of the violent perpetrator.<sup>69</sup> The prevalence of violence against women is linked to a pervasive attitude toward women's bodies and the restrictions thought to apply to them in various spheres.<sup>70</sup> The insidiousness of this attitude is captured in bold relief by examining the sex stereotyping of female rape victims' manner of dress and behavior. These attitudes or myths are used as excuses by perpetrators or sexual profilers to negatively impact women.<sup>71</sup> To begin to significantly solve the problem of bias against women, our legal system must tackle the problem at its roots: by giving all conduct or types of clothing worn by women, including those traditionally classified as socially

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65. Margaret A. Cain, Comment, *The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future*, 34 TULSA L.J. 367, 381 (1999) ("The U.S. Justice Department estimates that, in 60,000 incidents of on-the-job violence each year, the victims know their attackers intimately.").

66. *Id.* at 381-82.

Violence against women significantly affects the bottom line in businesses. . . . Statistically women who are abused or suffer sexual assault are more likely to be less productive in the work place and have a higher rate of absenteeism. . . . Domestic violence alone "has been estimated to cost employers between 3 to 5 billion dollars annually due to absenteeism in the workplace." This does not include medical costs which have been estimated at close to \$100 million dollars annually. Additionally, victims of domestic violence are often harassed in their work place, "prevented from arriving to work on time, and kept from attending work altogether because of serious injuries."

*Id.* (footnotes omitted).

67. *Id.* at 382 (footnotes omitted).

68. See Sarah Gill, Essay, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA WOMEN'S L.J. 27, 62 (1996) (arguing that education about gender stereotypes and rape myths is necessary to reduce date rape).

69. See *id.* at 79.

70. *Id.* at 34-35.

71. *Id.* at 50 (stating that "date rapist[s] . . . [have] socially acquired beliefs about rape myths, sexual aggressiveness, and gender and race stereotypes").

unacceptable, legitimate status as protected expression.<sup>72</sup> The protected status in question should not be any different than other types of actions that have been worthy of First Amendment consideration by our jurisprudence.<sup>73</sup>

### III. TREATMENT OF GENDER-BASED GROOMING POLICIES AND SEX STEREOTYPING UNDER TITLE VII

#### A. General Grooming Standards Under Title VII

Currently, many plaintiffs bring grooming cases under the sex discrimination provisions of Title VII. The resulting jurisprudence arising from these claims has been highly unsatisfactory, however. Discussed below are the short-comings of Title VII in regard to grooming cases, which illustrate why the First Amendment provides a more beneficial cause of action for public employees.

To prove discrimination under Title VII, a plaintiff must show “that the challenged employment action was either intentionally discriminatory or that it had a discriminatory effect on the basis of gender. Once a plaintiff establishes such a *prima facie* case, [t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”<sup>74</sup> Courts have dealt with both employers’ grooming standards as well as with the idea of sex stereotyping in the employment context through the use of Title VII.<sup>75</sup> Under this cause of action, an employee can bring

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72. See Alexandre, *supra* note 1, at 185-87 (discussing women’s conduct that society views as unacceptable).

73. Currently, however, there exists a sharp contrast between the contemptuous manner in which women’s expression through body or clothing has traditionally been viewed and the respect accorded to many other forms of expression. See *Marrero v. Camden County Bd. of Soc. Serv.*, 164 F. Supp.2d 455, 477 (D.N.J. 2001) (demonstrating judicial attitudes toward women’s First Amendment claims based on dress in stating that “women’s fashions seem to change much more rapidly than men’s, [therefore] very little can be concluded . . . from the fact that the dress code committee paid more attention to women’s clothing than to men’s”). In contrast, *Morse v. Frederick* illustrates that even a student’s rebellious action of holding a banner at a school event stating “BONG HiTS 4 JESUS” has triggered a thorough First Amendment analysis by the Supreme Court — an analysis not granted to women’s grooming choices. See *generally*, 127 S. Ct. 2618 (2007). But gender-based grooming choices are of parallel importance to this type of expression and therefore should be granted a similar First Amendment analysis.

74. *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1108-09 (9th Cir. 2006) (discussing the burden shifting test laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (citations omitted)).

75. *Seaman*, *supra* note 11, at 426-27.

Courts have for years addressed challenges to employer dress codes that differentiate between men and women in conformance with widely-accepted social dress norms. . . . [T]he increasing judicial acceptance of the sex stereotyping theory of sex discrimination under Title VII is in substantial tension

a suit alleging discrimination as a result of an employer's grooming standard or sex stereotyping when the employer's decision or behavior was clearly motivated by gender.<sup>76</sup>

Both the sex stereotyping cases and the grooming cases that have been litigated under Title VII, however, have revealed the limitations of this statute.<sup>77</sup> The courts' treatment of both types of claims demonstrates a definition of discrimination limited to extreme, offensive, or openly hostile behavior by the employer.<sup>78</sup> Furthermore, under the "equal burdens test" established in *Jespersen v. Harrah's Operating Co.* courts may uphold discriminatory and gender-motivated grooming policies if it is deemed that the employer placed equal grooming burdens on both genders.<sup>79</sup> The problem with this rationalization is that grooming restrictions that apply to one gender are often patently different from the ones that apply to the other gender.<sup>80</sup> This comparative approach between the genders also ignores the fact that gender restrictions create hierarchies among women as well as between men and women. Thus, the notion that a woman who is required to wear makeup is equally situated with a man who is not required to wear makeup is flawed. As a result, the unequal burdens test that the courts have developed to analyze the grooming cases leads to a circular rationale that has proven ineffective to deal with the gender restrictive grooming practices that exist in the employment context.<sup>81</sup>

*Jespersen* is the leading case on the viability of gender-based grooming standards.<sup>82</sup> The plaintiff, Darlene Jespersen, was terminated for refusing to wear makeup while working as a bartender for a Harrah's casino shortly after a new employee grooming policy was implemented.

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with recent cases that insist that sex-differentiated dress and grooming requirements that "merely" conform to existing social gender norms do not amount to impermissible sex discrimination.

*Id.* (footnotes omitted).

76. *Id.* at 426 & n.19.

77. See Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195, 203-06, 209 (2000); Karen Zakrzewski, *The Prevalence of 'Look'ism in Hiring Decisions: How Federal Law Should be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. PA. J. LAB. & EMP. L. 431, 442 (2005).

78. See Seaman, *supra* note 11, at 441 & n. 96 (discussing judicial acceptance of "appropriate" or "reasonable" gender-based dress codes in contrast to policies utilizing offensive stereotypes relating to female attractiveness, sexiness, and competence).

79. See *id.* at 433-34 (describing the unequal burdens test).

80. See *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755-56 (9th Cir. 1977) (holding that an employer's policy requiring male employees, but not female employees, to wear a bow tie is not sex discrimination under Title VII); see also Seaman, *supra* note 11, at 434-35 (analyzing the problems of the *Jespersen* majority's opinion).

81. Seaman, *supra* note 11, at 440.

82. See generally *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006).

The standards required all bartenders, men and women, to wear the same uniform of black pants and white shirts, a bow tie, and comfortable black shoes. The standards also included grooming requirements that differed to some extent for men and women, requiring women to wear some facial makeup and not permitting men to wear any. Jespersen refused to comply with the makeup requirement . . . .<sup>83</sup>

Jespersen had worked for Harrah's for twenty years with an exemplary record.<sup>84</sup> Her conflict with her employer arose only when the employer implemented the "Personal Best" grooming policy in 2000.<sup>85</sup> The grooming standards of this policy required women to wear makeup and styled hair, whereas men were prohibited from growing hair long or wearing facial makeup.<sup>86</sup>

The Ninth Circuit agreed with the district court's decision and ruled that the employer passed the "unequal burdens" test applied in grooming cases by also requiring men to wear a uniform and maintain their hair at a certain length above the collar.<sup>87</sup> Title VII's narrow

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83. *Id.* at 1105-06.

84. *Id.* at 1106-07.

85. *Id.* at 1107.

86. *Id.*

- Overall Guidelines (applied equally to male/female):
  - Appearance: Must maintain Personal Best image portrayed at time of hire.
  - Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.
  - No faddish hairstyles or unnatural colors are permitted.
- Males:
  - Hair must not extend below top of shirt collar. Ponytails are prohibited.
  - Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
  - Eye and facial makeup is not permitted.
  - Shoes will be solid black leather or leather type with rubber (non skid) soles.
- Females:
  - Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.
  - Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.
  - Nail polish can be clear, white, pink or red color only. No exotic nail art or length.
  - Shoes will be solid black leather or leather type with rubber (non skid) soles.
  - Make up (*face powder, blush and mascara*) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times. (emphasis added).

*Id.* (quoting the Harrah's "Personal Best Policy").

87. *Id.* at 1111-12.



scope, which confines discrimination to the unequal treatment of both genders in similarly situated positions, limits our ability to eliminate instances of gender bias that cannot be framed within that principle. Employment standards can promote gender bias for both men and women — it is generally not possible to find a case where a man and a woman are situated exactly the same. By their very nature, most grooming policies will regulate different aspects of women's appearance than men's appearance.<sup>88</sup> As in *Jespersen*, for example, men are generally not allowed to wear makeup at work.<sup>89</sup> Thus, to require a woman to wear makeup while men are not required to do so is evidence of a policy that affects one gender disparately.<sup>90</sup> It is also evidence of a policy that uniformly categorizes and stereotypes men and women.<sup>91</sup> The policy assumes that all women are likely to wear makeup or will only look good if they do so and that men are only at their personal best if they wear short hair.<sup>92</sup> Furthermore, the manner in which Harrah's implemented the dress code policy was itself problematic.

Harrah's hired a make-up expert to give each employee a make-over and then had a photographer take a post-make-over photograph of each employee. Harrah's instructed supervisors to use the photograph as an "appearance measurement tool": that is, the supervisor was empowered and encouraged to compare an employee to his or her photograph on a daily basis to see whether he or she measured up. The appearance code required females to wear specific types of make-up: foundation, blush, mascara, and lipstick. Other requirements included "teased, curled, or styled" hair and colored nail polish. Jespersen was fired because she challenged the power of the company to change her appearance.<sup>93</sup>

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88. See e.g., *id.* at 1109 (stating that "Harrah's 'Personal Best' policy contains sex-differentiated requirements regarding each employee's hair, hands, and face"); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 n.7 (9th Cir. 2001) (noting that some "regulations [might] require male and female employees to conform to different dress and grooming standards"); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755-56 (9th Cir. 1977) (holding that an employer's requirement that male employees wear bow ties is not a violation of Title VII).

89. See *Jespersen*, 444 F.3d at 1107 (observing that the requirements for Harrah's "Personal Best" program prohibited men from wearing makeup).

90. Jespersen explicitly argued that "it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short . . ." *Id.* at 1110.

91. See, e.g., Devon Carbado et al., *The Jespersen Story: Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION STORIES* 105, 150 (Joel WM. Friedman ed., 2006) ("Grooming requirements such as makeup for women and short hair for men are deeply constitutive of gender; of what it means to be a man or a woman.").

92. See *Jespersen*, 444 F.3d at 1118 (Kozinski, J. dissenting); Carbado et al., *supra* note 91, at 109, 111.

93. Fisk, *supra* note 9, at 1116.

Not only did this practice thoroughly invade the space and privacy of the Harrah's employees, it also seemed to create a police state instead of a mere employment environment.<sup>94</sup> Judging by the description of this practice, working at Harrah's seemingly meant relinquishment of all autonomy.<sup>95</sup>

It is contrary to the spirit of Title VII, which traditionally requires complete parity when comparing "similarly situated" individuals, to equate the requirement that a woman wear makeup on the job with the requirement that a man keep his hair a certain length.<sup>96</sup> The *Jespersen* analysis illustrates the flaw in current Title VII jurisprudence in that it traps us in attempting to equate men with women, while treating them separately.<sup>97</sup> Consistent with previous courts' treatment of the grooming cases, the *Jespersen* court erroneously trivialized the effects of the Harrah's grooming requirement,<sup>98</sup> which was laden with meanings that created gender-based hierarchies.<sup>99</sup> Finally, Title VII jurisprudence ignores one overarching issue — at least as regards public employers — public employers should not be able to infringe upon an employee's inherent right of expression by implementing gender discriminatory grooming policies that do not further a compelling interest for the employer.

### *B. Sex Stereotyping Under Title VII*

In *Price Waterhouse v. Hopkins* the Supreme Court prohibited employers from imposing gender role stereotypes on their employees.<sup>100</sup> This legal holding proscribed discrimination against employees

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94. Cf. Carbado et al., *supra* note 91, at 151 (questioning how much power employers should have to "police expressions of gender").

95. See Fisk, *supra* note 9, at 1117.

More than layering women's faces, makeup has layered the social meaning of women's identity. . . . By the early 1900s, makeup was actually employed to solidify class and racial distinctions. The cosmetics industry created separate markets for high class makeup, lower class makeup, and African American makeup. Makeup played a role in keeping women in their place not only with respect to gender, but with respect to class and race as well.

See also Carbado et al., *supra* note 91, at 106-07 (footnotes omitted) (discussing the underlying impact that makeup has on women's identity).

96. See Bartlett, *supra* note 38, at 2561.

97. Seaman, *supra* note 11, at 433 ("The presumption behind the unequal burdens test is that different treatment of men and women is not *per se* actionable. In essence, it is the 'separate but equal' standard imported into the law of sex discrimination.").

98. See Bartlett, *supra* note 38, at 2556-59 (discussing triviality).

99. See Carbado et al., *supra* note 91, at 110-11. ("Makeup was a means by which women could transform themselves into gender-role types expected in particular jobs, such as saleswoman, secretary, or waitress. . . . Through makeup, women could perform gender palatability and gender comfort. Makeup signified that gender integration would not mean the disruption of gender hierarchy.").

100. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989).

who fail to act within stereotypical roles regarding their particular gender. Although this decision proved to be a great advancement in limiting employers' ability to restrict an employee's identity based on gender roles, many circuit courts have specifically recognized personal grooming standards as falling outside of *Price Waterhouse's* sex stereotyping analysis.<sup>101</sup>

*Price Waterhouse* involved a plaintiff who was denied partnership in an accounting firm because her behavior was considered too masculine.<sup>102</sup> The record in *Price Waterhouse* indicated that "some of the partners found her to be too aggressive."<sup>103</sup> While some partners "praised . . . [Hopkins's] 'strong character, independence and integrity'" other partners stated that she was "'macho'" and needed "to take 'a course at charm school.'"<sup>104</sup> Furthermore, some of Hopkins's supervisors advised her to "'walk more femininely, talk more femininely, dress more femininely, wear make up, have her hair styled, and wear jewelry.'"<sup>105</sup> Ultimately, the Supreme Court determined that this type of employment decision-making constituted illegal discrimination under Title VII. Specifically, the Court held that sex stereotyping in the workplace is unlawful if the plaintiff shows that the sex stereotype was "a motivating part in an employment decision."<sup>106</sup> Based on the facts surrounding Hopkins's denial of partnership, the *Price Waterhouse* Court found that "[i]t was . . . impermissible for Hopkins's employer to place her in an untenable Catch-22: she needed to be aggressive and masculine to excel at her job, but was denied partnership for doing so because of her employer's gender stereotype."<sup>107</sup> Thus, the Supreme Court sent a firm message to employers that subjecting employees to sex stereotypes would not be tolerated in the workplace.

In contrast, Jespersen's claims were not successful, although the record in *Jespersen*, like the record in *Price Waterhouse*, indicated that Harrah's policy also interfered with Jespersen's ability to work.<sup>108</sup> Specifically, Jespersen considered it a violation of her identity to be

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101. See, e.g., *Schroer v. Billington*, 424 F.Supp.2d 203, 208-09 (D.D.C. 2006) (stating that "courts before and after *Price Waterhouse* have found no Title VII violation in gender-specific dress and grooming codes") (citing *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004); *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000); *Harper v. Blockbuster Ent. Corp.*, 139 F.3d 1385 (11th Cir. 1998); *Tavora v. New York Mercantile Exchange*, 101 F.3d 907 (2nd Cir.1996)).

102. *Price Waterhouse* 490 U.S. at 234-35.

103. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1111 (9th Cir. 2006) (quoting *Price Waterhouse*, 490 U.S. at 234-46).

104. *Price Waterhouse*, 490 U.S. at 234-35 (citations omitted).

105. *Jespersen*, 444 F.3d at 1111.

106. *Id.*

107. *Id.*

108. See *id.* at 1108.

forced to wear makeup — “she found the makeup requirement offensive, and felt so uncomfortable wearing makeup that she found it interfered with her ability to perform as a bartender.”<sup>109</sup> She had performed her job for twenty years without being forced to wear makeup, and with no indication that wearing makeup was essential to the performance of her job.<sup>110</sup>

Jespersen described the personal indignity she felt as a result of attempting to comply with the makeup policy. Jespersen testified that when she wore the makeup she “felt very degraded and very demeaned.” In addition, Jespersen testified that “it prohibited [her] from doing [her] job,” because “[i]t affected [her] self-dignity . . . [and] took away [her] credibility as an individual and as a person.”<sup>111</sup>

Yet the Ninth Circuit did not have as much sympathy for Jespersen as the *Price Waterhouse* Court did for Hopkins.<sup>112</sup> Consequently, under current Title VII jurisprudence an employer may not discriminate against female employees for acting too masculine, but may impose a dress code requiring female employees to adhere to grooming standards that fit social notions of femininity. This showcases the discrepancy that exists in protection for plaintiffs under Title VII in that sex stereotyping is unlawful discrimination whereas grooming policies based on gender norms are not.

Furthermore, unlike the Supreme Court’s decision in *Price Waterhouse*, public policy regarding the eradication of gender roles does not play an important role in the adjudication of grooming cases.<sup>113</sup> The standard used in this line of cases is the “unequal burdens test.”<sup>114</sup> According to the unequal burdens test, some gender-based distinctions are allowed as long as they place an equal burden on both male and female employees.<sup>115</sup> The Ninth Circuit, for example, has stated:

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109. *Id.*

110. *Id.* at 1106-07.

111. *Id.* at 1108.

112. Compare *id.* at 1106 (holding that Jespersen had not demonstrated a violation of Title VII when she was fired for not following her employer’s makeup requirement for women), with *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (holding that Hopkins had demonstrated a violation of Title VII when she was not given partnership status because she acted too much like a man).

113. See Carbado et al., *supra* note 91, at 118, 151 (discussing the public policy implications of letting judges render decisions regarding society’s constructions of masculinity and femininity).

114. See, e.g., *Jespersen*, 444 F.3d at 1108-11 (analyzing Jespersen’s claim through the unequal burdens test).

115. See, e.g., *id.* at 1110 (explaining that “[u]nder established equal burdens analysis, when an employer’s grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII”).

We have long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits. The material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an "unequal burden" for the plaintiff's gender.<sup>116</sup>

In its decision, the *Jespersen* court interjected its own notions of acceptable gender constructs into Title VII jurisprudence. It also erroneously concluded that to give credence to Jespersen's claims would be to declare that all grooming restrictions that conflict with an employee's self image are triable issues under Title VII.<sup>117</sup> Such a broad interpretation is not necessary, however, as only grooming standards that differentiate between or have a disparate impact based on gender could constitute discrimination based on sex.<sup>118</sup> Although there likely are restrictions that limit an employee's self image, and yet remain free from gender bias, such was not the case in *Jespersen*.<sup>119</sup> Harrah's requirement that all women wear makeup is tightly linked with the employer's idea of what an attractive woman should look like, and far less related to business productivity.<sup>120</sup> So is the case with the requirement in the "Personal Best" policy that all women wear their hair down.<sup>121</sup> This policy assumes that to be attractive and acceptable, a woman must always keep her hair long. So an employee who wore her hair up, or wore a bald or faddish cut would not fit into the idea of the suitable woman promoted by the grooming policy.<sup>122</sup> Also, by mandating that women wear makeup, the employer is arguably categorizing women as sexual objects rather than employees.<sup>123</sup> Summarily, by upholding this grooming policy, the Ninth Circuit further ingrained normative gender ideals and also the sexualization of women's bodies into our jurisprudence. Ultimately, the rationale in *Jespersen* is another example of Title VII's inability to tackle the

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116. *Id.* at 1110 (citations omitted).

117. *Id.* at 1112.

118. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2008) (listing sex as a protected class which may not legally be a basis of disparate treatment or impact).

119. See Alexis Conway, *Leaving Employers in the Dark: What Constitutes a Lawful Appearance Standard After Jespersen v. Harrah's Operating Co.*?, 18 GEO. MASON U. CIV. RTS. L.J. 107, 129 (2007) (discussing the dissenting opinion in *Jespersen*).

120. See *id.* at 129-30 ("While the majority in *Jespersen* noted that the sex-differentiated grooming policy did not impede Jespersen's ability to perform her job, critics of the *Jespersen* decision argue that the makeup requirement of the 'Personal Best' program had no relationship to either efficiency or productivity.").

121. See *Jespersen*, 444 F.3d at 1107-08.

122. See *id.*

123. See Conway, *supra* note 119, at 123 (discussing sex stereotyping and Harrah's "notion of what a 'real woman' looks like").

nuances of gender discrimination, particularly as it is manifested in current times.<sup>124</sup>

Although Title VII leaves much to be desired in protecting women's grooming choices in the workplace, it is important to note the beneficial impact that *Price Waterhouse* has had in the realm of employees' gender-based expression. Although widespread protection is lacking for the more "benign" sex stereotyping claims, many more extreme cases of sex stereotyping have been successful under Title VII in the past decade.<sup>125</sup> In post-*Price Waterhouse* cases:

Courts [have] recognized claims that sex-stereotyping constitutes sex discrimination [in] that such cases generally involve facts which evoke additional sympathy from the federal courts beyond the sympathy that one might expect being forced to conform to a sex stereotype would evoke. These facts may be allowing courts to view such cases as exceptional, even where Title VII doctrine would seem to imply that they are not.<sup>126</sup>

One such group that has benefitted from this extended protection is homosexual employees. For example, the Ninth Circuit has classified the following as sexual harassment: the taunting of a male employee for acting in a feminine manner and for not having sexual intercourse with a female co-worker; and employees forcing a gay employee to view homosexual pornography and providing him with sexual gifts in the workplace.<sup>127</sup> This protection of severe sex stereotyping has even filtered into the realm of certain grooming cases. For instance, it has

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124. See Allison T. Steinle, *Appearance and Grooming Standards as Sex Discrimination in the Workplace*, 56 CATH. U. L. REV. 261, 268, 285 (arguing that Title VII offers "questionable protection").

125. Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 314 n.71, 315 (2005).

126. *Id.* at 315.

127. *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 874 (9th Cir. 2001).

Following *Price Waterhouse*, our court has held that sexual harassment of an employee because of that employee's failure to conform to commonly-accepted gender stereotypes is sex discrimination in violation of Title VII. In *Nichols*, a male waiter was systematically abused for failing to act "as a man should act," for walking and carrying his tray "like a woman," and was derided for not having sexual intercourse with a female waitress who was his friend. Applying *Price Waterhouse*, our court concluded that this harassment was actionable discrimination because of the plaintiff's sex. In *Rene*, the homosexual plaintiff stated that a Title VII sex stereotyping claim because he endured assaults "of a sexual nature" when Rene's co-workers forced him to look at homosexual pornography, gave him sexually oriented "joke" gifts and harassed him for behavior that did not conform to commonly-accepted stereotypes.

*Jespersen*, 444 F.3d at 1112-13 (citations omitted).

been held that forcing women to wear extremely sexually revealing clothing is evidence of sexual stereotyping.<sup>128</sup> Nonetheless, more traditional cases where employees are forced to conform with stereotypes have been very difficult to win.

[T]he plaintiff who successfully states a sex-stereotyping claim has generally been a pre-operative transsexual. In these cases, a transsexual plaintiff's failure to conform to gender stereotypes is medicalized through the diagnosis of gender identity disorder. Thus, nonconformity in these cases may appear as both more "exceptional" and less of a "choice" to federal judges.<sup>129</sup>

Although the *Jespersen* court did not "preclude as a matter of law, a claim of sex stereotyping on the basis of dress or appearance codes"<sup>130</sup> the limitations of the "unequal burdens test" imposed on Title VII analysis reinforce the contention that the First Amendment is better suited to litigate cases of sexual profiling based on dress and conduct in the public employment context. Furthermore, distinctions made by courts between "immutable and mutable" characteristics have presented further obstacles to plaintiffs alleging discrimination based on grooming.<sup>131</sup> Generally, while an employee's sex itself has been found to be an immutable characteristic,<sup>132</sup> grooming choices have been found to be within the control of the employee and therefore not within the purview of Title VII.<sup>133</sup> While the circuit court's rationale in *Jespersen* did not center on a discussion of immutable characteristics, as did the district court's rationale,<sup>134</sup> the conclusion

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128. *Jespersen*, 444 F.3d at 1112 (citing *EEOC v. Sage Realty Corp.*, 507 F.Supp 599 (D.N.Y. 1981)).

129. Ramachandran, *supra* note 125, at 316 (footnotes omitted).

130. *Jespersen*, 444 F.3d at 1113.

131. See *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (distinguishing between immutable characteristics and business choices); *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1391 (D. Mo. 1979) (discussing immutable versus mutable characteristics).

132. See *e.g.*, *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 897 (9th Cir. 1974) (discussing that a person's sex itself, as opposed to modes of dress or cosmetics, is the immutable characteristic protected by Title VII).

133. See *e.g.*, *id.*; *Barrett v. Am. Med. Response, Nw., Inc.*, 230 F.Supp.2d 1160, 1164 (D.Or. 2001).

134. See *Jespersen v. Harrah's Operating Co.*, 280 F.Supp.2d 1189, 1192 (D.Nev. 2002); see also *Carbado et al.*, *supra* note 91, at 115. Courts tend to provide relief only when fundamental rights or immutable characteristics are being regulated by employers:

These cases established the so-called sex-plus regime — namely, that it is impermissible for the employer to discriminate against women based on sex plus some other aspect of identity. The caveat being that this other identity characteristic had to be either a fundamental right (for example, the right to get married) or an immutable characteristic (for example, race). While this body of law helpfully moved antidiscrimination doctrine beyond the inter-gender frame, it did little to disrupt the biological/immunity conception

that Jespersen did not provide sufficient evidence of sex stereotyping to make a claim under Title VII is reminiscent of this issue. The *Jespersen* court appeared to dismiss her concerns regarding Harrah's grooming requirements, finding the "Personal Best" policy to be a restriction on mutable characteristics and not discrimination based on the immutable status of being female. But under this type of analysis what kind of grooming limitations should rise to the level of sex discrimination if requirements pertaining to painted nails and makeup (which are stereotypical as pertaining to the female sex) do not trigger a discussion of sex stereotyping?

#### IV. CONDUCT AS EXPRESSION — DECONSTRUCTING GENDER STEREOTYPES THROUGH THE FIRST AMENDMENT

##### A. Conduct as Speech

Due to Title VII's inability to sufficiently protect plaintiff's grooming choices, the First Amendment should be further utilized as a cause of action in grooming cases. Grooming, like many other forms of conduct, may constitute expression under the First Amendment. The way a person chooses to express herself, whether in manner of dress or other forms of symbolic conduct, has distinct repercussions in whatever sphere she chooses to perform that expression.<sup>135</sup> These repercussions are especially severe in contexts where the expected codes of behavior for each gender are deeply ingrained. One such sphere is the workplace.<sup>136</sup> Whether an employee wears an unconventional skirt or a pantsuit, or utilizes other grooming choices to symbolically express herself contrary to what is expected of her gender, certain societal codes immediately surface in an attempt to rectify the perceived problem. An extreme consequence of enforcing these social codes may even be the loss of employment.<sup>137</sup>

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of sex discrimination, a conception that another body of case law further entrenched — the cross-dressing cases.

*Id.*; see also Roberto J. Gonzalez, Note, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2206-07 (2003) (discussing disparate impact and mutable traits).

135. Cf. Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 557 (1940) (describing the repercussions of an artist's self-expression). The artist projects into the world a part of his personality which is then subjected to critique, thereby subjecting the artist to possible psychological, economic, and emotional injury. *Id.*

136. See Tanya J. Stanish, Comment, *English-Only Rules in the Workplace: Discrimination or Employer Prerogative? A Comment on Spun Steak v. Garcia*, 7 DEPAUL BUS. L.J. 435, 456 (1995) (discussing sacrifices employees must make regarding their self-expression).

137. See, e.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (illustrating the plaintiff's loss of employment due to her desire to groom herself in a manner that broke with stereotypical gender norms).



Statements, in the form of symbols, are made every day through our clothing and other conduct without the need to exchange words.<sup>138</sup> And this idea of symbols as speech is not foreign to our jurisprudence:

We live in a culture of symbols. We speak not only through our words but through symbolic gestures — our acts, our religious symbols, and our associations. What we do, what we wear, how we worship, and with whom we associate are all deeply symbolic aspects of our cultural life. . . . What does it *mean* to burn a draft card or a cross, to sleep in the park, or to dance in the nude?<sup>139</sup>

Symbolic speech may take many forms. Over time, the Supreme Court has explored whether the use of crosses,<sup>140</sup> flags,<sup>141</sup> draft cards,<sup>142</sup> and even the wearing of armbands constitutes protected symbolic speech.<sup>143</sup> Although not all conduct is considered protected speech,<sup>144</sup> our jurisprudence has generally recognized the importance of protecting certain types of symbolic conduct in addition to traditional pure speech.<sup>145</sup>

The Court best defined when this type of symbolic conduct is considered protected speech in *Spence v. Washington*.<sup>146</sup> In *Spence* the Court recognized that when conduct is “a pointed expression” as opposed to “mindless nihilism” it may be protected under the First Amendment.<sup>147</sup> “[U]nder this approach, conduct is analyzed as speech under the First Amendment if, first, there is the intent to convey a specific message and, second, there is a substantial likelihood that the

138. Timothy Zick, *Cross-Burning, Cockfighting and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM & MARY L. REV. 2261, 2263 (2004).

139. *Id.* at 2263 (footnote omitted).

140. *Virginia v. Black*, 538 U.S. 343 (2003) (discussing the extent to which a state may infringe upon a person's First Amendment right to burn a cross).

141. *Spence v. Washington*, 418 U.S. 405 (1974); *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 627 (1943) (quoting the West Virginia Board of Education resolution recognizing that the flag was a “symbol of the Nation's power” and prestige and an “emblem of freedom”).

142. *United States v. O'Brien*, 391 U.S. 367 (1968) (noting that although burning a draft card may constitute symbolic speech, the government had an interest in regulating such action that was not related to the suppression of speech).

143. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that wearing an armband, which does not disrupt school activities, is protected by the First Amendment).

144. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1026 (2nd ed. 2002) (recognizing that not every action that conveys a meaning is necessarily protected under the First Amendment).

145. *Id.*

146. *Spence*, 418 U.S. at 410; *see also* CHERMERINSKY, *supra* note 144, at 1027 (discussing symbolic speech that communicates a protected message).

147. *Spence*, 418 U.S. at 410.

message would be understood by those receiving it.”<sup>148</sup> Body protest still faces some challenges under symbolic speech analysis, however.

Although in *Virginia v. Black* the Court specifically conceded that it could not disregard that certain objects like the cross hold cultural significance,<sup>149</sup> courts have been reluctant to extend protection to body expressions, as has been evident in the nude cases.<sup>150</sup> The courts limited their analysis in these cases to, first, interpreting the body as conveying an erotic message, and second, balancing the individual’s right against the state’s interest in controlling immorality.<sup>151</sup> In such balancing tests, the Court has often determined that the erotic expression in these cases does not outweigh the state’s interest in regulating immorality or alleged crime.<sup>152</sup> “The Court has been particularly wary of interpreting any message nude dancing — the striptease — may communicate. The Court has held that dance itself, even where it occurs in a dance hall, is not necessarily protected speech.”<sup>153</sup> Had the Court interpreted the use of the female body as protected speech, the legislative and judicial bodies would then have the burden of enacting and upholding laws to protect such speech.

Limiting the interpretation of the use of female body to erotic expression excludes all other potential interpretations.<sup>154</sup> Although any discussion of body politics must acknowledge the work of some feminist scholars in demonstrating agency through women’s use of their bodies in the areas of pornography and prostitution,<sup>155</sup> more traditional women may use their bodies to communicate a message as well. Furthermore, arguing for the recognition of female body protest as protected speech, of course, does not negate the fact that body

148. CHEMERINSKY, *supra* note 144, at 1027.

149. See 538 U.S. 343, 352-57 (2003) (discussing the evolution of cross-burning in the United States).

150. See *Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 565 (1991) (reiterating the Court’s opinion that the act of dancing nude only necessitated the “barest minimum of protected expression”); *Pap’s A.M. v. City of Erie*, 719 A.2d 273, 277 (1999), (involving an analysis of Pennsylvania’s public nudity prohibition in which the majority qualified public nudity to exist only in “the peripheral boundaries of the First Amendment protection”); see also *Dallas v. Stanglin*, 490 U.S. 19, 27 (1989) (showing the Court’s reluctance to protect recreational dancing as a form of expression).

151. See *Barnes*, 501 U.S. at 563; see also *Pap’s A.M.*, 529 U.S. at 296 (holding that Pennsylvania was entitled to protect public health and safety by prohibiting public nudity under all circumstances without regards to its message).

152. See *id.*

153. Zick, *supra* note 138, at 2284.

154. See *Pap’s A.M.*, 529 U.S. at 291 (assuming an “erotic message” without exploring other possible interpretations).

155. See generally Celine Parreñas Shimizu, *Queens of Anal, Double, Triple, and the Gang Bang: Producing Asian/American Feminism in Pornography*, 18 YALE J.L. & FEMINISM 235 (presenting the sex-positive feminist ideals of porn stars like Asia Carrera and Annabel Chong).

protest can also be manifested by male bodies, nor does it imply that all uses of the female body should constitute protected speech.<sup>156</sup> This article is meant only to advocate that symbolically expressive conduct by women, whom I refer to as "organic feminists" (everyday women using their bodies as a means for expression) is extremely important. The analysis in this article also suggests that feminist jurisprudence, and American jurisprudence in general, work with these organic feminists to protect female body expression.

My argument demands that courts consider female body expression on a case by case basis to determine whether specific uses of the female body should be protected as a form of expression. This determination is within the purview of the courts.<sup>157</sup> Similar to other forms of expressive conduct, body expression should benefit from constitutional protection and attempts at restricting such expression should be subject to the court's scrutiny.<sup>158</sup> As the courts have done in previous circumstances, i.e., the school desegregation cases or, more recently, in interpreting the meaning of the use of the burning cross, the courts can borrow from sociological and ethnographic studies to decipher the meaning of specific acts using the female body.<sup>159</sup> Ultimately, an interdisciplinary approach provides courts with a strong tool to determine if an individual's conduct is expression.

### *B. The First Amendment and Freedom of Expression*

Expression through manner of dress is a common form of symbolic speech, one that has been powerfully used by individuals of all ages and in diverse contexts.<sup>160</sup> For example, some middle school girls used this form of expression in the nineties:

As an eighth-grader in Ames Middle School in Ames, Iowa, Erin Rollenhagen spoke out against sexism in her school. In response to the Hooters restaurant t-shirts the boys in her school were wearing, which showed an owl whose eyes resembled women's breasts and the words "More than a Mouthful"

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156. See Alexandre, *supra* note 1, at 178-79 (defining body protest); Barbara Sutton, *Naked Protest: Memories of Bodies and Resistance at the World Social Forum*, 8 J. INT'L WOMEN'S STUD. 139, 146 (2007) (discussing "different stakes for male and female naked protests").

157. See, e.g., *Tinker v. Des Moines*, 393 U.S. 503, 505-06 (1969) (discussing student protest through wearing armbands as a form of expression).

158. CHEMERINSKY, *supra* note 144, at 1028 (discussing judicial scrutiny of expressive conduct).

159. For examples of the Supreme Court using sociological and ethnographic studies see *Virginia v. Black*, 538 U.S. 343, 352-57 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); *Brown v. Bd. of Educ.*, 347 U.S. 483, 489-90 n.4 (1954).

160. E.g., *Cohen v. California*, 403 U.S. 15, 16 (1971); *Tinker*, 393 U.S. at 504.

written on the back, Rollenhagen and several friends created their own parody t-shirts, "Cocks — Nothing to Crow About," with the graphic of a rooster on the front. Several of the Ames students were suspended when they refused to turn the "Cocks" shirts inside-out while they are at school. Eventually both shirts were banned from the school, and the suspended students were allowed back to school.<sup>161</sup>

By their manner of dress and expression, these middle school girls were able to bring national attention to the bias and demeaning behavior of their peers.<sup>162</sup> Eventually, the school prevented the boys from wearing the degrading shirts.<sup>163</sup> These middle school girls chose a powerful weapon to counter the misogyny that the young men's shirts projected.<sup>164</sup> They chose to express themselves through their clothing in a manner consistent with the message they wanted to convey.<sup>165</sup> The message in the shirts that they chose to wear was that, at their young age, they could turn misogyny on its head and directly fight it.<sup>166</sup> This manner of expression, the ability to express oneself through speech, conduct, or manner of dress is yet another way of expressing an individual's essence and uniqueness.<sup>167</sup> This right is of the utmost importance<sup>168</sup> and has been recognized as such by our jurisprudence.<sup>169</sup>

Although the Supreme Court has ruled that freedom of speech is not absolute,<sup>170</sup> infringement on expressive conduct is subject to

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161. Iowa Women's Archives, Erin Rollenhagen Papers 1994-1995, <http://sdrclib.uiowa.edu/iwa/findingaids/html/RollenhagenErin.htm> (biography of Erin Rollenhagen) [hereinafter Erin Rollenhagen Papers].

162. NAN STEIN, CLASSROOMS AND COURTROOMS: FACING SEXUAL HARRASSMENT IN K-12 SCHOOLS 76-77 (1999) ("They got their public forum, and about 300 people attended, including the national director of the American Civil Liberties Union . . .").

163. *Id.* at 76.

164. See Erin Rollenhagen Papers, *supra* note 161.

165. STEIN, *supra* note 162, at 76-77.

166. See *id.*

167. Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1405, 1409-10 (1992).

168. *Virginia v. Black*, 538 U.S. 343, 358 (2003)

("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). . . . [T]he First Amendment "ordinarily" denies a State "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.

*Id.* (citations omitted).

169. *Id.* at 360 n.2 ("[I]t is equally true that the First Amendment protects symbolic conduct as well as pure speech.").

170. *Id.* at 358-59 ("The First Amendment permits 'restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that

judicial scrutiny to ensure that a sufficient interest justifies the government action.<sup>171</sup> Several exceptions have been recognized, however, in which speech is not protected by the First Amendment at all.<sup>172</sup> Three such exceptions to the First Amendment's no viewpoint restriction are: 1) obscenity;<sup>173</sup> 2) "true threats,"<sup>174</sup> and 3) advertising with the intent to defraud.<sup>175</sup> The examples of body protest or expression this article advocates do not fall with any of these categories, however. Restrictions of these forms of body expression should be granted First Amendment protection.

These types of bodily expression, like that of the young middle school children, are also exhibited in the public employment context by adults. Employees use these forms of expression as body protest and a form of speech. Like the principal of the middle school children, many employers, uncomfortable with the employee's expression, take disciplinary measures or find pretexts to terminate employment. But the cases involving employers' disagreement over employee grooming choices have been primarily litigated under Title VII's gender discrimination clause.<sup>176</sup> This legal avenue, however, has not been adequate in capturing the full extent of the speech rights at issue.<sup>177</sup> The appellate courts in numerous circuits have reiterated the principle that distinctions based on gender that are deemed to have insignificant effects do not violate Title VII.<sup>178</sup> In following this principle,

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any benefit that may be derived from them is clearly outweighed by the social interest in order and morality'.").

171. CHEMERINSKY, *supra* note 144, at 1028.

172. *E.g.*, *Miller v. California*, 413 U.S. 15, 23 (1973) (stating "that obscene material is unprotected by the First Amendment").

173. *Id.*

174. *Watts v. United States*, 394 U.S. 705, 708 (1969).

175. Henry Cohen, *Freedom of Speech and Press: Exceptions to the First Amendment* 8 (Cong. Research Serv., CRS Report for Congress Order Code 95-815, updated Sept. 9, 2008), available at <http://fpc.state.gov/documents/organization/110843.pdf>.

176. Klare, *supra* note 167, at 1414.

177. *Id.* at 1415 (arguing that Title VII jurisprudence may reinforce stereotypes).

178. *See Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908 (1996) (citing *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977)); *Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976); *Knott v. Mo. Pac. Ry. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Willingham v. Macon Tele. Publ'g Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975); *Baker v. Ca. Land Title Co.*, 507 F.2d 895, 898 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973); *see also Boyce v. Gen. Ry. Signal Co.*, No. 99-CV-6225T, 2004 WL 1574023, at \*2 (D.N.Y. June 10, 2004) (discussing the facts of *Tavora*).

In a case directly on point, *Tavora v. New York Mercantile Exchange*; the Second Circuit held that an employer's policy requiring male, but not female, employees to have short hair did not violate Title VII. In that case, the plaintiff was terminated for failing to comply with a male hair length policy. The plaintiff filed suit alleging that the policy discriminated on the basis of gender because it placed no similar restriction on female employees. The Second

determining what effects are “significant” should result from a more objective and bias-free judicial assessment of what type of employment policy presents a burden.<sup>179</sup> The absence of a bias-free assessment as to the effects of these policies is yet another reason why the First Amendment context would be better to litigate grooming cases in public employment.

Generally, however, litigants in public employment First Amendment cases have failed to showcase grooming choices as symbolic speech.<sup>180</sup> Instead, public employment speech cases have generally, and not very successfully, centered on issues of retaliation for whistleblowing or other statements about the nature of the employment.<sup>181</sup> This tradition, however, does not preclude a more successful use of the First Amendment as a cause of action in expression cases where an employee alleges that an employer infringed on his or her right of expression by sexually profiling his or her manner of dress and behavior.<sup>182</sup>

The current public employment First Amendment cases provide us with a good starting point for developing a standard that would guide the analysis of grooming cases under the First Amendment.<sup>183</sup> Public employment speech, like all speech, does not receive absolute protection.<sup>184</sup> Speech relating to the public usually triggers the highest

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Circuit . . . held that ‘requiring short hair on men and not on women does not violate Title VII.’ . . .

As noted by the court in *Tavora*, every other federal court of appeals that has considered the issue of male hair-length policies has upheld such policy, finding either that the policy did not conflict with the statutory goal of equal employment or that it had only *de minimis effect* on employment opportunities.

*Boyce*, 2004 WL 1574023, at \*2 (citations omitted).

179. Cf. J. Michael McGuinness, *Developments in Public Employee First Amendment and Equal Protection Law*, in SECTION 1983 CIVIL RIGHTS LITIGATION COURSE HANDBOOK (24th Annual, Practising Law Institute 2007) (discussing the “similar and comparable” standard as an objective fact question). Perhaps the significant effect standard should be objective as well.

180. See Joshua Waldman, Note, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1869-72 (1997) (discussing that although the dissent in *Oloff v. East Side Union High School District* recognized that grooming may constitute symbolic speech, an aggregate review of relevant case law reveals that courts are not fully utilizing an in-depth analysis of grooming as a type of symbolic speech).

181. See McGuinness, *supra* note 179, at 132-33, 143-44 (discussing various cases where “whistleblowing” speech was considered protected under the First Amendment).

182. See *id.* at 113, 133 (discussing cases of sexual harassment and whistleblowing as protected speech). With courts applying the First Amendment freedom of expression to sexual harassment and whistleblowing claims, cases of sexual profiling by manner of dress is a logical extension.

183. See *id.* at 105-119 (outlining the reasoning in the more recent First Amendment expression cases for public employees).

184. *Id.* at 164-65.

protection.<sup>185</sup> Thus, employers are far from free to punish employees for making statements about their employment.<sup>186</sup> Still, even when the speech is shown to be of public and not individual concern, a balancing test that weighs the interest of the government against the value of the protected speech tends to strengthen the employer's position.<sup>187</sup> Despite this limitation, the public employment free speech cases provide a hopeful area for showcasing and resolving the issues that result from sexual stereotyping of public employees based on dress and/or conduct. Expanding the consideration of grooming cases under the First Amendment would only be the first step. Each case, of course, would have to be analyzed according to the balancing test created in *Pickering v. Board of Education*.<sup>188</sup>

#### V. RECONCILING FIRST AMENDMENT BASED SEXUAL PROFILING CLAIMS WITH *PICKERING*, *CONNICK*, AND *GARCETTI*

In Supreme Court jurisprudence, courts can discern a clear standard to apply in grooming cases in order to fully protect employees' symbolic speech, while balancing employers' interests. The cases of *Pickering v. Board of Education*,<sup>189</sup> *Connick v. Meyers*,<sup>190</sup> and *Garcetti v. Ceballos*<sup>191</sup> provide a framework for courts to use in examining employees' First Amendment rights in the public employment context. The placement of an employee's grooming choices within free speech jurisprudence would provide enhanced protection to expression through body protest.

Following *Pickering*, the subjective nature of the speech and its truth or falsity should be irrelevant.<sup>192</sup> The threshold question should be "whether the statements, *irrespective of their truth or falsity*, raised a 'matter of public concern.'"<sup>193</sup> In the recent public employment speech cases, the Supreme Court has placed greater restrictions

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185. *Id.* at 94-95 ("The greater the degree of public concern of the issues, the greater the degree of constitutional protection. . . . [S]peech, which merely relates to some isolated personal interest does not relate to a matter of public concern unless the broader consideration of that issue relates to some public interest." (citations omitted)).

186. *Id.* at 94-95.

187. *See id.* at 98-99.

188. 391 U.S. 563 (1968); McGuinness, *supra* note 179, at 98.

189. *Pickering*, 391 U.S. at 563.

190. 461 U.S. 138 (1983).

191. 547 U.S. 410 (2006).

192. *See Pickering*, 391 U.S. at 574-75 & n.6; *Pilkington v. Bevilacqua* 439 F.Supp. 465, 473 ("[T]he state-employer has no greater power to limit the false statements of an employee than the truthful statements unless it can show that the employee's activities impeded the proper performance of his daily duties . . .").

193. *Buschi v. Kirvin*, 775 F.2d 1240, 1248 (4th Cir. 1985).

on the protection accorded to speech in the workplace.<sup>194</sup> Despite these restrictions, however, the First Amendment offers more promise in the analysis of grooming issues than Title VII. Although the courts' deference to public employers' interests have strengthened in the past few years, courts still apply the balancing tests created to deal with these issues.<sup>195</sup> The tests are instrumental because they represent the key to understanding the importance and relevance of the grooming cases.

To make a First Amendment claim alleging a violation of symbolic speech due to sexual profiling based on dress and/or conduct, the standard enunciated in *Pickering* is an important starting point.<sup>196</sup> In *Pickering*, a teacher published a letter that was critical of the school to the editor in a local newspaper.<sup>197</sup> The teacher was subsequently dismissed when the school board determined that the letter had a negative effect on the school operations.<sup>198</sup> In *Pickering*, the Court developed a balancing test to deal with First Amendment claims brought by public employees.<sup>199</sup> The Court conceded that these types of cases are so diverse that a general standard would not be appropriate.<sup>200</sup> It is significant that the *Pickering* balancing test does not involve a general standard, but rather gives the trier of fact more flexibility to analyze the relevant issues based on the facts at hand.<sup>201</sup> Furthermore, the Court held that employees in the public sector "may not be punished for making statements on matters of public concern unless it is established by the employer that the employee's statements caused substantial disruption to or interference with the performance of his own duties or with the proper functioning of the employing public agency."<sup>202</sup> Under this test, a plaintiff bringing a First Amendment claim alleging infringement due to sexually stereotypical restrictions would have to first show that the nature of the speech is of public concern, not simply of individual importance.<sup>203</sup> It is then incumbent upon the employer to show that the particular expression in question presents a "disruption" to, or "interference" with the administration of the agency.<sup>204</sup>

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194. See McGuinness, *supra* note 179, at 104-05.

195. *Id.* at 98; see, e.g., *Pickering*, 391 U.S. at 575; *Garcetti* 457 U.S. 421-22.

196. See *Pickering*, 391 U.S. at 574; McGuinness, *supra* note 179, at 98-99.

197. *Pickering*, 391 U.S. at 564.

198. *Id.*

199. McGuinness, *supra* note 179, at 138.

200. *Pickering*, 391 U.S. at 569.

201. *Id.* ("Because of the enormous variety of fact situations . . . we do not deem it either appropriate or feasible to attempt to lay down a general standard . . .").

202. McGuinness, *supra* note 179, at 98-99.

203. *Id.* at 95, 98.

204. *Id.* at 98-99.



The *Pickering* test was refined in *Mt. Healthy City School District Board of Education v. Doyle* when the Supreme Court enunciated that after an employee demonstrates that his or her speech is constitutionally protected speech and was the chief motivating factor for the employer's adverse decision, the burden shifts to the employer to "show[] by a preponderance of evidence that it would have reached the same decision . . . even in the absence of the" particular speech.<sup>205</sup>

Under this test, Marcia from the previously discussed hypothetical would demonstrate how her symbolic speech — her choice of clothing — relates to the greater public issue of promoting the elimination of gender bias and sexual stereotypes in the workplace and that her choice of expression was the exact reason why her employment was terminated. The employer would in turn have to show that it would have terminated Marcia even if she had not engaged in that particular expression.

The Supreme Court subsequently further narrowed *Pickering* by limiting the matters that could be deemed to be of "public concern."<sup>206</sup> Furthermore, *Connick v. Meyers* lessened the burden on the public employer.<sup>207</sup> In *Connick*, an assistant district attorney circulated a questionnaire to seek the support of her co-workers against an impending transfer.<sup>208</sup> The Supreme Court reversed the district court and circuit court decisions, which had found that her conduct was protected.<sup>209</sup> Contrary to the lower courts, the Supreme Court found that the employee's conduct presented a substantial interference.

[The Court] observed that "government offices could not function if every employment decision became a constitutional matter." . . .

The Court in *Connick* concluded that only one question contained in the employee survey, which dealt with the pressure to work in political campaigns on behalf of employer supported candidates, was [a] matter of public concern. Applying *Pickering*, the employer was given an opportunity to demonstrate that the employee's activity interfered with "the interest of the state, as an employer, in promoting the efficiency of the public service it performs through it [sic] employees." The Court found that the burden placed upon the employer by the District Court was unduly onerous.<sup>210</sup>

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205. 429 U.S. 274, 287 (1977).

206. See McGuinness, *supra* note 179, at 126-32 (describing the different factors that impact a court determination of protected or unprotected speech).

207. See *Connick v. Meyers*, 461 U.S. 138, 147 (1983); McGuinness, *supra* note 179, at 101.

208. *Connick*, 461 U.S. at 138.

209. *Id.* at 138-39.

210. McGuinness, *supra* note 179, at 100-01.

The Court also found “that the district court’s lack of ‘deference to the employer’s judgment’ was inappropriate.”<sup>211</sup> “[T]he state employer need not ‘clearly demonstrate’ that the speech ‘substantially interfered’ with office efficiency, but rather that the employer possessed a *reasonable belief* thereof.”<sup>212</sup>

In order to survive *Connick*, Marcia would have to demonstrate that her grooming choice is a form of expression that makes a statement of inherent public concern that does not substantially interfere with the workplace. Her statement is of public concern because public employment should be one of the first sites where gender stereotypes are dismantled. Marcia’s form of expression will help destroy such stereotypes in the public sphere as well as provide a model for the rest of society. Thus, courts should seriously analyze the types of grooming choices they protect, which will ultimately dismantle societal stereotypes, paying particular attention to their potential for making statements that are of compelling public concern.<sup>213</sup> Marcia still, however, has to overcome the added hurdles imposed by *Garcetti v. Ceballos*.<sup>214</sup>

*Garcetti*, the precursor to the most recent line of cases, further restricted the scope of an employee’s freedom of speech in the employment context by ruling that employees do not enjoy First Amendment protection when their speech is made in the course of their official duties.<sup>215</sup> Ceballos worked as a deputy district attorney for the Los Angeles County District Attorney’s office.<sup>216</sup> During his employment he became concerned about a criminal case and began to actively recommend its dismissal.<sup>217</sup> Shortly thereafter, Ceballos began experiencing adverse treatment at his work.<sup>218</sup> He sued, alleging that his employers took retaliatory actions in response to his statements.<sup>219</sup> The Supreme Court first reiterated the *Pickering* test<sup>220</sup> and then stated:

[T]he controlling factor in Ceballos’ case is that his expressions were made pursuant to his duties as a calendar deputy. . . .

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211. Jaime Haggard, Casenote, *Constitutional Law — First Amendment — First Amendment Does Not Confer Liability on Government Employer for Discipline Resulting from Public Employee’s Speech Made Pursuant Solely to Employment Duties*, 37 CUMB. L. REV. 339, 349 (2007).

212. *Id.*

213. See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (stating that matters of public concern should be afforded First Amendment protection).

214. 457 U.S. 410, 421 (2006).

215. *Id.* at 421-22.

216. *Id.* at 413.

217. *Id.* at 414.

218. *Id.* at 415.

219. *Id.*

220. *Id.* at 417.

We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. . . .<sup>221</sup>

Thus, an employee under *Garcetti* would receive more First Amendment protections when speaking as a private citizen than when speaking within the scope of his or her employment.<sup>222</sup> Even this seemingly extreme restriction on speech rights, however, only diminishes protection when the speech occurs in the context of “official duties.”<sup>223</sup> The mere fact of being in the place of employment will generally not be sufficient.<sup>224</sup> But if, as with *Garcetti*, the speech in question occurs in official duties, such as in an official memorandum relating to the employee’s duties, then the employee’s speech right will likely be eroded.<sup>225</sup>

Despite this erosion, a claim like Marcia’s would still survive *Garcetti*. First, her form of expression is independent of the application of her official duties. Her expression, in fact, occurs as a private citizen concerned about gender bias, including gender bias in the public employment context. Second, her manner of dress is not closely related to a meeting, a memorandum, or any other official aspect of her employment. Furthermore, Marcia’s expression is worthy of the utmost protection under *Pickering* and *Garcetti* because her speech is both of public concern and not substantially disruptive to her employer’s operations.

## VI. LEARNING BY ANALOGY: THE SEXUAL ORIENTATION CASES

The sexual orientation cases brought under various provisions of the Bill of Rights might provide insight for the future of grooming cases litigated under the First Amendment’s speech clause. In our jurisprudence, courts have traditionally relied on disturbing stereotypes about gays and lesbians — stereotypes that are as ingrained and destructive as the traditional gender stereotypes associated with

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221. *Id.* at 421-22 (citations omitted).

222. *See id.* at 421.

223. *Id.*

224. For an example of what constitutes “official duties” see e.g., *Boykin v. City of Baton Rouge/Parish of E. Baton Rouge*, 439 F. Supp.2d 605, 609 (D. La. 2006) (discussing the drafting of an official report).

225. *E.g.*, *Haynes v. City of Circleville, Ohio*, 474 F.3d 357, 364 (6th Cir. 2007); *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1329, 1331 (10th Cir. 2007); *Green v. Bd. of County Comm’rs*, 472 F.3d 794, 798, 801 (10th Cir. 2007); *Battle v. Bd. of Regents for Ga.*, 468 F.3d 755, 761 (11th Cir. 2006).

women.<sup>226</sup> In general, treatment of cases involving the rights of homosexuals has been very conservative, especially in the employment context. For example, courts have repeatedly given particular deference to an employer's assertion that the hiring of a gay or lesbian employee would cause substantial disturbance to the workplace.<sup>227</sup> In *Childers v. Dallas Police Dept.*, where the plaintiff "was not hired for a position in the city police department evidence room, in part, because of his gay activities," the court found no violation of the First Amendment because the employer demonstrated "that its refusal to hire the employee was justified and necessary to prevent material and substantial interference with the employee's performance of his duties and the efficient operation of the government."<sup>228</sup>

But even in light of such conservative treatment, judicial progress has been made in the realm of constitutional protections for homosexuals.<sup>229</sup> A review of Supreme Court jurisprudence illustrates an initial hostile reaction toward homosexual rights in *Bowers v. Hardwick*,<sup>230</sup> which was later progressed by decisions such as *Romer*

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226. Compare Robin Cheryl Miller, Annotation, *Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian or Bisexual Orientation or Conduct*, 96 A.L.R.5th 391, 407 (2002) (stating that "[e]mployment discrimination against gay, lesbian, and bisexual persons has a long history of acceptance"), with Geraldine A. Del Prado, *The United Nations and the Promotion and Protection of the Rights of Women: How Well Has the Organization Fulfilled its Responsibility?*, 2 WM. & MARY J. WOMEN & L. 51, 60 (1995) (stating that "[s]tereotypes about traditional gender roles . . . play a large part in inhibiting the advancement of women").

227. See Miller, *supra* note 226, at 441-42 for a list of cases in which the substantial disturbance rationale is upheld by the courts.

228. *Id.* at 449 (citing *Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 148 (D. Tex. 1981)).

229. Note that a smaller scale advancement of gay civil rights may be found in the military context. For examples of such expansion, see *Matthews v. Marsh*, 755 F.2d 182 (1st Cir. 1985) and *benShalom v. Sec'y of Army*, 489 F. Supp. 964 (D. Wis. 1980). The decisions in *Matthews* and *benShalom* depart from the traditional conservative treatment of cases involving the rights of homosexuals in the military. In *benShalom* it was held that the military's discharge of the plaintiff based on an expressed interest in homosexuality without evidence of actual homosexual conduct violated her First Amendment rights. See *benShalom*, 489 F. Supp. at 974. In *Matthews*, although the 1st Circuit remanded the case based on the plaintiff's later admission that she had engaged in homosexual behavior, the district court found that "Matthews' statement about her sexual preferences and her status as a homosexual both fall within the general ambit of first amendment rights . . ." See *Matthews*, 755 F.2d at 183-84. Furthermore, although the Clinton administration's later enactment of the "Don't Ask, Don't Tell" policy proved to be a step back for gay rights in the military, many in the legal community speculate that this policy will be repealed by President Obama. See 10 U.S.C. § 654 (2008) (codified version of "Don't Ask, Don't Tell" policy); Rowan Scarborough, *Obama to Delay 'Don't Ask, Don't Tell' Repeal*, WASH. TIMES, Nov. 21, 2009, <http://www.washingtontimes.com/news/2008/nov/21/obama-to-delay-repeal-of-dont-ask-dont-tell/>.

230. See generally, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding state sodomy statutes as permissible under the Constitution).

*v. Evans*<sup>231</sup> and *Lawrence v. Texas*<sup>232</sup> — cases that serve as hallmarks for the advancement of gay civil rights. In *Romer*, the Supreme Court found that a statewide referendum prohibiting all forms of government action to protect the rights of homosexuals was unconstitutional under the Equal Protection Clause.<sup>233</sup> And more recently, in *Lawrence*, the Court found that a state statute criminalizing private, consensual, sodomy between homosexuals also violated the Equal Protection Clause — in contrast to its holding in *Bowers* which upheld such state sodomy bans.<sup>234</sup> Notably, to justify the overruling of *Bowers*, the *Lawrence* Court enumerated that the legal history and tradition surrounding a particular right is merely a starting point rather than an ending point as to the extent of protection that right deserves under the Constitution.<sup>235</sup> In light of this principle regarding the progression of individual protections, the Court's expansion of gay civil rights<sup>236</sup> as well as the judicial recognition that sexual stereotyping is actionable under Title VII,<sup>237</sup> are thus good omens for the future viability and expansion of rights for grooming cases under the First Amendment.

### CONCLUSION

Grooming cases are extremely hard to litigate because sexual profiling is an ingrained and significant practice in our society. Although the letter of the law advocates for formal gender equality, societal stereotypes have undermined many would-be protections for employees in the Title VII context. Still, there is no denying our constitutional jurisprudence's reverence for the protection of important personal rights. Although we have seen that courts often fall prey to enforcing gender stereotypes, the contradictory sex stereotyping cases and the Supreme Court sexual orientation cases showcase a burgeoning commitment to eradicating gender bias. Through their decisions, courts have actually acknowledged the limitations these stereotypes impose on plaintiffs and society,<sup>238</sup> truly highlighting

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231. *Romer v. Evans*, 517 U.S. 620, 620, 632 (1996) (striking down a state-wide Colorado referendum that “precluded all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their ‘homosexual, lesbian or bisexual orientation, conduct, practices or relationships’”).

232. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (recognizing a constitutional protection for consensual sex acts between homosexuals in the privacy of the home).

233. *Romer*, 517 U.S. at 632.

234. *Lawrence*, 539 U.S. at 584-85.

235. *Id.* at 571-72.

236. See *supra* notes 229-34 and accompanying text.

237. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51, 258 (1989).

238. See *Miller*, *supra* note 226, at 425 (discussing societal myths and false stereotypes).

the full potential of our individual rights jurisprudence. Thus, it is worthwhile to advocate for the analysis of gender-based employment decisions under the First Amendment whenever appropriate.

The possibility of eradicating gender bias using the First Amendment's right to public employment speech that is a "public concern," as well as the expansion of gay civil rights by the Supreme Court, should strengthen our belief in the redemptive potential of the Bill of Rights. Furthermore, it should reaffirm the viability of attacking gender bias on all fronts so that, eventually, the fight against one form of gender restriction can help arm us to fight against others.