

THE PEAHEN’S TALE, OR DRESSING OUR PARTS AT WORK

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*[W]hen the males and females of any animal have the same general habits of life, but differ in structure, colour, or ornament, such differences have been mainly caused by sexual selection*¹

*Our settled law in this circuit, however, does not support Jespersen’s position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a prima facie case.*²

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1. CHARLES DARWIN, *THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION* 137–38 (Penguin Classics 1985) (1859).

2. *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1109 (9th Cir. 2006) (en banc).

I. INTRODUCTION: DRESSING THE PART

Social norms regarding body modification, ornamentation, and covering exist in every known human society.³ And in every known human society, such norms include gender norms: individuals are expected to adhere to certain sex-differentiated dress and grooming codes.⁴ Gender differences in dress norms, in other words, appear to be universal among human societies.⁵

Likewise, sexual dimorphisms—differences in form between males and females of the same species—are a common feature of animal species. Such differences have been extensively studied by evolutionary biologists and are widely understood as adaptations caused by sexual selection. According to the most common understanding, males “dress up” in order to be chosen by picky females.⁶ Thus, in the most famous example, the peacock evolved his magnificent tail because peahens disproportionately chose to mate with fancy-tailed males. And the peahen’s tail is plain and drab because—to put it bluntly—the males are sufficiently promiscuous and indiscriminate that she need not waste precious biological resources making and carting around such an otherwise useless accessory.⁷

In humans, dress, broadly defined, may be viewed as in part driven by similar signaling purposes that are ultimately⁸ tied to sexual selection pressures. Human dress can serve to enhance, hide, minimize, distort, highlight, or reveal physical, mental or emotional features that are potentially relevant to others in the social context. Dress therefore serves various signaling and expressive functions⁹ in addition to its more mundane purposes of bodily protection and

3. See Joan Entwistle, *The Dressed Body*, in *BODY DRESSING (DRESS, BODY, CULTURE)* 33 (Joanne Entwistle & Elizabeth Wilson eds., Berg 2001) (“Dress is a basic fact of social life and this, according to anthropologists, is true of all human cultures that we know about: all cultures ‘dress’ the body in some way, be it through clothing, tattooing, cosmetics or other forms of body painting.”).

4. See Joanne B. Eicher & Mary Ellen Roach-Higgins, *Definition and Classification of Dress: Implications for Analysis of Gender Roles*, in *DRESS AND GENDER: MAKING AND MEANING* 17 (Ruth Barnes & Joanne B. Eicher eds., Berg 1993) (“Each society, or subgroup of a society, has its own rules regarding which body modifications or supplements should declare gender roles; to our knowledge, all make their declarations.”); RUTH P. RUBINSTEIN, *DRESS CODES: MEANINGS AND MESSAGES IN AMERICAN CULTURE* 103–04 (Westview Press 2d ed. 2001) (citing J. C. FLUGEL, *THE PSYCHOLOGY OF CLOTHES* 25–30 (International Universities Press 1966)).

5. Cf. DONALD E. BROWN, *HUMAN UNIVERSALS* 130–41 (Temple Univ. Press 1991) (compiling a list of traits of behavior and language that have been noted by ethnographers to exist in every known human society). While “body adornment” is included in Professor Brown’s list of “human universals,” sex or gender distinctions in dress are not. *Id.* Scholars of dress, however, do view such distinctions as universal.

6. See discussion *infra* Part III.

7. For a summary of the various theories used to explain such fancy ornaments as the peacock’s tail, see *infra* notes 114–23 and accompanying text.

8. In evolutionary biology, ultimate cause is distinguished from proximate cause. Ultimate cause refers to the evolutionary reason that a particular behavior or trait was adaptive; proximate causes, in contrast, are the more immediate triggers that lead to the behavior or trait being expressed under particular circumstances. See Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117, 1128 (1997).

9. Though it is obvious that dress serves these functions, it is not always obvious exactly what it is that particular dress is meant to signal or express. Most evolutionary psychologists assume that many human body modifications are meant to signal (truly or falsely) those qualities that, in theory,

warmth.¹⁰ Furthermore, these signals are not singular; rather, they are discursive and multiple. For example, a business suit on a man might signal status and self-restraint;¹¹ wearing a business suit to court conveys a willingness to conform to social dress norms;¹² wearing a business suit to the beach signals something altogether different;¹³ a woman in an identical men's suit sends yet another set of signals entirely.¹⁴ Therefore, while the original dress feature might signal one or more of a number of behavioral or social characteristics,¹⁵ once that signal becomes embedded in the web of social dress norms, adherence to or rejection of the signal carries an additional set of signals that bear on traits related to social conformity, risk-aversion, rebelliousness, and the like.¹⁶

are valued in the particular mating market. Most broadly, these are youth, fertility, and in some cases sexual availability or chastity in females, and wealth and status in males. See generally DAVID M. BUSS, *THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING* 19–72 (Basic Books rev. ed. 2003) [hereinafter BUSS, *EVOLUTION OF DESIRE*]; David M. Buss, *Sex Differences in Human Mate Preferences: Evolutionary Hypotheses Tested in 37 Cultures*, 12 *BEHAV. & BRAIN SCI.* 1, 2, 12 (1989) [hereinafter Buss, *Sex Differences*]. For a discussion of the symbolic meanings of various modes of dress, see generally RUBINSTEIN *supra* note 4.

10. Scholars have posited three theories for the origin of clothing: the modesty theory, the protection theory, and the adornment theory. See BUSS, *EVOLUTION OF DESIRE supra* note 9, at 20–33. Ethnographic research suggests that protection is unlikely to have been the original purpose of clothing because there exist societies in harsh climates where persons do not wear nor appear to need any bodily covering. However, once clothing is worn, the natural body defenses diminish and people become dependent on the clothing. See *id.* at 22–24. However, even in those societies devoid of clothing, the people wear some form of ornamentation or alter their bodies in some way. See *id.* at 20 (“while there are many societies in which the people are unclothed, there are no societies in which the people are unadorned”).

11. The classic male suit minimizes bodily features and thus seems the opposite of the peacock's tail. See RUBINSTEIN, *supra* note 4, at 86–88 (“The male suit in its form-following style denied the body; in its somber color it repudiated public expression of feelings.”).

12. *Cf.* *Devine v. Lonschein*, 621 F. Supp. 894 (S.D.N.Y. 1985) (upholding judge's policy requiring male attorneys to wear ties in the courtroom because policy appropriately sought to maintain decorum); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 222 (2d Cir. 2005) (finding that an employee's violation of the haircut policy was a legitimate basis for her firing, even after she took steps to comply with the policy, because “violating the rule [was] a form of insubordination”).

13. See ALISON LURIE, *THE LANGUAGE OF CLOTHES* 13 (Random House 1981) (“[T]he two-piece tan business suit and boldly striped shirt and tie that signify energy and determination in the office will have quite another resonance at a funeral or picnic.”).

14. See MALCOLM BARNARD, *FASHION AS COMMUNICATION* 171 (Routledge 1996) (“Non-verbal signs such as items of fashion and clothing, like linguistic signs, then, take their meanings from the context, or syntagm, in which they appear.”).

15. For example, in the Laboya culture of eastern Indonesia, adult individuals always carry a purse that contains ingredients for chewing betel, a plant that is integral to their social relationships. This betel purse reveals, at a glance, its owner's sex, marital status, age, and social status. See Danielle C. Geirnaert, *Purse-Proud: Of Betel and Areca Nut Bags in Laboya (West Sumba, Eastern Indonesia)*, in *DRESS AND GENDER: MAKING AND MEANING* 56–70 (Ruth Barnes & Joanne B. Eicher eds., Berg 1992).

16. See RUBINSTEIN, *supra* note 4, at 3 (“Most social scientists . . . recognize that a person's attire can indicate either conformity or resistance to socially defined expectations for behavior.”); see also *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1087 (5th Cir. 1975) (en banc) (noting that the employer “believed that the entire business community it served—and depended upon for business success—associated long hair on men with the counter-culture types”). Joan Roughgarden, an evolutionary biologist at Stanford, has recently argued that male animal ornamentation similarly might have evolved to serve a “social inclusionary” function rather than through sexual selection.

Though social norms regarding sex differences in dress have lost much of their force in recent years as so-called “unisex” fashions and gender cross-over in certain styles of dress have become fairly common, there still exist a number of dress conventions that are identifiably “male” and “female” in American culture. Thus, for example, skirts and dresses continue to be strongly coded as female,¹⁷ whereas ties are strongly coded as male.¹⁸ When such sex-specific social conventions are not only performed in the workplace but are actually mandated by employers, difficult doctrinal and normative issues arise.

Courts have for years addressed challenges to employer dress codes that differentiate between men and women in conformance with widely-accepted social dress norms.¹⁹ The outcomes of these cases, along with their reasoning and analysis, are increasingly difficult to reconcile across the spectrum of situations in which the issue arises. In rationalizing their holdings, courts have engaged in analytic contortionism of the highest degree. However, there may ultimately be no logical way to reconcile decisions that prohibit employers from requiring women to wear revealing outfits and others that permit employers to require them to wear makeup,²⁰ or decisions that prohibit penalizing a woman for being insufficiently feminine and others that permit penalizing a man for being insufficiently masculine.²¹ In addition, the increasing judicial acceptance of the sex stereotyping theory of sex discrimination under Title VII is in substantial tension with recent cases that insist that sex-differentiated dress and grooming

See JOAN ROUGHGARDEN, *EVOLUTION'S RAINBOW: DIVERSITY, GENDER, AND SEXUALITY IN NATURE AND PEOPLE* 175–81 (Univ. of Cal. Press 2004).

17. This particular item of dress appears to be very stubbornly resistant to attempts to broaden its appeal to men. Some avant-garde fashion designers, most notably Jean-Paul Gaultier, have repeatedly tried to market dresses and skirts for men with very minimal success. See DIANA CRANE, *FASHION AND ITS SOCIAL AGENDAS: CLASS, GENDER, AND IDENTITY IN CLOTHING* 195, 201 n.21 (The University of Chicago Press 2000); BARNARD, *supra* note 14, at 112.

18. See, e.g., RUBINSTEIN, *supra* note 4, at 51–52 (“An essential element of male dress that is symbolic of holding in one’s feelings is the necktie or cloth”); see also Susan Kaiser, *Minding Appearances: Style, Truth, and Subjectivity*, in *BODY DRESSING*, *supra* note 3, at 88 (assuming that ties are strongly coded male by relating the story of “a feminist professor [who] describes how she wears ‘pervertized ties’ with many of her outfits to undermine dominant masculinity”).

19. These cases arise primarily under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000), 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. See, e.g., *Lockhart v. Louisiana-Pacific Corp.*, 795 P.2d 602 (Ore. Ct. App. 1990); *Zalewska v. County of Sullivan*, 316 F.3d 314 (2d Cir. 2003).

20. Compare, e.g., *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981) (holding defendant employer’s policy requiring female lobby attendants to wear a sexually provocative uniform violated Title VII) with *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc) (holding that defendant employer’s policy requiring only female bartenders to wear makeup did not violate Title VII).

21. Compare, e.g., *Price Waterhouse v. Hopkins* 490 U.S. 228 (1989), with *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978); see Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (arguing that, despite the fact that the cases squarely considering the issue of discrimination against effeminate males were decided pre-Price Waterhouse, it remains doubtful whether an effeminate man in the typical case would prevail in a Title VII challenge to discrimination against him on the basis of his effeminate behavior).

requirements that “merely”²² conform to existing social gender norms do not amount to impermissible sex discrimination.

Most courts and scholars who have addressed this tension have attempted to draw lines such that some sex distinctions in dress requirements survive legal scrutiny while others fail. These approaches highlight various aspects of sex-differentiated dress rules that are seen as especially relevant or problematic. Whether the focus is upon subordination, power differentials, autonomy, freedom of expression, mutability, or the simple unfairness of being placed in an impossible Catch-22,²³ these various approaches bring into sharp relief the existence of the many strands that have become entangled in the employee dress cases.

This article proposes an analysis of employer dress codes that draws its inspiration from an examination of the reasons for sex distinctions in “dress” among nonhuman animals. Part II describes the contradictions inherent in the various lines of dress and grooming cases. This part teases apart the various doctrinal and theoretical strands to show that there are several separate elements in play, sometimes operating at cross-purposes. Part III explains the theory of sexual selection, which accounts for the striking dimorphisms in coloration, feathers, weaponry, and ornamentation among nonhuman animals. As this discussion reveals, there is a strong element of female choice and female power that is directly correlated with the type and extent of sexual dimorphisms in animals.

Part IV draws upon insights from the study of animal dress, along with the anti-caste view of Title VII, to propose a partial solution to the problem presented by the Title VII dress cases. Drawing a line that could be applied easily by courts, this Part proposes that any employer policy that requires females to be more highly decorated than males—including policies that require women to wear makeup or to wear clothes that reveal more of their bodies than the corresponding male dress requirement²⁴—should be deemed to run afoul of Title VII’s prohibition of discrimination because of sex. It further argues that the analogy to animal dress implies that there is no such thing as a sex-specific dress code that is *de minimus*²⁵ or that equally burdens males and females.²⁶

22. I place this word in quotation marks to emphasize that it is the courts, and not I, who find objections to these employer sex distinctions trivial. *See, e.g., Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907 (2d Cir. 1996) (characterizing male plaintiff’s claim that defendant-employer’s hair-length policy violated Title VII because it prohibited long hair for men but not women as an argument that “Title VII applies to any employment policy with any difference between men and women, no matter how trivial”). As I argue in Part IV.A, *infra*, sex differences in dress are far from trivial.

23. *See Price Waterhouse*, 490 U.S. at 251 (“An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.”).

24. In determining which items of dress fall under this rubric, I draw on both sexual selection and sociological accounts of dress and gender. *See discussion infra* Parts III and VI.

25. Many courts state that dress and grooming requirements are trivial or *de minimus* under Title VII. *See, e.g., Tavora*, 101 F.3d at 908; *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1336 (D.C. Cir. 1973); *Pacinka v. Fareway Stores, Inc.*, 672 N.W. 2d 800, 804 (Iowa 2003).

By offering sexual selection theory as a lens through which to examine dress codes in the workplace, I do not mean to suggest that it answers every question nor that it provides normative answers²⁷ simply based on analogy to evolutionary explanations of ornamentation and sexual dimorphism. I do not argue, for example, that because there exist sexual dimorphisms in dress in nonhuman animals, that such differences are “natural” and therefore acceptable or desirable.²⁸ Nor do I wish to suggest that, because there may be some biological or evolutionary basis for sexual dimorphisms in human social dress norms, that employee grooming choices should for that reason be granted greater protection under Title VII.²⁹ However, an evolutionary perspective that

26. See, e.g., *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000) (articulating “unequal burdens” test); *Bedker v. Domino’s Pizza*, 195 Mich. App. 725, 729 (Ct. App. 1992) (applying unequal burdens test); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 756 (9th Cir. 1977).

27. Clearly, a biological, genetic, or evolutionary explanation of human behavior cannot by itself answer prescriptive questions about the desirability or moral status of the behavior. Though the so-called “naturalistic fallacy” has resulted in much heat, most scholars who draw on evolutionary theory in legal analysis are careful to distinguish description from prescription. See, e.g., Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 SW. L.J. 617, 654 (1984) (“A recognition that certain behavioral sex differences have their origins in biology does not in any way answer the question of whether the differences are good and to be fostered by society, or bad and to be suppressed.”); John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439, 451–52 (2003); Julie A. Seaman, *Form and (Dys)Function in Sexual Harassment Law: Biology, Culture, and the Spandrels of Title VII*, 37 ARIZ. ST. L.J. 321, 361 (2005). As John Stuart Mill so astutely put it in criticizing the tendency to deduce moral “ought” from natural “is”: “nature impales men, breaks them as if on the wheel, casts them to be devoured by wild beasts, burns them to death, crushes them with stones like the first Christian martyr, starves them with hunger, freezes them with cold, poisons them by the quick or slow venom of her exhalations, and has hundreds of other hideous deaths in reserve.” 10 COLLECTED WORKS OF JOHN STUART MILL 385 (J.M. Robson ed., 1969), quoted in ROBERT WRIGHT, *THE MORAL ANIMAL: WHY WE ARE THE WAY WE ARE* 331 (Pantheon 1994).

28. Indeed, the comparison to nonhuman animals is at best analogical or perhaps even metaphorical, since most nonhuman animal “dress” is biological and therefore not under the animal’s behavioral control, whereas human dress is by definition something that we humans add to or deliberately change on our biological bodies. With respect to nonhuman animals, this distinction breaks down at the margins. Some species do in fact exhibit behaviors that alter their “dress,” broadly defined. For example, bower birds in Australia build and decorate elaborate structures, called bowers, which females inspect before choosing a male with which to mate. The satin bower bird, “decorates his display court with blue, yellow and white objects including feathers, flowers, leaves, snail shells, and, where available, plastic and paper, over a background of yellow straw.” Gerald Borgia, *Why Do Bower Birds Build Bowders?*, 83 AMER. SCIENTIST 542, 544 (1995). When a female chooses to enter the bower, the male puts on an elaborate mating display, which culminates in his “puff[ing] up his feathers, hold[ing] his wings at his side, fac[ing] the female with a small decoration—usually a yellow leaf—in his mouth and perform[ing] a series of knee bends.” *Id.* In this example, the male bower bird is in a sense decorating and enhancing his immediate physical environment so as to appear more attractive to females. The existence of this and other examples of courting behaviors that encompass decorative displays perhaps demonstrates the artificiality of the distinction between biology on the one hand and environment, behavior, and culture on the other. Cf. Owen D. Jones, *Time-Shifted Rationality and the Law of Law’s Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141, 1168 (2001) (“Arguing about whether or not a given behavior is the product of genes or culture is (as is often noted) like arguing about whether the area of a rectangle is the product of its length or its width.”).

29. This factor lies at the heart of one of the primary rationales by which courts have rejected sex (and race) discrimination challenges to employer grooming requirements. Because dress is under the individual’s control and is viewed as a matter of choice, courts tend to distinguish discrimination

considers the ultimate reasons³⁰ for sex differences in dress does help to distinguish those dress codes that should be permitted from those that should not, given the normative goals as derived from the statutory language and

based on dress from discrimination based on such immutable characteristics as race and sex. Several courts have articulated a test by which such requirements are permissible unless they target either an immutable trait or a constitutionally protected fundamental right. *See Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385 (11th Cir. 1998) (hairstyle is not an immutable characteristic); *Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349 (4th Cir. 1976); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (hair length is neither immutable nor a fundamental right); *Wiseley v. Harrah's Entm't, Inc.*, 2004 U.S. Dist. LEXIS 14963 (D.N.J. August 4, 2004) (hairstyle not immutable characteristic); *Barrett v. Am. Med. Response, N.W., Inc.*, 230 F. Supp. 2d 1160 (D. Ore. 2001) (beards not immutable nor fundamental right); *Austin v. Wal-Mart Stores, Inc.*, 20 F. Supp. 2d 1254 (N.D. Ind. 1998) (hairstyle is not an immutable characteristic); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981) (prohibition on all-braided hairstyles does not target immutable characteristic or fundamental right); *EEOC v. Delta Air Lines, Inc.*, 34 1980 U.S. Dist. LEXIS 16105 (S.D. Tex. Dec. 5, 1980) (holding that weight is neither immutable nor a fundamental right); *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388 (W.D. Mo. 1979); *Air Line Pilots Assoc. v. W. Airlines, Inc.*, 1979 U.S. Dist. LEXIS 7890 (N.D. Cal. Dec. 18, 1979) (holding that weight is neither immutable nor a fundamental right); *Thomas v. Firestone Tire & Rubber Co.*, 392 F. Supp. 373 (N.D. Tex. 1975); *McConnell v. Mercantile Nat'l Bank at Dallas*, 389 F. Supp. 594 (N.D. Tex. 1975); *Jahns v. Mo. Pac. R.R. Co.*, 391 F. Supp. 761 (E.D. Mo. 1975); *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800 (Iowa 2003) (ear stud neither immutable characteristic nor fundamental right); *Pik-Kwic Stores, Inc. v. Comm'n on Human Rights & Opportunities*, 170 Conn. 327 (1976); *Planchet v. N.H. Hosp.*, 115 N.H. 361 (1965); *Ind. Civil Rights Comm'n v. Sutherland Lumber*, 182 Ind. App. 133 (1979); *Albertson's v. Human Rights Comm'n*, 14 Wash. App. 697 (1976); *Page Airways of Albany, Inc. v. N.Y. State Div. of Human Rights*, 50 A.D. 83 (N.Y. App. Div. 1975).

Notions of mutability might also account for the increasing tendency of courts to recognize discrimination against transgendered persons—those for whom there is a disjunction between sexual identity and the sexual organs with which they were born—as sex discrimination. *See, e.g., Smith v. City of Salem (Ohio)*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006); *Mitchell v. Axcan Scandipharm, Inc.*, 97 Fair Empl. Prac. Cas. (BNA) 960 (W.D. Pa. 2006). Transsexualism is specifically excluded as a disability under the Americans with Disabilities Act, 42 U.S.C. § 12211(b)(1). *E.g., Johnson v. Fresh Mark, Inc.*, 98 Fed. App'x 461 (6th Cir. 2004) (per curiam) (dismissing transsexual's ADA claim on this ground). Nonetheless, some courts do seem influenced by a diagnosis of Gender Identity Disorder (GID) and by the implication that experienced gender identity is not under the free control of the plaintiff. Though they do not specifically mention mutability, such attention to the medicalized nature of transgenderism probably springs from a similar impulse to protect plaintiffs against discrimination for traits they cannot control or change. *See, e.g., Smith*, 378 F.3d at 568 (6th Cir. 2004) (noting that the plaintiff “began ‘expressing a more feminine appearance on a full-time basis’—including at work—in accordance with international medical protocols for treating GID”); *Schroer*, 424 F. Supp. 2d at 205 (noting that the plaintiff was diagnosed with gender dysphoria, and describing in detail the standards for treatment of the condition formulated by the leading organization for the study and treatment of gender dysphoria).

30. As noted *supra* at note 8, ultimate causation in biology has a specific meaning that is distinguished from proximate cause: “Proximate causes involve physiology and biochemistry as well as an organism’s unique developmental history. Ultimate causes involve the history and reproductive consequences of behavior, viewed in evolutionary time.” Owen D. Jones, *Law and the Biology of Rape: Reflections on Transitions*, 11 HASTINGS WOMEN’S L.J. 151, 174 (2000). Professor Jones uses the example of a male bird’s singing in spring: proximate causes “include the hormonal changes triggered by the lengthening of successive days, the activation of particular motor neurons to the vocal apparatus, and each bird’s individual experience of songs heard and songs practiced.” Ultimate causes, in contrast, “address the ‘purposes’ of singing—claiming territory, advertising genetic fitness, and attracting mates—all of which contribute to reproductive success and have thus been favored by natural and sexual selection.” *Id.*

history or from other policy considerations.³¹ By looking more deeply at why males and females—nonhuman and human alike—dress their parts, it may be possible to unravel the doctrinal strands and to begin to weave a more coherent and suitable legal fabric.³²

II. WHO WEARS THE PANTS: SEX-SPECIFIC DRESS RULES IN THE WORKPLACE

As one might expect given the pervasiveness of social norms that differentiate appropriate female from male dress,³³ the workplace is no exception to gendered expectations regarding dress. Whether explicitly stated or as part of the background fabric that governs who is deemed to “fit in,” whether embodied in formal written policies or informal understanding and practice, sex-specific norms governing what individuals may or must wear exist in many workplaces.³⁴ Courts have addressed such sex-differentiated³⁵ dress

31. Evolutionary analysis itself cannot supply a normative or policy goal; rather, the usual method of applying evolutionary insights to legal questions “looks to norms or policies supplied from an outside source (the legislature, for example), and then examines evolutionary explanations of behavior in order to explore their potential usefulness in shaping such behavior to further the given goal.” Seaman, *supra* note 27, at 364. An alternative method, which I also employ here, is to look to evolutionary explanations of behavioral patterns in order to reveal the salience of certain traits or the relative power dynamics that underlie particular behaviors. For a comprehensive discussion of the possible uses of evolutionary analysis in law, see Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405 (2005).

32. Clothing metaphors and idioms are very common in the English language (and, likely, in most other languages as well). Several of these idioms suggest themes of clothing as concealment, for example: a wolf in sheep’s clothing; an iron fist in a velvet glove; to draw a veil over something. Many more, however, suggest “clothing as behavior,” for example: a feather in one’s cap; at the drop of a hat; by the seat of one’s pants; off the cuff. See ROSAMUND MOON, *FIXED EXPRESSIONS AND IDIOMS IN ENGLISH: A CORPUS-BASED APPROACH* 204–05 (Oxford Univ. Press, USA 1998). Though not specifically noted by Moon, other clothing metaphors imply power and submission: who wears the pants; lick someone’s boots; too big for one’s britches.

33. In all known societies, human dress has clear gender associations and is sexually dimorphic in some way. See, e.g., CRANE, *supra* note 17, at 16 (asserting that, although clothing fashions also communicate messages about class and social power, “their principal messages are about the ways in which women and men perceive their gender roles or are expected to perceive them”); MALCOLM BARNARD, *FASHION AS COMMUNICATION* 112 (Routledge 1st ed. 1996) (noting that while sex differences in dress are virtually universal, they vary widely in the particulars of what denotes masculinity and femininity in dress).

34. Dean Bartlett has pointed out that “[d]ress and appearance expectations are pervasive and persist even in the absence of mandatory codes.” Thus, she argues that “eliminating dress and appearance discrimination . . . in the workplace is not as simple a matter as the critics [of judicial rationales for upholding sex-based dress codes] suggest.” Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2545–51 (1994).

35. Throughout this article, I refer to employer policies that apply differently depending upon the sex of the employee as “sex-specific” or “sex-differentiated” appearance codes. I use the word “sex” rather than “gender” in this context because the employer has chosen to tie the appearance standard to the biological sex of the employee rather than to his or her gender identity, which may in some cases diverge from biological or chromosomal sex. See, e.g., JOHN MONEY & ANKE A. EHRHARDT, *MAN & WOMAN, BOY & GIRL: THE DIFFERENTIATION OF DIMORPHISM OF GENDER IDENTITY FROM CONCEPTION TO MATURITY* (The Johns Hopkins Univ. Press 1973) (originating the distinction between sex and gender, and distinguishing between anatomical, chromosomal, and hormonal sex on the one hand, and psychological gender identity on the other); ANNE FAUSTO-STERLING, *SEXING*

requirements in a growing body of case law in which plaintiffs have challenged such rules as unlawful sex discrimination.³⁶ Though both the EEOC and the courts in the early cases often viewed facially sex-differentiated appearance codes as violative of Title VII, this formal equality framework soon gave way to the view that it was perfectly appropriate—and legal—for an employer to instantiate social dress and appearance norms even where these differed according to sex. Throughout its development, this line of case law has struggled to fit within the larger doctrinal framework; however, the fit has often seemed more akin to that of an ill-suited hand-me-down than a tailor made garment. Recent sex-stereotyping cases reveal that the existing framework is in danger of splitting at the seams.

In *Jespersen v. Harrah's Operating Company*, the Court of Appeals for the Ninth Circuit, sitting en banc, upheld an employer-mandated appearance code that required female bartenders to wear foundation, blush, and lipstick to work, and to tease or style their hair every day, while prohibiting male bartenders from doing so.³⁷ It is probably fair to say that this ruling, as with the prior decisions in the case by the district court³⁸ and the appellate panel,³⁹ came as something of a surprise⁴⁰ to many scholars. It is worth asking why this would be so. The legal rules that the court applied were unremarkable in the sense that they have been established doctrine for some time.⁴¹ And yet the application of

THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 3–5 (Basic Books New ed. 2000) (discussing the sex/gender dichotomy). In discussing male-female differences in nonhuman animals, I also use the word “sex” rather than “gender” inasmuch as most discussions of sex dimorphisms in animals do not recognize the sort of cultural and social gender components as are well-established in the literature on human gender identity. See ROUGHGARDEN, *supra* note 16, at 23 (“To a biologist, ‘male means making small gametes, and ‘female’ means making large gametes. Period! . . . Beyond gamete size, biologists don’t recognize any other universal difference between male and female.”) (emphasis in original). Roughgarden goes on to argue that there is a diversity of gender expression among animals. See *id.* at 30–105. Though I view the distinction between sex and gender as a useful heuristic and as a powerful critical tool, as a descriptive matter both the sex/gender divide and the animal/human divide are less clear at the edges than is usually imagined.

36. Note that some of these cases arise under the Constitution or state or local antidiscrimination legislation, but the analysis is generally the same as that under Title VII. See, e.g., *Page Airways of Albany, Inc. v. New York State Div. of Human Rights*, 50 A.D.2d 83 (N.Y. App. Div. 1975) (in case brought under New York Human Rights Law, court looks to federal case law to interpret analogous provisions of state antidiscrimination law); *E. Hartford Educ. Assoc. v. Bd. of Educ.*, 562 F.2d 838 (2d Cir. 1977) (where plaintiff challenged dress code under the First and Fourteenth Amendments, court held that the plaintiff’s right to dress as he pleased was not fundamental).

37. See *Jespersen*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

38. *Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189 (D. Nev. 2002).

39. *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1976 (9th Cir. 2004).

40. Or, if surprise is too strong a word, at least it seems that many considered the result sufficiently remarkable that it merited extended discussion, including the Symposium of which this Article is a part.

41. The “unequal burdens” standard, which the court applied, is well-established in the Ninth Circuit as a primary test for sex-differentiated dress and grooming codes. See *Geddom v. Cont'l Airlines*, 692 F.2d 602, 605 (9th Cir. 1982). Under this standard, such employer rules, though they explicitly apply differently to men and women, do not amount to sex discrimination under Title VII unless they impose “unequal burdens” on one or the other sex. *Jespersen*, 444 F.3d at 1109 (applying “settled law in this circuit” that “[a]n appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment” under Title VII) (quoting *Frank v.*

these settled rules to the case of Darlene Jespersen, a longstanding and highly regarded employee⁴² who was fired for refusing to wear makeup to work, sparked a flurry of commentary in the legal literature.⁴³

Why should the outcome of this case have generated such widespread comment and consternation? One reason is that the “unequal burdens” test used by the court was first articulated⁴⁴ prior to the Supreme Court’s landmark decision in *Price Waterhouse v. Hopkins*, which recognized that sex stereotyping could constitute sex discrimination under Title VII.⁴⁵ As the sex stereotyping

United Airlines, Inc., 216 F.3d 845, 854 (9th Cir. 2000)). Though not explicitly applying the unequal burdens test, other circuits had applied a similar standard to sex-differentiated appearance rules prior to *Gerdom*. See, e.g., *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249 (8th Cir. 1975) (reasoning that because grooming requirements were imposed on both male and female employees, the sexes were treated equally and there was no violation of Title VII); *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084 (5th Cir. 1975) (holding that slight differences in grooming standards for male and female employees do not violate Title VII when those grooming standards are applied to all employees in and evenhanded manner).

42. The majority noted that “Darlene Jespersen worked successfully as a bartender at Harrah’s for twenty years and compiled what by all accounts was an exemplary record.” *Jespersen*, 444 F.3d at 1107.

43. See, e.g., David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L. J. 240 (2004); Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111 (2006); William M. Miller, *Lost in the Balance: A Critique of the Ninth Circuit’s Unequal Burdens Approach to Evaluating Sex-Differentiated Grooming Standards under Title VII*, 84 N.C. L. REV. 1357 (2006); Megan Kelly, Note, *Making-Up Conditions of Employment: The Unequal Burdens Test as a Flawed Mode of Analysis in Jespersen v. Harrah’s Operating Co.*, 36 GOLDEN GATE U. L. REV. 45 (2006); Jennifer L. Levi, *Clothes Don’t Make the Man (or Woman), But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90 (2006); Hillary J. Bouchard, Casenote, *Jespersen v. Harrah’s Operating Co.: Employer Appearance Standards and the Promotion of Gender Stereotypes*, 58 ME. L. REV. 203 (2006); *Recent Cases, Title VII—Sex Discrimination—Ninth Circuit Holds that Women Can Be Required to Wear Makeup as a Condition of Employment—Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076 (9th Cir. 2004), 118 HARV. L. REV. 2429 (2005). For an enlightening examination of the facts, procedural history, and legal and social context of the *Jespersen* case, see Devon W. Carbado, G. Mitu Gulati & Gowri Ramachandran, *Makeup and Women at Work*, HARV. C.R.-C.L. L. REV. (forthcoming 2006).

44. The unequal burdens test, under which grooming or appearance rules that explicitly differ based on sex are nonetheless permissible so long as the grooming requirements as a whole are equally burdensome to both men and women, was first announced in *Gerdom v. Continental Airlines*, 692 F.2d 602 (9th Cir. 1982). In *Gerdom*, the court struck down weight requirements for female flight attendants but distinguished earlier cases that had upheld such limits by emphasizing that in those cases “unlike this case, no significantly greater burden of compliance was imposed on either sex; that is the key consideration.” *Gerdom*, 692 F.2d at 606. See also *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 756 (9th Cir. 1977) (affirming employer’s right to change the dress code for either sex in order to prevent it from becoming “overly burdensome” to either sex); *Laffey v. Nw. Airlines*, 366 F. Supp. 763 (D.D.C. 1973), *vacated and remanded in part and aff’d in part*, 567 F.2d 429 (1976) (holding that airline policy prohibiting female, but not male, flight attendants from wearing eyeglasses was a violation of Title VII, and reasoning that the rule forced female flight attendants to wear contact lenses, which “are substantially more expensive than eyeglasses with lenses of comparative quality.”). EEOC guidelines in effect prior to the *Price Waterhouse* decision adopted the unequal burdens theory of discrimination in the context of sex-differentiated grooming codes. See EQUAL EMPLOYMENT OPPORTUNITY COMM’N, 2 EEOC COMPLIANCE MANUAL § 619.4 (1981) (“So long as [dress code] requirements are suitable and are equally enforced and so long as the requirements are equivalent for men and women with respect to the standard or burden that they impose, there is no violation of Title VII.”).

45. See *Price Waterhouse*, 490 U.S. 228 (1989).

theory of sex discrimination has gained greater judicial acceptance,⁴⁶ it has begun to push at the edges of the foundational rationales that ground the dress and grooming cases.⁴⁷ However, other cases, including some in the Ninth Circuit, have continued to apply the unequal burdens standard to employee appearance codes well after *Price Waterhouse*.⁴⁸ Thus, the mere fact that the *Jespersen* court continued to apply this test to a sex-differentiated grooming rule seems insufficient reason for the case to have generated the type and degree of notice that it has.

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.⁴⁹ A

46. In 2004, the Sixth Circuit held that a male-to-female (MTF) transsexual firefighter whose co-workers told him he was not sufficiently masculine and who was subsequently suspended had sufficiently pleaded claims of sex stereotyping and sex discrimination under Title VII and *Price Waterhouse*. See *Smith v. City of Salem (Ohio)*, 378 F.3d 566 (6th Cir. 2004); see also *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Dawson*, 398 F.3d 211 (2d Cir. 2005) (implicitly approving sex stereotyping theory of sex discrimination in case of masculine woman); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (noting that discrimination against a homosexual based on a sex stereotyping theory might be actionable because it “would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine”). District courts have also held that penalizing transsexual individuals for dress and grooming that crosses societal gender boundaries may constitute sex discrimination under *Price Waterhouse*. See *Mitchell v. Axcan Scandipharm, Inc.*, 2006 U.S. Dist. LEXIS 10824 (W.D. Pa. Mar. 13, 2006) (following *Price Waterhouse* and finding sexual stereotyping could be a basis for a Title VII sexual discrimination claim). Other courts have found that impermissible sex stereotyping existed in non-dress contexts. See, e.g., *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) (holding that school psychologist could state a claim under Title VII where she alleged that she was not promoted because her supervisors believed that women with young children could not both be a good mother and a committed worker, exhibiting an impermissible sex-stereotype).

47. The essence of the sex stereotyping theory of sex discrimination is that an employment decision may not be premised upon an employee’s failure to “match the stereotype associated with [her] group.” *Price Waterhouse*, 490 U.S. at 251. The Sixth Circuit has interpreted the Supreme Court’s decision in *Price Waterhouse* to mean that “an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex.” *Smith*, 378 F.3d at 574. In similar fashion, taking the theory of sex stereotyping discrimination to its logical conclusion would also seriously undermine the argument that sexual orientation discrimination is not sex discrimination. See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (“Ultimately, recognition of Vickers’ claim would have the effect of de facto amending Title VII to encompass sexual orientation discrimination. In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.”).

48. See *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000) (“A sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a bona fide occupational qualification”); see also *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006); *Bedker v. Domino’s Pizza*, 195 Mich. App. 725, 729 (Mich. Ct. App. 1992); *Bridges v. Carrolls Corp.*, 66 Empl. Prac. Dec. (CCH) 43694 (E.D. Mich. 1995). Note that recent editions of the EEOC’s guidelines, issued post-*Price Waterhouse*, have also continued to use this standard. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, 2 EEOC COMPLIANCE MANUAL § 619.4 (1998).

49. Cf. *Plessy v. Ferguson*, 163 U.S. 537 (1896). Indeed, the rhetoric of the grooming code cases eerily mirrors *Plessy*. For example, Justice Brown in *Plessy* stated that the Fourteenth Amendment “could not have been intended to abolish distinctions based upon color” *Id.* at 544. Compare the D.C. Circuit’s view of Congress’s intent in Title VII: “Title VII was never intended to encompass

comparison of the language in *Jespersen* to earlier decisions makes clear the essential continuity of judicial rhetoric and doctrine from the pre-*Price Waterhouse* cases, through the post-*Price Waterhouse* cases, and to the *Jespersen* case itself. In 1975, considering one of the several hair length cases in which male plaintiffs challenged employer policies that required male employees to wear short hair but allowed female employees to wear their hair long, the Eighth Circuit stated that:

Defendant's hair length requirement for male employees is part of a comprehensive personal grooming code applicable to all employees. While no hair length restriction is applicable to females, all employees must conform to certain standards of dress. Where, as here, such policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities.⁵⁰

A decade after the Supreme Court held that Ann Hopkins had suffered sex discrimination when her employer penalized her for failing to conform to socially entrenched gender stereotypes,⁵¹ the Ninth Circuit stated that “[a]n appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment.”⁵² In *Jespersen*, the court simply reaffirmed this standard, stating that “companies may differentiate between men and women in appearance and grooming policies” unless the policy in question “creates an ‘unequal burden’ for the plaintiff’s gender.”⁵³

Perhaps, then, it was the application of the test, rather than the test itself, that was somewhat unanticipated. In *Jespersen*, the court refused to take judicial

sexual classifications having only an insignificant effect on employment opportunities.” *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973). In *Plessy*, the Court focused on what it viewed as the reasonableness of the railroad’s regulation, and it provided, in contrast, examples (drawn from *Plessy*’s arguments) of rules that would be patently unreasonable and therefore unconstitutional: “requir[ing] separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people on the other, or requiring white men’s houses to be painted white, and colored men’s black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color.” *Plessy*, 163 U.S. at 549–50. Likewise, courts in the grooming cases have fallen back upon the notion of reasonableness to explain why employers may enact rules that treat men and women differently on their face: “We may take judicial notice that reasonable regulations prescribing good grooming standards are not at all uncommon in the business world, indeed, taking account of basic differences in male and female physiques and common differences in customary dress of male and female employees, it is not usually thought that there is unlawful discrimination ‘because of sex.’” *Fagan v. Nat’l Cash Register Co.*, 481 F.2d 1115, 1117 (D.C. Cir. 1973).

50. *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (holding that minor differences in appearance regulations that “reflect customary modes of grooming do not constitute sex discrimination within the meaning of § 2000(e).”).

51. See *Price Waterhouse*, 490 U.S. 228 (holding that, once a plaintiff has shown that gender was a motivating factor in the employment decision, the employer could avoid liability only if it showed, by a preponderance of the evidence, that the decision would have been the same regardless of gender).

52. *Frank*, 216 F.3d at 854.

53. *Jespersen v. Harrah’s Operating. Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc).

notice of the asserted fact that a rule requiring women to wear substantial amounts of makeup and to tease or style their hair was more burdensome than a corresponding rule requiring men to wear no makeup and to keep their hair cut short.⁵⁴ In dissent, Judge Kozinski argued that the plaintiff had raised a triable issue of fact on the issue of unequal burdens because, among other reasons, “Harrah’s policy requires women to apply face powder, blush, mascara, and lipstick,” and “[y]ou don’t need an expert witness to figure out that such items don’t grow on trees.”⁵⁵ It may be that a makeup requirement such as that at issue in *Jespersen* seemed, as it did to Judge Kozinski and the other dissenters, so patently burdensome that the court’s refusal to notice the burden came as a surprise.

Or it may be that it was not the obvious nature of the unequal burden, but the obviousness of the sex stereotyping that underlay the makeup policy that gave those watching the case pause. The *Jespersen* majority held that a sex-differentiated grooming policy could constitute sex discrimination in either of two ways: (1) if it unequally burdened men and women, or (2) if it reflected and enforced an impermissible sex stereotype. Thus, while the court recognized that the sex stereotyping theory of sex discrimination might apply to invalidate a workplace dress code,⁵⁶ it held that the theory did not apply to invalidate the Harrah’s code at issue in *Jespersen*.⁵⁷

The *Jespersen* court thus rested this part of its holding upon an asserted distinction between dress codes that reflect socially accepted gender appearance norms, which it found unproblematic, and those based upon impermissible sex stereotypes, which might violate Title VII. The difference between a gender norm on the one hand and an impermissible stereotype on the other was only imprecisely defined in *Jespersen*, but the court did offer some clues as to what sorts of sex-differentiated appearance codes would raise sex stereotyping issues.⁵⁸ These clues are significant because they are representative of the threads of analysis that run through the appearance code cases in general and that comprise the forms upon which the patterns of rhetoric in these cases have been sewn. And these themes, it turns out, raise some intriguing analogies to the animal “dress” literature.

54. The court stated: “Jespersen asks us to take judicial notice of the fact 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, but these are not matters appropriate for judicial notice.” *Id.*

55. See *Id.* at 1117 (Kozinski, J., dissenting). Judge Kozinski also argued that it undeniably takes substantial time and effort to apply make-up, as even non-makeup wearers know based on “the hundreds of hours we’ve spent over the years frantically tapping our toes and pointing to our wrists.” *Id.* Finally, Judge Kozinski recognized that, wholly irrespective of time, effort, or money, there is a non-trivial dignitary and privacy burden in forcing a person who strongly objects either to wear makeup or quit her job. See *id.* at 1117–18.

56. See *Id.* at 1113 (majority opinion) (“We emphasize that we do not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes.”).

57. See *id.*

58. Scholars have noted the extreme lack of clarity in judicial treatment of the concept of stereotyping. See, e.g., Anita Cava, *Taking Judicial Notice of Sexual Stereotyping*, 43 ARK. L. REV. 27, 28 (1990) (“Court opinions use the word [stereotype] without defining it.” (alteration added)).

There are three lines of cases in which female plaintiffs have had some success in challenging workplace appearance codes. First, some women have prevailed where they have demonstrated that the appearance code at issue required them to appear in sexualized or provocative clothing.⁵⁹ Second, but closely related, is a series of cases in which courts have upheld challenges to certain airline maximum weight policies.⁶⁰ Finally, some courts have found sex discrimination where women were required to wear uniforms but their male counterparts were permitted to dress in business attire.⁶¹ Each of these pockets of judicial skepticism of sex-differentiated appearance codes finds a mirror image in the reasoning of the *Jespersen* opinion.

The *Jespersen* majority distinguished *Price Waterhouse* on the ground that, unlike the sex stereotyped notions applied to Ann Hopkins, those applied to Darlene Jespersen did not “single [her] out,” but rather these policies “applie[d] to all of the bartenders, male and female.”⁶² Harrah’s policy did not amount to “impermissible stereotyping,” said the court, first because it was not “intended to be sexually provocative” or to “stereotype women as sex objects.”⁶³ Were a policy to do this, the court suggested, it could amount to an impermissible sex stereotype that would violate Title VII.⁶⁴

This focus on the stereotype of sexual attractiveness and availability—the requirement that women appear “sexy” and attractive at work—is a prominent, though at times ambivalent, underlying theme in the grooming cases.⁶⁵ In those

59. See *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981) (finding in favor of the plaintiff where the court found as a matter of fact that defendant required her to wear a sexually provocative uniform in her job as an office building lobby attendant). See also discussion *infra* notes 66–69 and accompanying text.

60. See *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000); *Gerdorn v. Cont’l Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (en banc).

61. See *Carroll v. Talman Fed. Sav. & Loan Ass’n of Chi.*, 604 F.2d 1028 (7th Cir. 1979); *O’Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F. Supp. 263 (S.D. Ohio 1987); *EEOC v. Clayton Fed. Sav. & Loan Assoc.*, 1981 WL 152 (E.D. Mo. 1981). See also *infra* notes 84–87 and accompanying text.

62. This assertion on the part of the court is almost patently ridiculous. The court insisted that the grooming policy was “for the most part unisex.” *Jespersen*, 444 F.3d at 1112 (alterations added). Judge Pregerson’s dissent pointed out that such reasoning would insulate any sex-differentiated appearance code so long as it contained some provisions that applied to both men and women and other burdensome and stereotypical requirements for both men and women. See *id.* at 1115–16 (Pregerson, J., dissenting).

63. *Id.* at 1112.

64. See *id.* (distinguishing Darlene Jespersen’s situation from that of Margaret Hasselman, the plaintiff in *EEOC v. Sage Realty Corp.*, discussed *infra* notes 66–68 and accompanying text, who “was required to wear a uniform that was ‘short and revealing on both sides [such that her] thighs and portions of her buttocks were exposed.’” (alteration in original)) (quoting *Sage Realty Corp.*, 507 F. Supp. at 604).

65. It is an ambivalent theme because of the BFOQ exception in Title VII. Even where an employer policy discriminates on the basis of sex, the employer may defend the policy by demonstrating that sex is a bona fide occupational qualification or, alternatively, that there exists a business necessity for a rule that has a disparate impact on one sex. See 42 U.S.C. § 2000e-2(e) (2000). The ironic result is that the more likely a grooming policy is to be held discriminatory on the basis of sex stereotyping because it forces women in the workplace to appear sexy, the more likely it will survive a Title VII challenge based on BFOQ or business necessity. This is because the most blatant sexually-charged dress codes exist in businesses that are geared toward selling sex. See Bartlett, *supra*

relatively rare instances in which female plaintiffs have prevailed in challenges to workplace grooming codes, the cases have sometimes involved what a court perceives as a sexually suggestive dress requirement that is unrelated to the main purpose of the defendant's business.⁶⁶ For example, in *EEOC v. Sage Realty Corporation*,⁶⁷ one of the first cases to hold that an employer dress code violated Title VII, the court found in favor of a female lobby "hostess"⁶⁸ in a New York City office building who was constructively discharged because she refused to wear what the court found was a revealing and sexually provocative costume.⁶⁹

Similarly, in *Gerdom v. Continental Airlines, Inc.* the plaintiff, like Darlene Jespersen, had amassed an "otherwise exemplary" employment record.⁷⁰ Nevertheless, she was fired from her position as a "flight hostess" when she

note 34, at 2567–79 (discussing the Hooters litigation and stating that "[t]he area where the least visible progress has been made concerns businesses that are the most objectionable from the perspective of reducing the subordination of women: businesses that trade on women's sexual objectification," but noting that forcing these companies to "be explicit about the nature of [their] business" in order to fall under the BFOQ defense may actually be "beneficial in the long run" because of community norms that might "impose limits on the kinds of businesses employers are willing, explicitly, to defend"); Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004) (explaining and endorsing courts' seemingly strange distinction between sexual-titillation cases involving sex businesses and those involving plus-sex businesses based on a normative worker-focused perfectionism). Professor Cruz has argued persuasively that the BFOQ exception does not apply to employer dress policies, and that the business necessity defense likewise is inapplicable because these are generally disparate treatment rather than disparate impact claims. See David B. Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 NEV. L. J. 240 (2004).

66. Across the spectrum of cases involving challenges to workplace dress codes, challenges by men greatly predominate. Among these, suits involving hair length rules make up the largest proportion of the cases. And, with only a few exceptions, these challenges by men to hair length and other dress rules have been unsuccessful. See, e.g., *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385 (11th Cir. 1998); *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907 (2d Cir. 1996); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2d Cir. 1976); *Baker v. Cal. Land Title Co.*, 507 F.2d 895 (9th Cir. 1974); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333 (D.C. Cir. 1973). Female plaintiffs represent a minority in the dress cases, but they have been more likely than male plaintiffs to prevail in their challenges, and sometimes when their challenges have failed this has been because courts have determined that plaintiff's dress was not the reason for the adverse employment action. See, e.g., *Colafemina v. Mass. Comm'n Against Discrimination*, 1994 Mass Super. LEXIS 80 (D. Mass. 1994) (finding that plaintiff had failed to prove that defendant's legitimate reason for failing to promote her to the position of cocktail server was pretextual, where plaintiff claimed that she was not promoted because management believed that her breasts were too large); *Marks v. Nat'l Commc'n Assoc., Inc.*, 72 F. Supp. 2d 322 (S.D.N.Y. 1999) (finding that plaintiff had failed to show that overweight men were treated differently than overweight women). In sum, while relatively few dress and appearance code challenges have been successful, those that have been successful seem to share some notable characteristics, discussed in this Part.

67. See *EEOC v. Sage Realty Corp.*, 87 F.R.D. 365 (S.D.N.Y. 1980) (denying defendant's motion for summary judgment on Title VII claim), *aff'd*, 507 F. Supp. at 599; *Sage Realty Corp.*, 507 F. Supp. at 613 (awarding plaintiff back pay, benefits, and attorneys' fees after trial on her Title VII claim).

68. See *Sage Realty Corp.*, 507 F. Supp. at 602 n.3.

69. The employer insisted that the costume was not sexually provocative or revealing, but the court found as a matter of fact that it was, and that the defendant was aware that wearing the costume had subjected Margaret Hasselman, the plaintiff-employee, to sexual harassment by building patrons. See *id.* at 610–11.

70. 692 F.2d 602, 603 (9th Cir. 1982) (en banc).

exceeded the airline's maximum weight restrictions.⁷¹ The Ninth Circuit noted that "[t]he purpose of the weight program was, according to Continental, to create the public image of an airline which offered passengers service by thin, attractive women, whom executives referred to as Continental's 'girls.'"⁷² Because there was no showing that slimness was necessary to perform the job of cabin attendant, and because men who performed similar functions were not subject to a maximum weight requirement, the court concluded that the sex-targeted policy smacked of "occupational clichés" and "stereotypical notions of the roles of men and women" and constituted disparate treatment sex discrimination on its face. Continental's admission that the policy's purpose was to cater to the flying public's desire to be served by sexually attractive women was a prominent factor in the court's reasoning in support of its holding that the policy was discriminatory.⁷³ The *Jespersen* court characterized the policy as "part of an overall program to create a sexual image for the airline."⁷⁴

The other flight attendant cases in which female plaintiffs have prevailed in challenging sex-specific policies—though these were not appearance policies *per se*⁷⁵—similarly involved what courts considered to be stereotypical notions of female attractiveness and sexual availability. Thus, courts have invalidated airline rules that restricted flight attendant positions to young, single, childless women, holding that policies that prevented flight attendants from being married,⁷⁶ having children,⁷⁷ or working beyond their early- to mid-thirties⁷⁸ all constituted sex discrimination in violation of Title VII.⁷⁹ In their attempts to

71. *See id.*

72. *Id.* at 604.

73. *See also* *Laffey v. Nw. Airlines, Inc.*, 366 F. Supp. 763, 774 (D.D.C. 1973) (employer policy that, among other sex-differentiated provisions, required female but not male flight attendants to wear contact lenses rather than eyeglasses, violated Title VII), *cited in* *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000) (citing *Laffey* for the proposition that appearance standards that impose unequal burdens on men and women are impermissible). One cannot help but be reminded, reading these cases, of the famous Dorothy Parker quip, "Boys don't make passes at girls who wear glasses," and of the modern variation, "Boys don't make passes at girls with fat asses." IMDb, Memorable Quotes From "Will & Grace" (1998), <http://www.imdb.com/title/tt0157246/quotes> (last visited Jan. 8, 2007).

74. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109 (9th Cir. 2006) (discussing *Gerdom*).

75. There is some question whether even the weight cases are properly considered among the "grooming" or "appearance" cases. In *Frank*, the court determined that it "need not decide whether a rule or regulation that compels individuals to change or modify their physical structure or composition, as opposed to simply presenting themselves in a neat or acceptable manner, qualifies as an appearance standard," because, even if they qualified as an appearance standard, Continental's weight rules "would still be invalid." *Frank*, 216 F.2d at 855.

76. *See generally* *Burwell v. E. Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 965 (1981).

77. *See In re Consol. Pretrial Proceedings*, 582 F.2d 1142 (7th Cir. 1978).

78. *See Sprogis v. United Airlines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971).

79. The Fifth Circuit had earlier held that it was impermissible sex discrimination for airlines to restrict hiring for the position to women. *See Diaz v. Pan Am. World Airways, Inv.* 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971). The airlines, in response, changed the designation from "stewardess" to "flight attendant," and opened the position to men. *See generally* *Laffey v. Nw. Airlines, Inc.*, 366 F. Supp. 763, (D.D.C. 1973) (describing history of airline rules regarding flight attendants).

control these particular traits of its female flight attendants, the airlines tracked very closely those traits that the sexual selection literature posits as the desirable mating characteristics of human females: youth, fertility, health, and availability.⁸⁰

The other main hook upon which the *Jespersen* court hangs its hat concerns the extent to which the policy at issue interfered with the plaintiff's ability to perform her job *because she was a woman*.⁸¹ In evaluating Harrah's appearance policy—which tracked a social gender norm that women are at their “Personal Best” only in makeup and with styled hair while men can achieve theirs with unadorned faces and plain hair—the *Jespersen* majority determined that the company did not place a burden on women's ability to perform their work.⁸² In both the “Unequal Burdens” portion of its opinion, and in the “Sex Stereotyping” portion, the decision turned largely upon this intuition on the part of the court.

Dismissing the plaintiff's argument that the makeup requirement alone—because it applied differently on its face to men and women—established a *prima facie* case of discrimination,⁸³ the *Jespersen* court held that, though different, the grooming requirements that applied to men and women were not unequal.⁸⁴ According to the court, the makeup requirement was not burdensome

80. See, e.g., BUSS, EVOLUTION OF DESIRE, *supra* note 9, at 70 (“Men worldwide want physically attractive, young, and sexually loyal wives who will remain faithful to them until death.”); see also Buss, *Sex Differences*, *supra* note 9, at 1.

81. As discussed *infra* note 82, the *Jespersen* court did not quarrel with the undisputed evidence that the makeup rule interfered with Darlene Jespersen's ability to perform her work because it burdened her as an individual. The court, however, distinguished this type of individual, subjective impediment to job performance from an impediment based on sex in some general sense. See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (stating that, if it were to agree that Jespersen's personal objection to the makeup policy were sufficient to state a claim of sex stereotyping, the court “would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination”).

82. See *id.* at 1112. The court recognized that Darlene Jespersen herself was severely impacted in her ability to perform her job, but it rejected as unworkable and unwise the notion that the subjective reaction of an individual woman to a “reasonable” grooming policy could sustain a finding of sex discrimination. This objective burden test imposed by the court is closely analogous to the objective element of the unwelcomeness requirement in sexual harassment law. See *Harris v. Forklift Sys.*, 510 U.S. 17 (1993).

83. In order to make out a *prima facie* case of disparate treatment, which encompasses the requirement of discriminatory intent, a plaintiff ordinarily must introduce either direct evidence of discriminatory intent, or if such direct evidence is unavailable, circumstantial evidence sufficient to raise an inference of discriminatory intent. See, e.g., HAROLD S. LEWIS & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 164–88 (West Group Publ'g 2d. ed. 2004). Normally, an employer policy that *explicitly* differentiates between female and male employees is the paradigm example of direct evidence of discriminatory intent and by itself states a disparate treatment claim; in such cases, a court will typically go on to determine whether the employer had demonstrated that the differential treatment was justified as a BFOQ. See, e.g., *Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187, 200 (1991) (finding employer's “fetal protection” policy applied to the reproductive capacity of females but not to males, and was thus illegal sex discrimination unless the employer could demonstrate a BFOQ). Appearance policies are uniquely exempted from this general rule that facially discriminatory policies satisfy the plaintiff's *prima facie* showing.

84. This reasoning tracks the “difference/sameness” debate in feminist legal theory, except that there is no attempt by the court to reason that, in order to achieve employment equality, different

to women and had “only a negligible effect on employment opportunities.”⁸⁵ In an exquisite example of circular reasoning, the court insisted that “[g]rooming standards that *appropriately differentiate* between the genders are not facially discriminatory.”⁸⁶ Because the plaintiff had offered no evidence that “the grooming standards would objectively inhibit a woman’s ability to do the job,”⁸⁷ she failed to demonstrate that the policy was discriminatory. This focus on the issue of job impairment is evident in those cases that have found in favor of female plaintiffs who challenged sex-differentiated dress and grooming requirements.

Apart from the sexualized appearance and flight attendant cases, female plaintiffs have also prevailed in challenging policies that required women, but not men, to wear uniforms at work. In the leading case of *Carroll v. Talman Federal Savings & Loan Ass’n of Chicago*,⁸⁸ the Seventh Circuit struck down such a policy because “when some employees are uniformed and others not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes.”⁸⁹ Thus, the employer’s stated justifications for the policy “reveal[ed] that it [was] based on offensive stereotypes prohibited by Title VII.”⁹⁰ In a similar case, another court found that “it is demeaning for one sex to wear a uniform when members of the other sex holding the same positions are allowed to wear professional business attire.”⁹¹ These cases suggest that where a dress code imposes a demeaning image upon one sex only, it constitutes discrimination under Title VII.

treatment is necessary in this instance. See generally MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 39–76 (Aspen Publishers 2d ed. 2003) (discussing feminist debate over equal versus special treatment and which approach is most likely to lead to true equality for women and men). Rather, the reasoning of the courts in the grooming cases seems to be that, because social norms posit that a “professional” and “attractive” appearance connotes different things for men and women, enforcing these differences makes everyone neat and attractive and, therefore, equal.

85. *Jespersen*, 444 F.3d at 1110 (quoting *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975)).

86. *Id.* at 1109–10 (emphasis supplied).

87. *Id.* at 1112. See also *id.* at 1113 (“Harrah’s grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender.”).

88. 604 F.2d 1028 (7th Cir. 1979).

89. *Id.* at 1033. The *Carroll* court also rejected the unequal burdens analysis. It noted that “the dissent relies on the fact that the female dress code ‘did not *substantially burden* the female employees more than the male employees in the enjoyment of their jobs’ (emphasis supplied), but that is not the criterion imposed in Section 703(a)(1) of the Act, for that Section was ‘intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’” *Id.* (emphasis in original) (quoting *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971), cert. denied, 404 U.S. 991 (1971)). See also *O’Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F. Supp. 263 (S.D. Ohio 1987) (holding that employer’s dress code violated Title VII where only female employees were required to wear smocks); *EEOC v. Clayton Fed. Sav. & Loan Assoc.*, 1981 U.S. Dist. LEXIS 12388 (E.D. Mo. Mar. 11, 1981) (holding that an employer policy “requiring only female employees to contribute to the purchase of, and to wear a uniform is prima facie evidence of actionable discrimination,” and denying defendant’s motion for summary judgment).

90. *Carroll*, 604 F.2d at 1033.

91. *O’Donnell*, 656 F. Supp. at 266.

Thus, the gender norms that are viewed by courts, explicitly or implicitly, as invidious are those that relate to female attractiveness and sexiness as well as those that relate to female competence and status.⁹² This is what distinguishes “appropriate” or “reasonable” sex-differentiated dress codes from unduly burdensome ones, and benign “norms” from inappropriate “stereotypes” in these cases. The categories of cases in which female plaintiffs prevail are those where employers are seen to be attempting to enhance the attractiveness or sex appeal of female employees for a position where attractiveness should not be relevant,⁹³ and where female employees are compelled to wear uniforms though male employees are not.⁹⁴ In the latter context, courts reason that such policies imply to customers that the uniformed female employees are of lesser status than the non-uniformed male employees.⁹⁵ In addition, there is the patronizing suggestion that women are not capable of good judgment as to appropriate business attire because they are competitive and subject to fashion’s whim.⁹⁶

III. SEXUAL SELECTION AND SEXUAL DIMORPHISM IN HUMAN AND NONHUMAN ANIMALS: THE PEACOCK’S TAIL AND OTHER FANCY ACCOUTREMENTS

Male and female peafowl look different: Peacocks have large, unwieldy and seemingly useless tails that they drag along behind them and then occasionally, with regal pomp, fan out in a spectacular display of blues, greens, and golds as they strut in circles and shimmy and vibrate their rear-ends. Peahens, in striking contrast, have short, drably colored tails. Though peafowl

92. Clearly, these sets of norms and stereotypes are often related, as when women are seen as suited for ornament rather than intellectual pursuits, or when their status is tied to their attachment to a high-status male which, in turn, is viewed as dependant on youth and physical attractiveness.

93. Courts uniformly hold in these cases that customer preference for attractive female attendants is not a defense. *See, e.g., Gerdom v. Cont'l Airlines*, 692 F.2d 602, 609 (9th Cir. 1982); *Diaz v. Pan Am. World Airways, Inv.* 442 F.2d 385, 389 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971). As Professor Yuracko has pointed out, however, there are two discreet areas in which courts do not always apply this rule. *See Yuracko, supra* note 65, at 147.

94. Courts emphasize that there is nothing inherently problematic about uniform requirements per se, but that the policies become impermissible when they are applied differently based upon the sex of the employee. *See O'Donnell*, 656 F. Supp. 263 (D. Ohio 1987); *Clayton*, 25 Fair Empl. Prac. Cas. (BNA) at 841.

95. *See Carroll*, 604 F.2d at 1033 (“While there is nothing offensive about uniforms per se, when some employees are uniformed and others are not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes.”).

96. *Id.* Although it was not the primary rationale by which the Court of Appeals found the uniform policy impermissible, the court was clearly troubled by the defendant’s attempt to justify the policy by reference to “dress competition among women” and women’s tendency to “follow the fashion” even where the fashion is problematic from the standpoint of appropriate “business judgment.” *Id.* (quoting employer’s stated justification for the policy). The court found that these justifications were grounded upon “offensive stereotypes prohibited by Title VII.” *Id.* As gender stereotypes go, this one seems to strike the court as invidious rather than harmless. It is interesting that this kind of competitiveness—in the context of fashion, attractiveness, and appearance—is gendered female and considered a demeaning stereotype, whereas “good competition”—over work, productivity, status—is more often gendered male.

present a very dramatic example of sexual dimorphism,⁹⁷ they are only one of many species of birds, mammals, fish, and even insects that exhibit obvious male-female differences in coloration, size, or ornamentation.

This Part lays the groundwork for understanding the evolutionary impetus for the sorts of showy dimorphisms in coloration and ornamentation—e.g. feathered crests or long tails, antlers, wattles, elaborate antennae—that are exemplified by the peacock and peahen. It then layers onto the description of basic evolutionary theory a discussion of cultural norms that inform the human practice of ornamentation and, specifically, sex- and gender-differentiated⁹⁸ social dress norms.

A. The First Layer: Animal “Dress” and Sexual Selection

As seen in the quotation at the start of this Article, Charles Darwin recognized sexual dimorphism within species and coined the term “sexual selection” to describe the process by which many such sex differences could evolve.⁹⁹ Sexual selection, as distinct from natural selection,¹⁰⁰ refers to a process by which the sexes evolve particular traits, generally divergent traits, based on the differential reproductive success¹⁰¹ conferred by those traits.¹⁰² Sexual selection theory remains the primary explanation among contemporary evolutionary biologists for most intra-species sex differences.¹⁰³ Whereas natural

97. Dimorphism refers to “[t]he existence of two distinctly different types of individual within a species. An obvious example is *sexual dimorphism* in certain animals, in which the two sexes differ in colouring, size, etc.” OXFORD DICTIONARY OF BIOLOGY 178 (4th ed. 2000) (emphasis in original).

98. I use the word “gender” here, in addition to “sex,” because the cultural practice of layering social expectations and normative evaluations upon persons by various technologies including dress implicates the concept of gender as well as being tied to biological sex.

99. See DARWIN, *supra* note 1. See also CHARLES DARWIN, THE DESCENT OF MAN AND SELECTION IN RELATION TO SEX (John Murray ed., 1882) [hereinafter DARWIN, DESCENT OF MAN].

100. Stated most simply, natural selection as first theorized by Darwin consists of two important steps: first there must arise heritable variation among individuals of a particular species; next, because some individuals, based on these differences, are better able to survive and pass along their genes to the next generation, over time individuals with such characteristics will come to predominate in the population. Given sufficient time and environmental pressure, Darwin posited that the process of natural selection would lead to speciation (i.e., the evolution of new species). See ERNST MAYR, WHAT EVOLUTION IS 117–20 (Basic Books 2001); see also OXFORD DICTIONARY OF BIOLOGY, *supra* note 97, at 398.

101. An individual’s reproductive success, generally abbreviated as RS, is simply the sum total of offspring and offspring’s offspring that the individual has been able to produce. In other words, RS measures the individual’s ability to pass its genes to future generations. See RANDY THORNHILL & CRAIG T. PALMER, A NATURAL HISTORY OF RAPE: BIOLOGICAL BASES OF SEXUAL COERCION 5 (MIT Press 2000) (“We evolutionists use the term reproductive success to refer to th[ose] reproductive interests [of an individual], by which we mean not the mere production of offspring but the production of offspring that survive to produce offspring. A trait that increases this ability is ‘good’ in terms of natural selection even though one might consider it undesirable in moral terms.” (alteration added)).

102. A leading scholar in the field defines sexual selection as “the differences in reproduction that arise from variation among individuals in traits that affect success in competition over mates and fertilizations.” MALTE ANDERSSON, SEXUAL SELECTION 31 (Princeton University Press New Ed. ed. 1994).

103. See, e.g., *id.* at 13–17, 437 (discussing Darwin’s suggestion that most secondary sex traits, which have no direct role in insemination, arise because they confer success in competition over

selection can be expected to operate fairly uniformly upon members of a particular group, sexual selection can create different evolutionary pressures upon males and females in the group based largely upon the differing reproductive strategies of males and females of the species.¹⁰⁴

Until the 1970's, most evolutionists accepted the idea of natural selection but ignored or disparaged Darwin's theory of sexual selection.¹⁰⁵ When they did recognize it as a valid explanatory model, they often viewed male competition for females—in contrast to female preference for certain traits—as the driving force behind sexual selection.¹⁰⁶ If larger, stronger, more aggressive, or more dominant males tended to win the contest for access to reproductive females, those traits, if heritable, would be disproportionately passed on to future generations and would become widespread in the male population.¹⁰⁷ Explaining sexually dimorphic traits, Darwin argued that these came about where “individual males have had, in successive generations, some slight advantage over other males whether in their weapons, defence, or charms; and have transmitted these advantages to their male offspring.”¹⁰⁸ Included in those “charms” would be traits, such as fancy tails, that females for some reason might prefer.

Elaborating upon Darwin's explanation, contemporary biologists typically distinguish two main types of sexual selection:¹⁰⁹ “intrasexual competition” and

mates, and concluding that “many secondary sex traits have now been shown [through experimentation] to be sexually selected”); HELENA CRONIN, *THE ANT AND THE PEACOCK: ALTRUISM AND SEXUAL SELECTION FROM DARWIN TO TODAY* 249 (Cambridge Univ. Press 1991) (“Darwin was confident that eventually ‘the idea of sexual selection [would] . . . be much more largely accepted.’ It has taken more than a century. But his prediction has at last proved true.”) (alterations and ellipsis in original) (internal citations omitted). *But see* ROUGHGARDEN, *supra* note 16 (challenging orthodoxy of sexual selection as explanation for most sex dimorphisms).

104. *See, e.g.*, ANDERSSON, *supra* note 102, at 31 (“Anisogamy and greater female than male parental effort is [sic] the likely reason for stronger male than female competition over mates.”)

105. For a wonderful description and analysis of this history, see generally CRONIN, *supra* note 103, at 113–249. Summarizing the treatment of Darwin's theory of sexual selection in the hundred years after it was first articulated, Cronin writes: “Throughout most of this period, sexual selection remained on the Darwinian sidelines, neglected, distorted or misunderstood. Natural selection suffered a partial eclipse for almost half a century after Darwin's death. Sexual selection suffered an almost total eclipse for almost twice as long.” *Id.* at 243.

106. *See id.* at 114 (noting that the “attitude—accepting direct male competition but rejecting female choice—predominated throughout most of the theory's history”).

107. A heritable genetic trait that confers a 1% reproductive advantage to an individual will, in only 265 generations, be present in the entire population. *See* Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141, 1165–66 n.80 (2001) (citing ROBERT TRIVERS, *SOCIAL EVOLUTION* 28–29 (James W. Behnke & Jo Andrews eds., Benjamin/Cummings Publ'g Co. 1985)). As to the question why these traits should be expressed in males but not females, when both sexes share the same genetic endowment save for those genes on the Y chromosome, the answer in all likelihood stems from differential activation of genes. “The great majority of sex differences . . . are not sex linked, but sex limited. Sex limitation is the result of *differential expression* (activation) of genes which are present in both sexes.” LAURA MEALEY, *SEX DIFFERENCES: DEVELOPMENTAL AND EVOLUTIONARY STRATEGIES* 13 (2000) (emphasis in original).

108. DARWIN, *supra* note 1, at 222.

109. Though Darwin mentioned both weapons and charms, some feminist biologists have noted that intersexual selection resulting from female preference for certain male traits was for many

“intersexual competition.” Male-male competition for females¹¹⁰ that takes the form of fighting, dominance, and status-seeking is referred to as intrasexual competition. In contrast, selection that is more easily understood in the context of female preference for certain male characteristics is known as intersexual selection.¹¹¹

Both intersexual and intrasexual selection pressures can result in evolution of fancy “dress” in animals. Where males and females differ in ornamentation or coloring, the male of the species is the “fancier” sex in the overwhelming majority of cases.¹¹² Evolutionary analysis suggests that this is because in most species access to females is the major limiting factor in reproductive success.¹¹³ Physiological differences—and, according to evolutionary psychologists, cognitive, behavioral and emotional differences—between males and females stem largely from their differing reproductive strategies.¹¹⁴

decades ignored or disparaged by evolutionists because it contradicted closely held beliefs about the extent of female agency. See Andreas Paul, *Sexual Selection and Mate Choice*, 23 INT'L J. PRIMATOLOGY 877, 878 (2002); Patricia Adair Gowaty, *Sexual Natures: How Feminism Changed Evolutionary Biology*, 28 SIGNS: J. WOMEN CULTURE & SOC. 901, 908–12 (2003).

110. Note that male competition and female choosiness are the usual patterns among most species, and especially among mammals, though there are exceptions to this rule. See ANDERSSON, *supra* note 102, at 10 (“In the minority of species with mainly paternal care, the sex differences in parental roles can override the effects of anisogamy and lead to a reversal of other aspects of sex roles and sexual dimorphism.”); *id.* at 177–82 (describing and explaining sex-role reversal). In addition, feminist scientists in recent years have made clear that, even in species in which this general rule prevails, the reality is much more complex and nuanced than previously imagined. See Patricia Adair Gowaty et al., *Indiscriminate Females and Choosy Males: Within- and Between-Species Variation in Drosophila*, 57 EVOLUTION 2037 (2003); Patricia Adair Gowaty et al., *Male House Mice Produce Fewer Offspring with Lower Viability and Poorer Performance When Mated with Females They Do Not Prefer*, 65 ANIMAL BEHAV. 95 (2003). This recent work suggests that mate selection is a dialectic process with significant choice exercised by both males and females, and with significant fitness effects demonstrated when that choice is constrained.

111. See MAYR, *supra* note 100, at 138. In addition, recent scholarship in the field has identified a third major component of sexual selection: “male-female conflict.” See, e.g., C. Cordero & W.G. Eberhard, *Female Choice of Sexually Antagonistic Male Adaptations: A Critical Review of Some Current Research*, 16 J. EVOLUTIONARY BIOL. 1 (2003); Andrew Sih et al., *Path Analysis and the Relative Importance of Male-Female Conflict, Female Choice and Male-Male Competition in Water Striders*, 63 ANIMAL BEHAV. 1079 (2002) (stating that of the three major behavioral mechanisms underlying sexual selection, that of male-female conflict has been the least studied). According to a recent literature review, “[i]mportant theoretical and empirical developments have suggested new interpretations of sexual selection. Some evolutionary phenomena that were previously explained by mate choice or intrasexual competition, may be better explained by coevolution of males and females that result [sic] from conflicts of interest between the sexes, in which females evolve to avoid natural selection costs.” *Id.* at 1.

112. See MELVIN KONNER, *THE TANGLED WING* 265 (W.H. Freeman 2d ed. 2002) (“In most species of birds and mammals, males are at least somewhat larger, more conspicuous, more competitive, more variable in reproductive success, and less caring toward their offspring than females.”).

113. “In most species, males are the more competitive sex, and females choosier, because potential rates of reproduction are greater for males than for females. For example, human males can, in principle, produce offspring at the rate of one every few weeks or months; human females can, at best, produce offspring every few years.” DOUG JONES, *PHYSICAL ATTRACTIVENESS AND THE THEORY OF SEXUAL SELECTION: RESULTS FROM FIVE POPULATIONS* 21 (Univ. of Mich. Museum 1996).

114. Strategy is used here in the biological sense; there is no normative implication. A reproductive strategy is merely a possible way of passing genes onto the next generation. A

In biology, “male” and “female” are defined in a very specific manner:¹¹⁵ “those individuals we label ‘female’ are individuals that produce relatively large, nutrient-rich, immobile gametes (sex cells); males are those individuals that produce relatively small, nutrient poor, mobile gametes.”¹¹⁶ This division into two distinct gametal types—termed “anisogamy” —has all manner of repercussions for the organisms that produce them due to the simple definitional fact that “sperm is [relatively] cheap.”¹¹⁷ Furthermore, among mammals and other groups that internally gestate their offspring, it is almost invariably¹¹⁸ the female of the species that does so. This disparity between males and females in the initial parental investment¹¹⁹ results in pressure for females to be relatively “choosy” and males to be relatively promiscuous.¹²⁰ This variance in

successful strategy likewise implies only reproductive success, not moral approval. See Seaman, *supra* note 31, at 349 n.61.

115. In contrast, psychologists generally distinguish sex from gender and identify several individual components of sex and gender that result in a spectrum rather than a simple male-female binary. These components include chromosomal sex, fetal gonadal sex, fetal hormonal balance, fetal brain development, assigned gender, gender identity, and pubertal hormones. See MEALEY, *supra* note 107, at 11–23 (discussing sex and gender and describing sexologist John Money’s “Eight Elements of Sex and Gender”).

116. *Id.* at 47. Not all species reproduce sexually, and of those that do, not all consist of two sexes that can be defined thus as male and female. Many species reproduce asexually; some reproduce both asexually and sexually; and some, such as slime molds, are made up of multiple mating types. See *id.* However, sexual reproduction and two distinct “male” and “female” mating types is the most common pattern of reproduction in nature. See DONALD SYMONS, *THE EVOLUTION OF HUMAN SEXUALITY* 21 (Oxford University Press, USA 1979) (“[A]mong nonhermaphroditic, many-celled animals that reproduce sexually there are two and only two sexes, defined on the basis of the sex cells they produce: a female produces eggs, which are large and carry a reserve of food for the embryo; a male produces sperm, which are small and possess a taillike organ to enable them to reach the egg.”). But see ROUGHGARDEN, *supra* note 16, at 75–105 (arguing that there are multiple expressions in nature—and often within species—of “maleness” and “femaleness”).

117. Linda Mealey attributes this phrase to anthropologist Donald Symons. She points out that the phrase is grammatically incorrect—“it should be ‘sperm are cheap.’” MEALEY, *supra* note 107, at 76.

118. There are a few—very few—exceptions to this rule. “Of all sex-role-reversed species, the only ones which are viviparous [offspring are born live rather than laying eggs] are seahorses and pipefish—which have male gestation.” *Id.* at 77 (citing A. Berglund et al., *Reversed Sex Roles and Parental Energy Investment in Zygotes of Two Pipefish (Syngnathidae) Species*, 29 *MARINE ECOL. PROGRESS* 209 (1986)) (alteration added).

119. Parental investment refers to energy and resources devoted to offspring. It includes such components as gametal production, provision of resources to offspring, and protection of offspring. For female mammals, parental investment also includes gestation and nursing. See Robert L. Trivers, *Parental Investment and Sexual Selection*, in *SEXUAL SELECTION AND THE DESCENT OF MAN 1871–1971*, at 136 (Bernard Campbell ed., 1972).

120. See *id.* at 136. According to a recent academic text on sex differences in human and nonhuman animals, “the consequences of anisogamy—that males are typically more mobile, have a higher sex drive, and seek multiple partners—are that attracting a sexual partner for a female is a fairly easy task. (As we all know, males of our own species are not infrequently known to be willing to even pay for sexual access.) This circumstance allows females an element of choosiness when it comes to purely sexual partnering.” MEALEY, *supra* note 107, at 118. The descriptors “coy” and “eager” have often been used to describe the behaviors of females and males, respectively. See, e.g., DARWIN, *DESCENT OF MAN*, *supra* note 99, at 225 (“The female, on the other hand, with the rarest exceptions, is less eager than the male . . . she generally ‘requires to be courted;’ she is coy, and may often be seen endeavouring for a long time to escape from the male.” (quoting HUNTER, *ESSAYS AND*

optimal reproductive strategy between males and females creates a dynamic by which males will tend to compete for scarce access to female reproductive partners, and by which females will discriminate among prospective males for sperm to fertilize her expensive eggs.¹²¹

This basic evolutionary pattern sets up a dynamic by which males may come to possess weaponry, status badges, bright coloration, lovely song, dramatic tail feathers, combs, and wattles. All of these reveal competition among males for access to females. Where such competition tends toward a male-male struggle in which the victor “gets the girl,” intrasexual competition predominates and favors development of such “masculine” characteristics as extreme size and aggression, status badges,¹²² and weaponry such as tusks, horns, or fangs. Alternatively, the competition may emphasize female choice rather than male power: In “lekking” species,¹²³ for example, males gather in a large group—a “lek”—to display their charms, and females choose the males with which to mate.¹²⁴

OBSERVATIONS 194 (Owen ed., 1961)); RICHARD DAWKINS, *THE SELFISH GENE* 140–65 (Oxford University Press, USA 1st ed. 1986) (discussing intersexual and intrasexual competition using game theory, and labeling female reproductive strategies “coy” and “fast”). As Helena Cronin has pointed out, however accurate as a general matter these terms may be, they are quite loaded. She notes that “it has become standard to talk of ‘coy females (and ‘eager males’),” and that she “can’t resist wondering what words would be used if the sex-roles were reversed. Would a (male) investor or business executive be called coy for not rushing headlong into the first option? If males were choosy about mates, would they be ‘coy’—or discriminating, judicious, responsible, prudent, discerning? (And, by the way, would females be ‘eager’—or would they be wonton, frivolous, wayward, brazen?).” CRONIN, *supra* note 103, at 248.

121. This summary is an oversimplified account of evolutionary theory and data that omits much detail and complexity, including exceptions to this general account, such as “sex role reversals,” that are usually traced to certain environmental conditions. See, e.g., KONNER, *supra* note 105 at 264–67. However, as Professor Konner states, “even the exceptions prove the rule,” *id.* at 264, and “species with partly reversed sex roles illuminate the evolutionary process and prove that gender as we know it is not irrevocably set in the genes. But important as they are for theory, they are exceptions.” *Id.* at 265.

122. Status badges are traits that “can serve as signals of potential aggression, so individuals (male or female) typically refrain from challenging others whose signals indicate they would be likely to accept the challenge and triumph in a physical contest.” MEALEY, *supra* note 107, at 96–98 (citing S. Rohwer & P.W. Ewald, *The Cost of Dominance and Advantage of Subordination in a Badge Signaling System*, 35 *EVOLUTION* 441 (1981); S.A. Adamo & R.T. Hanlon, *Do Cuttlefish (Cephalopoda) Signal Their Intentions to Conspecifics During Agonistic Encounters?*, 52 *ANIMAL BEHAV.* 73 (1996); T. Jarvi & M. Bakken, *The Function of the Variation in the Breast Stripe of the Great Tit (Parus Major)*, 32 *ANIMAL BEHAV.* 590 (1984); Ligon et al., *Male-Male Competition, Ornamentation and the Role of Testosterone in Sexual Selection in Red Jungle Fowl*, 40 *ANIMAL BEHAV.* 367 (1990); A.P. Moller, *Variation in Badge Size in Male House Sparrows *Passer Domesticus*: Evidence for Status Signalling*, 37 *ANIMAL BEHAV.* 1637 (1987); A. P. Moller, *Sexual Behavior is Related to Badge Size in the House Sparrow *Passer Domesticus**, 27 *BEHAV. ECOL. & SOCIOBIOL.* 23 (1990); P. J. Moore et al., *Odour Conveys Status on Cockroaches*, 389 *NATURE* 25 (1997)).

123. Lekking species are those “in which males congregate and display on particular patches of ground, ground that is used only for this purpose—not for food or cover or anything else. The females visit the males there and apparently look them over . . . the lek is a meeting place for mating.” CRONIN, *supra* note 103, at 222.

124. “By lekking, [males] simply advertise their ‘quality’—how well they have survived, what great risks they can take by displaying, how strong their sons might be . . . Females visit the lek, assess male quality, and choose a male.” BOBBI S. LOW, *WHY SEX MATTERS: A DARWINIAN LOOK AT HUMAN BEHAVIOR* 50 (Princeton Univ. Press 2000) (alteration added).

Where competition takes the latter form—which tends to emphasize female choice—males are most likely to possess the fanciest dress, such as the peacock's tail.¹²⁵ Though evolutionary biologists long professed to be baffled by the seemingly irrational preferences of females that might lead to a male trait such as the peacock's tail,¹²⁶ in recent years there has been an upsurge of interest among scientists in the area of female choice.¹²⁷ Several theories have been

125. Though on the surface it might seem reasonably accurate to attribute most weaponry to male-male competition and most fancy ornament to female choice, in fact the relationship is much more complex and has only recently begun to be studied in detail by animal behaviorists. In fact, it is very difficult to tease apart the various sexual selection pressures on sexually dimorphic traits. Some studies of these traits have revealed simultaneous—at times conflicting—pressures resulting from intrasexual and intersexual competition upon the same trait. See Sih et al., *supra* note 111 (finding that male size in the stream-dwelling water strider was simultaneously affected by all three mechanisms of male-male competition, female choice, and male-female conflict); Cordero & Eberhard, *supra* note 111 (arguing that female choice, in addition to male-female conflict, could simultaneously contribute to the evolution of male traits that had been attributed solely to male-female conflict). In addition, there is a dialectical quality by which “intersexual selection pressures imposed by female choice on the display of males can set up further intrasexual selection pressures of males competing with other males and vice versa.” MEALEY, *supra* note 107, at 123 (citations omitted) (emphasis in original). Moreover, interesting research has recently shown that male aggressive traits (that would figure more prominently in male-male competitive selection) may be co-opted to become courtship display traits important in female choice selection. See Gerald Borgia & Seth William Coleman, *Co-option of Male Courtship Signals from Aggressive Display in Bowerbirds*, 267 PROC. R. SOC. LONDON 1735 (2000).

126. Darwin believed that females of species such as peafowl preferred beauty out of an aesthetic sense similar to that which led humans to admire art and music. He wrote that “a great number of male animals . . . have been rendered beautiful for beauty's sake,” because such “beauty may serve as a charm for the female, and for no other purpose.” DARWIN, SEXUAL SELECTION, *supra* note 99, at 92, 152–53 (quoted in CRONIN, *supra* note 103). Cronin states that Darwin failed to “face up to the most serious aspect of this irrationality: the fact that the choice is for costly and often grossly extravagant characteristics.” CRONIN, *supra* note 103. She notes that “[t]o require the male to deck himself out in gaudy colours, or sport a long tail, or sing and dance for hours on end is to impose a heavy burden on him.” *Id.* at 185. Male traits such as this one are viewed as a liability in terms of purely natural selection because they may attract predators as well as fertile females and may hamper the animal's ability to escape. In addition, they require an enormous amount of energy to maintain and carry around. Evolutionists seemed either to view such silly choices as simply an animal manifestation of the stereotypical female focus on decoration instead of substance, or to reject the idea of sexual selection altogether and rely on alternative explanations for the male ornaments. See *id.* at 133–46 (summarizing history of sexual selection debate as related to proposals made to explain coloration without selection). It has been found, however, that “[i]n the wild, peacocks that had been successful at attracting mates were more likely to be alive the following year than cocks that had been unsuccessful,” demonstrating that “[s]omehow, females do make accurate choices” about male health and vigor. MEALEY, *supra* note 107, at 123 (alterations added).

127. See Paul, *supra* note 109, at 878 (“[S]ince the 1970s, the theory of sexual selection and mate choice has experienced a fulminant revival, with major new theoretical insights and empirical findings.” (alteration added)). This is likely related to the influx of women into the fields of biology, primatology, ethology, and related areas. See Griet Vandermassen, *Sexual Selection: A Tale of Male Bias and Feminist Denial*, 11 EUR. J. WOMEN'S STUD. 9 (2004); Anne Fausto-Sterling, Patricia Adair Gowaty, and Marlene Zuk, *Evolutionary Psychology and Darwinian Feminism*, 23 FEMINIST STUD. 403, 409 (1997) (“Over the last decade and a half, however, ideas about animal sexual behavior and the evolution of sexual differences have undergone a revolution. During the 1970s women flooded into the field of animal behavior—especially the study of primates.”).

advanced as to why females might exhibit preferences for such fancy and extravagant accoutrements as the peacock's tail.¹²⁸

There are several models of mate choice that attempt to explain female preference for certain male characteristics, most notably the extreme and costly ornaments such as the peacock's tail. The "runaway process" (or "sexy sons") model posits that "females gain indirect genetic benefits by choosing attractive males, not because they are genetically superior in any way, but because females with a strong preference for attractive males will have attractive sons and, ultimately, more grand-offspring than females mating with less attractive males."¹²⁹ There is clearly a circular quality to this model: it does not explain the original female preference but only how, once assumed, such a preference would enhance reproductive success. However, there is empirical support for the theory in several studies across a variety of insect and fish species.¹³⁰ It is possible that a male trait that originally is preferred based on a sensory predisposition that is otherwise unrelated to reproduction could set up a process of runaway selection that would favor the male ornament simply because other females are likely to find it attractive and thus mate preferentially with the "sexy sons" of the females who prefer the trait.¹³¹

In addition to the sexy sons or runaway hypothesis, there are several versions of the "good genes" hypothesis for female preference for male ornaments and other showy traits. Common to all of these variations on the good genes hypothesis is the assumption that the particular trait is an honest signal for good genes in the male who wears it. The most straightforward of these theories, and one for which there is growing empirical support, suggests that the appearance of the ornament directly correlates with good health because, for example, bright colors indicate low parasite load.¹³² Several studies have now shown correlations between bright coloration in birds and low parasite load.¹³³ In their original study, biologists William Hamilton and Marlene Zuk tested their hypothesis of an interaction between parasite resistance and

128. See generally ANDERSSON, *supra* note 102 (containing detailed discussion of possible mechanisms of competition over mates, including scrambles, endurance rivalry, contests, mate choice (including Fisherian runaway selection, indicator mechanisms, species recognition, direct phenotypic benefits, sensory bias, and mating synchronization and stimulation), and sperm competition).

129. *Id.* at 885. See also RONALD A. FISHER, *THE GENETICAL THEORY OF NATURAL SELECTION* 146-56 (Dover 2d ed. 1958).

130. See Paul, *supra* note 109, at 885.

131. See Michael J. Ryan, *Sexual Selection and Mate Choice*, in *BEHAVIORAL ECOLOGY: AN EVOLUTIONARY APPROACH* 181 (J.R. Krebs & N.B. Davies, eds., Blackwell 1997) (noting that sexual selection of certain male traits "could result from pleiotropic effects, such as sensory adaptations for predator avoidance or prey detection, which can then affect mating preferences"); see generally Michael J. Ryan, *Sexual Selection, Sensory Systems and Sensory Exploitation*, 7 *OXFORD SURVEYS EVOLUTIONARY BIOL.* 157 (1990).

132. See William D. Hamilton & Marlene Zuk, *Heritable True Fitness and Bright Birds: A Role for Parasites?*, 218 *SCI.* 384, 384 (1982); see also Gerald S. Wilkinson et al., *Male Eye Span in Stalk-Eyed Flies Indicates Genetic Quality By Meiotic Drive Suppression*, 391 *NATURE* 276, 277-78 (1998).

133. See M. Petrie, *Improved Growth and Survival of Offspring of Peacocks with More Elaborate Trains*, 371 *NATURE* 598 (1994); see also JT Manning & M.A. Hartley, *Symmetry and Ornamentation are Correlated in the Peacock's Train*, 42 *ANIMAL BEHAV.* 1020 (1991).

male coloration and song complexity and found that the showiest species of North American birds were those that were most susceptible to parasite infection.¹³⁴ They tentatively concluded that these species evolved their showy traits as a signal to females of individual health and vigor, whereas non-susceptible species would be less likely to evolve such traits.

A variation on this model is the "handicap theory" of mate choice. This theory posits that the fancy ornament signals genetic quality and robust health precisely because of its otherwise detrimental affect on male fitness: Only the most robust and fit males could manage to survive while supporting such a useless, energy-demanding appendage that tends to attract predators and hinder escape.¹³⁵

Finally, recent theoretical and empirical work suggests that at least in some species, both males and females prefer mates who are particularly suited to them individually.¹³⁶ Rather than positing a single male or female who possesses the "best genes" and with whom all opposite sex individuals should choose to mate if they are able, this model proposes that "good genes" may mean different things to different individuals. For example, a female might, all else being equal, choose to mate with the male whose immunological traits most complement hers, or who will allow her offspring the greatest degree of genetic variability.¹³⁷

This last model emphasizes female agency and the role of free female choice in reproductive success. Recent studies have demonstrated that constraints on mate choice can have detrimental consequences for the well-being of the female as well as the fecundity of the group.¹³⁸ In a series of experiments

134. See Hamilton & Zuk, *supra* note 132, at 386.

135. See Amotz Zahavi, *Mate Selection—A Selection for a Handicap*, 53 J. THEORETICAL BIOL. 205 (1975); see also CRONIN, *supra* note 103, at 195–97 (discussing example of male pelicans that grow large bumps on their beaks during mating season that make it difficult for them to see; according to Zahavi, "The point of the exercise is to show off, and to do so reliably. 'Look how well I can feed myself, even with this great big bump in front of my eyes!'"). In an anecdote that illustrates the force as well as the great irony of the handicap theory, it is said that President William Henry Harrison campaigned against Martin Van Buren by emphasizing his masculinity in contrast to Van Buren, whom he portrayed as an effeminate dandy in "ruffled shirt and silken hose." "Harrison won the election, but on the day William Henry Harrison took the oath of office it was bitter cold. Lest he appear weak and unmanly, he refused to wear a topcoat and caught pneumonia and died one month after taking office." RUBINSTEIN, *supra* note 4, at 159 (citing M. KIMMEL, *MANHOOD IN AMERICA* 39 (Free Press 1995)).

136. See Jerram L. Brown, *A Theory of Mate Choice Based on Heterozygosity*, 8 BEHAV. ECOLOGY 60, 60 (1997) (developing theoretical and empirical support for the hypotheses that: "(1) What is best for one female may not be best for another; (2) even if the 'best' male is found, his superiority may be due to heterozygosity at one or more loci, hence not simply heritable (heterozygosity is not an allele); (3) mate choice amplifies the chief advantage of sexuality, namely genetic diversification" and concluding that "a female's strategy should be to find the alleles that best complement her own in at least some of her offspring"); Jeanne A. Zeh & David W. Zeh, *The Evolution of Polyandry I: Intra-genomic Conflict and Genetic Incompatibility*, 263 PROC. BIOLOGICAL SCI. 1711 (1996) ("present[ing] the hypothesis that, by mating with more than one male, females can reduce the threat to their [Reproductive Success] of genetic incompatibility" that arises from genetic conflict at the molecular level) (alterations added).

137. See Brown, *supra* note 136, at 62 (discussing the immunological incompatibility theory of mate choice and the heterozygosity theory of mate choice).

138. See SARAH BLAFFER HRDY, *MOTHER NATURE: MATERNAL INSTINCTS AND HOW THEY SHAPE THE HUMAN SPECIES* 41–42 (Pantheon 1st ed. 1999) (discussing the work of evolutionary biologist

across five different species, evolutionary biologist Patricia Adair Gowaty has found that females who were able to mate with their preferred male had offspring with increased rates of viability and reproductive success.¹³⁹ The same experiments showed identical results when the sexes were reversed and the males were permitted free choice of mates.¹⁴⁰ Furthermore, these studies demonstrate that the preferred male is different for different females; there is no absolute genetic fitness independent of the selecting female. With respect to sexual selection and sexually dimorphic traits, these studies highlight the relevance of subtle variations in the “dress” of individuals and the dangers of uniformity, both genetic and apparent.

A final aspect of animal dress should be noted because it is, perhaps, the facet that is most analogous to human dress in that it involves *behavior* that is decorative, rather than an animal’s purely physiological features. This is the practice of some animals, most notably the male bowerbird of Australia, to create decorative displays which females evaluate in order to choose reproductive partners.¹⁴¹ Male bowerbirds build elaborate structures known as bowers and then attempt to entice females to enter and mate.¹⁴² Many species decorate their bowers with colorful objects such as berries, feathers, shells, and other found treasures. In addition, certain species show preferences for specific

Patricia Adair Gowaty and Geneticist William Rice in evaluating the possibilities of “free female choice”).

139. See generally Cynthia K. Bluhn & Patricia Adair Gowaty, *Social Constraints on Female Mate Preference in Mallards’ *Anas platyrhynchos* Decrease Offspring Viability and Mother Productivity*, 68 ANIMAL BEHAV. 977 (2004); Lee C. Drickhamer et al., *Free Female Mate Choice in House Mice Affects Reproductive Success and Offspring Viability and Performance*, 59 ANIMAL BEHAV. 371 (2000); Patricia Adair Gowaty et al., *Mutual Interest Between the Sexes and Reproductive Success in *Drosophila Pseudoobscura**, 56 EVOLUTION 2437 (2002).

140. See generally Patricia Adair Gowaty et al., *Male House Mice Produce Fewer Offspring with Lower Viability and Poorer Performance When Mated with Females They Do Not Prefer*, 65 ANIMAL BEHAV. 95 (2003). This result challenges conventional sexual selection wisdom, which tends to assume that males of most species do not engage in significant sexual selection of females, and which tends to ignore variation among females. In other words, Professor Gowaty’s groundbreaking work provides strong evidence that—at least in the species she has studied—sexual selection is a dialectical process operating on both males and females. This research suggests that both males and females compete for and choose their mates.

141. See MEALEY, *supra* note 107, at 91–92. Mealey remarks upon the strong analogy to human culture: “In one of the more interesting twists of evolution (perhaps interesting because it is so blatant in our own species), the males of some species use objects for sexual signaling.” *Id.* at 91. I would like to thank Sarah Brosnan for bringing this example to my attention.

142. The bowers are not nests; the females do not lay eggs in the bowers. Rather, the bowers are used only for courtship displays and mating. Bowerbirds are a “lekking” species, and the male does not contribute parental care or resources to the female or to the offspring. Information about bowerbirds is available on a website maintained by Professor Gerald Borgia, an authority on the birds. See Professor Gerald Borgia, Borgia Lab, University of Maryland, Sexual Selection in Bowerbirds, <http://www.life.umd.edu/biology/borgialab/> (last visited Jan. 8, 2007). Professor Borgia’s research has demonstrated that the bower serves a protective function for the female in that a well-constructed bower allows the female to observe the aggressive courtship display of the male without being herself threatened with coerced mating. See Borgia, *supra* note 28, at 542. This brings to mind a quotation about fashion attributed to Sophia Loren: “A woman’s dress should be like a barbed-wire fence: serving its purpose without obstructing the view.” JAMES B. SIMPSON, SIMPSON’S CONTEMPORARY QUOTATIONS (1988), available at <http://www.bartleby.com/63/42/6042.html> (last visited December 13, 2006).

colors: the satin bowerbird female favors blue decorations, and males will go to elaborate lengths, including stealing from other males, to obtain blue objects for their bowers. This is an example of a sexual dimorphism in a nonhuman animal whereby one sex—here, the male—deliberately decorates his immediate environment so as to send certain signals to the other—here, the female—in order to gain reproductive advantage.¹⁴³

The themes of the animal dress literature and of sexual selection theory more generally thus emerge as centered around social signaling (i.e. communication), competition, power, and status. These themes are remarkably consistent with those seen in the interdisciplinary scholarship on human dress, discussed in the next section.

B. Adding a Layer: Human Dress

Clothing and other additions to, or modifications of, the human body have drawn interest from scholars in many fields, including sociology, psychology, philosophy, art history, and anthropology.¹⁴⁴ Many of the recent interdisciplinary treatments of dress reveal intriguing similarities to the sexual selection literature. In particular, human dress has clear gender associations and is almost always sexually “dimorphic” in some respects.¹⁴⁵ Most obviously, the signaling functions of dress are closely analogous to the functions of animal dress as evolutionary adaptations.¹⁴⁶ On the other hand, dress in contemporary

143. This language, which implies conscious motivation, is used as a convenience but is sometimes cause for confusion. The behaviors evolve because they tend to further reproductive success and therefore are differentially passed along; however, there is not necessarily any motivation—conscious or otherwise—on the part of individuals to gain reproductive advantage. See, e.g., RICHARD DAWKINS, *THE SELFISH GENE* 50 (Oxford Univ. Press, USA 1st ed. 1986) (“In practice it is usually convenient, as an approximation, to regard the individual body as an agent ‘trying’ to increase the numbers of all its genes in future generations. I shall use the language of convenience.”); RICHARD DAWKINS, *THE ANCESTOR’S TALE* 5 (2004) (“From our human point of view, the emergence of our remote fish ancestors from water to land was a momentous step, an evolutionary right of passage That is not the way it was at the time. Those Devonian fish had a living to earn. They were not on a mission to evolve, not on a quest towards the distant future.”).

144. See, e.g., Joanne Entwistle & Elizabeth Wilson, *Introduction: Body Dressing*, in *BODY DRESSING*, *supra* note 3, at 1 (“Interdisciplinarity has gained ground across the humanities and social sciences and scholars have approached fashion and dress from a number of perspectives that have challenged the marginal place of fashion within tradition academic scholarship.”); CHARLOTTE SUTHRELL, *UNZIPPING GENDER: SEX, CROSS-DRESSING AND CULTURE* (2004) (comparative ethnographic study of male to female cross-dressing, including deep examination of gender norms and gender barriers embodied in clothing, in Britain and India); *DRESS AND GENDER: MAKING AND MEANING* (Ruth Barnes & Joanne B. Eicher eds., 1992); CAROLINE DALEY, *GIRLS & WOMEN, MEN & BOYS: GENDER IN TARADALE 1886–1930* (Auckland Univ. Press 1999); ANNETTE LYNCH, *DRESS, GENDER AND CULTURAL CHANGE: ASIAN AMERICAN AND AFRICAN AMERICAN RITES OF PASSAGE* (Berg Publishers 1999); RUBINSTEIN, *supra* note 4; CRANE, *supra* note 17; BARNARD, *supra* note 14.

145. See, e.g., CRANE, *supra* note 17, at 16 (arguing that, although clothing fashions communicate messages about class hierarchy and social power, “their principal messages are about the ways in which women and men perceive their gender roles or are expected to perceive them”); BARNARD, *supra* note 14, at 112 (noting that, while sex differences in dress are virtually universal, they vary widely in the particulars of what denotes masculinity and femininity in dress).

146. All of the various “good genes” hypotheses of mate choice necessarily assume that the character trait preferred by the female in some way signals health, vigor, or other quality beneficial to reproductive success.

Western society is characterized by fancy females and plain males,¹⁴⁷ which seems counter to the prevalent pattern among nonhuman animals. It may be that this curious feature of modern Western human dress reveals something important about the interaction between biology and culture in the formation of human gender roles and differences.

A few preliminary points are in order. First, though variously defined by different authors and in different academic fields, this article adopts the broad definition of dress suggested by interdisciplinary scholars Joanne Eicher and Mary Ellen Roach-Higgins. Combining the related categories of “body modifications” and “body supplements,” these scholars recognize that “the dressed person is a *gestalt* that includes body, all direct modifications of the body itself, and all three-dimensional supplements added to it.” “Dress,” as defined by Eicher and Roach-Higgins, includes everything that is left of this package once the body itself is separated out.¹⁴⁸ Thus, it includes, in addition to clothing, all manner of body modifications and supplements such as deliberately made scars, tattoos, perfumes, hairstyles, foot coverings, jewelry, and hand-held accessories.¹⁴⁹ While dress is defined as ultimately distinct from the unmodified body, recognizing that human dress is, at bottom, a *gestalt* that is in some fundamental way inseparable from that unadorned body serves to make the analogy to nonhuman dress that much more apparent.

Second, in evolutionary terms, an adaptation is defined as such largely based on an examination of its function.¹⁵⁰ The prior section analyzed the function of gender-differentiated dress in nonhuman animals so as to tease apart the various selection pressures that likely led to the evolution of those dress differences. This section turns to human dress and the gender norms and signals

147. This general pattern whereby the females tend to be the more highly ornamented and colorful sex has not always been the rule among humans. For example, during the Renaissance in Europe and continuing through the reign of Henry IV into the Seventeenth Century, men adopted a body-revealing and sexualized style of dress that was highly adorned and ornamented. See RUBINSTEIN, *supra* note 4, at 156–58 (describing rise of male decorative and sexualized dress during the Renaissance and Cavalier periods).

148. Eicher & Roach-Higgins, *supra* note 4, at 13 (emphasis in original). Eicher and Roach-Higgins recognize that this separation is somewhat fictive and can only be accomplished through “mental manipulation.” See *id.* Some authors distinguish clothing from fashion, with fashion connoting change, trendiness, and the simultaneous desires to be part of the social whole and to distinguish one’s individuality. See BARNARD, *supra* note 14, at 7–24; J.C. FLUGEL, *THE PSYCHOLOGY OF CLOTHES* (1930).

149. See *id.* at 15–16. As this classification system makes clear, humans are almost infinitely creative when it comes to dress: “Parts of the body that can be modified include hair, skin, nails, muscular-skeletal system, teeth, and breath.” *Id.* at 16.

150. Evolutionary biologists generally recognize a feature of an organism as an adaptation when “it solves an adaptive problem with ‘reliability, efficiency, and economy.’” Leda Cosmides & John Tooby, Univ. of Cal. Santa Barbara Ctr. for Evolutionary Psychology, *Evolutionary Psychology: A Primer*, <http://www.psych.ucsb.edu/research/cep/primer.html> (quoting GEORGE C. WILLIAMS, *ADAPTATION AND NATURAL SELECTION: A CRITIQUE OF SOME CURRENT EVOLUTIONARY THOUGHT* (Princeton Univ. Press 1966)). Thus, the definition of an adaptation focuses upon the function of the trait: one cannot determine whether a particular trait solves an adaptive problem unless one understands the function of the trait—what the trait *does* in the life of the organism.

that it reflects, perpetuates, and creates.¹⁵¹ It then examines the function of dress through the lens of the sexual selection principles outlined above.

Before discussing the cultural overlay of human dress, it is useful to briefly summarize the contours and extent of evolved sex dimorphism in humans. Humans are generally said to exhibit relatively little sexual dimorphism in physical appearance and size.¹⁵² Compared to our closest primate relatives, human males and females are very close in size and weight¹⁵³ and do not show large differences in coloration or other physical features, as do gorillas, for example.¹⁵⁴ Many evolutionary biologists conclude that “we are a ‘mildly polygynous’ species,” which means also “that we are a mostly monogamous species. Other than in strength we do not exhibit much physical dimorphism (we are monomorphic).”¹⁵⁵

151. “Fashion and clothing are instrumental in the process of socialization into sexual and gender roles; they help shape peoples’ ideas of how men and women should look. It is not the case that fashion and clothing simply reflect an already existing sex and gender identity, but that they are ‘part of the process by which attitudes to and images of both men and women are created and reproduced.’” BARNARD, *supra* note 14, at 111 (quoting E. ROUSE, UNDERSTANDING FASHION-89 108 (Blackwell Science 1989)).

152. Dimorphism of the human brain, and in particular the existence of differences in average cognitive abilities between men and women, is a controversial topic and one that need not be addressed here. For representative sources on either side of the debate, see KINGSLEY R. BROWNE, BIOLOGY AT WORK 25–32 (Rutgers Univ. Press 2002); Richard A. Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981, 988–89 (1992); CYNTHIA FUCHS EPSTEIN, DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER 52–56 (Yale Univ. Press & Russell Sage Foundation 1988); ANNE FAUSTO-STERLING, SEXING THE BODY 3–5 (2000); CAROL TAVRIS, THE MISMEASURE OF WOMAN 43–56 (Simon & Schuster 1992).

153. See MEALEY, *supra* note 107, at 264 (stating that human “[b]ody size dimorphism is small to moderate . . . (about 10% by height and about 20% by weight)” (alteration added)). It should be emphasized, however, that size is not a binary characteristic, and there is much overlap between the sexes. This statistic relates the difference in average size between males and females. Of course, some women are larger than many or even most men, and some men are smaller than many or even most women.

154. Gorillas are a “harem” species, in which a single silverback male (recognizable by the silver fur on his back) has exclusive reproductive access to all fertile females in the group. In contrast, chimpanzees live in large, multi-male troops and females mate often and with many males. See *id.* Among primates, the traits that vary the most depending upon the mating system of the particular species are body size, relative canine size, and relative testes size. As with body size, relative canine and testes sizes (relative to body weight of the male) in humans are consistent with the conclusion that humans are mostly monogamous. See *id.* at 263–64.

155. *Id.* at 317. Suppositions about the prevalent human mating pattern are presumed to be related to the extent and type of sex dimorphism based both on empirical observation and theoretical models of sexual selection. Empirically, monogamous species are generally monomorphic, exhibiting little sexual dimorphism. Theoretically, this would be predicted because monogamy should evolve under ecological and economic conditions wherein “the costs of desertion are too high (i.e. without the investment of a second parent, the offspring would likely not otherwise survive) or when the benefits of desertion are too low (i.e. other mating opportunities are unlikely).” MEALEY, *supra* note 107, at 156 (citing numerous scientific sources). Under such conditions, “both sexes should be circumspect in choice of partner, looking not only for ‘good genes’ and immunocompetence, but indications that the prospective partner will not desert the family unit as well.” *Id.* Thus, in monogamous species, “both sexes exercise choice in mateships, relying on mutual displays of vigor and commitment.” *Id.* Because the sexual selection pressures are similar upon both the male and the female, the species is monomorphic.

But if our unadorned bodies are relatively monomorphic, our adorned bodies are frequently much less so. Humans are creative and diverse in the ways that we modify our bodies, and in the ways that we do so in a gender-specific¹⁵⁶ manner. Humans begin with a body and then, like the male bowerbirds of Australia, proceed to build an elaborate construct on and around that body. Because humans are a highly social species,¹⁵⁷ the construction of that dressed body takes place within an elaborate fabric of social norms and expectations. It has also been said that humans are a profoundly *symbolic* species in that humans in all societies invest objects and happenings with meaning beyond their most obvious or mundane functions.¹⁵⁸ As such, it should come as little surprise that dress serves much more than the simple functions of warmth or protection from the elements. Scholars of dress uniformly assume, to a greater or lesser degree, that dress is a communicative social behavior.¹⁵⁹ Among many social messages that dress communicates, sex and gender are especially salient.¹⁶⁰ “All cultures will use clothing, if not fashion, to distinguish male from female, most will use it to mark the difference between secular and religious classes, and some will use it to mark membership of different families.”¹⁶¹ Thus, it appears that gender distinction may be the most universal and salient characteristic marked by human dress.¹⁶²

156. I use the word gender here, rather than sex, because dress norms in many cultures are not binary.

157. *E.g.*, *id.* at 265.

158. See TERRANCE W. DEACON, *THE SYMBOLIC SPECIES: THE CO-EVOLUTION OF LANGUAGE AND THE BRAIN* 436 (Norton 1997) (arguing that, because of brain evolution spurred by the development of the symbolic system of language, humans as a species “are not just a species that uses symbols . . . the symbolic urge has infected us, and now by virtue of the irresistible urge it has instilled in us to turn everything we encounter and everyone we meet into symbols . . .”).

159. Some have gone so far as to argue that dress is itself a language, see LURIE, *supra* note 13; others view dress as highly analogous to language in many respects, see ROLAND BARTHES, *THE LANGUAGE OF FASHION* (Andy Stafford trans., Berg Publishers Eng. ed. 2005); BARNARD, *supra* note 14 (This idea is inherent in the title of the book, *Fashion as Communication*).

160. There has been much discussion in the legal, sociological, and feminist literature of the proper meanings of the terms sex and gender. See, e.g., JOHN MONEY & ANKE EHRHART, *MAN & WOMAN, BOY & GIRL: THE DIFFERENTIATION OF DIMORPHISM OF GENDER IDENTITY FROM CONCEPTION TO MATURITY* (The Johns Hopkins Univ. Press 1973) (distinguishing sex from gender); ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 3–5 (Basic Books New Ed. ed. 2000) (discussing the sex/gender dichotomy); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 182 (Yale Univ. Press 1979) (discussing the dual meanings of the word sex “to refer both to gender status (as in ‘the female sex’) and to the activity of intercourse (as in ‘to have sex’)”; Epstein, *supra* note 152 (arguing that “sex discrimination” as prohibited by Title VII is discrimination on the basis of physical sex, not gender; Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 12 (1995) (arguing that “gender” is more appropriately used as an adjective, describing “masculine” or “feminine”). As discussed *supra* note 35, I use the word “sex” to refer to biological maleness or femaleness, and “gender” to refer to social conventions regarding masculinity and femininity. In addition, note that the use of the word “sex” in the text accompanying this note conveys both meanings noted by Professor MacKinnon.

161. BARNARD, *supra* note 14, at 58.

162. An early writer stated that “[t]he great bifurcation of dress is sexual.” See Joanne B. Eicher, *Dress, Gender and the Public Display of Skin*, in *BODY DRESSING*, *supra* note 3, at 247 (quoting ERNEST CRAWLEY, *DRESS, DRINKS, AND DRUMS* (Methuen & Co. Ltd. 1931)) (alteration added).

Three theories regarding the origin and function of dress were developed in the nineteenth century: the modesty theory, the protection theory, and the adornment theory.¹⁶³ Contemporary theorists have elaborated upon these basic categories to suggest up to thirteen distinct possible functions of clothing: protection, modesty and concealment, immodesty and attraction, communication, individualistic expression, social worth or status, definition of social role, economic worth or status, political symbol, magico-religious condition, social rituals, and recreation.¹⁶⁴

As noted previously,¹⁶⁵ protection is unlikely to have been the original impetus for human dress and “variation within cultures and between different cultures as to what constitutes protection caution against seeing protection as the prime function of clothing.”¹⁶⁶ Furthermore, though history contains examples of distinctions in protective clothing based upon perceived biological differences between the sexes,¹⁶⁷ it is unlikely that current gender-differentiated dress codes would or could be defended based upon such a rationale.¹⁶⁸

The second major category of dress function is encompassed by the modesty theory. “Until quite recently . . . it was almost universally agreed that the primal and fundamental reason for wearing clothes was modesty For those who accepted the literal truth of the Genesis story, there was no question about it.”¹⁶⁹ Inherent in this theory is “the idea that certain body parts are indecent or shameful and should be covered so that they cannot be seen.”¹⁷⁰ However, there is a mirror image to the modesty story: attraction or seduction. Another theory of the origin and function of dress suggests that “the motive for wearing clothes is precisely immodesty or exhibitionism,” and that the purpose

163. See RUBINSTEIN, *supra* note 4, at 20; BARNARD, *supra* note 14, at 48.

164. See *id.* at 48–67.

165. See *supra* note 10.

166. BARNARD, *supra* note 14, at 50. Notwithstanding this apparent consensus on the part of dress theorists, some clothing quite obviously serves a protective function. In addition, when the concept of protection is expanded to encompass spiritual, religious, or magical beliefs, then many dress items such as amulets and good luck charms that are worn to ward off evil or to bring the wearer luck might be said to fall under the function of protection. See J.C. FLUGEL, *THE PSYCHOLOGY OF CLOTHES* 71 (The Hogarth Press Ltd. 1930). Rubinstein classifies such items of dress under the category of adornment. See RUBINSTEIN, *supra* note 4, at 29–33 (noting that some items that today are considered adornment originated as “amulets believed to help the wearer master fears and anxieties relating to the supernatural world as well as those relating to the natural world, such as natural disasters, darkness, illness, and death”).

167. A highly ironic example was the corset of the early Victorian era, which was thought medically necessary but actually caused significant physical harm to its wearers. “Ladies’ ‘frames,’ it was believed, were extremely delicate; their muscles could not hold them up without assistance.” LURIE, *supra* note 13, at 217.

168. Cf. *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (holding that employer’s policy that prohibited fertile women from working in certain factory jobs that might expose potential offspring to lead constituted impermissible sex discrimination).

169. RUBINSTEIN, *supra* note 4, at 20 (quoting JAMES LAVER, *MODESTY IN DRESS* 9–11 (Heinemann 1969)).

170. BARNARD, *supra* note 14, at 51.

of clothing is “to attract attention to the body rather than to deflect or repel that attention.”¹⁷¹

Social norms regarding both the modesty and seduction functions of dress are and have historically been highly gender-stratified and thus are of particular interest here. With respect to modesty, though the religious exhortation to mask the signs of sexuality originally applied only to men,¹⁷² over time it came to be applied to women as well. Eventually, as with fundamentalist Islam and Orthodox Judaism, some religiously-based rules required women to remain almost completely covered from head to foot. The injunction that women cover their bodies was based on women’s “ability to seduce,” which “would lead men to stray from the spiritual.”¹⁷³

In addition to highly sex-specific expectations concerning how much—and which—skin may appropriately be revealed in public,¹⁷⁴ the term “modesty” itself carries different substantive connotations based on the sex of the individual to which it is applied. For women in societies in which gendered expectations require them to cover certain body parts so as not to appear seductive to men, “modesty entails concealing the body and denying sexual allure, encouraging sexual inhibition.” In contrast, “[m]en offend modesty by ‘swagger,’ an attempt at self-aggrandizement.”¹⁷⁵ Applied to men, the concept of modesty strongly implies self-restraint. In the religious context, such male self-restraint entailed a denial of worldly passions and devotion to the Church and to God. Applied to women, the concept of modesty implied self-restraint of a different sort: refraining from exposure of the body or suggestion of its seductive nature.¹⁷⁶

The virtue of self-restraint in men gained particular traction in the United States during the second half of the nineteenth century.¹⁷⁷ In terms of fashion, this was a turning point after which “many well-to-do men rejected the sumptuous, body-hugging style, the velvet coat, breeches, perfume, and lace, and adopted a matched suit consisting of a coat, waistcoat, and trousers.”¹⁷⁸ Male “gentlemen’s clothing” in England by the end of the nineteenth century “was designed to represent mastery over one’s feelings and to demonstrate rationality, the state of making decisions on the basis of calculation,

171. *Id.* at 53; see also RUBINSTEIN, *supra* note 4, at 135–68 (discussing historic and contemporary “seductive images” in dress). Ironically, research has shown that covering parts of the body tends to eroticize those areas. It may be that in cultures in which body covering is not practiced, this supposed “danger” of the female body to seduce is lessened. See LURIE, *supra* note 13, at 212–14.

172. This was because, according to Saint Augustine, only in men are the signs of sexual arousal physically manifested in an obvious way. See RUBINSTEIN, *supra* note 4, at 21.

173. *Id.*

174. There is enormous variation among different cultures regarding this social norm, and in some there is no such requirement for women to cover certain body parts. See *id.* at 20–22.

175. *Id.* at 22.

176. See LAVER, *supra* note 169.

177. “The doctrine of self-restraint [for men] was espoused from the pulpit, in the medical press, and on the lecture circuit. Writers of advice manuals suggested that, in controlling sexual desires, a man’s energy would be harnessed to productive activity.” *Id.* at 160 (citations omitted).

178. *Id.* at 159.

organization, abstract rules, and procedures.”¹⁷⁹ This style became the prototype for the modern navy or charcoal gray business suit,¹⁸⁰ which is widely viewed as projecting this image of (male) self-restraint.¹⁸¹

A related theme that is represented by the dark-colored business suit—and also mirrored in both the evolutionary literature¹⁸² and the gender performance literature¹⁸³—concerns the tension between individuality and social conformity. “Dress serves as a sign that the individual belongs to a certain group, but simultaneously differentiates the same individual from all others: it includes and excludes.”¹⁸⁴ Certain types and styles of clothing emphasize individuality, while others emphasize conformity. As one might imagine, the archetype of conformity-emphasizing clothing is the uniform, for which lack of individual identity is embodied in the very word that names the category of dress. This is most clearly seen in the prototypical male business suit, often described as a type of uniform.¹⁸⁵

Like the evolutionary explanation of fancy dress in animals, the scholarly analysis of human dress tends to center around the ideas of communication, control, hierarchy, status, and sex- and gender-signaling.¹⁸⁶ Thus, this literature adds a layer of complexity that is largely consistent with the ways in which many biologists view the functions of animal dress. In the next Part, I turn to the question of what lessons and insights might flow from the foregoing biological and sociological analysis of nonhuman and human dress.

179. *Id.* at 45.

180. *See id.*

181. There are echoes of this theme in the law and economics literature on signaling. For example, Eric Posner’s recent work relies heavily on an understanding of signaling cooperation and self-control (what he calls “discount rate”). *See generally* ERIC POSNER, *LAW AND SOCIAL NORMS* (Harvard Univ. Press New Ed. ed. 2002). If an important role of signaling is to allow people correctly to distinguish cooperators from cheaters so as to decide with whom to cooperate, then the important trait that must be signaled is self-restraint—i.e., that one “care[s] about future games relative to present gains” and is willing to forego short-term gains from selfish behavior in order to reap the long-term rewards of cooperative behavior. *See* Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 *J. LEGAL STUD.* (1998). Because this type of signaling would be important in a business context, the understanding of the male business suit as a symbol (signal) of self-restraint converges interestingly with Posner’s theory.

182. For example, some biologists view distinctive coloration and ornament in animals as a signal of conspecificity (animals of the same species) and therefore as a means of avoiding mating with non-specifics (animals of other species). *See* CRONIN, *supra* note 103, at 129–31.

183. *See* KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* xi (Random House 2006) (“I recognize the value of assimilation, which is often necessary to fluid social interaction, to peaceful coexistence, and even to the dialogue through which difference is valued. For that reason, this is no simply screed against conformity. What I urge here is that we approach the renaissance of assimilation in this country critically.”).

184. *DRESS AND GENDER*, *supra* note 4, at 1.

185. Dissenting from a decision invalidating an employee dress code that required women in certain positions to wear uniforms but allowed men to wear “business attire,” a Seventh Circuit judge argued that the majority opinion “ignore[d] the fact of life that men’s customary business attire has never really advanced beyond the status of being a uniform.” *Carroll v. Talman Fed. Sav. & Loan Ass’n of Chi.*, 604 F.2d 1028, 1034 (7th Cir. 1979) (Pell, J., dissenting).

186. That is, signals both about sexual availability and modesty and about gender identity.

IV. IF THE SHOE FITS: SEXUAL SELECTION, SEX-BASED DRESS RULES,
AND SEX DISCRIMINATION

The foregoing discussion reveals two predominant themes that emerge quite vividly in the sexual selection literature, the appearance code case law, and the sociological scholarship on human dress. The first theme concerns sexual attraction and mating behavior. As evolutionary theory and research reveal, differences in animal dress are, in the broadest sense, a result of sexual selection.¹⁸⁷ This means that they are ultimately driven by sexual attraction and mating behavior. Likewise, a prominent strand of concern in the appearance code cases is whether a particular sex-specific requirement seems to be based on stereotypes about female sexual attractiveness. Finally, interdisciplinary scholarship on human fashion and dress demonstrates that among the primary functions of human dress are gender expression, modesty, and seduction.

The second major theme that runs through all three categories of materials is that of status and power. The most highly ornamented males are found in species in which females have the greatest degree of sexual choice and power in the mating dance; that is, the degree of sexual dimorphism in animals is closely related to questions of status and power.¹⁸⁸ In the case law involving workplace dress and grooming, courts have invalidated sex-differentiated uniform policies because of the perception that such rules signaled power and status differences that were not justified by the relative positions of the employees in question.¹⁸⁹ Similarly, scholarship on human dress has long revealed the role of clothing in creating, reflecting, and enforcing power and status differences.¹⁹⁰

187. The quote from Charles Darwin in *ORIGIN OF SPECIES*, *supra* note 1, with which this Article began remains an accurate statement of the understanding of sexual selection and sex differences: “when the males and females of any animal have the same general habits of life, but differ in structure, colour, or ornament, such differences have been mainly caused by sexual selection.”

188. See MATT RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE* 137 (Macmillan Publ'g Co. 1st Am. Ed. ed. 1994) (“Where males gather on communal display arenas, a male’s success owes more to his ability to dance and strut than to his ability to fight other males”) (citing J. Hoglund & J.G.M. Robertson, *Female Preferences, Male Decision Rules and the Evolution of Leks in the Great Snipe, Gallinago Media*, 40 *ANIMAL BEHAV.* 15 (1990)); EDWARD O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* 331–32 (Belknap Press of Harvard Univ. Press 2000) (“The most complicated and spectacular lek systems occur in birds,” and “[t]he males belonging to species on this list [of ten families of lekking species of birds] are among the most colorful of the bird world. The brilliant red cock of the rock, for example, is easily the most spectacular cotingid, and the birds of paradise are justly considered the most beautiful of all birds.” (alterations added)).

189. See *Carroll*, 604 F.2d at 1028 (majority opinion); *O’Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F. Supp. 263 (S.D. Ohio 1987); *EEOC v. Clayton Fed. Sav. & Loan Assoc.*, 1981 WL 152 (E.D. Mo. 1981).

190. See, e.g., Entwistle & Wilson, *Introduction: Body Dressing*, in *BODY DRESSING*, *supra* note 3, at 4 (“[D]ress and fashion mark out particular kinds of bodies, drawing distinctions in terms of class and status, gender, age, sub-cultural affiliations that would otherwise not be so visible or significant.” (alteration added)); Kate Soper, *Dress Needs: Reflections on the Clothed Body, Selfhood and Consumption*, in *BODY DRESSING*, *supra* note 3, at 21 (“Nor should we forget the extent to which restrictions on human dress are used to distinguish and police social and sexual hierarchies . . . one , very insidious, way of exercising power over others is by means of control over their mode of dress”); RUBINSTEIN, *supra* note 4, at 69–99 (discussing the images of power and of authority reflected and reinforced by certain modes of dress); LURIE, *supra* note 13, at 115–53 (discussing the role of clothing in reflecting status).

In this Part, I argue that these intuitive concerns on the part of courts are valid and that an examination of animal dress differences supports the importance of these two major rhetorical strands in the case law. Indeed, the biological literature suggests that these two themes might actually be two sides of the same coin, an insight which has important implications when considering employer policies that mandate female ornamentation. While sexual attractiveness and status signals are not the only relevant considerations, at the very least those employer grooming codes that reflect stereotypes either of attractiveness and sexuality or of power and status should be viewed as sex discrimination in violation of Title VII.¹⁹¹ Furthermore, the animal dress analogy suggests that the categories of dress codes that implicate these two concerns are much broader than courts have usually found. Thus, for example, under the analysis presented here the makeup requirement in *Jespersen* should be invalidated.

Furthermore, the sexual selection literature teaches that sex differences in appearance are anything but trivial. Though courts and employers tend to view clothing, makeup, and hair rules as *de minimis*,¹⁹² both sexual selection theory and the interdisciplinary work on human dress demonstrate not only that sex dimorphisms are shaped by—and in turn shape—relations between the sexes but also that the implication of frivolity itself reflects a negative gender-linked stereotype.

A. Sexual Dimorphism, Dress, and the Triviality Question

Addressing first the latter point, social science and humanities scholarship on human dress teaches that dress is anything but insignificant, both on an individual and a cultural level.¹⁹³ Likewise, evolutionary biology makes clear

191. Thus, the analysis here is silent about the treatment of transgendered individuals, discrimination based on sexual orientation, and the hair length rules as applied to male employees. It may well be (and I would argue) that the sex-based differential treatment and sex stereotyping evidenced by the employer practices in those contexts constitutes sex discrimination under Title VII. See Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination*, 81 GEO. L. J. 1 (1992). My claim here is more specific and more modest.

192. See, e.g., *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 907 (2d Cir. 1996) (per curiam) (summarizing federal appellate case law on hair length policies and stating that a major rationale supporting the decisions is “that such employment policies have only a *de minimis* effect”); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (holding that where employer-mandated appearance rules “are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities”); *Boyce v. Gen. Ry. Signal Co.*, 2004 WL 1574023 (W.D.N.Y. 2004) (“[E]very . . . 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 a *de minimis* effect on employment opportunities.”); *Matter of Gladstone (Catherwood)*, 36 A.D. 2d 204, 206 (N.Y. 3d Dept. 1971), *aff’d*, 30 N.Y. 2d 576 (1972) (“The employer did not have to change the rules to conform to the particular whim of this claimant, and a failure to do so did not violate his rights to privacy and free expression.”). See also Bartlett, *supra* note 34, at 2556–57.

193. See generally RUBINSTEIN, *supra* note 4; LURIE, *supra* note 13; BARTHES, *supra* note 159, at 7 (describing dress as a “system [that] is essentially defined by normative links which justify, oblige, prohibit, tolerate, in a word control the arrangement of garments on a concrete wearer who is identified in their social and historical place: it is a value” (alteration added)).

that sexual dimorphisms in coloration and ornament come about mainly through sexual selection, and that such features play an enormous role in animal behavior and social systems.¹⁹⁴ Yet many courts continue to treat clothing, hair, and makeup as if they are trivial.¹⁹⁵ Such treatment mirrors the cultural stereotype that interests in fashion and appearance are superficial and non-serious, and that these are mainly female concerns.¹⁹⁶ Indeed, the Seventh Circuit in *Carroll* viewed the employer's argument that uniforms were necessary to prevent women from indulging in fashion excesses and competition to imply a demeaning sex-based stereotype.¹⁹⁷

Many recognize the importance of dress not only as a method of individual and cultural expression but also as a kind of language that triggers conscious and unconscious associations on the parts of both wearer and viewer.¹⁹⁸ In *Price Waterhouse*, Ann Hopkins was not passed over for promotion because she violated an explicit dress code.¹⁹⁹ Insofar as dress played a role in the case, it was as a suggestion of what she might do to increase her chances of making partner the following year. As the partner charged with explaining to Hopkins why she had been passed over told her, she might fare better the next time around if only she would "dress more femininely, wear make-up, have her hair styled, and wear jewelry."²⁰⁰ The Supreme Court took this as evidence that Hopkins was subjected to sex stereotyping and that the adverse employment action was because of her sex and not, as the employer argued, based on a gender-neutral standard requiring good interpersonal skills.²⁰¹ As the Court wryly noted, it does not require expertise in psychology "to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism."²⁰²

This is a very telling statement by the Court. The partner presumably gave Hopkins this advice because he understood on some level that dress is

194. See discussion *supra* Part III.A.

195. See, e.g., cases cited *supra* note 192.

196. See Entwistle & Wilson, *supra* note 190, at 15 (describing philosophy's "repudiation of the body as the intellectual form of its repudiation of the feminine," and noting that "[t]his is a stance which also lends itself to a more general cultural process of gender stereotyping and masculine disassociation in Western culture, according to which it is women who are the vainer sex and the more concerned with what they wear while men are largely indifferent to questions of attire" (alteration added)).

197. See *Carroll*, 604 F.2d at 1033 ("What is offensive is the compulsion to wear employer-identified uniforms and the assumption on which the employer openly admits that rule is based: that women cannot be expected to exercise good judgment in choosing business apparel, whereas men can.").

198. See RUBINSTEIN, *supra* note 4; LURIE, *supra* note 13; BARTHES, *supra* note 159; BARNARD, *supra* note 14; ANNE HOLLANDER, SEEING THROUGH CLOTHES (Univ. of Cal. Press Reprint ed. 1993); BODY DRESSING, *supra* note 3.

199. 490 U.S. 228 (1989).

200. *Id.* at 235.

201. The defendant argued, and there was some evidence in the record tending to show, that Hopkins was somewhat lacking in this area. The Court viewed the evidence as sufficient to show that, whether she was "nice" or not, such a requirement was not equally imposed upon men being considered for partnership. See *id.* at 256.

202. *Id.*

relevant—in an empirical, rather than legal, sense—to the way in which an individual is viewed by others in a particular social context. He believed that if she presented an outward appearance of femininity, she might counter the negative impression among some partners of her “macho” behavior.²⁰³ The evolutionary and human dress literatures strongly bear out this intuition on the part of the Court and the Price Waterhouse partner; in addition, social psychology research demonstrates the very strong unconscious impact social categorization can have upon both self-assessment and assessment by others.²⁰⁴

With respect to the scientific understanding of sex differences in dress in nonhuman animals, it is quite clear that these are not trivial or they would not have evolved. Male peacocks have the tails that they do because peahens, whatever their reasons, prefer to mate with males that have large, beautiful, colorful, magnificent tails. We might think that the peahens are silly for having such a preference, but this underestimates peahens in the extreme, and imposes human sex stereotypes upon them as well. Recent sexual selection research demonstrates empirically that the females’ preferences are neither silly nor arbitrary; rather, they tend to correlate with better reproductive outcomes.²⁰⁵ Whether because feather coloration signals low parasite load, or because it otherwise signals male fitness, it is simply not a *de minimus* consideration in biological terms.²⁰⁶ In short, animals take notice of dress differences and mold their behaviors in response to them.

Likewise, the interdisciplinary social science scholarship on human dress reveals that the ways humans in any culture clothe, adorn, and modify their bodies are anything but trivial.²⁰⁷ In the first place, both body adornment and gender differences in dress are, by all accounts, universal among human beings. Though there are vast differences across cultures in the manner and extent of dress and sex differences therein, human societies without exception do expect their members to dress and to do so in accordance with specific gender norms. Dress is understood to express or signal a panoply of social characteristics and behavioral traits—indeed many theorists view dress as akin to language, which many view as a (perhaps the) defining trait of the human species.²⁰⁸ “Being

203. Among other comments in her promotion file were statements that Hopkins was “macho,” that she “overcompensated for being a woman,” that she needed to “take ‘a course at charm school,’” and that she “ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr [partner] candidate.” *Id.* at 235 (alterations added).

204. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (finding that subjects construed the same actions differently depending on, for example, the race of the actor); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (describing the psychological literature on “priming,” which demonstrates the clear impact of subconscious self-categorization upon individual performance).

205. See RIDLEY, *supra* note 188, at 146–59 (collecting and discussing studies demonstrating that the preferred males are also the fittest males by other measures, such as low parasite load, disease resistance, and offspring success).

206. See discussion *supra* Part III.A.

207. See discussion *supra* Part III.B.

208. See Entwistle & Wilson, *supra* note 190, at 2 (“A number of theorists [studying dress] saw the manner in which dress communicated as a kind of language. This may have been partly because it

clothed . . . is the mark of a distinctively human form of consciousness, of being a 'person.'"²⁰⁹

The idea that dress is trivial is closely tied to the association in contemporary Western culture of fashion with femininity. Dress is viewed, negatively, as a superficial, female concern.²¹⁰ Thus, the notion that dress rules that facially differentiate on the basis of sex do not give rise to a prima facie case of sex discrimination is, ironically, an embodiment of exactly the negative sex stereotyping that the law otherwise condemns. The argument in the grooming cases based on immutability cannot do all of the work of explaining why sex-based dress codes are treated differently than other types of facial discrimination.²¹¹ Rather, the notion in the case law seems to be that some combination of mutability and lack of importance is what grounds the articulation of a test that applies uniquely to dress codes.²¹² That notion is itself a reflection of demeaning gender stereotypes. Rather than avoid true analysis by insisting that enforced dress differences are *de minimus*, courts should recognize that dress matters and proceed to a genuine examination of whether they are a form of impermissible sex discrimination.

B. Wolves, Sheep, and Clothing: Sex, Power, and Dress

Based upon the foregoing discussion, I will assume that dress is non-trivial and that employer mandated sex distinctions in dress are likewise deserving of actual analysis rather than ad hoc rules. Like the wolf in sheep's clothing, dress rules appear benign but carry hidden dangers of unconscious discrimination and retrenchment of invidious gender stereotypes. The questions still remain:

had become somewhat commonplace to assert the idea that fashion and dress are ubiquitous to culture, a fundamental feature which defines humanity." (alteration added).

209. *Id.* at 18 (quoting RENE DESCARTES, A DISCOURSE ON METHOD ETC. 92–93 (Dent 1924)).

210. See BARNARD, *supra* note 14 (explaining the theory of a "gender imbalance in the structures of looking," such that males are assumed to be active and be the "looker," while females are passive and are looked at such that "[t]he creation and maintenance of a look, or an appearance, becomes something like a defining feature of femininity, [which] may be a part of the sense behind the popular or traditional belief that fashion and clothing are somehow especially or properly the concern of women rather than of men." (alterations added)); *cf.* Case, *supra* note 21 (arguing that the denigration of things considered "feminine" is at the root of much sex discrimination and that the law must therefore protect effeminate men from discrimination on the basis of their expression of femininity in order also to protect women against sex discrimination); BARNARD, *supra* note 14, at 2 (noting idea that "for some people, to be fashion conscious or 'fashionable' is still deemed to make you 'fickle,' 'shallow,' 'dumb,' 'ephemeral' [and] 'fascist' In many everyday colloquialisms, fashion, clothing and textiles are associated with deceit and triviality." (alteration added)).

211. Other traits that are arguably immutable (in the sense that they are not completely outside the individual's control) are protected, for example religion and pregnancy. For an illuminating comparison of courts' treatment of immutability in the race, sex, and religion contexts, see Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317 (1997).

212. See, e.g., *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (hair length is neither immutable nor a fundamental right); *Austin v. Wal-Mart Stores, Inc.*, 20 F. Supp. 1254 (N.D. Ind. 1998) (hair length is neither immutable nor a fundamental right); *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800 (Iowa 2003) (wearing ear stud implicates neither immutable characteristic nor fundamental right).

What should the rules look like and what insight can the study of sexual selection and animal dress differences provide in answering that question?

In comparing animal and human dress, one intriguing difference presents itself at the outset: when sexual dimorphism is present in animals, it is nearly always the male that is the more decorated of the two sexes. In contrast, in modern Western human societies the relative decoration of the sexes is exactly the reverse.²¹³ An examination of the evolutionary pressures that result in sexual dimorphisms in animals suggests some reasons why this anomaly might exist and also helps answer the question what the legal standard should look like for eliminating barriers to equal employment opportunity for women.²¹⁴

As explained in Part IIIA, sex dimorphisms in color, decoration, and ornamentation are caused mainly by sexual selection and, in particular, intersexual selection. That is, the primary way that male animals acquire the fancy dress that is exemplified by the peacock's tail is through female preference to mate with males exhibiting the trait.²¹⁵ The very best-dressed, fanciest males are those that are members of what are known as "lekking" species.²¹⁶ "A lek is a place where males gather in the breeding season, mark out little territories that are clustered together, and parade their wares for visiting females."²¹⁷ In these species, the female exercises a rare degree of reproductive choice. A description by a well-known science writer of the sage grouse lek provides a striking illustration:

213. Though there have been eras and places in which human males have been highly adorned, the current pattern has generally prevailed in the West since the end of the French Revolution. See RUBENSTEIN, *supra* note 4, at 49–50 (relating that "[a]fter the French Revolution, scions of aristocratic families in France and England were ridiculed for constructing highly elaborate sartorial expressions," that in the 1880's "[m]en who looked beautiful continued to be denigrated as not being men," and that in the U.S. "at least since the beginning of the twentieth century, goal-directed behavior has been the standard in industrial production" with the concomitant move toward the dark, somber-colored business suit as the epitome of male status dress). On the other hand, clothing regulations from medieval times presents an almost exact mirror image of the male-female pattern in lekking species. These regulations "recognized that to attract a husband women had to wear more frivolous attire than at other times. Women in the courting stage were allowed to make use of color and ornament different from what a wife could use." *Id.* at 112; *see also id.* at 123–25.

214. *See, e.g.,* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.") (alteration in original); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) ("Section 703 (a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex.").

215. This is in contrast to dimorphisms involving size and weaponry, which are more often caused by intrasexual selection, or competition between males. One author describes the peacock thus: "Peacocks are among the few birds that run a kind of market in seduction techniques, called a "lek" after the Swedish word for play." RIDLEY, *supra* note 188, at 140–41.

216. *See* WILSON, *supra* note 188, at 331–32. As Wilson notes, "[t]he most complicated and spectacular lek systems occur in birds," and "[t]he males belonging to species on this list [of ten families of lekking species of birds] are among the most colorful of the bird world. The brilliant red cock of the rock, for example, is easily the most spectacular cotingid, and the birds of paradise are justly considered the most beautiful of all birds." *Id.* (alterations added).

217. RIDLEY, *supra* note 188, at 141.

It is an extraordinary experience to drive out to the middle of Wyoming before dawn, stop the car on a featureless plain that looks like every other one, and see it come alive with dancing grouse. Each knows his place; each runs through his routine of inflating the air sacs in his breast and strutting forward, bouncing the fleshy sacs through his feathers for all the world like a dancer at the Folies Bergere. The females wander through this market, and after several days of contemplating the goods on offer, they mate with one of the males. That they are choosing, not being forced to choose, seems obvious: The male does not mount the female until she squats in front of him.²¹⁸

The correlation between fancy dress and female choice is that the males must entice the females to choose them or lose out in the contest for reproductive success. In lekking species, a small number of males do most of the mating and the rest of the males go home empty-handed, so to speak. This dynamic creates selection pressures for showy displays of the sort that the females prefer. The females, in this sense, are possessed of a good deal of reproductive choice and a certain degree of power and autonomy.²¹⁹ The males, conversely, are looking to be chosen.

For humans, in contrast, the contemporary Western norm posits that females should be the showy sex. They are expected to wear more colorful clothing than men, to color their faces with makeup, and to display certain body parts. Just as this is a reversal of the dress dimorphism pattern among nonhuman animal species, so might we hypothesize that it is a reversal of the power dimorphism as well. In other words: the prevalent gender based norm that requires women to be the fancier sex is likely to reveal a power differential that is both reflected and perpetuated by such a gender dress norm. Such a norm, then, is neither trivial nor benign.

Courts already evidence a suspicion of dress codes that seem to mandate female sexiness.²²⁰ The animal dress research suggests that this suspicion is not only well grounded, but that it does not go far enough. Not just blatantly sexually provocative attire, but any dress policy that requires women employees to be more colorful, more decorated, or to show more of their bodies should raise an inference that the policy is discriminatory on the basis of sex.

Likewise, courts have struck down as discriminatory uniform requirements that seemed to imply a power or status differential between male and female

218. *Id.* The picture is not all freedom and play for the female, however: "Minutes later his job is done, and her long and lonely parenthood is beginning. She has received only one thing from her mate—genes—and it looks as if she has tried hard to get the best there were to be had." *Id.*

219. Sexual coercion is not seen in lekking species as it is often seen in other species, including those in which the males are significantly larger than the females or in which the dimorphisms are otherwise the result of intrasexual (male-male) selection. For discussions of sexual coercion among animals, see Barbara B. Smuts & Robert W. Smuts, *Male Aggression and Sexual Coercion of Females in Nonhuman Primates and Other Mammals: Evidence and Theoretical Implications*, 22 *ADVANCES STUDY BEHAV.* 1-63 (1993); T.H. Clutton-Brock & G. Parker, *Punishment in Animal Societies*, 373 *NATURE* 209 (1995).

220. See *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981); *Gerdorn v. Cont'l Airlines*, 692 F.2d 602, 605 (9th Cir. 1982); *Laffey v. Nw. Airlines, Inc.*, 366 F. Supp. 763, 774 (D.D.C. 1973). See also discussion *supra* notes 66-69 and accompanying text.

employees.²²¹ Viewed through the prism of sexual selection, power and decoration are closely related. Forcing women to wear makeup and reveal their legs, as much as forcing them to wear a uniform when males in similar positions do not, implies that they are objects of selection rather than agents of choice and authority.

Several scholars have in recent years turned their focus to the problems of unconscious discrimination and cognitive biases.²²² Dress, as the aspect of individuals that others see first and see most clearly, cannot but be a part of any assessment of the individual employee, just as the peahen cannot but be influenced by the size, brightness, and symmetry of the peacock's tail. Because dress is so crucial a characteristic in sexually dimorphic species, and because it is so closely tied to sexual attractiveness, choice, and power dynamics, employers should be prohibited from requiring women to dress in gender normative ways that reflect those traits even if they believe that such dress codes do not amount to intentional sex stereotyping.²²³ Where, as here, so many threads come together to demonstrate that sex differences in dress are likely to affect the way that individuals are treated by others, employers should not be permitted to mandate differences that implicate notions of attractiveness or power.

V. CONCLUSION

People are not peafowl, and yet an examination of sex-based dress norms cannot but evoke the image of the peacock strutting his stuff or the male sage grouse shimmying his breast like a burlesque dancer.²²⁴ Nor can it fail to illuminate the contrast between the plain females in such animal species and the modern Western dress norms that cast males as drab and colorless and females as fancy. Such dress differences among animals are caused by sexual selection and, in that sense, are most certainly "because of . . . sex."²²⁵ More significant, the extent and nature of these dress dimorphisms among nonhuman animals reflect male-female power dynamics and are closely related to sexual attractiveness and mating behavior. Indeed, sexual behavior and power dynamics are two sides of the same coin and cannot logically be separated in the context of animal dress: males are fancier precisely *because* females have more power.

Courts in the workplace dress cases have already exhibited some sensitivity to the factors of sexuality and power status where women have challenged sex-differentiated dress requirements, though they have not explicitly related these two concerns nor applied them in any systematic way. An examination of the

221. See *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1028 (7th Cir. 1979); *O'Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F. Supp. 263 (S.D. Ohio 1987); *EEOC v. Clayton Fed. Sav. & Loan Assoc.*, 1981 WL 152 (E.D. Mo. 1981).

222. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Krieger, *supra* note 204; Ann C. McGinley, *jViva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL'Y 415 (2000); Amy L. Wax, *Discrimination as Accident*, 74 IND. L. J. 1129 (1999).

223. See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc) (finding no evidence that Harrah's intended to enforce a sex stereotype).

224. See *supra* note 218 and accompanying text.

225. Title VII imposes this requirement as a basis for a finding of sex discrimination. See 42 U.S.C. § 2000e(2) (2000).

sexual selection literature reveals that all dress dimorphisms are essentially and inextricably entwined with the elements of sexuality and power. The fancier the dress, the more power exercised by the undecorated sex. When viewed in that light, it becomes impermissible—indeed inexcusable—for employers to mandate, and for courts to validate, dress and grooming differences that reflect social gender norms of attractiveness and decoration.²²⁶

226. I do not address here the problem of sex related businesses such as the late Playboy Club or strip clubs. In a sense, those cases involve not sex-differentiated dress codes but sex-based hiring pure and simple (though of course, once hired, female employees are required to dress in a highly sexualized manner). Thus, the issue is distinct and is beyond the scope of this Article.