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CORRECTING RACE AND GENDER: PRISON REGULATION OF SOCIAL HIERARCHY THROUGH DRESS

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This Article examines the enforcement of racialized gender norms through the regulation of dress in prisons. Dress, including hair and clothing, is central to the ways government and other institutions enforce hierarchical social norms. These norms are based on the intersection of race and gender, as well as religion, sexuality, class, age, and disability. For many people, dress is a way to express identity, exercise autonomy, practice religion, participate politically, experience pleasure, preserve health, or avoid violence. My review of prison dress regulations shows that prison systems commonly impose penalties including solitary confinement for deviations from dominant social norms. Examples of these deviations include wearing hair in an Afro, covering hair with a headscarf, or having long hair if incarcerated as a man. I situate prison rules in the historical context of dress regulation and prison evolution in the United States. The justifications—such as repression of homosexuality and group affiliation, prevention of attacks and escapes, and promotion of hygiene and rehabilitation—that prison officials offer for these rules raise normative and instrumental concerns. Nonetheless, courts frequently diminish individual and community interests in dress while deferring to prison regulations that lack complete or credible justifications. In furtherance of the goal of prison abolition, I propose an integrated approach for change through policy amendments, doctrinal shifts, and broader grassroots efforts for social transformation.

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"[N]o white American ever thinks that any other race is wholly civilized until he wears the white man's clothes . . . ."

—Booker T. Washington[1]

"How they control you and mandate you to this gender binary is if you're in a women's facility you must wear whatever society says is for women. . . . At CIW when I first got there, I had on boxers; they took them, said they were contraband. . . . Then they make you wear panties and a mumu, an old lady housedress."

—Bakari[2]

"[I]f 'the category of "inmate" in the United States today . . . [is] a racialized one,' corrections regulation may be conceived as a kind of racialized law-making."

—Giovanna Shay[3]

INTRODUCTION

Throughout the United States, prison systems lock people in solitary confinement for such offenses as wearing dreadlocks or Afros, possessing nail polish in a men's facility, or wearing boxers in a women's facility. Guards beat, subdue, and forcibly shave the heads of Native men, transgender women,[4] and other people in men's prisons

[1] BOOKER T. WASHINGTON, UP FROM SLAVERY 68 (2d ed., Penguin Group 2010).

[2] Julia Sudbury, *From Women Prisoners to People in Women's Prisons: Challenging the Gender Binary in Antiprison Work*, *in* RAZOR WIRE WOMEN 169, 177 (Jodie Michelle Lawston & Ashley E. Lucas eds., 2011).

[3] Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 330–31 (2009) (quoting Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, 255 (2009)).

[4] *Transgender women* or *trans women* are those who now self-identify as women who were identified by others as male at birth. *Transgender men* or *trans men* are those who now self-identify as men who were identified by others as female at birth. Not all transgender people identify as men or as women. I refer to people who are not transgender as *non-transgender* or *non-trans*.

with long hair. Imprisoned people may lose credits earned toward early release due to braiding another person's hair or wearing tight or sagging pants.[5]

In this Article, I use these types of prison dress[6] regulations to explore the enforcement of racialized gender norms in the U.S. criminal legal system. Dress is a central means through which people convey and perceive social meaning;[7] its regulation provides a nuanced prism for examination of larger systems of hierarchy. Although courts and commentators often claim that concerns about dress are trivial, dress has been regulated throughout history and has provoked severe responses in the U.S. criminal legal system. Dress is also sufficiently important to individuals and communities that many resist restrictions on their dress even when faced with serious punishment.

Additionally, race and gender are central axes around which society, and societal fixation on dress regulation, is structured. Institutional and interpersonal enforcement of norms of race and gender perpetuate the subordination of people of color, women, and transgender people.[8] Looking at norms of race and gender separately, however, is misleading. Race is the lens through which gender is constructed and vice versa.[9] Kimberlé Crenshaw has written about how women of color are marginalized within both anti-racist discourses—constructed around men of color's experience—and in feminist discourses—constructed around White women's experience.[10] The experience of women of color is not additive; it is not the same as White women's experience *plus* men of color's experience.[11] Instead, women

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[5] *See infra* Part III.

[6] I use the term *dress* to encompass "hairstyle, makeup, clothing, shoes, head coverings, tattoos, jewelry, and other adornments that make up the public image of our sometimes private persons." Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 13 (2006).

[7] *See, e.g.*, ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW 232 (1996) ("Since gender is a cultural construct and thus liable to instability, it follows that it must constantly be reinforced to preserve a stable and dichotomous conception of male/female, masculinity/femininity. Appearance is central to the visibility and recognizability of gender.").

[8] These categories are overlapping, not exclusive.

[9] *See, e.g.*, IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE, at xxi (2006) ("We live race through class, religion, nationality, gender, sexual identity, and so on.").

[10] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991).

[11] *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 ("Because the intersectional experience is greater than the

of color face unique forms of violence[12] and discrimination *as women of color* that cannot be understood simply through examining the experiences of the most privileged members of groups facing racism and sexism.[13] Crenshaw's concept of intersectionality centralizes the experiences of people facing multiple forms of marginalization, and thus avoids the distortion involved in considering only a single axis of marginalization.[14]

To understand the racialization of gender norms, we must expand Crenshaw's insights on intersectionality. Norms that enforce a hierarchical male/female binary in terms of gender simultaneously enforce a hierarchy based on race, producing different demands and stereotypes for different gendered and racialized groups. For example, racialized gender norms for White women have required passive subservience to White men, sexual purity, and domesticity, in contrast to norms which have conceived of Black women as asexual workhorses ("Mammy"), or alternatively as hypersexual ("Jezebel") or animalistic and violent ("Sapphire").[15] Norms of dress are also simultaneously racialized and gendered.[16]

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sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.").

[12] Crenshaw refers particularly to battering and rape. Crenshaw, *supra* note 10, at 1243. Throughout this Article, I employ an understanding of violence that includes a wide array of institutional, government, corporate, and individual practices and power structures that coerce, control, harm, restrict life chances, prevent self-determination, shorten life, or subordinate individuals or communities.

Max Weber introduced the concept of life chances. *See* MAX WEBER, *Class, Status, and Party*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 180 (H.H. Gerth & C. Wright Mills eds., 1948). I use it to refer to opportunities and resources, such as quality education, clean water, and safe housing, that create greater options in living one's life.

[13] Crenshaw, *supra* note 10, at 1243–44.

[14] *See* Crenshaw, *supra* note 11, at 140 (describing how dominant conceptions of discrimination focus on the most privileged members of the group, "marginaliz[ing] those who are multiply-burdened" and "creat[ing] a distorted analysis of racism and sexism").

[15] *See, e.g.*, PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 72 (2d ed. 2000) (describing how middle class White women were encouraged to aspire to "piety, purity, submissiveness, and domesticity" while the idealized black "mammy" was "loving, nurturing, and caring for her White children and 'family' better than her own"); *id*. at 83 ("In this context of a gender-specific, White, heterosexual normality, the jezebel or hoochie becomes a racialized, gendered symbol of deviant female sexuality."); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 157 (1998) ("[A] white woman's honor lay in the purity of her sexuality, in stark contrast to the degraded sexuality of a black 'Jezebel.'"). A more recent incarnation of these norms portrays Black women as dangerously fertile and lazy ("Welfare Queen"). *See id.* at 78–80 (describing the emergence of the stereotype of the "welfare queen" used to scapegoat Black women and mask government social welfare spending cuts in the 1980s).

[16] For example, the long straight hair that has been a standard for feminine beauty in the United States is defined in opposition not only to close-cropped "masculine" hair but

To be fully understood, racialized gender norms also must be examined in intersection with other forms of marginalization, including those based on religion, class, age, sexuality, and disability. Racialized gender norms impact all people, but primarily they devalue the lives, bodies, identities, and dress of outsiders to Whiteness, maleness, "Americanness," and ablebodiedness—trans people of color and women of color who are immigrants, disabled, youth, elders, poor, queer,[17] or members of religious minorities.[18] Trans people face different stereotypes and forms of violence through the intersection of race and gender.[19] While all trans people are vulnerable to discrimination and violence, trans people of color are targeted more intensely and pervasively than White trans people.[20]

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also to the short or tightly curled hair of many Black women. *See, e.g.*, ROSE WEITZ, RAPUNZEL'S DAUGHTERS: WHAT WOMEN'S HAIR TELLS US ABOUT WOMEN'S LIVES 99 (2004).

[17] I use *queer* to describe people whose sexualities are outside the norm of heterosexuality, including gay, lesbian, same-gender loving, bisexual, pansexual, asexual, and questioning people. Some people have reclaimed the term queer as an otherwise pejorative term "that has been adopted by communities with power and pride." Owen Daniel-McCarter, *Us vs. Them! Gays and the Criminalization of Queer Youth of Color in Chicago*, 32 CHILD. LEGAL RTS. J. (forthcoming 2012) (manuscript at n.7) (on file with the *New York University Law Review*). Also, the term queer "allows for gender fluidity—it does not gender the person identifying as queer, nor does it gender the people they have sex and other intimacy with." *Id.*

[18] *See* Pooja Gehi, *Struggles from the Margins: Anti-immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS. L. REP. 315, 317 (2009) ("People of color, low-income people, lesbian, gay, bisexual, and transgender people, people with infectious diseases, criminals, people with mental illness, and people without formal education are marginalized in our society whether or not they are immigrants.").

[19] For example, trans women of color are widely stereotyped as promiscuous and deceptive sex workers, whereas White trans women are more often stereotyped as ludicrous and tragic figures. *Compare* AMNESTY INT'L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 21–22, 24 (2005), *available at* http://www.amnesty.org/en/library/asset/AMR51/122/2005/en/2200113d-d4bd-11dd-8a23-d58a49c0d652/amr511222005en.pdf, *and* Monica Roberts, *Destruction of the Black Transwoman Image*, THE BILERICO PROJECT (May 12, 2008, 9:00 AM), http://www.bilerico.com/2008/05/destruction_of_the_black_transwoman_imag.php (describing how the media perpetuates the myth of Black transgender women as sex workers), *with* JULIA SERANO, ON THE OUTSIDE LOOKING IN (2005), *available at* http://www.juliaserano.com/outside.html, *and* Calpernia Addams, *Transsexual Clichés and Stereotypes in Film, Television and Print Media*, CALPERNIA ADDAMS, http://www.calpernia.com/transsexual-cliches-and-stereotypes-in-media/ (last visited Aug. 9, 2012).

[20] *See* JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 6, 58, 74, 166 (2011), *available at* http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf (finding that eighteen percent of White trans people who interacted with police experienced harassment, compared with thirty-eight percent of African-American trans people and twenty-nine percent of Asian trans people; that five percent of White trans people had been physically assaulted at work, compared with twenty percent of Latin@ trans people; that seventeen percent of White

Scholars have analyzed the regulation of race and gender norms through dress in the context of employment and education.[21] However, prison dress regulation has not received comparable attention, despite the centrality of prisons in U.S. society.[22] Prison dress regulations directly impact millions of incarcerated people and indirectly impact many millions more, particularly in marginalized communities targeted for criminalization.[23] Prisons consolidate and intensify the disciplinary regimes present in education, employment, and other settings,[24] while influencing practices beyond prison walls.[25] Prison dress regulations also shed light on the interests of many actors in the criminal legal system.[26] Furthermore, prison dress regulations

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trans people had been refused medical care, compared with thirty-six percent of Native trans people; and that twenty-nine percent of incarcerated White trans people had been harassed by staff, compared with fifty-six percent of incarcerated Latin@ trans people).

[21] *See, e.g.*, Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 377 (critiquing the lack of intersectional analysis in a federal court decision ruling against a Black woman fired for having a braided hairstyle); Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, *in* TRANSGENDER RIGHTS 3, 7 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006) ("That schools are central to reproducing hegemonic cultural norms is made clear by the courts in the many decisions supporting gender-based dress codes in schools."); Ritu Mahajan, *The Naked Truth: Appearance Discrimination, Employment, and the Law*, 14 ASIAN AM. L.J. 165, 165 (2007) ("The appropriate standards for appearance are measured and dictated by societal norms, for which white culture often serves as a reference.").

[22] *See* DYLAN RODRIGUEZ, FORCED PASSAGES 14 (2006) ("[I]n the current era of mass imprisonment, white-supremacist unfreedom . . . provides the institutional form, cultural discourse, and ethical basis of social coherence, safety, and civic peace. It is therefore the normal functioning of the prison that bears interrogation . . . .").

[23] *See* Shay, *supra* note 3, at 329–30 (discussing the large number of incarcerated people and the effect of this mass incarceration on families and communities); *see also* DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 24 (2011) (arguing that "because they structure the entire context of life[,]" administrative classifications can actually produce more harm than "spectacular" acts—such as firing or murdering a person because of his race or gender); *infra* notes 235–39 and accompanying text.

[24] *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 236 (Vintage Books 2d ed. 1995) (1975) ("[The prison] carries to their greatest intensity all the procedures to be found in the other disciplinary mechanisms.").

[25] SPADE, *supra* note 23, at 22 (stating that "criminalization and imprisonment filter through every aspect of how we live and understand ourselves and the world," including the way students are disciplined in school, the way homeless services are provided, and the way issues are framed on the news and in elections).

[26] Many scholars use the term "prison industrial complex" to highlight the complex relationships of these entities. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 84–85 (2003) ("The notion of a prison industrial complex insists on understandings of the punishment process that take into account economic and political structures and ideologies, rather than focusing myopically on individual criminal conduct and efforts to 'curb crime.'"); Correctional Documentary Project, *The Prison Industrial Complex*, CORRECTIONSPROJECT.COM, http://www.correctionsproject.com/studyMaterials/PICposter.pdf (last visited Aug. 9, 2012) (explaining the relationships of many entities involved in the prison industrial complex).

uniquely mobilize the power of the criminal legal system to punish deviations, implementing some of the harshest punishments available to the government.[27] Thus, prisons present a crucial setting for better understanding how dress regulations enforce racialized gender norms throughout society.

Applying analysis from Critical Race Feminism and Critical Trans Politics, I conclude that prison dress regulations violently enforce racialized gender norms by: (1) taking away the ability of imprisoned people—who are often marginalized in multiple ways—to self-determine their dress; (2) forcing imprisoned people to adhere to dominant social norms through dress, even when they deeply object; (3) using the full weight of the criminal legal system to punish those who refuse to adhere to those norms; and (4) using dress that does not match dominant norms as a form of punishment and humiliation.

In light of these concerns, I build on the work of prison abolitionist scholars and activists who have developed proposals for meaningful change. Prison abolition and transformative justice are grassroots movements, scholarly theories, and strategic approaches seeking radical societal transformation by eliminating the use of criminalization as a "solution" to social problems.[28] Prison abolitionists seek to dismantle hierarchical systems that marginalize poor people, people of color, disabled people, immigrants, trans people, youth, women, members of religious minorities, and queer people.[29] Prison abolitionists seek to redistribute wealth, power, and opportunities to many people, rather than further consolidating those assets in the hands of a few. Prison abolitionists seek to create viable means to prevent violence, help survivors of violence heal, and hold people and communities accountable for violence they have perpetrated.[30]

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[27] *See infra* Part III.A.3.

[28] *E.g.*, Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, HISTORY IS A WEAPON, http://www.historyisaweapon.com/defcon1/davisinterview.html (last visited Aug. 9, 2012).

[29] *See* DAVIS, *supra* note 26, at 108 ("Alternatives that fail to address racism, male dominance, homophobia, class bias, and other structures of domination will not . . . advance the goal of abolition."); SPADE, *supra* note 23, at 196 (noting need to transform the racism, classism, patriarchy, and ableism that support imprisonment).

[30] *See* DAVIS, *supra* note 26, at 107 ("An abolitionist approach . . . would require us to imagine a constellation of alternative strategies and institutions, with the ultimate aim of removing the prison from the social and ideological landscapes of our society."); GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE 20, 25 (2007), *available at* http://www.generationfive.org/downloads/G5_Toward_Transformative_Justice.pdf (outlining a model of transformative justice that responds to violence by creating "opportunities for healing and transformation rather than retribution and punishment" and describing its application to childhood sexual abuse); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L.

Part I identifies key reasons why dress matters, particularly to people who are incarcerated or marginalized. In order to better understand the development and operation of our current system, I offer a historical context for the development of prison dress regulations in Part II.[31] Part II describes how dress regulation has played a role in racialized gender violence in the United States through colonization, slavery, immigration enforcement, cross-dressing laws, and other forms of regulation. After surveying these developments, I provide a brief history of prisons in the United States to show how present-day prison dress regulations have emerged.

After this background, in Part III I survey current prison dress regulations throughout the United States. In Part IV I analyze prison officials' justifications for dress regulations, which include: repressing homosexuality and gang affiliation; preventing escapes, attacks, and hygiene problems; and promoting detection of contraband, safe working conditions, and rehabilitation of imprisoned people. In Part V, I evaluate themes in case law concerning these regulations that minimize the interests of imprisoned people in dress while deferring to government interests.

Finally, in Part VI I discuss the possibilities for change on three levels: policy reform, doctrinal shifts, and social transformation. I propose an approach that synthesizes several key critiques and incorporates multiple strategies to end enforcement of racialized gender norms through prison dress regulations in ways that support dismantling of race and gender social hierarchy more broadly.

I
How Dress Matters

Before examining prison dress regulations, it is helpful to consider the complex interests at stake for regulated people.[32] Below, I

Rev. 283, 285 (2007) (arguing that "redirection of criminal justice spending to rebuild [devastated] neigborhoods" should accompany abolition).

[31] Jim Phillips, *Why Legal History Matters*, 41 Victoria Univ. Wellington L. Rev. 293, 294 (2010), *available at* http://www.law.utoronto.ca/documents/Phillips/Phillips_-_Why_Legal_History_Matters.pdf ("[I]f I am right that legal developments cannot be separated from other historical trends then a sense of history is vital to understanding the law, even (or perhaps because), it tends to highlight the limitations of law.").

[32] I do not wish to imply that the burden to prove why dress matters should fall on those people whose dress practices are restricted; however, I seek to resist the "perpetrator perspective" that looks only at the motivations of dominant groups for their actions while obscuring the impact of those actions on marginalized groups. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* Critical Race Theory: The Key Writings That Formed the Movement 29 (Kimberlé Crenshaw et al. eds., 1995) (defining the perpetrator perspective).

provide an overview of some of the individual and community interests in self-determining dress.

A. Identity, Dignity, and Bodily Integrity

Self-determination of dress involves the ability to make intimate decisions about one's body and the way one is perceived, to express identities that are central to a sense of self and of group belonging, and to maintain dignity, autonomy, and privacy. Expression of identity, including gender and racial identity, is a central reason why dress is important.[33] Depriving a person of the opportunity to express their identity and personality through dress causes profound dignitary harm[34] and injury to one's sense of self.[35] The interest in expressing one's identity is also an interest in autonomy.[36] For example, a Black working class lesbian described being forced to wear a hairstyle that did not reflect her identity as "bondage" and degradation.[37]

Because dress involves changes to parts of the body, materials that touch the body, and how much of the body is revealed, it also implicates rights to bodily integrity and privacy.[38] Stefanie, a Latina

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[33] *See* Mahajan, *supra* note 21, at 173 ("Individuals express their identities through social practices, including the choices they make about dress and appearance."); *see also* WEITZ, *supra* note 16, at 64 ("Changing our hair . . . changes our identity because our hair (and our appearance more generally) is central to how we see ourselves and are seen by others."); Angelica M. Sinopole, *"No Saggy Pants": A Review of the First Amendment Issues Presented by the State's Regulation of Fashion in Public Streets*, 113 PENN ST. L. REV. 329, 351–52 (2008) ("Baggy pants that sag below the waistline express the wearers' identification with their neighborhood roots or socio-economic background" or "express identification with the black popular culture or hip-hop style."); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 754 (2008) ("For those [transgender people] who wish to enhance the masculinization or feminization of their appearance, changing external gender expressions such as hairstyle, clothing, and accessories is often an effective, affordable, non-invasive way to alter how they are perceived in day-to-day life.").

[34] *See* Caldwell, *supra* note 21, at 387 ("[A] black woman's choice of hairstyle . . . is associated in the minds of the women themselves and others with an extension of the personality, a dignitary interest.").

[35] *See* ERVING GOFFMAN, ASYLUMS 20 (1961) ("On admission to a total institution, . . . the individual is likely to be stripped of his usual appearance and of the equipment and services by which he maintains it, thus suffering a personal defacement."); WEITZ, *supra* note 16, at 134 ("[L]osing one's hair can feel like losing one's very self.").

[36] Kenji Yoshino defines "covering" as "ton[ing] down a disfavored identity in order to fit into the mainstream." KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS ix (2006). He argues against unjustified, coercive covering demands and describes the interest in *not* being forced to cover as one based in autonomy, through "giving individuals the freedom to elaborate their authentic selves." *Id*. at 93.

[37] WEITZ, *supra* note 16, at 159.

[38] *See* Ramachandran, *supra* note 6, at 34–35 (arguing that clothing, hairstyle, makeup, piercings, tattoos, and other choices about dress implicate the right to bodily integrity as well as the right to bodily privacy). *See also* WEITZ, *supra* note 16, at xiv (explaining that "[t]he symbolic meaning of hair is heightened by its uniquely personal quality" as it grows directly from our bodies and is seen and interpreted by others).

trans woman in a New York state men's prison, compares the pain of the loss of her hair to other bodily loss: "It was the most devastating day of my life when they made me cut my hair when I was transferred . . . . It took me so long to grow it. It was like taking an arm."[39]

B. Communication, Politics, Culture, and Religion

Dress is uniquely suited for many forms of symbolic communication.[40] Studies discuss the semiotics of dress—interpreting the shades of meaning intended and understood through clothing, hair, and appearance.[41]

From black armbands to protest the Vietnam War[42] to red ribbons to raise awareness about HIV/AIDS,[43] many people communicate political views through dress.[44] Consequently, dress regulation can provoke dissent through dress. For instance, a hip-hop artist, outraged about Atlanta's proposed ordinance against sagging pants, publicized his decision to wear sagging pants during a concert in the city of Atlanta as a form of protest.[45]

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[39] SYLVIA RIVERA LAW PROJECT, IT'S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 31 (2005), *available at* http://srlp.org/files/warinhere.pdf.

[40] *See* HELEN BRADLEY FOSTER, "NEW RAIMENTS OF SELF": AFRICAN AMERICAN CLOTHING IN THE ANTEBELLUM SOUTH 69 (1997) ("The clothing one puts on one's corporeal self helps to mark one's place in humanity."); WEITZ, *supra* note 16, at xiii ("Because of its remarkable malleability, hair is uniquely suited for conveying symbolic meanings."); Mahajan, *supra* note 21, at 173 ("Dress and appearance choices communicate certain ideas, values, or beliefs held by an individual and create meaning.").

[41] *See* MALCOLM BARNARD, FASHION AS COMMUNICATION 80–95 (2d ed. 2002) (arguing for a semiological account of the meaning of fashion and clothing); HUNT, *supra* note 7, at 58 (discussing "dress as form of language"); Alinor C. Sterling, *Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women's Clothing in Rape Trials*, 7 YALE J.L. & FEMINISM 87 (1995) (discussing the semiotics of women's clothing in the context of criminal rape cases); Pauline Weston Thomas, *Theories of Fashion Costume and Fashion History*, FASHION-ERA.COM, http://www.fashion-era.com/sociology_semiotics.htm (last updated 2005) (analyzing the semiotics of fashion).

[42] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969) (ruling that wearing black armbands in schools in protest of war qualifies as constitutionally protected speech).

[43] *The Red Ribbon,* WORLD AIDS DAY, http://www.worldaidsday.org/the-red-ribbon.php (last visited Aug. 9, 2012) (explaining that the red ribbon is the universal symbol of awareness and support for people living with HIV).

[44] *See* HUNT, *supra* note 7, at 217–18 ("Since dress discloses gender it also expresses, directly or indirectly, the sexual politics of the age."); Ramachandran, *supra* note 6, at 42 ("Freedom of dress is important because manipulation of personal appearance is for many of us the means by which we negotiate the personal and the political—a means constituted on the borders of our own bodies."); Dean Spade, *Dress To Kill Fight To Win*, MAKEZINE, http://www.makezine.enoughenough.org/deanfas.html (last visited Aug. 9, 2012) (describing fashion and body modification as tactics of activist resistance).

[45] *See* Sinopole, *supra* note 33, at 353; *see also* Jennifer Brett & Jeffrey Scott, *Saggy-Pants Wearers Chafe at All the Attention*, ATLANTA J.-CONST., Aug. 24, 2007, at D1.

When people from marginalized groups dress in ways that challenge prevailing hierarchies, their messages carry power: "[T]he choice by blacks either to make no change [to their hair] or to do so in ways that do not reflect the characteristics and appearance of . . . whites, represents an assertion of the self that is in direct conflict with the assumptions that underlie the existing social order."[46] These decisions can communicate dignity and political identity—claiming space in the world for communities that have been excluded. Simi Linton describes disabled communities' use of dress in this way:

> We have come out not with brown woollen [sic] lap robes over our withered legs or dark glasses over our pale eyes but in shorts and sandals, in overalls and business suits, dressed for play and work—straightforward, unmasked, and unapologetic. . . . And we are not only the high-toned wheelchair athletes . . . but the gangly, pudgy, lumpy, and bumpy of us, declaring that shame will no longer structure our wardrobe or our discourse.[47]

Dress is also a key component of cultural continuity, preservation, creation, and expression. Some cultural traditions of dress, such as hair braiding among Black women[48] or the ceremonial use of henna tattooing,[49] extend hundreds and even thousands of years. For many, dress is also an art form.[50]

Many people have strong religious beliefs associated with their dress. Several religions prohibit men from cutting their hair.[51] For example, an imprisoned Cahuilla man expressed that his religious beliefs required him to keep his hair long. Cutting his hair would "cost

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[46] Caldwell, *supra* note 21, at 384.

[47] SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY 3–4 (1998).

[48] Caldwell, *supra* note 21, at 379 ("Wherever they exist in the world, black women braid their hair. They have done so in the United States for more than four centuries. African in origin, the practice of braiding is as American—black American—as sweet potato pie.").

[49] Carrie Griffin Basas, *Henna Tattooing: Cultural Tradition Meets Regulation*, 62 FOOD & DRUG L.J. 779, 781 (2007) ("This dialogue between the personal and invisible has been a theme of henna use for thousands of years. Henna's centrality has woven itself into cultures and their sacred texts throughout Asia, Africa, and more recently, the Americas and Europe.").

[50] *See* Ramachandran, *supra* note 6, at 49 ("Some persons put a great deal of imagination and creativity into the way they dress, wear their hair, or otherwise present themselves in public. . . . It is undeniable that such persons are engaging in a form of artistic expression via their dress, amateur or not.").

[51] Mara R. Schneider, *Splitting Hairs: Why Courts Uphold Prison Grooming Policies and Why They Should Not*, 9 MICH. J. RACE & L. 503, 508 (2004) ("Several religions require male members to forgo cutting their hair as a tenet of the religion.").

him his wisdom and strength" and have consequences in the afterlife.[52]

Dress often represents overlapping communicative, political, religious, identity, and cultural interests. For some Muslim women, wearing a headscarf or *hijab* in public can be "a choice to be modest, both in character and appearance."[53] Others have described wearing hijab as a compulsory religious duty; an expression of pride in their national, ethnic, or religious identity; a refusal to surrender to an Islamophobic society; a symbol of either liberation from patriarchy or of patriarchal control; an important aspect of membership in their communities; an act of political solidarity; or a combination of these and other forms of expression.[54] Even those forms of dress with profoundly personal meanings have a political impact.

C. Health, Safety, Survival, and Happiness

People sometimes make decisions about dress for health, safety, and survival reasons, as well as to promote pleasure and avoid suffering. Dress has particularly important consequences for survival in marginalized groups.[55] Many now believe that dress plays a beneficial

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[52] Warsoldier v. Woodford, 418 F.3d 989, 991–92 (9th Cir. 2005) (ruling that a required haircut of a Native imprisoned man would violate the Religious Land Use and Institutionalized Person Act (RLUIPA)).

[53] Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right To Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 449 (2008) (describing ideals that underlie wearing hijab for many Muslim women).

[54] *See, e.g.*, *id.* at 449–50; Z. Gabriel Arkles, *The Scarf*, *in* VOICES OF RESISTANCE: MUSLIM WOMEN ON WAR, FAITH & SEXUALITY 247, 247–48 (Sarah Husain ed., 2006) (describing pride as a Muslim and commitment to religious duty as reasons for wearing a headscarf); Mirvat F. Hatem, *Political and Cultural Representations of Arabs, Arab Americans, and Arab American Feminisms after September 11, 2011*, *in* ARAB & ARAB AMERICAN FEMINISMS 10, 23 (Rabab Abdulhadi, Evelyn Alsultany & Nadine Naber, eds., 2011) (discussing "*Hijab* Days" action organized by Muslim women college students where they invited others students to wear hijab as an expression of support); *see generally* LEILA AHMED, A QUIET REVOLUTION: THE VEIL'S RESURGENCE, FROM THE MIDDLE EAST TO AMERICA 209–10 (2011) (listing solidarity with other Muslims, pride in religious heritage, affirmation of identity and community, and protest against mainstream society as reasons for wearing hijab).

[55] *See* Caldwell, *supra note* 21, at 383 ("[P]articularly for black women, such [hairstyle] choices also reflect the search for a survival mechanism in a culture where social, political, and economic choices of racialized individuals and groups are conditioned by the extent to which their physical characteristics . . . approximate those of the dominant racial group."). Dress can support biological survival. *Absolute Poverty Definitions and Political Consequences*, POVERTIES.ORG, http://www.poverties.org/absolute-poverty.html (last visited Aug. 9, 2012) (defining absolute poverty as an inability to meet basic needs for biological life, including clothing as one of those necessities). Dress can support cultural survival. Irma Otzoy, *Maya Clothing and Identity*, *in* MAYA CULTURAL ACTIVISM IN GUATEMALA 141, 154 (Edward F. Fischer & R. McKenna Brown eds., 1996) ("Maya dress plays an

role in human development.[56]

Cynthia La Rochelle, an imprisoned trans woman, tried to get access to clothing that matched her gender identity but was refused. She explains: "I don't think they understand . . . its importance as it relates to relieving some of the dysphoria resulting from my gender identity issues."[57] Other imprisoned trans women have also identified their need for feminine forms of dress in terms of mental health and have noted prison officials' indifference to these claims. An imprisoned trans woman named Becky writes:

> I receive no treatment or support for my gender dysphoria. Even the smallest concessions to my female identity, like . . . shaving my body hair get[s] me punished and put into segregation. . . . I was diagnosed 2 1/2 years ago with gender identity disorder (GID), and I wanted the mental health worker to explain that my behavior was a symptom of the disorder. My request was ignored, and the reason for being punished was simply written up as "a hair shaving problem."[58]

Policies prohibiting facial hair have a disproportionate impact on Black people.[59] Shaving can cause pain and scarring for people with *psuedofolliculitis barbae*, a skin condition common among Black people.[60] One man filed a lawsuit when his prison would no longer exempt him from shaving; he explained that "when he shaves, he gets

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important role as a symbol of cultural survival and solidarity."). It can also support economic survival. *What We Do*, DRESS FOR SUCCESS, http://www.dressforsuccess.org/whatwedo.aspx (last visited Aug. 12, 2012) (describing mission of non-profit organization that supplies professional clothing to women to support their economic independence).

[56] Ramachandran, *supra* note 6, at 40 ("The therapeutic role of forms of self-presentation . . . are now acknowledged. Moreover, the freedom to choose individual fashion can greatly improve self-esteem and provide a sense of power over the environment."); Emily Anthes, *Dressed for Distress*, SCIENTIFIC AMERICAN, http://www.scientificamerican.com/article.cfm?id=dressed-for-distress (Oct. 10, 2008) (reporting results of study finding that Bangladeshi women in British schools were less likely to suffer psychological problems if they wore traditional Bangladeshi clothing).

[57] Letter from Cynthia LeAnn La Rochelle to TRIP Journal, *in* 2 GIC TRIP J., no. 2, 2002, at 1, 7, *available at* http://www.gicofcolo.org/Upload/TIP/PDF/2002/tip_2002_spring.pdf.

[58] Letter from Becky to TIP Journal, *in* 4 GIC TIP J., no. 2, 2004, at 3, *available at* http://www.gicofcolo.org/Upload/TIP/PDF/2004/tip_2004_spring.pdf; *see also* Wolfe v. Horn, 130 F. Supp. 2d 648, 654 (E.D. Pa. 2001) ("Wolfe contends that long hair would serve a therapeutic purpose for her gender identity disorder.").

[59] *See* Bradley v. Pizzaco of Neb., Inc., 939 F.2d 610, 612 (8th Cir. 1991) (finding that rule prohibiting Domino's Pizza employees from wearing facial hair had a disparate impact on Black employees because psuedofolliculitis barbae occurs almost exclusively in the Black population).

[60] *Id.*

painful bumps, scars, and bleeding which makes washing his face 'impossible' and sleeping uncomfortable."[61]

People with physical disabilities often find that required or prohibited clothing damages their body and dignity. Fred Leon Jackson Jr., an imprisoned disabled man, was prescribed "medical supplies," including sweat pants, ambulator shoes, diapers, and extra clothing and bedding.[62] In court he alleged that, because he did not receive these supplies "he had to defecate on himself and . . . suffered physical injuries to his legs and feet, including infection, pain, discomfort, humiliation and emotional harm."[63] Orlando Foreman, an imprisoned disabled man who used a wheelchair for mobility, developed sores on his feet but still did not receive appropriate footwear to prevent further injury.[64]

Choice of dress for many people is also in part about pleasure. For example, one person described the liberating experience of shaving her hair after growing up in a community that required any "good Christian woman" to have long hair.[65]

If choice of dress can bring pleasure, then loss of that choice—or a choice that is limited or coerced—can bring despair. Kitty, an imprisoned trans woman, described this trauma after cutting her hair when she was denied access to gender affirming medical care. While she experienced less mistreatment, she was "thoroughly depressed

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[61] Smith v. Ohai, No. CIV A 706CV00569, 2006 WL 2987929, at *1 (W.D. Va. Oct. 18, 2006) (dismissing deliberate indifference claim as "nothing more than a patient-doctor disagreement regarding diagnosis and proper course of treatment"). In another prison, even medical permission was not enough to prevent harassment for facial hair. *See* Lori Girshick, *Out of Compliance: Masculine-Identified People in Women's Prisons*, *in* CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 189, 198–99 (Eric A. Stanley & Nat Smith eds., 2011) [hereinafter CAPTIVE GENDERS] (reporting ongoing harassment from guards against an aggressive stud in a women's prison who had facial hair, despite the fact that she had permission from a dermatologist not to remove it for medical reasons). Some people of color assigned female at birth with a masculine gender presentation identify with the term *stud*.

[62] Jackson v. Lee, No. C 05-04110 JF (PR), 2009 WL 3047012, at *2 (N.D. Cal. Sept. 21, 2009).

[63] *Id.*

[64] Foreman v. Bureau of Prisons, No. Civ. 04-5413 (RBK), 2005 WL 3500807 (D.N.J. Dec. 20, 2005), *aff'd*, No. 06-1274, 2007 WL 108457 (3d Cir. Jan. 16, 2007); *see also* Saunders v. Horn, 959 F. Supp. 689, 692–93 (E.D. Pa. 1996), *report and recommendation adopted*, 960 F. Supp. 893 (E.D. Pa. 1997) (describing allegations of an imprisoned disabled man that his leg brace and orthopedic shoes were seized when he was transferred, forcing him to endure constant pain).

[65] WEITZ, *supra* note 16, 159–60 ("The first time I shaved my head it was orgasmic, it was better than sex . . . I felt free, absolutely free. . . .").

and miserable, and with no relief in sight, planning ways to cut short this oppressive existence."[66]

II
History of Dress Regulation and Incarceration

The very potency of dress as a form of communication, resistance, and survival for marginalized groups has made it a compelling tool for maintaining social hierarchy throughout history. Here, I provide an overview of two key historical developments—the rise of dress regulation and the rise of imprisonment—with a focus on their enforcement of racialized gender norms in intersection with class, disability, sexuality, age, and religion. This historical context clarifies the interests involved in current prison dress regulations.

A. Dress Regulation

1. From Europe to the Americas: Roots of Sumptuary Law

Scholars have studied regulation of dress as a subset of sumptuary law, the law governing conspicuous consumption. Throughout history, European dress regulation has represented anxieties about limiting extravagance, maintaining clear hierarchical class and gender distinctions, marking or preventing sexual deviance, and identifying targeted ethnic, religious, and sexual groups.[67] These laws took a variety of forms—such as detailed codes permitting certain colors and fabrics for certain ranks and genders;[68] prohibitions on forms of dress seen as immodest, particularly for women;[69] and requirements that certain people, often Jewish people and women engaging in commercial sex, wear distinguishing marks.[70]

To the extent European sumptuary laws were enforced, they were overwhelmingly enforced against people perceived to be women.[71] For example, between 1550 and 1839, at least 119 people perceived to be women dressing as men in the Netherlands were punished with

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[66] Letter from Formerly Kitty to TRIP Journal, *in* 2 GIC TRIP J., no. 2, 2002, at 5, *available at* http://www.gicofcolo.org/Upload/TIP/PDF/2002/tip_2002_spring.pdf.

[67] *See* Hunt, *supra* note 7, at 58–59 (arguing that dress can "speak" in a way that is similiar to language and noting that there are many rules for dress).

[68] *See id.* at 13–14.

[69] *See id.* at 222 (describing sumptuary laws regulating female necklines in the name of modesty).

[70] *See id.* at 246–47 (discussing a canon that required women engaging in commercial sex to wear distinguishing marks and Jewish people to be distinguishable from Christians by clothing).

[71] *Id.* at 214.

whipping, lifetime exile, or death.[72] For those who had a relationship with a woman, separation from her was also part of the punishment.[73]

During European colonization of the Americas, colonists imported some aspects of European sumptuary law. For example, a Massachusetts law passed in 1651 made it illegal for those "with annual incomes of less than £200 to wear gold, silver lace, buttons, silk hoods, or great boots."[74] However, colonists often went further, using dress to perpetrate colonial domination and genocide of indigenous populations and to enslave people of African descent.

2. Colonialism

From the era of European conquest of the Americas to the present, dress that does not match European norms has been used as evidence that indigenous people need White people to "civilize" them.[75] When European colonists perceived indigenous American people as wearing gender inappropriate clothing, the colonists reacted with violence.[76] In 1513, a Spanish conquistador encountered a group of indigenous people he perceived to be men dressed in women's clothing.[77] He ordered forty of them to be thrown to his hunting dogs, dismembered, and killed.[78] Europeans ascribed the perceived gender deviance of Native peoples to "primitivity" and used it as one of the justifications for conquest and genocide.[79] These attacks on perceived gender deviance furthered their control and conquest of indigenous communities. Forcing binary gender distinctions and patriarchal hierarchy onto Native communities aided colonization by disrupting soli-

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[72] JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 12 (2011).

[73] *Id.*

[74] I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN. 1, 7 (2008).

[75] *See* LUANA ROSS, INVENTING THE SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY 22 (1998) ("To the federal government, long hair signified a primitive culture."); ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE 9 (2005) (noting that White people in the 1800s referred to Native people as dirty and described them as wearing rags and not combing their hair).

[76] *See* MOGUL, RITCHIE & WHITLOCK, *supra* note 72, at 1 (asserting systematic "[p]olicing and punishment of gender 'deviance'").

[77] *Id.*

[78] *Id.* Another conquistador described burning to death an indigenous resister whom he perceived to be a man dressed as a woman. *Id.* at 4.

[79] *See* Scott Lauria Morgensen, *Settler Homonationalism: Theorizing Settler Colonialism within Queer Modernities*, 16 GLQ: J. LESBIAN & GAY STUD. 105, 106 (2010) ("Colonists interpreted diverse practices of gender and sexuality as signs of a general primitivity among Native peoples. Over time, they produced a colonial necropolitics that framed Native peoples as queer populations marked for death.").

darity and structure in those communities and increasing acceptance of other forms of hierarchy and dominance.[80]

Beginning around 1869, government-supported boarding schools became a central perpetrator of cultural genocide and colonization in North America.[81] These schools forced children to practice Christianity, speak only English, and dress and act according to White traditions and norms.[82] These norms were enforced through violence, including whippings, beatings, shackling, isolation, and forced head shaving.[83] As one Sioux child described:

> I remember being dragged out [from where I was hiding under my bed], though I resisted by kicking and scratching wildly. In spite of myself, I was carried downstairs and tied fast to a chair. I cried aloud, shaking my head all the while, until I felt the cold blade of the scissors against my neck, and heard them gnaw off one of my thick braids. Then I lost my spirit.[84]

While most non-reservation boarding schools have now closed,[85] control over Native students' dress persists. In 2011, the ACLU reported that a Native boy in public school in New Orleans was suspended for having long hair.[86] Policing of indigenous people perceived to reject conformity with White Christian gender norms continues as a form of cultural destruction.[87]

3. Slavery

Dress regulation also supported the enslavement of African people. The clothing of West African people who were targeted for capture and enslavement, not surprisingly, differed from European

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[80] *See* MOGUL, RITCHIE & WHITLOCK, *supra* note 72, at 2 ("[Such racialized gender violence] was neither a reflection of Indigenous traditions nor a mere byproduct of old-time European moralities brought across the Atlantic. It was foundational to the birth of the United States, and its echoes can be heard throughout the current criminal legal system."); *see also* SMITH, *supra* note 75, at 23 ("Patriarchal gender violence is the process by which colonizers inscribe hierarchy and domination on the bodies of the colonized.").

[81] *See* SMITH, *supra* note 75, at 35 (describing the origin of the boarding school system for American Indians).

[82] *See* Morgensen, *supra* note 79, at 114 (describing boarding schools that severely punished children for speaking their native languages or practicing their native customs).

[83] SMITH, *supra* note 75, at 39.

[84] WEITZ, *supra* note 16, at 9.

[85] SMITH, *supra* note 75, at 37.

[86] *See Native American Teen Suspended from School for Long Hair in Livingston Parish, ACLU Says*, NOLA.COM (Mar. 19, 2011), http://www.nola.com/education/index.ssf/2011/03/native_american_teen_suspended.html.

[87] *See* MOGUL, RITCHIE & WHITLOCK, *supra* note 72, at 5–6 (summarizing historical policing of Native people).

norms.[88] When White people went to Africa, they often described the clothing of Africans in derogatory terms. In particular, many Europeans decried the "evil" failure of Africans to cover their bodies as fully as Europeans did,[89] and "nudity or even certain types of clothing and ways of ornamenting the body became a stereotypical way of viewing Black Africans as uncivilized."[90] White people also interpreted the interest of some Africans in examining or obtaining European clothing as a sign of African inferiority.[91]

In the United States, the legal system of slavery gave White people total power over enslaved Black people.[92] Enslaved Black people created most of the clothes worn at the time.[93] However, slave owners controlled the clothing enslaved people could make, keep, and wear.[94] Slave owners compelled enslaved people to wear clothing "deemed gender appropriate by white society."[95]

At the same time that slave owners imposed a White gender binary through dress, they also used dress as a form of humiliation and control. Slave owners punished Black women by forcing them to wear men's clothing or by cutting off their hair.[96] Enslaved children of all genders received simple white dresses to wear or no clothing at all.[97]

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[88] *See* FOSTER, *supra* note 40, at 35–37 (detailing accounts of African dress given by early European travelers).

[89] *See id.* at 25.

[90] *Id.*

[91] *See id.* at 21 (noting a Frances Kemble quote describing African clothing as "barbarous and ludicrous" and notes how eager the Africans were to have European-style clothing).

[92] State v. Mann, 13 N.C. (1 Dev.) 263, 266 (1829) ("The power of the master must be absolute, to render the submission of the slave perfect."). Tom v. State, 27 Tenn. 86, 88 (1847) (holding that any White person may apprehend a Black person who has escaped slavery and that it is the duty of the Black person to submit).

[93] *See* FOSTER, *supra* note 40, at 88–92, 206 (describing how enslaved Black people harvested cotton, sheared wool, wove, sewed, dyed, and laundered clothes, including clothes for Confederate soldiers).

[94] *Id.* at 91 (discussing clothing worn by slaves, which was made of inferior fabrics such as "tow" flax, hemp, and burlap).

[95] *The Clothes Make the Man, the Woman, and the Slave*, *Gender Specific Clothing*, PBS.ORG, http://www.pbs.org/wnet/slavery/experience/gender/feature.html (last visited Aug. 12, 2012).

[96] *Dress That Oppressed and Clothing That Liberated*, PBS.ORG, http://www.pbs.org/wnet/slavery/experience/gender/feature.html (last visited Aug. 12, 2012); *see also* FOSTER, *supra* note 40, at 249 ("One day [the white slave owner] whipped my grandma and then had her hair cut off. From that [time?] [sic] on my grandma had to wear her hair shaved to the scalp." (quoting James Brittain)); WEITZ, *supra* note 16, at 10 (noting that punishment with head shaving was typically ordered by White women to be performed on enslaved women with straight hair).

[97] *See Clothing for Slave Children*, PBS.ORG, http://www.pbs.org/wnet/slavery/experience/gender/feature.html (last visited Aug. 12, 2012) (describing how slave children were forced to go nude or wear "long, dress-like shirts").

Enslaved people were stripped completely for inspection during auctions and stripped to the waist for punishment by whipping.[98]

Legislation added formal dress restrictions to slave owners' informal practices. For example, in some areas of the South, legislation required Black women to wear their hair in head wraps that White people saw as markers of inferior social status.[99] South Carolina's slave code required enslaved people to wear only certain enumerated fabrics and colors.[100]

The clothing provided to enslaved people also maximized labor while minimizing costs for slave owners. Owners were less likely to provide shoes for older people, children, and disabled people, who were seen as less capable of generating profit.[101] Shoes and garments often did not fit correctly, were not warm enough, were made from materials that caused pain, or were worn out well before being replaced.[102] Slave owners also imposed a hierarchy among those they enslaved through dress, with some enslaved people receiving better clothing than others based on their status.[103]

4. Immigration Enforcement

Dress regulation has also been a component of immigration law enforcement. The experience of Chinese immigrants exemplifies how the law has used dress to maintain hierarchies of race, gender, class, and sexuality. During the nineteenth century, many White Americans vilified the long braided hair of Chinese immigrant men as "unhygienic, unmanly, and uncivilized."[104] This characterization was

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[98] *Nudity and the Captive Body*, PBS.ORG, http://www.pbs.org/wnet/slavery/experience/gender/feature.html (last visited Aug. 12, 2012).

[99] *Slave Women and the Head-Wrap*, PBS.ORG, http://www.pbs.org/wnet/slavery/experience/gender/feature.html (last visited Aug. 12, 2012) ("For their white European masters, the slaves' head-wraps were signs of poverty and subordination. . . . Legislation appeared that required black women to wear their hair bound up . . . .").

[100] Capers, *supra* note 74, at 8.

[101] SOJOURNER TRUTH, NARRATIVE OF SOJOURNER TRUTH 15 (Margaret Washington ed., 1993) (describing how, during the winter in her youth, "her feet were badly frozen, for want of proper covering").

[102] *See, e.g.*, *id.*; FOSTER, *supra* note 40, at 91 (recounting the experience of enslaved people wearing rough, cheap cloth that was "torture" on the skin and the experience of an owner only giving two outfits to the people he enslaved).

[103] *Slave Clothing*, MONTICELLO, http://www.monticello.org/site/plantation-and-slavery/slave-clothing (last visited Aug. 12, 2012) (noting, in describing the clothing Thomas Jefferson allotted to his slaves, "their clothing became a visual indicator of age, gender, and—most importantly—status"); *see also* FOSTER, *supra* note 40, at 138 ("[F]or some enslaved African Americans, their clothing coded an improved social standing from others.").

[104] *The Chinese Experience in 19th Century America: Background*, UNIV. OF ILL. AT URBANA-CHAMPAIGN, http://teachingresources.atlas.uiuc.edu/chinese_exp/introduction04.html (last visited Aug. 12, 2012); *see also* PETER BOAG, RE-DRESSING AMERICA'S

part of the racist discourse that supported passage of the Chinese Exclusion Act in 1882.[105]

Following the passage of the Act, dress became a proxy to verify acceptable class, sexuality, and citizenship status among people of Chinese descent seeking entry into the United States. For example, immigration officials examined the dress of Chinese men seeking entry as merchants for signs that they might actually be laborers.[106] Chinese women were widely perceived to be sex workers, and it was difficult to convince U.S. immigration officials that they were not unless they could show certain kinds of dress.[107] In fact, whether people were perceived to be Chinese at all depended in part on dress. One man of Chinese and European descent was not identified as Chinese during several trips into the United States in part because of his "American" dress.[108]

People of Chinese descent born in the United States also faced obstacles in proving their citizenship. U.S. district attorney Henry Foote argued that Wong Kim Ark, a man of Chinese descent born in the United States, could not be a U.S. citizen because he had "been at all times, by reason of his race, language, color, and *dress*, a Chinese person . . . ."[109] Conversely, one immigrant inspector recommended that a person of Chinese descent who claimed U.S. citizenship be permitted to enter because he "dresses in American clothes, and speaks good English."[110]

The focus on dress in immigration enforcement has continued. For example, in 1960, customs officers stopped Sarah Harb Quiroz, a Latina legal permanent resident, because an officer perceived her to

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FRONTIER PAST 147 (2011) ("[F]rom the perspective of whites, Chinese men's outward appearance—their long braided queue . . . and their loose and flowing clothing—marked them as effeminate.").

105 Chinese Exclusion Act, ch. 126, 22 Stat. 58 (repealed 1943) (barring Chinese laborers from entering the United States).

106 *See* ERIKA LEE, AT AMERICA'S GATES 89 (2003) ("Chinese merchants were also expected to look like merchants. . . . [O]fficials believed that bona fide merchants' wealth would be apparent in their dress and appearance.").

107 *See id.* at 94 (describing how immigration officials inspected Chinese women's belongings for "fine clothing" and checked whether their feet had been bound as evidence that they were not sex workers).

108 *Id.* at 79.

109 United States v. Wong Kim Ark, 169 U.S. 649, 650 (1898) (emphasis added).

110 LEE, *supra* note 106, at 107. While rarely explicitly identified as such, these racial markers in clothing are also gendered—the conclusion that a man of Chinese descent was wearing "American" clothes included the implication that he was neither wearing American "women's" clothing nor Chinese "men's" clothing, both of which would have been seen as feminine. *See supra* note 104 and accompanying text.

be a lesbian based on her appearance.[111] She was placed in deportation proceedings as a suspected homosexual, and testimony against her included the fact that she wore a shirt and trousers and had short hair.[112] In 1975, the Supreme Court stated that "trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut."[113] Representative Brian Bilbray echoed the same idea in 2010 when he defended Arizona's S.B. 1070[114] from charges that it mandated racial profiling. According to Representative Bilbray, undocumented immigrants could be identified not only by their race but also by their clothing.[115]

5. Cross-Dressing Laws

The law has also enforced racialized gender norms by criminalizing cross-dressing. Between 1850 and 1870, many states and localities passed legislation focused on criminalizing gender nonconforming dress.[116] In Chicago, for example, an ordinance made it a crime for one to "appear in a public place . . . in a dress not belonging to his or her sex."[117] Sometimes these laws were not originally intended to enforce gender norms. For example, New York's law prohibiting individuals from assembling "disguised" in public places[118] was originally intended to quell uprisings and protect interest in investment capital. It was enacted as a part of efforts to end the anti-rent riots, "an armed insurrection by farmers in the Hudson Valley."[119] Some of the White male farmers resisting eviction dressed as Native women to make it

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111 EITHNE LUIBHÉID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 77 (2002) (describing Quiroz's questioning as she traveled between Juarez, Mexico and Texas).

112 *Id.* at 81.

113 United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975).

114 S.B. 1070, 2010 Ariz. Sess. Laws 450 (codified at ARIZ. REV. STAT. ANN. § 11-1051 (2011)).

115 *See Hardball with Chris Matthews* (MSNBC television broadcast Apr. 21, 2010), *available at* http://www.youtube.com/watch?v=e-BlskNRJ7c (detailing Rep. Bilbray's claim that he can spot immigrants by their clothing).

116 *See* Capers, *supra* note 74, at 8–9 (listing anti-cross-dressing legislation).

117 City of Chicago v. Wilson, 589 N.E.2d 522, 523 (Ill. 1978). An Atlanta ordinance made it illegal to "impersonate, masquerade, or be disguised as being of the opposite sex" under certain circumstances. Atlanta, Ga., Ordinance by the Police Committee (Feb. 5, 1968).

118 N.Y. CODE CRIM. PROC. § 887(7) (1882) (current version at N.Y. PENAL LAW § 240.35 (McKinney 2010)).

119 People v. Archibald, 296 N.Y.S.2d 834, 837 (App. Term 1968), *aff'd*, 260 N.E.2d 871 (N.Y. 1970) (Markowitz, J., dissenting).

harder for law enforcement to identify and retaliate against them.[120] Over the next century, New York law enforcement used this law to arrest people perceived to be cross-dressing under many circumstances far different from those that motivated passage of the original law.[121]

People of color experienced the brunt of enforcement of these anti-cross-dressing laws.[122] One Black stud explained: "At the time, when they pick[ed] you up, if you didn't have two garments that belong to a woman, you could go to jail . . . . They call it male impersonation . . . . It would give them the opportunity to whack the shit out of you."[123] Sylvia Rivera, a trans Puerto Rican revolutionary activist, reported the regularity of police round-ups and arrests of dozens of drag queens and trans women for walking down the street while "look[ing] like a faggot."[124] Police response to perceived violations of these laws escalated to murder. In 1970, police reportedly shot a young Black trans person eight times in the back as she ran from them.[125] They had pursued her after seeing her wearing women's clothes; she had been arrested and charged with "impersonating the opposite sex" in the past.[126]

Several courts in the 1970s invalidated these laws, and two main themes emerged in these cases. First, some laws were found to be unconstitutionally vague.[127] Notably, courts expressed concern that the statutes could be read so broadly that they could punish even het-

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120 *See id*. ("This particular statute was addressed to a specific group of insurrectionists who, while disguised as 'Indians,' murdered law enforcement officers attempting to serve writs upon the farmers. The 'Indians' were in fact farmers, who as part of their costumes, wore women's calico dresses to further conceal their identities.").

121 *See id.* (noting several cases that enforced the statute in situations not involving the anti-rent riots).

122 *See* Rebecca Widom, Lavender, Lipstick, Labryses and Leather: Lesbian Fashion and the Politics of Exclusion 21 (March 21, 1994) (unpublished B.S. thesis, Massachusetts Institute of Technology) (on file with the *New York University Law Review*) ("These laws were used against all butches, but African Americans were harassed more than whites.").

123 Elizabeth Lapovsky Kennedy & Madeline Davis, *"They Was No One To Mess With": The Construction of the Butch Role in the Lesbian Community of the 1940s and 1950s*, *in* THE PERSISTENT DESIRE: A FEMME-BUTCH READER 62, 69 (Joan Nestle ed., 1992).

124 Sylvia Lee Rivera, *The Drag Queen*, *in* MAKING HISTORY: THE STRUGGLE FOR GAY AND LESBIAN EQUAL RIGHTS 187, 189–90 (Eric Marcus ed., 1992).

125 *See* John D'Emilio, *Chicago Gay History: Risky Business*, WINDY CITY TIMES, Sept. 10, 2008, at 8.

126 *See id.*

127 *See, e.g.*, District of Columbia v. City of St. Louis, 795 F.2d 652, 654–55 (8th Cir. 1986) (directing nominal damages for the appellant where the lower court dismissed the charge for violating the cross-dressing law as unconstitutionally vague); City of Columbus v. Rogers, 324 N.E.2d 563, 565 (Ohio 1975) (finding a state cross-dressing statute unconstitutionally vague); Joe Baker, *Cross Dress Law Falls*, ADVOCATE, Sept. 24, 1975, at 10 (reporting that a Detroit judge found a cross-dressing law void for vagueness).

erosexual, non-trans, middle-class people. For example, in one such case a court noted: "It goes so far as to bring under suspect the woman who wears one of her husband's old shirts to paint lawn furniture . . . ."[128] This example shows the norms the court sought to protect: a family in which a woman and a man are married and own property, including a lawn where the woman does household tasks while taking care not to get her clothes dirty.

In other cases, courts declined to apply the laws to certain trans women undergoing medical transition.[129] For example, in a case upholding the facial validity of a Columbus ordinance prohibiting people from appearing in public in "dress not belonging to his or her sex," a court found that the ordinance could not be applied legitimately to the defendant, a "true transsexual."[130] The judge ruled that due to mental defect, the defendant was incapable of making a choice about her clothing and therefore could not form the requisite intent to commit the crime.[131] While this ruling prevented further punishment of the defendant, it avoided any interrogation of the validity of legal enforcement of gender normativity.

Even where laws prohibiting cross-dressing have been repealed or struck down, law enforcement officials continue to target people with gender nonconforming clothing. For instance, in 2002 in Washington, D.C., a Black lesbian reported that officers unbuttoned her pants during a search on the street, asking her: "Why are you wearing boys' underwear? Are you a dyke? Do you eat pussy?"[132] In 2001, Oakland police noticed that a gay Latino man they were arresting wore pink socks. While putting him in the patrol car, one of the officers said he had on "faggot socks" and slammed the car door against his ankle.[133] In 2011, Oklahoma police arrested a Black trans woman for disorderly conduct because she wore high heels and carried a purse in a public park.[134]

Far from discouraging law enforcement officials from engaging in this conduct, courts continue to accept gender nonconforming dress as

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128 City of Cincinnati v. Adams, 330 N.E.2d 463, 466 (Ohio Mun. Ct. 1974).

129 *See, e.g.*, City of Chicago v. Wilson, 389 N.E.2d 522, 523–25 (Ill. 1978) (finding that a city cross-dressing ordinance as applied to two women undergoing psychiatric treatment in preparation for medical transition was "an unconstitutional infringement of their liberty interest").

130 City of Columbus v. Zanders, 266 N.E.2d 602, 603, 606 (Ohio 1970).

131 *Id.* at 606.

132 AMNESTY INT'L, *supra* note 19, at 70–71.

133 MOGUL, RITCHIE & WHITLOCK, *supra* note 72, at 50.

134 *See* Galbreath v. City of Oklahoma City, No. CIV-11-1336-HE, 2012 WL 255734, at *2 (W.D. Okla. Jan. 27, 2012) (providing the arresting officer's account of the reasons for the arrest).

relevant evidence in criminal cases and commitment proceedings.[135] For example, in a 2006 case, New York City Police Department officers stopped Steph Miller, who was standing on the street with two acquaintances from her homeless shelter and looking for something in a purse.[136] The police questioned her, searched her, and then arrested her for theft of the purse.[137] Miller argued that the police had no valid basis to stop her.[138] Relying on her "transgender appearance," the trial court agreed to determine that merely carrying a purse was not enough to support reasonable suspicion for the police officers.[139]

The appellate court reversed, reasoning that the trial judge's finding that Miller appeared trans was not supported by the evidence because, when arrested, Miller had stubble on her face and was wearing a dark jacket over a red shirt and jeans.[140] This factual assessment demonstrated the court's assumption about what could and could not credibly constitute "transgender appearance."[141] The court's ruling—that police seeing "a male in need of a shave . . . rifling through a woman's purse" constituted a legitimate basis for a stop—condoned police profiling based on gender norms.[142]

6. Dress Regulation Targeting Religious Garb, Public Disability, and Youth of Color

The nineteenth, twentieth, and twenty-first centuries also produced a range of other dress regulations, often targeting religious garb, public disability, and youth of color through both formal laws and informal enforcement mechanisms. For example, a number of state laws enacted in the late nineteenth and early twentieth centuries prohibited public school teachers from wearing certain religious

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135 *See, e.g.*, People v. Martinez, 105 Cal. Rptr. 2d 841, 855 (Ct. App. 2001) (discussing admittance of evidence of cross-dressing to support declaration of sex offender status); State v. Taylor, 832 P.2d 1153, 1155 (Idaho Ct. App. 1992) (using "cross-dressing" as reason to enhance sentencing); *In re* Civil Commitment of R.X.S., No. SVP-300-03, 2006 WL 1071586, at *3 (N.J. Super. Ct. App. Div. Apr. 25, 2006) (noting expert testimony that "transvestic fetishism . . . predisposes him to commit sexually violent acts" in committing a person as a sexually violent predator). Gender nonconforming dress has also been accepted as a reason to strike potential jurors. *See* Carter v. Duncan, No. C 02-0586SBA(PR), 2005 WL 2373572, at *18 (N.D. Cal. Sept. 27, 2005) (denying habeas petition where an African-American juror was struck from jury in part because she was perceived as a cross-dresser).

136 People v. Lomiller, 818 N.Y.S.2d 27, 31 (App. Div. 2006).

137 *Id.* at 30–31.

138 *Id.* at 28–29.

139 *See id.* at 29–30.

140 *Id.* at 30.

141 *Id.*

142 *See id.* at 31.

attire.[143] While these statutes are facially neutral, "the history of the statutes suggests a discriminatory motivation for their enactment, especially because they impose criminal penalties."[144] Although the statutes were originally motivated by bias against Catholic women, they have been used against Sikh and Muslim women more recently.[145]

Nebraska and Pennsylvania continue to impose criminal penalties on teachers for wearing certain religious attire.[146] Other states with similar laws have repealed them,[147] but the practice of punishing individuals whose religious dress falls outside of White Christian gender norms persists. Muslim women, in particular, continue to face social and legal consequences for dressing in religious attire. In 2008, a Georgia judge imposed a jail sentence on a Black Muslim woman for contempt of court when she refused to remove her headscarf in the court room.[148] The Transportation Security Administration (TSA) has been accused of profiling Muslim women of color wearing hijab and subjects them to additional screening and security controls.[149]

In terms of public disability, in the early twentieth century, many municipalities passed so-called "Ugly Laws," which prohibited disabled people from exposing "deformity" in public, particularly for purposes of asking for money.[150] For example, a Chicago ordinance read: "Any person who is diseased, maimed, mutilated, or . . . deformed, so as to be an unsightly or disgusting object, or an improper person to be allowed . . . on the streets . . . or public places in this city, shall not . . . expose himself to public view . . . ."[151]

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143 *See, e.g.*, NEB. REV. STAT. § 79-898 (2008); N.D. CENT. CODE § 15-47-29 (1997) (repealed 2001); OR. REV. STAT. § 342.650 (2008); 24 PA. CONS. STAT. § 11-1112 (2008).

144 Abdo, *supra* note 53, at 471.

145 *See, e.g.*, United States v. Bd. of Educ. for Sch. Dist. of Phila., 911 F.2d 882, 894 (3d Cir. 1990) (upholding a school board's refusal to allow a female Muslim teacher to wear a head scarf and other religious clothing); Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298, 313–14 (Or. 1986) (upholding suspension of a female Sikh teacher for wearing a white turban and white clothing).

146 NEB. REV. STAT. § 79-898 (2010); 24 PA. STAT. ANN. § 11-1112 (West 2011).

147 N.D. CENT. CODE § 15-47-29 (1997) (repealed 2001); 2010 OR. REV. STAT. § 342.650 (2009) (repealed 2010).

148 *U.S. Judge Jails Muslim Woman Over Head Scarf*, MSNBC.COM (Dec. 17, 2008, 2:48 PM), http://www.msnbc.msn.com/id/28278572/ns/us_news-crime_and_courts/t/us-judge-jails-muslim-woman-over-head-scarf/.

149 *See* Nafees Syed, Editorial, *Airport Screening for 'Flying While Muslim*,' CNN.COM (Jan. 29, 2010), http://articles.cnn.com/2010-01-29/opinion/syed.muslim.while.flying_1_profiling-muslim-women-head-scarf?_s=PM:OPINION (discussing the author's experience with profiling at TSA checkpoints).

150 *See* SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC 2 (2009) (describing the creation and prevalence of laws that regulated the activities of physically disabled people).

151 *Id.* at 1–2.

While these ordinances have been repealed,[152] law enforcement continues to target disabled people in part through dress. Police might perceive non-normative dress as an indicator that someone is mentally ill.[153] Police often deal with those they perceive to be mentally ill with extreme, even fatal, force.[154] Non-normative dress can also function as a mechanism for law enforcement violence toward disabled people. In 2009, a police officer beat a 15-year-old disabled Black boy in his school for a dress code violation.[155] His shirt was untucked.[156] In 2011, TSA officials forced a woman with cancer using a wheelchair to remove an adult diaper in order to conduct a search.[157]

Recent years have seen a rash of new criminal laws about dress that disproportionately affect youth of color. Some ordinances make it illegal to wear sagging pants—a style associated with prison and hip-hop cultures particularly popular with young Black men.[158] While many academics have raised questions about the constitutionality of these ordinances, they continue to be enforced in several localities.[159] Some legislation has also criminalized wearing "gang insignia,"

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[152] *See id.* at 6 (noting that some Ugly Laws remained in force as late as the 1970s).

[153] *See* MASS. POLICE DEP'T, POLICY NO. OPS-6.03B, DEALING WITH THE MENTALLY ILL ¶ 3.0 (Apr. 14, 2007) (listing an inability to care for one's clothing as a sign that someone is mentally ill); Joel W. Godfredson et al., *Police Perceptions of Their Encounters with Individuals Experiencing Mental Illness: A Victorian Survey*, 44 AUSTL. & N.Z. J. CRIMINOLOGY 180, 184, 186 (2011) (finding that unkempt appearance and hygiene was the third most common way the police would identify someone as mentally ill).

[154] *See, e.g.*, AMNESTY INT'L, USA: RACE RIGHTS AND POLICE BRUTALITY 7 (1999), *available at* http://www.amnesty.org/en/library/asset/AMR51/147/1999/en/735f2b8c-e038-11dd-865a-d728958ca30a/amr511471999en.pdf (listing the "mentally disturbed" among groups vulnerable to police brutality); *Mentally Ill*, CIVILIANS DOWN, http://www.civiliansdown.com/Mentally%20Ill%20-%20Killed%20or%20Wounded.htm (last visited Aug. 12, 2012) (listing mentally ill people killed by police).

[155] *See* Edecio Martinez & Dave Savini, *Caught on Tape: Cop Beats Special Needs Student on Camera*, CBS NEWS (Oct. 7, 2009, 10:35 AM), http://www.cbsnews.com/8301-504083_162-5368597-504083.html.

[156] *Id.*

[157] *See* Lauren Sage Reinlie, *Elderly Woman Asked To Remove Adult Diaper During TSA Search*, NWF DAILY NEWS (June 25, 2011), http://www.nwfdailynews.com/news/mother-41324-search-adult.html.

[158] *See* Sinopole, *supra* note 33, at 351–52 & n.160 (explaining that the act of wearing sagging pants, even if framed as conduct expressing the wearer's identification with a particular neighborhood or socio-economic background, will probably not qualify for First Amendment protection); Niko Koppel, *Are Your Jeans Sagging? Go Directly to Jail*, N.Y. TIMES, Aug. 30, 2007, at G1, *available at* http://www.nytimes.com/2007/08/30/fashion/30baggy.html (discussing examples of ordinances outlawing sagging pants and reactions to those ordinances).

[159] *See* Sinopole, *supra* note 33, at 331 (discussing public indecency ordinances designed to prohibit individuals from wearing saggy pants); Onika K. Williams, *The Suppression of a* Saggin' *Expression: Exploring the "Saggy Pants" Style Within a First Amendment Context*, 85 IND. L.J. 1169, 1170 (2010) (exploring attempts by cities across the country to suppress sagging-pants style).

although at least one of these laws has been struck down as unconstitutional.[160]

Law enforcement officers also use clothing to identify people, particularly young people of color, as gang members. One report quotes a San Jose police officer who said that someone could be perceived as a gang member "if he or she were seen on just one occasion wearing . . . a blue jean jacket, cut-off sweat pants, any clothing associated with the Los Angeles Raiders, or white, blue, gray, black, khaki, or any other 'neutral' colored item."[161] There is also "an increasing trend toward framing girls and young women of color who wear 'thuggish' (in other words, hip-hop, gender nonconforming, or both) clothing as gang members."[162]

Gang injunctions are one tool that law enforcement and other government agencies use to criminalize youth of color and certain kinds of dress popular with them. These injunctions tend to be targeted at communities of color[163] and prohibit otherwise lawful acts, such as wearing certain types of clothing, when engaged in by people perceived to be gang members.[164]

Formal regulation of dress also continues in settings closely regulated by government or private institutions, such as the military,[165] schools,[166] workplaces,[167] and other domains[168] beyond the scope of this Article.

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160 City of Harvard v. Gaut, 660 N.E.2d 259, 260 (Ill. App. Ct. 1996) (finding that the city's ordinance, which made it a crime to wear "gang colors, emblems, or other insignia," violated "constitutional guarantees of free speech").

161 *Gang Injunction on Oakland's Horizon*, OAKLAND LOCAL (Feb. 5, 2010), http://oaklandlocal.com/article/gang-injunction-oaklands-horizon.

162 MOGUL, RITCHIE & WHITLOCK, *supra* note 72, at 42.

163 Ali Winston, *Are San Francisco's Gang Injunctions Working?*, KALW NEWS (Apr. 19, 2011), http://kalwnews.org/audio/2011/01/20/are-san-franciscos-gang-injunctions-working_800405.html (noting that all but one of over sixty gang injunctions in California target Black, Latin@, or Asian groups).

164 *See, e.g.*, Martina Castro, *Profiling or Policing? Oakland's Proposed Gang Injunction*, KALW NEWS, http://www.sfgate.com/cgi-bin/blogs/kalw/detail?entry_id=61871 (last visited Aug. 12, 2012) (quoting an Oakland resident who "was served some gang injunction papers . . . [that say] you could not wear a certain type of clothing, like Oakland A's clothing, any clothing that say[s] 'North Oakland' on it. . . . [, or any clothing that honor] people who died in the past").

165 *See, e.g.*, United States v. Modesto, 39 M.J. 1055, 1061 (A.C.M.R. 1994), *aff'd*, 43 M.J. 315 (C.A.A.F. 1995) (upholding court martial for cross-dressing).

166 In one case, a court rejected the equal protection claim of students who police escorted from the prom based on their gender-nonconforming clothing. Harper v. Edgewood Bd. of Educ., 655 F. Supp. 1355 (S.D. Ohio 1987); *see also* Murray v. W. Baton Rouge Parish Sch. Bd., 472 F.2d 438, 443 (5th Cir. 1973) (rejecting claim of Black students challenging grooming code and stating that the court will not interfere in matters of dress in public schools); Bear v. Fleming, 714 F. Supp. 2d 972, 991 (D.S.D. 2010) (denying injunction to Lakota student who sought to wear traditional clothing instead of a cap and gown to graduation).

B. The Evolution of Prisons in the United States

For centuries, governments and other institutions have utilized prisons as mechanisms of punishment and social control. The nature, layout, and goals of prisons, however, shift across geographic, temporal, and political contexts. I provide a brief overview of prison evolution in the United States, focused on the role of racialized gender norms in prison formation and prison change.[169]

In the 1790s, Christian reformers in the United States advocated for penitentiaries as an alternative to other forms of punishment, such as public corporal and capital punishment.[170] Penitentiaries were proposed as more humane and conducive to the salvation of a criminal's soul.[171] However, as Foucault has observed, the rise of the prison structure was not simply about a new humanitarian impulse, but instead reflected a desire for more consistent and widespread punishment—particularly for property crimes impinging on the interests of financial capital.[172]

The initial model for prisons relied on solitary confinement.[173] Almost as soon as prisons were created, they were critiqued as a form

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[167] *See, e.g.*, Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981) (dismissing the complaint of a Black woman fired for having a braided hairstyle); Bethanne Walz Mcnamara, *All Dressed Up with No Place To Go: Gender Bias in Oklahoma Federal Court Dress Codes*, 30 TULSA L.J. 395, 415 (1994) (discussing requirements that female court personnel wear dresses).

[168] *See, e.g.*, Basas, *supra* note 49 (arguing that pure henna products should not be the focus of FDA regulation); Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010) (arguing intellectual property law is taking on the role of sumptuary law in order to maintain a traditional system of social distinctions based on consumption).

[169] For more detailed historical analysis, see generally REGINA KUNZEL, CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY (2008), where the author documents the evolution of prisons in the United States through the lens of sexuality, and FOUCAULT, *supra* note 24, at 23–24, where the author addresses the evolution of disciplinary and punitive mechanisms—primarily in Europe—including the birth of the prison.

[170] *See* Angela Y. Davis, *Race, Gender, and Prison History: From the Convict Lease System to the Supermax Prison*, *in* PRISON MASCULINITIES 35, 38 (Don Sabo, Terry A. Kupers & Willie London eds., 2001) (providing a brief history of the experiences of Black people in the U.S. prison system); Mark E. Kann, *Penitence for the Privileged: Manhood, Race, and Penitentiaries in Early America*, *in* PRISON MASCULINITIES, *supra*, at 25 (describing opposition to traditional state coercion in late 1780s Pennsylvania).

[171] *See* KUNZEL, *supra* note 169, at 15, 17 (describing the Christian roots of prison as a place of penitence and atonement, as well as describing the conception of prison as a humane and progressive alternative to other punishments).

[172] *See* FOUCAULT, *supra* note 24, at 75–77 (discussing the development of less severe but more frequent punishment primarily for property crimes coinciding with greater "juridical and moral value placed on property relations").

[173] *Id.* at 236–37.

of torture, largely because of the severe isolation they imposed.[174] Prisons were also seen as providing a disturbing opportunity for sexual perversion.[175]

At the time of their founding, most prisons in the United States incarcerated primarily or even exclusively White men, especially in the South.[176] Women and people of color were sometimes punished by incarceration, but they were more often punished through other legally structured relationships.[177] White slave owners were primarily in charge of punishing enslaved Black people—often for some form of failure to comply with White rule.[178] Typical punishments included forced separation from family members, whipping, and other forms of violence.[179] Rape was an additional form of punishment for enslaved Black women.[180] Punishment of White women was primarily entrusted to their husbands or fathers and was expected to occur primarily through beatings inside the home.[181] Mental institutions or asylums also had a significant role in the confinement and punishment of White women, often for resistance to patriarchal control or gender norms.[182] Many Native people were forced onto reservations and not

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174 *See In re* Medley, 134 U.S. 160, 168 (1889) (recounting early reactions to solitary confinement).

175 *See* KUNZEL, *supra* note 169, at 16 (describing the preoccupation among early prison administrators with the possibility of sex between imprisoned men and arguing that this concern was central to structuring prisons).

176 Geeta Chowdhry & Mark Beeman, *Situating Colonialism, Race, and Punishment*, *in* RACE, GENDER, & PUNISHMENT 13, 16 (Mary Bosworth & Jeanne Flavin eds., 2007).

177 *See id.* at 22 (noting that while courts occasionally judged crimes of enslaved people if they were committed off of plantations, most punishments were determined by owners and overseers and included whipping, isolation, and castration); Julia Sudbury, *Rethinking Antiviolence Strategies: Lessons from the Black Women's Movement in Britain*, *in* COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 13, 17 (INCITE! Women of Color Against Violence ed., 2006) (discussing the idea that increased criminal punishment of women became necessary when women were perceived to be inadequately punished and controlled by family members).

178 *See* Vernetta D. Young & Zoe Spencer, *Multiple Jeopardy: The Impact of Race, Gender, and Slavery on the Punishment of Women in Antebellum America*, *in* RACE, GENDER, & PUNISHMENT, *supra* note 176, at 65, 66–68 (arguing that pre-Civil War strategies of punishment were designed not to discourage crime, but to ensure conformity to racial and other social hierarchies).

179 *Id.* at 67; NICOLE HAHN RAFTER, PARTIAL JUSTICE: WOMEN, PRISONS, AND SOCIAL CONTROL 131 (1990).

180 Davis, *supra* note 170, at 38.

181 *Id.* at 37; Young & Spencer, *supra* note 178, at 67 (describing husbands beating their wives as one way in which White women's "traditional gender role[s]" were enforced).

182 *See, e.g.*, E.P.W. Packard, *Madness and Marriage*, *in* THE AGE OF MADNESS 53, 53–76 (Thomas S. Szaz ed., 1973) (describing the institutionalization of a woman for refusing to submit to her husband); Tom Silex, *The Psychology Study of Trauma: History (Part I)*, HEALTHMAD (Feb. 11, 2010), http://healthmad.com/mental-health/the-psychological-study-of-trauma-history-part-1/ (discussing the history of hysteria, a "women's disease" that was often used to describe trauma from sexual and domestic vio-

permitted to leave, effectively incarcerating them without reliance on the criminal legal system.[183]

Under the model of expanding imprisonment in the 1800s, rehabilitation was expected to occur primarily through Christian penitence.[184] To this day, Christianity retains a strong presence in U.S. prisons. Government-contracted faith-based services in prison include counseling, church services, prayer, comprehensive "educational" programs, and separate living arrangements.[185] Incentives for participating in these programs can include early release, better prison conditions, and financial help.[186]

Christian leaders in prisons often enforce racialized gender norms.[187] Indeed, rehabilitation to White, upper-class masculinity played a central role in the founders' argument in favor of prisons.[188] Manliness—which was thought of as independence, temperance, and support and control of one's wife and children—was defined not only in contrast to femininity, but also to Blackness.[189] Black men were structurally prevented from taking up the family provider/controller role because White people controlled their children and intimate partners.[190] The founders conceived of prison as an effective method of controlling White men partly because it exercised a deterrent effect,

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lence and which sometimes led to confinement in asylums). For a discussion of how modern prisons and medical institutions continue to play this role, see DAVIS, above note 26, at 66, noting the disproportionate psychiatric institutionalization of women as a form of societal control over deviance, whereas men are considered criminal and are incarcerated.

183 *See* ROSS, *supra* note 75, at 82 (describing Native reservations as virtual imprisonment due to federal and state policy at the time).

184 KUNZEL, *supra* note 169, at 15.

185 *See, e.g.*, WINNIFRED FALLERS SULLIVAN, PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION 20 (2009) (discussing a new model for incorporating religion into prisons, in which faith-based prisons or wings of prisons infuse every aspect of prison experience with religion).

186 *See, e.g.*, *id.* at 28–29; JUANITA DÍAZ-COTTO, CHICANA LIVES AND CRIMINAL JUSTICE: VOICES FROM EL BARRIO 210 (2006) (describing the financial assistance an evangelical Christian church group offered to prisoners in a California facility).

187 PASCAL EMMER, ADRIAN LOWE & R. BARRETT MARSHALL, HEARTS ON A WIRE COLLECTIVE, THIS IS A PRISON, GLITTER IS NOT ALLOWED: EXPERIENCES OF TRANS AND GENDER VARIANT PEOPLE IN PENNSYLVANIA'S PRISON SYSTEMS 30 (2011), *available at* http://www.scribd.com/doc/56677078/This-is-a-Prison-Glitter-is-Not-Allowed (reporting people in men's prisons and jails being excluded from services because of their feminine appearance or hairstyle).

188 *See* Kann, *supra* note 170, at 21 (describing the founders' understanding of manhood).

189 *See id.* at 22 (describing the exclusion of Black men from the founders' ideas of manliness).

190 *See id.* at 30 (discussing why Black men were unable to be traditional heads of household while enslaved).

by threatening to deprive them of their manliness, and a rehabilitative effect, by holding out the possibility of restoration to manliness.[191]

After Emancipation, institutional punishment systems shifted to incorporate systems of slavery and White-Black power structures.[192] The demographics of prisons shifted dramatically everywhere in the United States, but especially in the South: Prisons were increasingly filled with Black people in percentages disproportionate to the percentages of Black people in the general population.[193] Rehabilitation faded as a major goal of prisons as Black people replaced White people as the main target of imprisonment.[194]

When the Thirteenth Amendment abolished slavery, it did so only for those who had not been convicted of a crime,[195] thus precipitating an economic and social incentive to maintain a large prison population that persists into the present. Particularly in the South, lawmaking and enforcement shifted to focus on crimes that Black people were perceived as likely to commit.[196] Incarceration practices shifted to address the vacuum in forced labor that Emancipation might have otherwise left.[197] Punishment for incarcerated people came to mirror punishment formerly used on enslaved people (for example, whipping).[198] The convict lease system—allowing people to pay the government to use teams of imprisoned people for forced

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191 *See id.* at 26–28 (describing manliness as both a deterrent and rehabilitative theory behind imprisonment).

192 *See* DAVIS, *supra* note 26, at 28–29 (noting the historical shift from societal slavery to the convict lease system in prisons and describing the regulation of Black people after slavery through the Black Codes as similar to that under slavery).

193 *See id.* (describing the passage of Black Codes criminalizing certain conduct only for Black people); RAFTER, *supra* note 179, at 132 (noting the shift from White to Black imprisonment in the South); Chowdhry & Beeman, *supra* note 176, at 26 (describing post–Civil War Southern prisons as shifting from predominately White to predominantly Black).

194 *See* Davis, *supra* note 170, at 36 ("It is not a coincidence that rehabilitation, the historical goal of the prison, has receded theoretically and practically as U.S. prisons have come to house spiraling numbers of black men.").

195 *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

196 *See* City of Chicago v. Morales, 527 U.S. 41, 54 n.20 (1999) ("[V]agrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery."); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 57 (2004) ("The post-Civil War Black Codes continued the racialization of the criminal law as a means of controlling the freedmen."); Chowdhry & Beeman, *supra* note 176, at 26.

197 *See* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The* Peonage Cases, 82 COLUM. L. REV. 646, 651 (1982) (discussing high demand for leased convict labor in the South after the Civil War).

198 *See, e.g.*, Jamison v. Wimbish, 130 F. 351, 355 (S.D. Ga. 1904), *rev'd*, 199 U.S. 599 (1905) ("[W]ith each gang stands the whipping boss, with the badge of his authority. This

labor—made it easy for plantation owners to continue to use Black labor in ways almost identical to slavery.[199] Imprisoned Black women were, and are, regularly sexually assaulted—as enslaved women had been.[200]

Clothing may also have been used as a punishment during this time. Some evidence from the early twentieth century shows incarcerated Black people punished for having sex with one another carting rocks while wearing loose white dresses.[201] The dresses may have been an aspect of their punishment.[202] Those subjected to the convict lease system at times had no clothes at all.[203]

In the latter half of the nineteenth century, middle-class White female reformers became concerned with the plight of White women in prisons.[204] At the time, there were no separate prisons designated for women.[205] People of all genders were incarcerated in the same facilities, although the men in these facilities far outnumbered women.[206] Reformers advocated for facilities dedicated to the distinct needs of women and capable of reforming the conduct of "fallen women."[207] As a result, around the turn of the century, women's reformatories were founded in a number of regions.[208]

Reformatories were designed to prepare women to "occupy the position assigned to them by God, viz., wives, mothers, and educators of children."[209] In Indiana, no one was hired to work in a women's reformatory as a guard unless she was willing to lead religious services.[210] Placement in women's reformatories was generally restricted to those imprisoned people seen as capable of rehabilitation: namely,

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the evidence discloses to be a heavy leathern strap, about 2 1/2 or 3 feet long, with solid hand grasp, and with broad, heavy, and flexible lash.").

199 *See* DAVIS, *supra* note 26, at 31 (explaining the use of Black Codes to incarcerate Black people and then utilize those incarcerated people for labor).

200 Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571, 604 (2006) ("At base, both slave-owners and correction officers used sexual domination and coercion of women to reinforce notions of domination and authority over the powerless. Like women slaves, women prisoners are seen as untrustworthy, promiscuous, and seductive.").

201 *See* KUNZEL, *supra* note 169, at 70.

202 *See id.*

203 *See, e.g.*, DAVIS, *supra* note 26, at 32 (describing the prison conditions in Mississippi at the end of the nineteenth century).

204 *See* RAFTER, *supra* note 179, at 147 (noting the particular interest of reformatories in "redeeming" White women).

205 *See id.* at xxvi (describing women's imprisonment with men until the mid-nineteenth century).

206 *Id.*

207 *Id.* at 24.

208 *See id.* at xxix (noting that seventeen states opened women's reformatories).

209 *Id.* at 33; *see also infra* note 215 and accompanying text.

210 RAFTER, *supra* note 179, at 33.

young White women.[211] These women were primarily poor, working-class, or immigrants.[212]

The alleged advantages of women's reformatories are questionable. The women's reformatory movement successfully advocated for indeterminate sentences and parole, making sentences much longer than they had been previously.[213] The people incarcerated in these reformatories received greater access to programming[214] than they had previously, but it was less diverse and lower paying than the programming men received. Also, this programming was designed to train women to assume an "appropriate" role as domestic servants for wealthier White women or, if possible, as wives to White men who had access to sufficient money to support the family.[215] Sewing, knitting, and laundry were the most common forms of programming[216]—and still are in many women's prisons.[217] As a part of "rehabilitation," dressing in feminine clothing was required.[218]

Black women, on the other hand, were usually held with men in prisons, prison farms, or convict lease programs.[219] At times they were held in gender-segregated facilities, although these were custodial institutions rather than reformatories.[220] Excluded from notions of White femininity, Black women were seen as workhorses and inherently sexually licentious, thus unworthy of protection from rape, inappropriate for exemption from hard labor, and incapable of

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211 *See id.* at 36–37.

212 *Id.* at 126–27, 140.

213 *See id.* at 35.

214 Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 542 (2009) (noting that while prison programs can be dangerous and exploitative, they remain desirable to many imprisoned people because they provide opportunities for earlier release, a small amount of remuneration, an interruption to boredom, and, in some cases, skills that can be helpful upon release).

215 *See* Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 197 (2006) ("[T]he way to start reforming women in prison was by controlling their sexuality, training them for domesticity either as a wife or servant, and then saving their souls."); RAFTER, *supra* note 179, at 159 (describing the purposes of Albion reformatory in New York to train women to become dutiful daughters, wives, or servants).

216 RAFTER, *supra* note 179, at 32.

217 ROSS, *supra* note 75, at 122 ("As in the past, training continues to reflect sex-role stereotypes, with options such as food service, clerical work, and cosmetology. Subsequently, when women are released from prison they are prepared for low-status, low-paying, sex-segregated occupations." (citations omitted)).

218 *See* RAFTER, *supra* note 179, at 32 (noting that incarcerated people wore dresses and aprons).

219 *See id.* at 88–90 (describing Black women convicted of crimes working the fields at a private farm in Texas and plantation in Louisiana).

220 *See id.* at 87 (describing Black women convicted of crimes in an overcrowded custodial setting in Tennessee).

rehabilitation.[221] In prisons, Black women were often isolated and denied access to most programs.[222] In prison farms and convict lease programs, they had no provisions for privacy.[223] In all of these settings, they were particularly targeted for and vulnerable to rape and sexual exploitation. They often experienced conditions worse than those Black men or White women experienced.[224]

Imprisonment of Native women ballooned between 1944 and 1966.[225] Legal shifts lessened the extent of incarceration of Native people on reservations.[226] They also diminished Native sovereignty over crimes committed within Native communities.[227] Native people quickly became overrepresented in prisons in comparison to their representation in the general population.[228]

The early 1970s marked the beginning of massive prison expansion on a scale unprecedented in the United States or abroad.[229] The expansion has been especially dramatic in women's prisons.[230]

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221 *See id.* at 37 ("Reformatory officials wished to work with women who were worthy of reform—a viewpoint that, for them . . . disqualified most blacks."); *see also* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 81–82 (2d ed. 2000) (noting the origins in slavery of stereotypes of sexual aggression among Black women, and the concomitant rationale for sexual assault on enslaved women); Maria Lugones, *Heterosexualism and the Colonial/Modern Gender System*, 22 HYPATIA 186, 203–04 (2007) (tracing the notions of non-White women as inferior because they were both women and unworthy of the privileges that accompanied White femininity).

222 *See* RAFTER, *supra* note 179, at 149–54 (noting segregation and lower levels of care and privileges for Black women in reformatories).

223 *See id.* at 151 (noting that Black women in prison farms and convict lease programs often had to live in the same stockades as men, as well as relieve themselves in front of men).

224 *See id.* at 87 (noting that the "Negro wing" of a women's facility was constantly overcrowded as compared to the White wing); *id.* at 89 (noting that Black women on a prison farm dealt with cotton and corn and all occupied one small building with no sanitary facilities, unlike White women who were given more domestic tasks such as sewing and gardening and had more space); *id.* at 149 (noting that men received better treatment than women and White people better than Black people); *see also id.* at xxx (noting that outside of reformatories women were often supervised by men, exposing them to forced prostitution and rape).

225 ROSS, *supra* note 75, at 85.

226 *Id.*

227 *Id.* at 25–26.

228 *Id.* at 78; Greg Guma, *Native Incarceration Rates Are Increasing*, TOWARD FREEDOM (May 27, 2005), http://www.towardfreedom.com/americas/140-native-incarceration-rates-are-increasing-0302 (describing Native people as having the second highest state incarceration rate); Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, HISTORY IS A WEAPON, http://www.historyisaweapon.com/defcon1/davisprison.html (last visited Aug. 12, 2012) (reporting that Native people have the highest per capita rate of incarceration).

229 DAVIS, *supra* note 26, at 11; RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 7 (2007).

230 Davis, *supra* note 170, at 36.

Scholars have identified numerous factors that contributed to this change. Instrumentally, many have noted the role of the War on Drugs in massive prison expansion[231] and, more recently, the War on Terror in increasing detention of immigrants and others.[232]

Ruthie Gilmore argues that prison expansion appeared to be an appealing solution to late twentieth century displacement and unrest that resulted from the decline of industry, agriculture, and manufacturing; rural/urban shifts; and consolidation of capital.[233] In describing causes of prison expansion, Dylan Rodriguez highlights the systematic crackdown on Black nationalism and other radical activism in the late 1960s and early 1970s, along with the fear of racial unrest and an end to White supremacy that made a "law and order" political agenda appealing to large segments of the White voting public.[234]

These factors combined to create a prison system in the United States that currently incarcerates more people per capita than any other nation in the world,[235] and disproportionately affects marginalized people. People with disabilities, particularly psychiatric disabilities, are over-represented in detention.[236] Trans people are also

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231 *See* Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 12 (2011) ("The War on Drugs and the 'get tough' movement explain the explosion in incarceration in the United States and the emergence of a vast, new racial undercaste."); Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 436 (2010) ("The last great criminal war, the War on Drugs, resulted in an erosion of civil liberties, mass incarceration, and a fundamental reorientation of American criminal justice.").

232 Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1283 (2010) (noting record high rates of criminal immigration prosecutions in the face of heightened concerns over "foreigners" in the War on Terror).

233 *See generally* GILMORE, *supra* note 229 (explaining the reasons for the phenomenal growth of California prisons and the subsequent movement against incarceration).

234 RODRIGUEZ, *supra* note 22, at 48 (discussing the FBI targeting of Black nationalist groups as a precursor to "prison's contemporary reconstruction").

235 *See generally* Adam Liptak, *More Than 1 in 100 Adults Are Now in Prison in U.S.*, N.Y. TIMES, Feb. 29, 2008, at A14 ("The United States imprisons more people than any other nation in the world."). State and federal prisons had custody of 1,605,127 people in 2010, according to the Department of Justice. PAUL GUERINO, PAIGE M. HARRISON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010, at 1 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf. In 2006, jails had custody of an additional 762,003 people. JAMES STEPHAN & GEORGETTE WALSH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF JAIL FACILITIES, 2006, at 3 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cjf06.pdf. These figures do not account for people incarcerated in juvenile detention facilities, psychiatric hospitals, police precincts, court-mandated drug treatment facilities, immigration detention, or other institutions (unless a jail or prison also has custody over them). As of 2007, one in every thirty-two people in the United States was under some form of correctional supervision. SILJA J.A. TALVI, WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM, at xiv (2007).

236 *See* 42 U.S.C. § 15601(3) (2006) ("America's jails and prisons house more mentally ill individuals than all of the Nation's psychiatric hospitals combined."); TALVI, *supra* note

present in prisons in disproportionate numbers.[237] Black, Latin@,[238] Native, and, in some areas, Asian and Middle Eastern people are highly disproportionately represented.[239]

During this same time period, prison litigation also has increased dramatically.[240] Successful prison litigation has saved lives and distributed money to people in prison who have experienced serious injuries.[241] However, some scholars have expressed concern that prison litigation and reform more broadly have also inadvertently contributed to prison expansion by: (1) requiring construction of additional facilities; (2) forcing greater expenditures on prisons in state and federal budgets; and (3) rhetorically legitimizing the existence of prisons

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235, at 144 (noting that 75.4% of people in local women's jails and 62.8% of people in local men's jails exhibit mental health problems).

237 *E.g.*, S.F. DEP'T OF HEALTH, THE TRANSGENDER COMMUNITY HEALTH PROJECT (1999), *available at* http://hivinsite.ucsf.edu/InSite?page=cftg-02-02 (finding that sixty-five percent of transgender women and twenty-nine percent of transgender men had a history of incarceration); GRANT, *supra* note 20, at 163 (noting that sixteen percent of trans people had been incarcerated in jail or prison).

238 I use the term *Latin@* that some feminist, queer, and trans Latin@ people have adopted to resist patriarchy and gender binary in language. For examples of organizations using this term, see ADVOCATES FOR LATIN@ ARTS AND CULTURE, http://www.alacaz.org/ (last visited Aug. 12, 2012); CHICAN@ AND LATIN@ STUDIES AT THE UNIVERSITY OF WISCONSIN, http://www.chicla.wisc.edu/ (last visited Aug. 12, 2012); TUCSON LATIN@ GAY PRIDE, http://wingspan.org/2011/tucson-latin-gay-pride-2011-this-week/ (last visited Aug. 12, 2012); and UNID@S: THE NATIONAL LATIN@ LGBT HUMAN RIGHTS ORGANIZATION, http://www.unidoslgbt.com/ (last visited Aug. 12, 2012).

239 *See* TALVI, *supra* note 235, at 47 (discussing the disproportionate incarceration rates of Native and Latin@ men and women in various states); Peter Wagner, *Incarceration Is Not an Equal Opportunity Punishment*, PRISON POLICY INITIATIVE (June 28, 2005), http://www.prisonpolicy.org/articles/notequal.html (stating that as of 2004, there were 393 White people incarcerated per 100,000 members of the population, compared to 957 Latin@ people and 2531 Black people); OMAR C. JADWAT, ACLU, THE ARBITRARY DETENTION OF IMMIGRANTS AFTER SEPTEMBER 11, at 1, http://www.aclu.org/files/iclr/jadwat.pdf (last visited Aug. 12, 2012) (stating that petitioners in an action before the U.N. Working Group on Arbitrary Detention argued that their "post-September 11 detentions were arbitrary because arrests . . . disproportionately affected Muslim men from South Asian and Middle Eastern countries").

240 *See* Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 559 (2006) (noting the increased willingness of federal courts to uphold prisoner rights in the 1960s).

241 *See, e.g.*, Vincent M. Nathan, *Have the Courts Made a Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?*, 24 PACE L. REV. 419, 423–24 (2004) (describing improvements in prison conditions as a result of litigation, including improvements in health care and reductions of environmental hazards and excessive use of force); Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 433 (2004) (describing improvements in prison conditions as a result of litigation, including the reduction of torture and improvements in nutrition); *Prisoners' Rights Cases*, KOOB & MAGOOLAGHAN, http://kmlaw-ny.com/prisoners.html (last visited Aug. 12, 2012) (describing settlements of cases on behalf of imprisoned people ranging from $125,000 to $9,750,000).

by asserting that safe, humane, or healthy prisons are possible if only certain practices or procedures are changed.[242] In response, marginalized groups and their allies have organized to resist and abolish the prison industrial complex.[243] Organizations such as INCITE! Women of Color Against Violence, Justice Now, the Sylvia Rivera Law Project, the TGI Justice Project, and the Transformative Justice Law Project of Illinois have brought valuable intersectional analyses to abolitionist work.[244]

III
Prison Dress Regulation

Prison dress regulations emerged from this historical context. Below I outline some of the common themes and divergences in these regulations, particularly those that directly enforce racialized gender norms. I also provide examples of how these rules are enforced in practice.

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[242] *See, e.g.*, Alexander L. Lee, Nowhere To Go but Out: The Collision Between Transgender and Gender-Variant Prisoners and the Gender Binary in America's Prisons, at Part IV.C (Spring 2003) (unpublished Comment), *available at* http://www.justdetention.org/pdf/nowheretogobutout.pdf (discussing the unintended consequences of creating gender-segregated prisons); Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 Law & Soc'y Rev. 731, 732–33 (2010) (discussing how court orders against overcrowding were interpreted by states as orders to build more prisons, increasing the state's capacity to incarcerate).

[243] In 1976, the Prison Research Education Action Project released the influential handbook *Instead of Prisons*. Prison Research Educ. Action Project, Instead of Prisons: A Handbook for Abolitionists (1976). Activists have founded organizations such as Critical Resistance and the California Prison Moratorium Project to stop new prison construction and end incarceration. *See History*, Critical Resistance, http://crwp.live.radicaldesigns.org/?page_id=202 (last visited Aug. 12, 2012) (describing the formation of Critical Resistance in 1997 in order to challenge the "prison industrial complex"); *History*, California Prison Moratorium Project, http://www.calipmp.org/history (last visited Aug. 12, 2012) (describing the formation of the California Prison Moratorium Project in Oakland in 1998 to challenge the expansion of prisons in California).

[244] *See* Andrea Smith et al., *Introduction* to Color of Violence: The Incite! Anthology, *supra* note 177, at 1, 2 (describing the genesis of their organization in the recognition of the failure of anti-violence movements and anti-racist movements to address violence that women of color face from both the state and individuals); Dean Spade & Rickke Mananzala, *The Nonprofit Industrial Complex and Trans Resistance*, 5 Sexuality Res. & Soc. Pol'y 53, 63 (2008) (describing the Sylvia Rivera Law Project as a model for radical, anti-racist organizing for trans liberation); Make It Happen! (Transforming Justice 2011), *available at* http://vimeo.com/16952110 (documentary video describing the Transforming Justice conference, an event focused on ending the criminalization of transgender communities of color, created in part by the above-named organizations).

A. Policies

1. Hair

My research identified fifteen jurisdictions with specific maximum hair length requirements set forth in written rules and thirty-four without them.[245] Jurisdictions without written requirements may still regulate hair length through other means, such as through staff commands or through harassment that incentivizes conformity.

Hair length restrictions usually track normative expectations that men should have short hair and women long hair. Most systems that regulate hair length do so only for men's prisons.[246] For example, New York requires all people entering men's prisons to cut or shave their hair so that it is one inch or less in length.[247] However, New York does not require people entering women's prisons to cut their hair at all.[248]

For those jurisdictions that do regulate hair length in both men's and women's prisons, the required (or maximum) length varies between men's and women's prisons. In Ohio, people in men's prisons may not grow their hair more than three inches long,[249] while people in women's prisons may not cut their hair shorter than two inches long.[250] In Arkansas, people in men's prisons must keep their hair above their ears and collar, while people in women's prisons must keep their hair above their shoulders.[251]

Many systems without explicit limits on hair length adopt a more general requirement—for example, that hair must be kept "neat and trimmed" or that imprisoned people may be compelled to cut their hair for safety and security reasons.[252] While these policies appear

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245 *See infra* Figure 1.

246 *See id.*

247 N.Y. DEP'T OF CORR. SERVS., DIRECTIVE NO. 4914, INMATE GROOMING STANDARDS 1 (2010), *available at* http://www.doccs.ny.gov/Directives/4914.pdf.

248 *See id.* (failing to mention any hair restrictions for people incarcerated as women). Other jurisdictions regulate hair length throughout incarceration, rather than just at intake. *See, e.g.*, N.M. CORR. DEP'T, POLICY NO. CD-151100, INMATE GROOMING AND HYGIENE 2 (2010) (prohibiting people incarcerated as men from having hair longer than three inches, but not stating any hair length restrictions for people incarcerated as women).

249 OHIO ADMIN. CODE § 5120-9-25(D) (2009).

250 OHIO ADMIN. CODE § 5120-9-25.1(D) (2009).

251 ARK. DEP'T OF CORR., GUIDE FOR FAMILY AND FRIENDS 6 (n.d.), *available at* adc.arkansas.gov/resources/Documents/handbook.pdf.

252 U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, NO. 5230.05, PROGRAM STATEMENT: GROOMING 1 (1996) (stating that incarcerated people may "select the hair style of personal choice . . . in keeping with standards of good grooming and the security, good order, and discipline of the institution"); ALASKA DEP'T OF CORR., POLICIES AND PROCEDURES NO. 806.2, SANITATION AND HYGIENE: PRISONER HYGIENE, GROOMING AND SANITATION 1 (1995) ("[P]risoners [have] the freedom to groom and dress as they wish as long as their appearance does not conflict with an institution's requirements for safety, security, identification, and hygiene."); WASH. DEP'T OF CORR., POLICY NO. DOC

more permissive, in practice imprisoned people may experience punishment for the same types of hair prohibited in other jurisdictions, but without the same notice.[253]

Idaho does not have specific hair length requirements but explicitly prohibits people in men's prisons from having "effeminate" hair and people in women's prisons from having "masculine" hair.[254] The policy does not define "effeminate" or "masculine." Wyoming also lacks specific hair length requirements but gives imprisoned men "the opportunity" to receive a military haircut upon entering.[255] Wyoming then charges a fee to replace the identification card for anyone whose hair changes and imposes administrative segregation on those who cannot or do not comply.[256]

In addition to regulating hair length, some systems also prohibit particular hairstyles, especially those associated with non-White racial groups, non-Christian religious groups, or non-mainstream political groups. Afros, braids, cornrows, dreadlocks, beards, and mohawks are among the most commonly prohibited hairstyles.[257] For example, Florida prohibits imprisoned people from shaving or styling their hair "according to fads or extremes that would call attention to the inmate or separate inmates into groups based upon style."[258] The policy then exemplifies "fads" or "extremes" by prohibiting tails, woven braids,

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440.080, HYGIENE AND GROOMING FOR OFFENDERS 4 (2012) ("The Superintendent may restrict hair styles . . . when the style . . . presents a security risk.").

253 *See* Lee v. Young, No. 99-6012, 2000 WL 1720930, at *2 (6th Cir. Nov. 6, 2000) (rejecting a challenge to a restriction on an "admittedly feminine" hair style even though the prison regulations only "require[d] an appearance that is 'in keeping with . . . the security, good order, and discipline of the institution'" (quoting 28 C.F.R. § 551.1 (2010))).

254 IDAHO DEP'T OF CORR., PROCEDURE CONTROL NO. 325.02.01.001, PRISON RAPE ELIMINATION 5 (2009).

255 WYO. DEP'T OF CORR., POLICY AND PROCEDURE NO. 4.201, INMATE GROOMING, HYGIENE AND SANITATION 3–4 (2006).

256 WYO. DEP'T OF CORR., POLICY AND PROCEDURE NO. 4.201, INMATE GROOMING, HYGIENE AND SANITATION 3–4 (2006). Administrative segregation is a special type of housing in prisons, usually a form of solitary confinement. *See* Arkles, *supra* note 214, at 537–38; *see also* Hewitt v. Helms, 459 U.S. 460, 468 (1983) ("The phrase 'administrative segregation,' as used . . . here, appears to be something of a catchall: it may be used to protect the prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer.").

257 *See, e.g.*, TEX. DEP'T OF CRIMINAL JUSTICE, OFFENDER ORIENTATION HANDBOOK 10 (2004) [hereinafter TEXAS OFFENDER ORIENTATION HANDBOOK] ("No block style, afro, natural or shag haircuts will be permitted. No fad or extreme hairstyles/haircuts are allowed. No mohawks, tails, or designs cut into the hair are allowed."); Acoolla v. Angelone, 7:01-CV-01008, 2006 WL 938731, at *1 (W.D. Va. Apr. 10, 2006) (describing West Virginia regulations prohibiting people imprisoned as men from having "braids, plaits, dreadlocks, cornrows, ponytails, buns, [or] Mohawks"); N.M. CORR. DEP'T, NO. CD-151101, INMATE GROOMING AND HYGIENE (2011) (prohibiting beards).

258 FLA. ADMIN. CODE ANN. r. 33-602.101(4) (2009).

and mohawks, among others.[259] Wigs are also commonly prohibited.[260] Figure 2,[261] from a New Hampshire handbook provided to inmates in both men's and women's prisons, strikingly illustrates the norms these rules often enforce: An apparent White male figure with short hair, no head covering, and no beard demonstrates the exact dimensions of permissible mustaches and sideburns.

2. *Clothing and Other Dress*

Regulation of clothing, accessories, cosmetics, hygiene products, and other forms of dress is even more sweeping. Regulation typically has at least two dimensions. First, prison systems provide certain items to imprisoned people—for example, uniforms. Second, prison systems prohibit imprisoned people from receiving, buying, possessing, wearing, or using certain items, usually any item not included on a list of permissible items. In this way, prisons establish three basic categories of clothing and other items: prison-issued (and sometimes required), permissible (but often inaccessible), and contraband.

Many styles and types of dress associated with non-White racial groups, non-Christian religious groups, or non-mainstream political views are considered contraband. Some systems prohibit sagging pants.[262] Some prohibit baseball caps.[263] Others permit baseball caps but do not allow imprisoned people to wear them back- or side-

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[259] *Id.*

[260] *See* U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, NO. 5230.05, PROGRAM STATEMENT 2 (1996) ("Inmates may not wear wigs or artificial hairpieces, unless medical authorization to do so is approved by the Warden."); ARIZ. DEP'T OF CORR., DEP'T ORDER NO. 704.01, INMATE REGULATIONS (2010) (prohibiting wigs unless medically necessary); CAL. CODE REGS. tit. 15, § 3062(d) (2011) (same); PENN. DEP'T OF CORR., POLICY NO. DC-ADM 807 4(b), INMATE GROOMING AND BARBER/COSMETOLOGY PROGRAMS 3 (2003) (same); UTAH DEP'T OF CORR., DIV. OF INSTITUTIONAL OPERATIONS, INMATE FRIENDS AND FAMILY ORIENTATION BOOKLET 7 (2010) (same).

[261] *See infra* Figure 2.

[262] *E.g.*, ARIZ. DEP'T OF CORR., DEP'T ORDER NO. 704, INMATE REGULATIONS 5 (2010) (prohibiting sagging pants); FLA. ADMIN. CODE ANN. r. 33-602.101(6) (2012) (same); KY. CORR., POLICY NO. 17.1(II)(A)(6)(C), INMATE PERSONAL PROPERTY 2 (2009) (same); TEX. DEP'T OF CRIMINAL JUSTICE, OFFENDER ORIENTATION HANDBOOK 11 (2004) (same); VT. DEP'T OF CORR., POLICY NO. 321.01, OFFENDER/INMATE PROPERTY (1998) (same); WYO. DEP'T OF CORR., POLICY AND PROCEDURE NO. 4.201(IV)(H)(9)(ii)(a), INMATE GROOMING, HYGIENE AND SANITATION 19 (2010) (same).

[263] *See, e.g.*, LA. DEP'T OF PUB. SAFETY & CORR., DEP'T REG. NO. C-03-007, FEMALE OFFENDER PERSONAL PROPERTY LIST, at attach. 2 (2010) (permitting only straw or knit caps); WYO. DEP'T OF CORR., POLICY AND PROCEDURE NO. 4.201IV(H)(8)(iv)(c), INMATE GROOMING, HYGIENE AND SANITATION 18 (2010) ("Only ball caps and hats issued by the correctional facility and required for a specific work assignment or purchased through the correctional facility's commissary are authorized for inmate possession or wear.").

facing.[264] Headscarves, doo rags, and hoods are often prohibited or restricted.[265] For example, Connecticut rules state: "Doo rags shall not be worn outside the housing unit, and a head covering which could serve as a hood shall be prohibited . . . ."[266] Many systems also regulate clothing color.[267]

Almost every system I studied provides or permits different dress to people in different gender facilities, thereby suggesting normative judgments about what men and women should and should not wear.[268] The only two systems that do not seem to have different rules for men and women appear to require conventionally masculine

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[264] *E.g.*, KY. CORR., POLICY NO. 17.1, INMATE PERSONAL PROPERTY 3 (2009); CONN. DEP'T OF CORR., DIRECTIVE NO. 6.10(36)(I), INMATE PROPERTY 17 (2010) ("Hats shall be worn in an appropriate manner with the brim in the front.").

[265] *See, e.g.*, CONN. DEP'T OF CORR., DIRECTIVE NO. 6.10(14), INMATE PROPERTY 5 (2010) ("Any clothing article with a hood or that may be utilized as a hood shall not be allowed."); FLA. ADMIN. CODE ANN. r. 33-602.101(2)(b)(9) (2012) ("No hats shall be worn inside, except as stated for religious reasons, and shall be removed from the head when passing through any gate area. Skull caps of any kind are prohibited."); GA. DEP'T OF CORR., No. IIB06-0001, INMATE PERSONAL PROPERTY STANDARDS, at attach. 1 (2008) (on file with the *New York University Law Review*) ("[B]aseball caps are not allowed."); IND. DEP'T OF CORR., PROPERTY—ADULT MALE—LEVEL 1: NON-WORK RELEASE (permitting doo rags only in the immediate bed area of men's facilities); UTAH DEP'T OF CORR., NO. FDr22/2.05(H)(1), INMATE CODE OF CONDUCT (2006) ("Inmates shall not be permitted to wear rags, scarves, neckerchiefs, or any other head apparel except head apparel sold by the commissary, i.e. beanies and caps."); WYO. DEP'T OF CORR., POLICY AND PROCEDURE NO. 4.201(IV)(G)(8)(iv)(a), INMATE GROOMING, HYGIENE AND SANITATION (2006) ("Head coverings are authorized for wear outside the buildings only, unless required to be worn by job description (i.e., head covering for food service workers . . .), or approved for religious purposes (e.g., yarmulke . . . made from a single layer of single-colored cloth for authorized adherents of Judaism).").

[266] CONN. DEP'T OF CORR., DIRECTIVE NO. 6.10(36)(I), INMATE PROPERTY 17 (2010).

[267] *See, e.g.*, IND. DEP'T OF CORR., PROPERTY—ADULT MALE—LEVEL 1: NON-WORK RELEASE 1 (n.d.) (restricting the color of several items of clothing to colors such as grey, black, white, or navy); LA. DEP'T OF PUB. SAFETY & CORR., DEP'T REG. NO. C-03-007, MALE OFFENDER PERS. PROP. LIST, at attach. 1 (2010) (restricting the color of many items of clothing to white or gray); MO. DEP'T OF CORR., NO. IS22-1.1(D)(2)–(3), POLICY & PROCEDURE MANUAL: OFFENDER AUTHORIZED PERSONAL PROPERTY 2 (2010) (prohibiting black clothing and camouflaged clothing); N.M. CORR. DEP'T, NO. CD-15020, INMATE PROPERTY 3 (2012), *available at* http://www.corrections.state.nm.us/policies/current/CD-150200.pdf (requiring T-shirts to be white or orange and gym shorts to be gray); N.Y. DEP'T OF CORR. SERVS., DIRECTIVE NO. 4911, PACKAGES & ARTICLES SENT OR BROUGHT TO FACILITIES, at D-5 (June 17, 2010), *available at* http://www.doccs.ny.gov/Directives/4911.pdf ("Except as indicated below, blue, black, gray or orange colors are not permitted. Any shades of colors such as melon, peach, aqua, etc. that are not readily distinguishable from blue, black, gray or orange are not permitted. Solid colors only, except where indicated.").

[268] *E.g.*, N.D. DEP'T OF CORR. & REHAB., INMATE HANDBOOK 46 (2011), *available at* http://www.nd.gov/docr/adult/docs/INMATE_HANDBOOK_2010.pdf (listing shorts and T-shirts but not bras or panties among state-issued clothing); N.H. DEP'T OF CORR., MANUAL FOR THE GUIDANCE OF INMATES 61 (2011) (providing for shirts, pants, and underwear but not bras); *see also infra* Appendix B.

clothing for everyone, although they may have separate unwritten rules for people in women's prisons. The rules vary, but they are usually very detailed. For example, in Indiana, only people in men's prisons may receive tweezers, facial tissue, undershorts, jeans, or athletic supporters. Only people in women's prisons may receive barrettes, nail polish, sleepwear, curlers, hair dryers, flat irons, earrings, panties, bras, camisoles, girdles, slips, long underwear, panty hose, footies, or leotards.[269] Some systems also prohibit feminine dress in men's facilities and masculine dress in women's facilities.[270] Even when jewelry is generally prohibited, many systems permit married people in both men's and women's prisons to wear wedding bands[271] supporting norms of sexuality as well as gender.

3. Punishments

Punishments for violating these rules also vary significantly, but they usually involve one or more of four main components: (1) loss of time earned toward early release,[272] (2) loss of privileges,[273] (3) extra

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[269] *Compare* IND. DEP'T OF CORR., POLICY NO. 02-01-101, PROPERTY—ADULT FEMALE FACILITY (n.d.), *with* IND. DEP'T OF CORR., POLICY NO. 01-01-101, PROPERTY—ADULT MALE—WORK RELEASE (n.d.). In Alabama, only people in women's prisons may receive bras, panties, pajamas, dresses, shower caps, vaseline, face cream, face tissue, earrings, makeup, emery boards, or perm or relaxer kits, while only people in men's prisons may receive boxers or briefs. ALA. DEP'T OF CORR., ADMIN. REG. NO. 338, INMATE PROPERTY 13 (2009).

[270] *E.g.*, IDAHO DEP'T OF CORR., PROCEDURE CONTROL NO. 325.02.01.001, PRISON RAPE ELIMINATION 5–6 (2009) (prohibiting incarcerated people from "dressing or displaying the appearance of the opposite gender"); KY. CORR., POLICY NO. 17.1, INMATE PERSONAL PROPERTY 1 (2009) (same); TENN. DEP'T OF CORR., INDEX NO. 502.03, HAIRSTYLES/DRESS CODE/GROOMING 1 (2006) ("Females are not permitted to cultivate or attach beards and mustaches and males are not permitted to wear cosmetic makeup substances.").

[271] *See, e.g.*, FLA. ADMIN. CODE ANN. r. 33-602.201(4)(c) (2010) (allowing only wedding bands and watches in both men's and women's prisons and allowing earrings only to people in women's prisons); OR. ADMIN. R. 291-117-0080(1)(f) (2011) (permitting only wedding bands); LA. DEP'T OF PUBLIC SAFETY & CORR., DEP'T REG. NO. C-03-007, MALE OFFENDER PERSONAL PROPERTY LIST, at attach. 1 (2010) (allowing wedding bands and watches); N.M. CORR. DEP'T, POLICY NO. CD-150201, INMATE PROPERTY (2012), *available at* http://www.corrections.state.nm.us/policies/current/CD-150200.pdf (permitting wedding bands and stating: "Inmate must produce evidence of legal marriage. No other form of jewelry will be allowed."); TEX. DEP'T OF CRIMINAL JUSTICE, OFFENDER ORIENTATION HANDBOOK (2004) (allowing newly incarcerated people to bring wedding bands).

[272] *See, e.g.*, OHIO ADMIN. CODE § 5120-9-08(L)(6) (2009) (listing loss of earned time for release as possible disciplinary sanction); MO. DEP'T OF CORR., NO. IS19-1.1, CONDUCT RULES AND SANCTIONS (June 27, 2010) (listing loss of earned time for release as a possible disciplinary sanction).

[273] *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2.vii.113.17 (2011) (defining possession of unauthorized jewelry as a tier one or two offense); § 252.5(a) (stating potential dispositions for tier one violations, including loss of privileges); § 253.7(1)(a) (stating potential dispositions for tier two violations); KY. CORR., POLICY NO. 15.2, RULE

obligatory labor,[274] and (4) solitary confinement.[275] The drastic harm caused by solitary confinement is well documented.[276] Prison rules often permit the use of force to compel compliance with dress regulations.[277]

For example, in Missouri, "wearing or making a disguise"[278] is punishable by up to thirty days in disciplinary segregation; up to a year of no contact visits; permanent loss of unauthorized property; mandatory program participation; referral for assignment to administrative segregation, loss of time credit, or extension of date for conditional release; and loss of eligibility for work release.[279] Ohio prisons may confiscate contraband, force haircuts, place imprisoned people in

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VIOLATIONS AND PENALTIES (2011) (making violation of dress code set forth in Kentucky Corrections Policy 17.1 a category III offense and setting forth authorized penalties).

274 N.Y. COMP. CODES R. & REGS. tit. 7, § 253.7(a)(1)(v) (2011); KY. CORR., POLICY NO. 15.2(II)(G)(3), RULE VIOLATIONS AND PENALTIES (2011).

275 *See, e.g.*, GA. COMP. R. & REGS. 125-3-2.08 (2009) (permitting thirty days of confinement to quarters for low-severity infractions and thirty days isolation plus indefinite administrative segregation in greatest-severity infractions); 37 TEX. ADMIN. CODE § 283.1 (2000) (permitting fifteen days of disciplinary separation for minor infractions and thirty days for major infractions).

276 *See, e.g.*, *In re* Medley, 134 U.S. 160, 168 (1889) ("A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide . . . ."); TALVI, *supra* note 235, at 140 (noting that men in solitary confinement "began to mutilate themselves, swallow sharp objects, or commit suicide"); Arkles, *supra* note 214, at 537 (describing how isolation can increase vulnerability to violence, particularly for transgender imprisoned people); Cassandra Shaylor, *"It's Like Living in a Black Hole": Women of Color and Solitary Confinement in the Prison Industrial Complex*, 24 NEW ENG. J. CRIM. & CIV. CONFINEMENT 385, 397 (1998) ("Research indicates that women *are* more prone to violent behavior as a result of confinement in solitary units, but violence against themselves."); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 462 (2006) ("[A]t least a third of the inmates reacted to isolation with adverse health effects, and at least a third of these . . . might be characterized as suffering from major psychological and psychiatric problems including hallucinations, paranoia, and different kinds of personal degeneration."); THE CORRECTIONAL ASS'N OF N.Y., DISCIPLINARY CONFINEMENT IN NEW YORK STATE PRISONS (2004), *available at* http://www.correctionalassociation.org/publications/download/pvp/factsheets/SHU-fact.pdf (noting that between 1998 and 2001, more than half of the suicides in New York State prisons occurred in disciplinary confinement, although fewer than seven percent of prisoners were housed in these units).

277 *See, e.g.*, FL. REG. TEXT 33-602.101(5) (NS) (2008) ("If an inmate refuses to adhere to the grooming standards . . . , the officer in charge . . . shall direct staff to shave the inmate or cut the inmate's hair, or take other necessary action to bring the inmate into compliance . . . . When it is necessary to use force . . . [it] shall be documented . . . . "); N.Y. COMP. CODES R. & REGS. tit. 7, § 251-1.2(d) (2011) (authorizing use of physical force "to enforce compliance with a lawful direction"); OHIO ADMIN. CODE § 5120-9-25 (2010) (authorizing forced haircuts once a decision on an infraction report has been made).

278 MO. DEP'T OF CORR., NO. IS19-1.1(II)(N)(4)(4.5), CONDUCT RULES AND SANCTIONS 3 (2010) (listing disguise as a level one violation).

279 *Id.* (listing potential consequences for level one violations).

"control" or solitary housing, deny privileges, assign extra work, and deny earned credits toward release.[280]

Some jurisdictions create exceptions to dress regulations available to certain imprisoned people, usually members of particular religious groups,[281] people with medical permits,[282] or trans people.[283] These types of policies still maintain a dominant orthodoxy—people not adhering to agency-imposed norms are at best relegated to the exception. Imprisoned people who wish to take advantage of these exceptions must work to get them, usually requiring approval from either a chaplain or medical staff and sometimes also from an administrator.[284] Permission can be withheld arbitrarily.[285] Imprisoned people

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[280] OHIO ADMIN. CODE § 5120-9-08(L) (2009).

[281] *See, e.g.*, FLA. ADMIN. CODE ANN. r. 33-602.101(2)(b)(9) (2012), *available at* https://www.flrules.org/gateway/ruleno.asp?id=33-602.101 ("No hats shall be worn inside, except as stated for religious reasons . . . ."); MO. DEP'T OF CORR., NO. IS17-1.1(III)(J)(1)(a), RELIGIOUS PROGRAMS AND ACTIVITIES (2003) (allowing imprisoned people to apply for permission to wear religious clothing to religious events); N.Y. DEP'T CORR. SERVS., DIRECTIVE NO. 4914, INMATE GROOMING STANDARDS 1 (2010), *available at* http://www.doccs.ny.gov/Directives/4914.pdf (exempting members of particular religious groups from the required initial hair cut in men's facilities); OHIO ADMIN. CODE § 5120-9-25.1(P) (2009) ("If the grooming restrictions established by this rule substantially burden an inmate's sincerely held religious belief, the inmate may seek an appropriate exemption by applying for a religious accomodation [sic]."); WYO. DEP'T OF CORR., POLICY AND PROCEDURE NO. 4.201, INMATE GROOMING, HYGIENE AND SANITATION 7 (2010), *available at* http://doc.state.wy.us/Media.aspx?mediaId=37 ("Hairstyles that are religiously indicated by the mandatory tenets of the inmate's professed religion . . . will be authorized as long as the hair is capable of being searched and does not present a health or safety hazard (i.e., Orthodox Judaism, Native American, Rastafarian, Sikh).").

[282] *See, e.g.*, UTAH DEP'T OF CORR., NO. DIOGO 09-019, INSTITUTIONAL OPERATIONS DIVISION MANUAL: INMATE CODE OF CONDUCT, at FDr22/02.05(G)(2) (2006) ("Male inmates shall not be allowed to keep or use cosmetics, unless approved for skin conditions or other treatment issues as prescribed by Clinical Services.").

[283] *See, e.g.*, CAL. CORR. HEALTHCARE SERVS., NO. 4.26.2, TREATMENT OF TRANSGENDER PERSONS PROCEDURE 2 (2012) (permitting transgender women incarcerated in men's facilities to have bras and transgender men incarcerated in women's facilities to have boxers).

[284] *See, e.g.*, MASS. DEP'T OF CORR., NO. 103 DOC 652, IDENTIFICATION, TREATMENT, AND CORRECTIONAL MANAGEMENT OF INMATES DIAGNOSED WITH GENDER IDENTITY DISORDER (GID) 5, 12–13 (2010) (requiring diagnosis of Gender Identity Disorder and recommendation of treatment committee for access to "cross-gender" clothing or cosmetics); N.Y. DEP'T OF CORR. SERVS., POLICY NO. 1.31, GENDER IDENTITY DISORDER (2008) (requiring treatment with hormones for access to bras in men's facilities); OHIO ADMIN. CODE § 5120-9-25.1(P) (2009) (requiring an application for religious accommodation for an exception to the dress regulations); UTAH DEP'T OF CORR., *supra* note 282, at FDr22/02.05(G)(2) (requiring a prescription from Clinical Services before people imprisoned as men can gain access to cosmetics).

[285] *See, e.g.*, Grayson v. Schuler, 666 F.3d 450, 451–52 (7th Cir. 2012) (describing facts where prison chaplain told an African Hebrew Israelite of Jerusalem that he was not allowed to have dreadlocks because he believed only Rastafarians needed to wear them).

who do not fit into recognized exceptional categories must comply with the "general" rule.

B. Practice

An exploration of a few examples of dress-related enforcement illustrates the impact of prison regulations, particularly where practice deviates from written rules.[286] In practice, the actual clothing provided to imprisoned people may fall short of what the regulations describe. The clothes are often ill fitting, inadequate for weather, dirty, and worn out before they are cleaned or replaced.[287]

At times, dress that is not prohibited is nonetheless punished or dress that is not required is nonetheless imposed. Staff may single people out for discriminatory treatment in this regard. A trans man imprisoned in a California women's facility reported that "at one point I was being made to wear a dress, despite the fact that no one else was forced to. It was just to humiliate me."[288]

Gender differences in clothing are frequently designed to force people into dominant gender norms.[289] However, at times non-dominant gendering is used as a form of punishment, humiliation, and control. For instance, South Carolina prison officials forced people in men's prisons found guilty of having sex with other imprisoned people to wear pink jumpsuits.[290] The infamous Maricopa County Sheriff Joe Arpaio forced detainees perceived as male, regardless of alleged sexual practices, to dye their underwear pink.[291] In Los Angeles, gay and trans people in men's jails must wear powder blue uniforms,

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286 I also draw on some examples from jails and juvenile detention facilities. Information from these systems is somewhat better documented and sheds light on patterns that likely exist in prisons.

287 *See, e.g.*, Davidson v. Coughlin, 920 F. Supp. 305, 309–10 (N.D.N.Y. 1996) (finding allegations of inadequate clothing for the winter sufficient to establish deliberate indifference); Lancaster v. Tilton, No. C 79-01630WHA, 2007 WL 4570185, at *12 (N.D. Cal. Dec. 21, 2007) (finding that providing imprisoned people with only worn out and ill-fitting clothing did not rise to the level of a constitutional violation). Through many conversations with trans women in men's prisons, I learned that those who manage to obtain bras often receive only uncomfortable sports bras. These bras seem intended to compress and hide their breasts, and they often get holes in them long before they are replaced.

288 *See* MOGUL, RITCHIE & WHITLOCK, *supra* note 72, at 111.

289 *See infra* Part IV.

290 David M. Reutter, *Food Deprivation & Pink Clothing Imposed for Violating South Carolina Prison Rules*, PRISON LEGAL NEWS, https://www.prisonlegalnews.org/19431_displayArticle.aspx (last visited Aug. 12, 2012).

291 *See, e.g.*, *Arizona Criminals Find Jail Too In-'Tents,'* CNN (July 27, 1999), http://www.cnn.com/US/9907/27/tough.sheriff/.

instead of standard navy blue uniforms, making them easily identifiable and more vulnerable to harassment.[292]

Feminine clothing can also play a complex role in patterns of sexual assault and exploitation in men's prisons. At times, guards provide feminine clothing to trans women as an inducement to comply with sexual demands.[293] Guards and imprisoned people have also pressured and forced people in men's prisons to wear dresses, panties, and other feminine clothing during rapes.[294]

Even when the staff does not specifically punish people for their dress, they often do punish people differently or more harshly for other violations because of their dress. A young person in a girl's juvenile detention facility explains:

> Sometimes when a situation would get out of control . . . they would say "Oh you wanna act like a man? I'll put you on the floor like a man. You wanna act like a man? You're gonna take the restraint like a man" . . . . [S]ince they had pictures of me dressed as a boy they automatically see me as a threat.[295]

A Native woman in a Montana prison explained that she was placed in a maximum security facility even though she had no disciplinary record in part because of her "tough Indian" image: "[T]hey think, probably because of my size and tattoos or something, that I'm a bulldog."[296] Prison officials perceived her as threatening because of her body and dress, as viewed through the lens of her gender and race.

IV
Penological Justifications for Regulating Prison Dress

Imprisoned people who challenge dress restrictions often rely on claims based on the First Amendment, the Eighth Amendment, the Fourteenth Amendment, or the Religious Land Use and

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292 Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 Calif. L. Rev. 1309, 1321 (2011).

293 Incarcerated transgender women reported this activity to me when I was in practice. *See, e.g.*, blake nemec, *No One Enters Like Them: Health, Gender Variance, and the PIC*, *in* Captive Genders, *supra* note 61, at 217, 222–23 (describing how guards forced a transgender woman to have sex with an imprisoned man and offered her panties, a bra, and lipstick to "look good" for "[her] man").

294 *See id.*; Anonymous, *The Story of a Black Punk*, *in* Prison Masculinities 127, 130 (Don Sabo, Terry A. Kupers & Willie London eds., 2001) (describing the gratitude of an imprisoned man to one of his rapists for not forcing him to wear drag).

295 *Danalay's Story*, The Urban Justice Center Peter Cicchino Youth Project, http://www.urbanjustice.org/oral_history/danalay.mp3 (last visited Aug. 12, 2012).

296 Ross, *supra* note 75, at 143.

Institutionalized Person Act (RLUIPA).[297] In most of these challenges, the government's interests form a crucial part of the analysis. As in all cases challenging prison officials' actions, the officials typically identify safety and security as the key interests at stake. However, those safety and security concerns take a variety of forms: repressing homosexuality and gang affiliation; protecting vulnerable imprisoned people; responding to gender differences; preventing escape and contraband; and promoting hygiene, labor, and rehabilitation.

Of course, the articulated government interests may be significantly different from the actual interests that motivated the action. Nonetheless, the articulated interests that prison officials believe courts might accept as justifications for the regulations can enrich our understanding of the context, interests, and anxieties behind these regulations. These articulated interests expose the operation of prison dress regulations and imprisonment as broadly enforcing racialized gender norms, maintaining social hierarchies, and controlling imprisoned people and people from marginalized communities.

I will first give a brief doctrinal background on common legal theories that imprisoned people use to challenge prison dress regulations, in order to contextualize the interests prison officials raise. The First Amendment gives rise to both free speech and free exercise challenges. In both, the test developed in *Turner v. Safley* applies.[298] The *Turner* test establishes that when a prison regulation is challenged, state action that would violate the First Amendment in other contexts is permissible in prisons if it is reasonably related to legitimate penological interests.[299] *Turner* also establishes that in order to determine whether an infringement on a constitutional right is reasonably related to a legitimate penological interest, courts must consider whether there is a "valid, rational connection" between the regulation and the interest; whether "alternative means" remain open to imprisoned people to exercise their constitutional rights; the impact that accommodation of the imprisoned person's rights would have on guards, other imprisoned people, and allocation of prison resources; and the availability of ready alternatives to the infringement.[300]

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[297] Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2006).

[298] Turner v. Safley, 482 U.S. 78 (1987).

[299] *Id.* at 89.

[300] *Id.* at 89–90.

In reaction to this limited reading of the First Amendment by the Supreme Court, Congress passed RLUIPA,[301] which prohibits the government from substantially burdening incarcerated people's free exercise of religion unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[302] While this statutory test seems to restore strict scrutiny to violations of free exercise in the prison context, some courts have interpreted RLUIPA to require deference to prison officials,[303] and some scholars have expressed concern that RLUIPA has devolved into a version of the *Turner* test.[304]

On the other hand, equal protection challenges based on race in the prison context receive a strict scrutiny analysis.[305] However, it is unclear whether the usual equal protection analysis applies to actions based on factors other than race. A number of court of appeals and district court cases have applied the *Turner* test, even in cases based on quasi-suspect classifications such as gender.[306] The Eighth Amendment's prohibition on cruel and unusual punishment generally prohibits excessive use of force by prison staff,[307] deliberate indifference on the part of prison staff to substantial risk of serious harm[308] or

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301 *See* 146 Cong. Rec. E1563-01, E1563 (2000) (material in support of remarks of Rep. Charles T. Canady) (indicating that a section of RLUIPA was meant to "simplif[y]" the enforcement of the First Amendment in cases that would otherwise be factually difficult for a complaining party to prove); 146 Cong. Rec. S7991-02, S7991 (2000) (statement of Sen. Strom Thurmond) (expressing reservations about RLUIPA and characterizing it as an attempt to change the way courts interpret the First Amendment).

302 42 U.S.C. § 2000cc-1(a) (2006).

303 *See, e.g.*, Murphy v. Missouri Dep't of Corr., 372 F.3d 979, 987–88 (8th Cir. 2004) (concluding that Congress intended courts to accord significant deference to prison officials when applying RLUIPA).

304 *See, e.g.*, JOHN BOSTON, PRISONERS' RIGHTS PROJECT, OVERVIEW OF PRISONERS' RIGHTS 67–68 (2011) (arguing that, despite the clear intent that RLUIPA be applied more favorably to prisoners than the *Turner* test, a number of decisions have come down that "appear to be indistinguishable in their analytic approach").

305 *See* Johnson v. California, 543 U.S. 499, 507 (2005) (holding that strict scrutiny applies to racial distinctions in the prison context).

306 *See, e.g.*, Yates v. Stalder, 217 F.3d 332, 335 (5th Cir. 2000) (applying the *Turner* test to a case brought by male prisoners claiming discrimination on the basis of gender); Benjamin v. Coughlin, 905 F.2d 571 (2d Cir. 1990) (applying the *Turner* test to a case brought by Rastafarians).

307 Hudson v. McMillian, 503 U.S. 1, 9 (1992) (requiring a showing of malicious and sadistic use of force to cause harm).

308 *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994) (stating that prison officials violate the Eighth Amendment when they act with "deliberate indifference").

to a serious medical need[309] of an imprisoned person, and deprivation of the minimal civilized measures of life's necessities.[310]

A. Repressing Homosexuality

In many legal contexts, formal discrimination against people on the basis of sexual orientation is increasingly viewed as illegitimate.[311] Much of the criminology literature and a number of judicial decisions, however, assume the importance of preventing and punishing any sexual or affectionate contact among people in prison, as well as any public expression of queer or trans identities.[312] While prison officials have often linked this justification with a need to keep imprisoned people safe from sexual assault, in a number of cases they focus only on repressing queer identities or relationships, trans identities, or gender nonconforming dress.[313]

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309 *See* Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (concluding that "deliberate indifference to serious medical needs of prisoners" is proscribed by the Eighth Amendment).

310 *See* Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

311 *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing the ban on outwardly gay people serving in the military); Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998) (adding sexual orientation to the federal government's employment anti-discrimination policy); THE NATIONAL GAY AND LESBIAN TASK FORCE, RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE U.S. (2011), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_6_28_11.pdf (showing that nineteen states and the District of Columbia, as of June 28, 2011, have some form of relationship recognition for same-sex couples); THE NATIONAL GAY AND LESBIAN TASK FORCE, STATE NONDISCRIMINATION LAWS IN THE U.S. (2011), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_6_11.pdf (showing that fifteen states, as of June 14, 2011, ban discrimination based on sexual orientation and gender identity and expression and six states ban discrimination based on sexual orientation but not gender identity).

312 *See* KUNZEL, *supra* note 169, at 115 (noting that the "[v]iolation of the rule against hugging or any other bodily contact with another inmate at one state prison for women . . . was punished by solitary confinement"); ROSS, *supra* note 75, at 149 (noting from a prison staff member that "'lesbian activity' . . . is not easy to control, and once a prisoner is written up for sexual misconduct, she is 'hit hard' by the hearing officer"); Dreibelbis v. Marks, 742 F.2d 792, 795 (3d Cir. 1984) (stating that "the hair regulation assists in controlling homosexuality within the correctional institution"); Dooley v. Quick, 598 F. Supp. 607, 609 (D.R.I. 1984) (noting "the pervasive threat which homosexuality poses in a custodial environment"), *aff'd*, 787 F.2d 579 (1st Cir. 1986) (unpublished table decision).

313 *See* Swift v. Lewis, 901 F.2d 730, 731 (9th Cir. 1990) (describing prison justification of hair length restriction to "reduc[e] homosexual attractiveness of inmates"); Ashann-Ra v. Virginia, 112 F. Supp. 2d 559, 571 (W.D. Va. 2000) (describing the argument of prison officials "that a haircut of one inch in length would be considered an extreme hair style for a female inmate and that such haircuts might be used to symbolize involvement in a homosexual relationship with another inmate"); Wellmaker v. Dahill, 836 F. Supp. 1375, 1382 (N.D. Ohio 1993) (referring to prison official affidavit stating "long hair in [men's] prisons has become synonymous with homosexuality; therefore, to avoid all problems associated with homosexuality in prison, braids/long hair must be restricted").

Prison officials' concern over homosexuality and transsexuality is at times mobilized against people in prison who, according to all parties, are in fact heterosexual, non-trans men.[314] Thus, in addition to directly impacting trans women and gender nonconforming people in men's prisons,[315] the prohibition on long hair in men's prisons impacts Native, Rastafarian, Orthodox Jewish, Sikh, and other men from racialized or otherwise marginalized religious/ethnic groups who frequently seek to have long hair consistent with their religious or cultural practices.[316]

In these cases, as in many others, the government's interest in eradicating homosexuality and imposing (celibate) heterosexuality on imprisoned people is considered so self-evidently legitimate that it needs no explanation.[317] These cases assume not only that such a goal is desirable but that, in opposition to historical evidence, such a goal is achievable. These homophobic articulations and practices continue the marginalization of queer and trans people, as well as others who seek to wear dress inconsistent with racialized gender norms.

B. Repressing Gang Affiliation and Group Identification

Prison officials also argue that regulation of dress tends to prevent imprisoned people from participating in gangs. This goal is sometimes presented as an end in and of itself and sometimes presented as a means to an end of reducing animosity among imprisoned people.[318]

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[314] *See infra* note 326 and accompanying text; *see also* Wellmaker v. Dahill, 836 F. Supp. 1375, 1383 (N.D. Ohio 1993) (following *Pollack* to uphold hair length regulation in case brought by non-transgender straight man of the Nubian Islamic Hebrew faith).

[315] *See supra* notes 39–66 and accompanying text.

[316] *See supra* notes 51–52 and accompanying text.

[317] Prisons are often also hostile to heterosexual sexual expression. *See* Giano v. Senkowski, 54 F.3d 1050, 1057 (2d Cir. 2004) (upholding prohibition on possessing nude or semi-nude photographs of women in men's prison); Hernandez v. Coughlin, 18 F.3d 133, 137 (2d Cir. 1994) (ruling that imprisoned people do not have a right to conjugal visits). However, some prisons accommodate heterosexual sexual activity and expression to some degree. *See* Kacy Elizabeth Wiggum, *Defining Family in American Prisons*, 30 WOMEN'S RTS. L. REP. 357, 357 (2009) (listing states that permit conjugal visits and stating that "almost all of these states require the visitors be 'immediate family' or legally recognized opposite-sex spouses"). Prisons and courts tend to respond particularly severely to expressions of sexuality perceived as queer. Arkles, *supra* note 214, at 535. Also, actions of prisons such as their exclusion of publications concerning gay (but not straight) identity, community, and news demonstrate their preoccupation with preventing homosexuality in particular. *See*, *e.g.*, Espinoza v. Wilson, 814 F.2d 1093, 1099 (6th Cir. 1987) (discussing prison's prohibition on receipt of publications that "advocate" homosexuality); Willson v. Buss, 370 F. Supp. 2d 782, 784 (N.D. Ind. 2005) (discussing prison's characterization of gay magazines that "do not contain sexually graphic material" as, nevertheless, prohibited "blatant homosexual materials").

[318] *See* Warsoldier v. Woodford, 418 F.3d 989, 997 (9th Cir. 2005) ("Further, such policies reduce animosity and tension by removing a method by which inmates may signal a

For example, painting its goals in even broader terms, Louisiana's rule states: "[A]ny means of possible offender 'group' identification, including, but not limited to, offender hair styles and clothing, will not be permitted."[319]

Many courts have accepted this interest as legitimate and its connection to dress regulation as rational.[320] At least one court has rejected it as a legitimate interest.[321] As that court pointed out, while restrictions on long hair may prevent people from signaling their membership in certain gangs, it leaves people in other gangs—notably White supremacist "skin heads"—free to use hairstyles to signal their affiliation.[322]

Here, prison policies show some correspondence with the controversial innovation of gang injunctions aimed in part at the dress of youth of color in urban areas.[323] Gangs play a complex and important political role in communities of color, often "challeng[ing] mainstream society," "exhibit[ing] symbols of ethnic pride," and "demand[ing] an end to the discriminatory implementation of criminal justice policies . . . ."[324] While some gangs and individual gang members act in violent ways, the attempt to criminalize gangs wholesale does more to vilify communities of color and interrupt resistance to subordination

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gang affiliation."); Henderson v. Terhune, 379 F.3d 709, 712 (9th Cir. 2004) ("Short hair reduces animosity among prisoners, especially those in prison gangs who show loyalty through their hairstyles . . . ."); Hines v. S.C. Dep't of Corr., 148 F.3d 353, 356 (4th Cir. 1998) ("Moore implemented the Grooming Policy in order to address concerns about gang activity, prison security, and prisoner discipline."); Ragland v. Angelone, 420 F. Supp. 2d 507, 515–16 (W.D. Va. 2006) ("Inmates also use hairstyles to symbolize gang membership.").

319 LA. DEP'T OF PUB. SAFETY & CORR., DEP'T REG. NO. B-08-003, OFFENDER PERSONAL GROOMING/GROUP IDENTIFICATION (2008). *See also* COLO. DEP'T OF CORR., REG. NO. 850-11, HYGIENE AND GROOMING (2012) ("An offender's hairstyle . . . shall not be associated with any disruptive group affiliation."); MO. DEP'T OF CORR., NO. IS22-1.1, OFFENDER AUTHORIZED PERSONAL PROPERTY 2 (2010) (prohibiting imprisoned people from wearing clothing that indicates gang membership).

320 *See, e.g.*, *Hines*, 148 F.3d at 358 ("It cannot be gainsaid that these [dress policies] are legitimate—indeed, compelling—governmental and penological interests."); *Ragland*, 420 F. Supp. 2d at 516 ("On this evidence the court concludes that [a prison grooming regulation] addresses compelling state interests."); DeBlasio v. Johnson, 128 F. Supp. 2d 315, 325 (E.D. Va. 2000) ("The court thus finds that [the prison's] compelling governmental and penological interests clearly outweigh the minor intrusion caused by cutting inmate's hair.").

321 *See* Henderson v. Terhune, 379 F.3d 709, 713 (9th Cir. 2004) (rejecting the prevention of gang affiliation as a valid interest).

322 *Id.*

323 *See supra* Part II.A.6 (discussing use of gang injunctions to target youth of color in some urban areas).

324 DÍAZ-COTTO, *supra* note 186, at 76–77.

than to create safety.[325] The suppression of dress that might indicate gang membership, therefore, also plays a role in suppressing political dissent, disproportionately affects youth of color, and reinforces Whiteness as correctness.

C. Protecting Vulnerable Imprisoned People

Many prison administrations support their dress restrictions through a paternalistic rationale by stating that if they permitted imprisoned people in men's prisons to dress in ways perceived as feminine, other people in prison would attack them.[326] These arguments are often interspersed with those identifying prevention of homosexuality or transsexuality as key objectives. Prison officials, as well as courts, tend to conflate consensual sexual contact, prisoner-on-prisoner rape and sexual assault, queer sexual identities, transgender identities, and gender nonconforming dress all together as an undifferentiated threat.[327]

While in some cases prison officials may offer these justifications for their policies as an ex post justification during litigation, sometimes prison officials articulate protective purposes when they make their policies.[328] These measures resonate with mandatory arrest laws and hate crime laws, as exercises of the criminal legal system's power to ostensibly help "protect" a marginalized group in a way that ulti-

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[325] *See id.* ("[T]he existence of Chicano/a gangs has been used by the media, social scientists, and government agencies to successfully criminalize Chicano/a youths . . . ."); Patrick Wall, *Bronx Student Ticketed After Handing Out Flyers Protesting School Closure*, DNAINFO.COM (May 9, 2012), http://www.dnainfo.com/new-york/20120509/throgs-neck/bronx-student-ticketed-for-handing-out-flyers-protesting-school-closure (reporting that a 16-year-old high school student received a ticket for disorderly conduct after an officer called his letter protesting the closure of his school "gang-affiliated").

[326] *See* Pollack v. Marshall, 845 F.2d 656, 657 (6th Cir. 1988) (arguing that one of the reasons for prohibiting long hair among male prisoners was that "[h]omosexuality is a great problem in a prison facility. Longer hair increases the attractiveness of an inmate to other inmates. This increases the likelihood of sexual attacks."); Ahkeen v. Parker, No. W1998-00640-COA-R3CV, 2000 WL 52771, at *8, *9 (Tenn. Ct. App. Jan. 10, 2000) (defending a policy prohibiting a non-transgender man from wearing a cross earring by stating that it was intended to "promote institutional security by discouraging transsexual dressing by inmates," in part because this would, in turn, discourage sexual assaults).

[327] *See* Stephen "Donny" Donaldson, *A Million Jockers, Punks, and Queens*, *in* PRISON MASCULINITIES 118, 123 (Don Sabo, Terry A. Kupers & Willie London eds., 2001) (describing prison administrators "continuing to regard both rape and consensual sexuality as problems to be equally ignored or, when acknowledged, eliminated"); *supra* note 313 and accompanying text.

[328] *See* IDAHO DEP'T OF CORR., PROCEDURE CONTROL NO. 325.02.01.001(4), PRISON RAPE ELIMINATION 5 (2009) (prohibiting inmates from "dressing or displaying the appearance of the opposite gender" in regulation about prison rape elimination).

mately involves disproportionately punishing the members of that group.[329]

If punishing imprisoned people for wearing gender nonconforming dress were a paternalistic measure, its effectiveness would presume that prison officials understand better than imprisoned people the risks of their situations. In fact, people whose dress does not conform to gender norms are often acutely aware of danger they face.[330] When formal regulation does not force them to conform to gender norms in dress, some trans people and others in prison do choose a more gender conforming expression as a way to reduce the harm they experience.[331]

However, it may or may not be "safer" for a trans woman in a men's prison to dress in ways inconsistent with her gender identity. Studies in systems that already prohibit gender nonconforming dress show that trans women experience drastically heightened vulnerability to sexual assault as compared to others in the same prisons.[332] Some

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[329] *See* Lisa A. Crooms, *"Everywhere There's War": A Racial Realist's Reconsideration of Hate Crimes Statutes*, 1 GEO. J. GENDER & L. 41, 43 (1999) ("Can we, in good conscience, support criminal measures in a context where criminalization of the oppressed and conditional constitutional rights are commonplace?"); Sally Kohn, *Greasing the Wheel: How the Criminal Justice System Hurts Gay, Lesbian, Bisexual and Transgendered People and Why Hate Crime Laws Won't Save Them*, 27 N.Y.U. REV. L. & SOC. CHANGE 257, 260 (2002) (arguing "that hate crime legislation, beyond merely replicating the discrimination found in society, actually reinforces such discrimination"); Dean Spade & Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 21 CHICANO-LATINO L. REV. 38, 38 (2000) (noting "the limits of criminal justice remedies to problems of gender, race, economic, and sexual subordination"); Sudbury, *supra* note 177, at 13 ("[F]or women convicted of defending themselves against a violent partner, the criminal justice system becomes a site of secondary victimization.").

[330] *See* Ethan St. Pierre, *About the Day of Remembrance*, TRANSGENDER DAY OF REMEMBRANCE, http://www.transgenderdor.org/?page_id=4 (last visited Aug. 12, 2012) (explaining the origins of the annual international day where transgender communities commemorate those lost to transphobic violence); Gwendolyn Ann Smith, *About This Site*, REMEMBERING OUR DEAD, http://www.rememberingourdead.org/about/core.html (last visited Aug. 12, 2012) (noting the prevalence of violent deaths of transgender people and the lack of a "safe way" to be transgender).

[331] *See* Mark Summers, *Mark Summers Massachusetts DOC*, *in* 2 GIC TRIP J., no. 2, 2002, at 1, 8, *available at* http://www.gicofcolo.org/Upload/TIP/PDF/2002/tip_2002_spring.pdf ("For that reason, I have shed my 'drag' image. I am still gay, still effeminate and, more importantly, still me. But I must admit that once I 'toned it down' there was a corresponding decrease in the harassment."); State v. Wood, No. 58437, 1991 WL 76041, at *2 (Ohio Ct. App. May 9, 1991) (describing a transgender woman who changed into men's clothes before she called the police to turn herself in for a crime).

[332] *See, e.g.*, VALERIE JENNESS ET AL., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 3 (2007), *available at* http://www.ushrnetwork.org/sites/default/files/VJReport2007.pdf ("Sexual assault is 13 times more prevalent among transgender inmates . . . ."); STOP PRISONER RAPE & ACLU NATIONAL PRISON PROJECT, STILL IN DANGER: THE ONGOING THREAT OF SEXUAL VIOLENCE AGAINST TRANSGENDER PRISONERS 5 (2005), *available at* http://www.

evidence also supports the possibility of increased vulnerability to violence for people in men's prisons who were previously identified as feminine and who then try to become more normatively masculine.[333] Janet Loftin, a trans woman incarcerated with men in California, describes the safety instructions that guards gave her when she arrived:

> One of the things they were clear about was that, as a transgendered person in an all-male facility, my safety could not be guaranteed. They warned me to avoid any display of femininity and gave me oversized clothing to hide the feminizing effects of the hormones on my body. . . . [T]hey also said I couldn't use the showers. . . . In spite [of] all . . . these precautions, they told me that I almost certainly would be the victim of sexual violence, again warning me that they could not do anything about it.[334]

The guards explained that Loftin could not shower, must wear clothing that hid her breasts and hips, and must appear masculine—but that nonetheless others would rape her. While research has not conclusively shown that dress regulation helps, harms, or fails to influence sexual vulnerability in prisons,[335] at best it is vastly deficient at preventing violence.

Even if gender conforming dress does reduce exposure to certain types of violence, it also imposes costs in terms of dignity, liberty, health, well-being, and self-expression.[336] Perhaps most troubling, though, is that the protection justification of dress regulation blames the victim for rape—as well as for punishments such as solitary confinement. It condones the logic that men "cannot help themselves" from raping a more feminine person or that someone who dresses in a gender nonconforming or feminine way deserves or asks for rape. It also proposes to "help" marginalized people and communities by destroying and assimilating them. These policy justifications send the

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justdetention.org/pdf/stillindanger.pdf (documenting the increased threat of sexual assault against transgender women prisoners); SYLVIA RIVERA LAW PROJECT, IT'S WAR IN HERE: A REPORT ON THE EXPERIENCES OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 19–20 (2007), *available at* http://www.srlp.org/files/warinhere.pdf (describing heightened abuse against "transgender, gender nonconforming, and intersex" prisoners).

333 A person in a California prison said that he had to put up with "frequent threats of being stabbed" after he stopped plucking his eyebrows and wearing tight pants. KUNZEL, *supra* note 169, at 209.

334 Janet Loftin, *A Transsexual's Experience in the California Department of Corrections (CDC)*, *in* 4 GIC TIP, no. 2, 2004, at 1, 6, *available at* http://www.gicofcolo.org/Upload/TIP/PDF/2004/tip_2004_spring.pdf.

335 I have not found any empirical studies examining this factor specifically.

336 *See supra* Part I (providing an overview of the various interests at stake in self-determining dress).

message that, if people from marginalized groups will sacrifice who they are, abandon the practice of their beliefs and expression of their identities, and pretend to be members of the dominant groups, then they *might* deserve some measure of safety.

D. Recognizing Gender Differences

People in men's prisons often raise equal protection challenges on the basis of the differences between dress restrictions on people in women's prisons and those on people in men's prisons.[337] In these cases, prison officials often state that they must restrict dress in men's prisons differently than they do in women's prisons because men and women are different.[338] Typical concerns motivating restrictions in men's prisons, such as detecting contraband and preventing escape, are purportedly less severe in women's prisons because women are less prone to violence, disobedience, and escape.[339] In one case, a defendant cited women's greater concern with personal appearance as a justification for differential treatment.[340]

These justifications perpetuate longstanding gender stereotypes.[341] In this worldview, there are only two entirely distinct gender categories. Of the two categories, women are more passive and preoccupied with appearance. Men, on the other hand—or at least imprisoned men racialized as people of color—are more dangerous and in

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337 *See, e.g.*, Dreibelbis v. Marks, 742 F.2d 792, 795 (3d Cir. 1984) (discussing challenge to grooming rule in men's prison different from grooming rule in women's prison); Hill v. Estelle, 537 F.2d 214, 215 (5th Cir. 1976) (discussing an equal protection challenge to hair regulations that were applied to people in men's prisons but not people in women's prisons); Ashann-Ra v. Virginia, 112 F. Supp. 2d 559, 561 (W.D. Va. 2000) (discussing challenge to prison grooming regulations with different standards for people in men's prisons and people in women's prisons).

338 *See, e.g.*, Ragland v. Angelone, 420 F. Supp. 2d 507, 517 (W.D. Va. 2006) (citing prison officials for the assertion that "female inmates as a group simply do not present security and health concerns of the same magnitude as male inmates do"); Poe v. Werner, 386 F. Supp. 1014, 1020 (M.D. Pa. 1974) (accepting a prison administrator's assertion that men and women must be treated differently because of their physical and psychological differences).

339 *See, e.g.*, *Ragland*, 420 F. Supp. 2d at 517 ("Female inmates also have much less history than do male inmates of committing violence and other security breaches, such as secreting weapons and contraband or attempting escape."); *Poe*, 386 F. Supp. at 1020 ("[T]he greater aggressiveness and disposition toward violent action frequently displayed by male prisoners makes institutional security, maintenance of internal discipline and prevention of homosexual attacks—penal goals which the hair regulation furthers—a much greater problem in the men's prisons than in the women's correctional institution.").

340 *See Poe*, 386 F. Supp. at 1020 ("Likewise the greater importance of personal appearance to women than men largely eliminates any hygienic problems with respect to long hair of female inmates.").

341 *See Ashann-Ra*, 112 F. Supp. 2d at 571 (recognizing that "some of defendants' arguments in favor of the policy have the hollow ring of sexual stereotypes").

need of more exacting control. These gender differences are perceived and presented as genuine and significant, even if evidence supporting them is scant.[342]

Moreover, this justification makes these differences appear natural and inherent, rather than produced by actions of prisons themselves or any other extrinsic forces. For example, people in women's prisons are often disciplined for minor infractions that would not be punished in men's prisons.[343] Also, people in women's prisons are over-medicated with sedating psychotropic drugs to a greater extent than are people in men's prisons.[344] Stating that women are "better behaved" eclipses the differences in treatment and the potential impact those differences could have on the behavior and perceptions of that behavior among imprisoned people in men's and women's prisons, as well as the role of the prison in formulating those categories.

E. Identifying Imprisoned People and Preventing Escape

When prison officials offer preventing escape as an explanation for dress regulations, they do not always explain the connection.[345] However, when an explanation is offered, it is often that if people in men's prisons are permitted to have long hair, they could radically change their appearance by cutting their hair and thus disguise themselves from law enforcement.[346] Prison officials have also expressed

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[342] *See* Warsoldier v. Woodford, 418 F.3d 989, 1000 (9th Cir. 2005) (noting that defendants' claim that violence was much more common among men was not supported by evidence that showed only a 1.5% difference).

[343] *See* Brian Bilsky & Meda Chesney-Lind, *Doing Time in Detention Home: Gendered Punishment Regimes in Youth Jails*, *in* RAZOR WIRE WOMEN, *supra* note 2, at 31, 41–42 (describing minor incidents that girls were punished for as compared to boys in Hawaii juvenile detention and comparing findings to the differential punishment of women and men in Texas state prisons); TALVI, *supra* note 235, at 137 (noting allegations that people in women's prisons are locked down for behaviors "almost expected of men in prison").

[344] *See* DAVIS, *supra* note 26, at 66 ("Psychiatric drugs continue to be distributed far more extensively to imprisoned women than to their male counterparts."); ROSS, *supra* note 75, at 118 ("Studies in the United States indicate that incarcerated women are more heavily medicated than incarcerated men.").

[345] *See, e.g.*, Henderson v. Terhune, 379 F.3d 709, 712 (9th Cir. 2004) (explaining only that "[s]hort hair makes it easier to identify inmates who . . . pose an escape risk"); Brightly v. Wainwright, 814 F.2d 612, 613 (11th Cir. 1987) (stating that an interest in preventing escape is sufficient to justify a policy requiring people in men's prison to have short hair and no beards).

[346] *See Warsoldier*, 418 F.3d at 997 ("[R]equiring male inmates to cut their hair ensures public safety because it 'enhance[s] identification of inmates who are attempting to escape or who have escaped.'" (quoting 15 CAL. CODE REGS. tit. 15, § 3062 (2004)); Ragland v. Angelone, 420 F. Supp. 2d 507, 516 (W.D. Va. 2006) ("Prisoners with long hair and/or beards can rapidly change their appearance to facilitate an escape attempt or frustrate

concern that imprisoned people could use makeup to change their appearance.[347]

While forcibly depriving people of liberty is a core function of prisons, prevention of escape is, at most, an incomplete explanation for the regulations. It is conceivable that, in some circumstances, dress regulation makes it more difficult for people in prison to escape. Any form of dress *can* change a person's appearance, at least in minor ways. Some systems have implemented rules that require taking a new photograph of imprisoned people who change their dress in significant ways.[348]

However, it seems at least as plausible that dress regulation has no impact or even may increase the ability of people in prison to escape, which suggests that these explanations may be pretextual or misguided. The historical preoccupation with maintaining strict regulation of dress based on class in Europe also made it much easier for one to masquerade as a member of a different class.[349] The same could be said of the efforts to regulate dress in prisons.[350] Furthermore, in many cases, it strains credulity that forcing people to dress in ways that are radically different from their freely-chosen dress will make them *easier* to identify if they again attain freedom. These justifications make even less sense when applied to most rules in

identification in a disciplinary infraction or crime committed during incarceration."), *aff'd sub nom.* Ragland v. Powell, 193 F. App'x 218 (4th Cir. 2006).

347 *See, e.g.*, Lee v. Young, No. 99-6012, 2000 WL 1720930, at *5 (6th Cir. Nov. 6, 2000) ("Makeup can change an inmate's appearance, resulting in difficulty in identification for prison staff.").

348 *See, e.g.*, ALASKA DEP'T OF CORR., NO. 806.02, POLICIES AND PROCEDURES: PRISONER HYGIENE, GROOMING AND SANITATION 1 (1995) ("If a prisoner drastically changes his or her appearance, e.g., changing hair length or color, shaving, or growing a beard or mustache, the individual shall be re-photographed for purposes of identification."); COLO. DEP'T OF CORR., REG. NO. 850-11, OFFENDER PERSONNEL, HYGIENE AND GROOMING 2 (2009) (requiring new photo if appearance changes).

349 *Cf.* HUNT, *supra* note 7, at 137 (noting that "visible self-presentation creates endless possibilities for the perpetration of fraud and misrepresentation").

350 One man famously escaped from custody at a Manhattan courthouse by wearing a business suit. He was perceived to be a lawyer and allowed to walk out. *Escaped Inmate Captured in Manhattan*, WABC-TV (Oct. 2, 2009), http://abclocal.go.com/wabc/story?section=news/local&id=7040475; Laura Italiano & Jamie Schram, *Jailbreak a Piece of Cake*, N.Y. POST (Oct. 1, 2009), http://www.nypost.com/p/news/local/manhattan/item_qmXucpyt64UIUNRQCy34pJ. While it is conceivable that he would have been able to escape even without a system of exacting dress regulation that requires and presumes officers, attorneys, imprisoned people, civilian volunteers, and others to be distinguishable based on dress, it might have been more difficult for him if dress were considered a less stable indicator of status.

women's prisons, such as Ohio's requirement that people in women's prisons grow their hair long.[351]

F. Finding Contraband and Saving Time

Restrictions on hair length and styles, as well as headwear, are also often justified out of concern that they make it easier to find contraband.[352] Prison officials also argue that less hair and fewer clothes result in less time needed to search prisoners.[353] Here, prisons strike a very particular cultural balance. Nudity and tight-fitting or otherwise "immodest" clothing is often prohibited, despite the fact that such dress would make it harder to hide contraband.[354] A headscarf is not more conducive to hiding contraband than pants or a shirt, but nonetheless it is often prohibited. Having some hair on the head is usually permitted in men's and women's prisons even when beards are not allowed, although hair on one's head is not necessarily any less conducive to concealing contraband than facial hair.

Also, contraband exists exactly to the extent that prison or other government agencies define objects to be contraband. Prisons make many dress-related items (for example doo rags, Rastafarian crowns)

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[351] OHIO ADMIN. CODE § 5120-9-25.1(D) (2007) (requiring that people in women's prisons maintain hair longer than two inches, unless there is a documented medical reason). The reasoning that quick appearance changes are possible because long hair can be cut in moments could not justify a rule requiring long hair.

[352] *See, e.g.*, Warsoldier v. Woodford, 418 F.3d 989, 997 (9th Cir. 2005) (noting that the California Department of Corrections justified its hair grooming policy by claiming that "inmates may hide contraband or weapons in their hair or on their bodies"); Ragland v. Angelone, 420 F. Supp. 2d 507, 515 (W.D. Va. 2006) ("An inmate can conceal weapons or contraband in his long face or head hair."), *aff'd sub nom.* Ragland v. Powell, 193 F. App'x 218 (4th Cir. 2006).

[353] *See, e.g.*, Henderson v. Terhune, 379 F.3d 709, 712 (9th Cir. 2004) ("Short hair facilitates searches for concealed contraband, and reduces the difficulty and time needed for such searches . . . ."); *Angelone*, 420 F. Supp. 2d at 515 ("The extra time it takes for officers to conduct searches of inmates' long hair means less staffing for other security concerns and/or more cost."); Ashann-Ra v. Virginia, 112 F. Supp. 2d 559, 571 (W.D. Va. 2000) ("Defendants also argue that shorter hair for male inmates saves time and effort during routine searches.").

[354] *See, e.g.*, LA. DEP'T OF PUB. SAFETY & CORR., DEP'T REG. NO. C-03-007, FEMALE OFFENDER PERSONAL PROPERTY LIST, at attach. 2 (2010) (setting minimum lengths for shorts and jumpers); N.Y. DEP'T OF CORR. SERVS., DIRECTIVE NO. 4911, PACKAGES & ARTICLES SENT OR BROUGHT TO FACILITIES, at D-6 (2010), *available at* http://www.doccs.ny.gov/Directives/4911.pdf (prohibiting thongs and midriff-bearing blouses for people in women's facilities); OHIO ADMIN. CODE § 5120-9-25.1(O) (2007) ("Inmates must be . . . fully dressed at all times when outside their living area."); UTAH DEP'T OF CORR., NO. 09-003, DIVISION OF INSTITUTIONAL OPERATIONS, INMATE PROPERTY FDR22/02.07(G) (Jan. 22, 2009) ("[E]xcept while in the shower, inmate dress shall be modest at all times.").

contraband, purportedly in part to detect more contraband.[355] In fact, more contraband may well be detected in large part because more contraband has been produced through new legal definitions. If the goal is to save time, eliminating dress restrictions would much more directly achieve that goal because staff would no longer need to enforce those restrictions or detect dress-related contraband.

G. Promoting Hygiene

Another common justification for dress restrictions is to prevent vermin and unhygienic conditions.[356] For example, in *Standing Deer v. Carlson*, prison officials asserted that Native imprisoned people wearing headbands presented a sanitary problem.[357] Another prison listed risks from long hair and beards as "everything from insect or parasite infestation to skin and scalp conditions."[358]

Hygiene is a somewhat ironic justification, since a common concern among imprisoned people is not being allowed to maintain basic hygiene and cleanliness. Much litigation and writing by imprisoned people focuses on poor conditions: dirty cells with no way to clean them, dirty clothes with no way to launder them, and restrictions on whether and how often they may wash their bodies.[359] Parasites such as lice can be a problem in institutional settings. However, short hair does not prevent lice.[360] Lice can also be quickly and easily treated

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355 *See, e.g.*, Benjamin v. Coughlin, 905 F.2d 571, 579 (2d Cir. 1990) (finding that concern about hiding contraband justified restriction and prohibition of Rastafarians wearing crowns); Patterson v. Godward, No. 2:08-cv-78, 2012 WL 652470, at *8 (W.D. Mich. Feb. 28, 2012) (describing the discipline of an imprisoned person for wearing a doo rag, based on concerns that doo rags can hide contraband).

356 *See, e.g.*, Aqeel v. Seiter, 781 F. Supp. 517, 520 (S.D. Ohio 1991) (describing prison official's explanation that headgear was not permitted because "[d]irt, dust and grime may accumulate" on it), *aff'd*, 966 F.2d 1451 (6th Cir. 1992).

357 Standing Deer v. Carlson, 831 F.2d 1525, 1527 (9th Cir. 1987).

358 *Angelone*, 420 F. Supp. 2d at 516.

359 *See, e.g.*, Miller v. Wathen, No. 7:04-CV-136-O, 2009 WL 874601, at *1 (N.D. Tex. Apr. 2, 2009) (concerning claim that imprisoned people were forced to wash their clothing in their toilets); Cranshaw v. Freeman, No. 2:08-CV-0003 JVB, 2008 WL 2857258, at *4–5 (N.D. Ind. July 23, 2008) (describing allegations of inadequate soap, toothpaste, and shower access, as well as filthy conditions in shower stalls); Crain v. Bordenkircher, 342 S.E.2d 422, 443 (W. Va. 1986) (acknowledging rats, raw sewage, and other sanitation problems in a West Virginia prison); ASSATA SHAKUR, ASSATA: AN AUTOBIOGRAPHY 46 (1987) (expressing shock from the perspective of a formerly imprisoned woman at how rarely they could have clean uniforms); *Poor Sanitary Conditions at County Jail*, THE DAILY JEFFERSONIAN (Feb. 26, 2009), http://www.daily-jeff.com/citizen%20opinion/2009/02/26/poor-sanitary-conditions-at-county-jail (reporting, from the perspective of a formerly imprisoned man, the unsanitary conditions in the jail where he was confined).

360 John Mersch, *Lice*, EMEDICINEHEALTH.COM, http://www.emedicinehealth.com/lice/article_em.htm (last visited Aug. 12, 2012) (noting that hair length is not a predictive factor for getting head lice); N. Ky. Indep. Dist. Health Dep't, *Lice (Head)*, PREVENTION,

without cutting hair[361] and are no more likely to occur among men than among women.[362]

In one district court case, prison officials stated that guards risked their health through contact with the substances imprisoned people used to bind dreadlocks, such as feces.[363] The ease with which the court accepted this justification is striking and echoes stereotypes of people of color as "dirty." While little appears in the opinion to indicate how this fact was ascertained or how frequent the use of feces was, it seems implausible to imagine that imprisoned people with dreadlocks would choose to use feces in any significant numbers. To the extent that people use improvised substances to bind dreadlocks, permitting access to preferred products and techniques could alleviate the problem. Dreadlock wax and similar products are generally contraband.[364] Also, most methods of starting dreadlocks require the help of another person, which is typically against prison rules.[365]

H. Extracting Labor

Workplace injuries to imprisoned people are another concern cited by prison officials.[366] The conditions for this forced or coerced labor are often poor, in part because of inadequate protective clothing for imprisoned workers.[367] However, were workplace safety a genuine

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CONTROL AND MANAGEMENT OF INFECTIOUS DISEASES IN CHILD CARE SETTINGS 65, http://www.nkyhealth.org/docs/Healthy%20Start/Lice.pdf (last visited Aug. 12, 2012) ("Shaving the head bald or cutting the hair short does not prevent head lice.").

361 *Head Lice: Treatment*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 2, 2010), http://www.cdc.gov/parasites/lice/head/treatment.html.

362 *Head Lice: Epidemiology & Risk Factors*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 2, 2010), http://www.cdc.gov/parasites/lice/head/epi.html.

363 *Angelone*, 420 F. Supp. 2d at 515.

364 *See, e.g.*, IND. DEP'T OF CORR., POLICY NO. 02-01-101, PROPERTY—ADULT FEMALE FACILITY (n.d.) (on file with the *New York University Law Review*) (not including dreadlock wax on the list of personal property allowed in women's prisons); IND. DEP'T OF CORR., POLICY NO. 01-01-101, PROPERTY—ADULT MALE WORK RELEASE (n.d.) (on file with the *New York University Law Review*) (same for men's prisons).

365 *See, e.g.*, OHIO ADMIN. CODE § 5120-9-25.1(L) (2007) ("Inmates are not permitted to manicure each other's nails or eyebrows, style or cut another inmate's hair, or to perform any other cosmetic procedure, except in an authorized program, or by inmates who have been authorized by the institution to perform such duties."); PA. DEP'T OF CORR., NO. DC-ADM 807, INMATE GROOMING AND BARBER/COSMETOLOGY PROGRAMS 2 (2003) ("Inmates are not permitted to cut or groom the hair or beard of another inmate except as part of the facility barber, cosmetology, or barbershop programs.").

366 *See* Warsoldier v. Woodford, 418 F.3d 989, 997 (9th Cir. 2005) (arguing that "[h]ealth and safety are also further facilitated by short hair, because it reduces the risk of injury during the inmate's use of heavy machinery"); Henderson v. Terhune, 379 F.3d 709, 712 (9th Cir. 2004) ("Short hair ensures that prisoners who work in industrial jobs can wear safety devices like goggles . . . .").

367 *See, e.g.*, ROSS, *supra* note 75, at 116–17 (noting how Native women at a women's correctional center were forced to clean asbestos without protective clothing or equip-

concern, it could be addressed by allowing people in prison to tie their hair back or cover it while working (a common solution in prison systems without hair length restrictions),[368] allowing long-haired people in prison the choice to work in an environment without the same hazards, improving safety conditions more broadly, or allowing imprisoned people to organize and negotiate appropriate safety precautions.[369]

The cited potential concern that sharp objects hidden in the hair of people in prison often injure guards seems even less likely.[370] Some facilities require people in prison to run their fingers through their own hair during searches or to pass through metal detectors.[371] Either alternative could address the concern of hidden objects.

I. Promoting Rehabilitation

Some prison officials advance justifications for their regulation of dress that are even more explicitly about adhering to dominant social norms or changing the character of imprisoned people.[372] For

ment); Danny Cahill & Paul Wright, *Worked to Death*, *in* THE CELLING OF AMERICA: AN INSIDE LOOK AT THE US PRISON INDUSTRY 112, 112 (Daniel Burton-Rose et al. eds., 1998) (describing hazardous conditions in prison labor and resulting health problems).

368 *See, e.g.*, U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, NO. 5230.05, PROGRAM STATEMENT 2 ("The Warden shall require an inmate with long hair to wear a cap or hair net when working in food service or where long hair could result in increased likelihood of work injury."); ALASKA DEP'T OF CORR., NO. 806.02, PRISONER HYGIENE, GROOMING AND SANITATION 1 (1995), *available at* http://www.correct.state.ak.us/corrections/pnp/pdf/806.02.pdf ("The superintendent shall ensure that prisoners wear hair nets or head coverings if they work in the kitchen, dining room, or near machinery."); COLO. DEP'T OF CORR., REG. NO. 850-11, HYGIENE AND GROOMING 2 (2012), *available at* http://www.doc.state.co.us/sites/default/files/ar/0850_11_020112.pdf (providing for wearing "hair restraints" or changing job assignments if hair styles present problems when working with food or machinery); PA. DEP'T OF CORR., NO. DC-ADM 807, INMATE GROOMING AND BARBER/COSMETOLOGY PROGRAMS 2 (2011) ("Inmates shall be required to wear a protective or safety device such as a hardhat, hairnet, hair covering, and face or respiratory protection on assignments where such items are appropriate."); WYO. DEP'T OF CORR., POLICY AND PROCEDURE NO. 4.201, INMATE GROOMING, HYGIENE AND SANITATION 8 (2006) ("Inmates who work with machinery and whose hair length, in the judgment of staff, poses a safety or health problem must wear protective hair covering when performing their job assignment in conformance with OSHA guidelines.").

369 *See* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (upholding a prison's prohibition on unionization by imprisoned laborers).

370 *See* Ragland v. Angelone, 420 F. Supp. 2d 507, 515 (W.D. Va. 2006) ("In addition, officers risk injury during searches from sharp objects concealed in inmates' hair."), *aff'd sub nom.* Ragland v. Powell, 193 F. App'x 218 (4th Cir. 2006).

371 *See, e.g.*, N.Y. DEP'T OF CORR. SERVS., DIRECTIVE NO. 4914, INMATE GROOMING STANDARDS 3 (2010), *available at* http://www.doccs.ny.gov/Directives/4914.pdf ("[D]uring a pat frisk, an inmate will be required to run fingers through their hair.").

372 *See, e.g.*, Aqeel v. Seiter, 781 F. Supp. 517, 520 (S.D. Ohio 1991), *aff'd*, 966 F.2d 1451 (6th Cir. 1992) (arguing that "a goal of any penal institution [is] to rehabilitate inmates and prepare them for re-entry into Society; removal of a hat during dining, and in a courtroom

example, some officials claim that "[s]hort hair encourages a positive self-image, which may facilitate employment opportunities for inmates upon their release."[373] However, these justifications are paternalistic and likely to be counterproductive. It is unlikely that the self-image of a Rastafarian or a trans woman would improve through forced hair-cutting. In fact, it is doubtful that anyone's self-image would be improved by solitary confinement as punishment for choosing how they dress.[374] This model of rehabilitation accomplishes little other than an attempt to force imprisoned people to abandon dress that supports their dignity, autonomy, resistance, communication, and survival,[375] in order to comply with dominant norms.[376] It also evokes the justifications that Native and African peoples need to be "civilized" by White people,[377] in part through dress, as well as the goals of nineteenth century women's reformatories to teach women to take up their appropriate subservient role.[378]

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proceeding, is designed to have the inmate show respect toward others and comport with the way that society ordinarily conducts itself"); Seale v. Manson, 326 F. Supp. 1375, 1383 (D. Conn. 1971) (justifying restrictions on jewelry in a women's prison as an attempt to "maintain the decorum of the institution").

373 Henderson v. Terhune, 379 F.3d 709, 712 (9th Cir. 2004).

374 *See* Emmer et al., *supra* note 187, at 48 (reporting an imprisoned trans woman's statement that "an individual who lives as a woman getting stripped of their legal name, clothing, having their head shaved . . . was truly shocking and harmful to me, not just for coming into prison but also for re-entry into society").

375 *See supra* Part I (describing the significance of dress for self-determination).

376 *See* FOUCAULT, *supra* note 24, at 235–36 ("[T]he prison must be an exhaustive disciplinary apparatus: it must assume responsibility for all aspects of the individual, his physical training, his aptitude to work, his everyday conduct, his moral attitude, his state of mind . . . it has its internal mechanisms of repression and punishment: a despotic discipline."); RODRIGUEZ, *supra* note 22, at 88 (describing one goal of the Pennsylvania prison system as that of moral reform of imprisoned people through the amplification of Christian penitence ideology); ROSS, *supra* note 75, at 137 ("[P]rison programs modeled for Euro-American society are another way to control Native people. Rather than focusing on the societal structure as the primary problem, Native prisoners are diverted by rehabilitative programs that search for internal, personal deficiencies."); Jennifer C. James, *Gwendolyn Brooks, World War II, and the Politics of Rehabilitation*, *in* FEMINIST DISABILITY STUDIES 140 (Kim Q. Hall ed., 2011) (discussing the role of "rehabilitation" in society generally and noting that "black rehabilitation required that African Americans capitulate to a range of normalization processes espoused by white America," including skin lightening and hair relaxing for Black women).

377 *See supra* Parts II.A.2, II.A.3.

378 *See supra* notes 209–18 and accompanying text.

V
JUDICIAL TREATMENT OF PRISON DRESS

A. Diminishing Imprisoned People's Interests

Courts have generally not been receptive to claims of imprisoned people contesting dress regulations. The U.S. Supreme Court has not yet decided a case about prison dress regulations. However, when the Supreme Court turns its attention to prison dress in other contexts, it acknowledges the profound impact prison dress can have. For example, the Court has concluded that forcing an accused person to stand trial while wearing prison-issued clothing violates the Fourteenth Amendment.[379] Also, three Justices considered prison dress worthy of note in their dissent when considering whether or not a punishment of hard labor, not in a penitentiary, constituted an "infamous" punishment triggering the right to a grand jury under the Fifth Amendment.[380] Thus, in some contexts the Justices have concluded that prison dress carries significant symbolic and tangible import, but the Court has not prioritized prison dress sufficiently to grant certiorari in any of the cases challenging its regulation.[381]

Some courts have stated or implied that dress simply does not matter enough to merit their attention.[382] Other courts have dismissed cases challenging prison dress regulations as frivolous.[383] Dismissals of

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379 Estelle v. Williams, 425 U.S. 501 (1976). On the other hand, the Supreme Court has held that uniformed police sitting in the front row during a criminal trial did not violate the rights of the accused. Holbrook v. Flynn, 475 U.S. 560, 570–72 (1986).

380 United States v. Moreland, 258 U.S. 433, 444–45, 449, 450, 451 (1922) (repeatedly referring to distinctive dress and shaved heads as characteristics of infamous punishments).

381 *See, e.g.*, Thunderhorse v. Pierce, No. 08-40821, 2010 WL 454799, at *143 (5th Cir. Feb. 9, 2010), *cert. denied*, 131 S. Ct. 896 (2011) (denying certiorari in RLUIPA case in which an imprisoned Native man was prohibited from having long hair); Flagner v. Wilkinson, 241 F.3d 475 (6th Cir. 2001), *cert. denied*, 534 U.S. 1071 (2001) (denying certiorari where an imprisoned Hasidic Jewish man sought an injunction to prevent the forced shaving of his beard).

382 *See* Karr v. Schmidt, 401 U.S. 1201, 1202–03 (1971) ("The only thing about it that borders on the serious to me is the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear."); Alison G. Myhra, *No Shoes, No Shirt, No Education: Dress Codes and Freedom of Expression Behind the Postmodern Schoolhouse Gates*, 9 SETON HALL CONST. L.J. 337, 379–80 (1999) (explaining that "some jurists and courts have urged that courts have no time or business involving themselves with such trivial matters"). *See also* HUNT, *supra* note 7, at 8 (describing the overwhelming response of commentators to sumptuary law as "dismissive").

383 Brooks v. Wainwright, 428 F.2d 652, 653 (5th Cir. 1970) (affirming dismissal of a case challenging prison shaving and haircut rules as frivolous); Wilson v. Dir. of Div. of Adult Insts., No. CIVS-06-0791FCDGGHP, 2008 WL 927696 (E.D. Cal. Apr. 4, 2008) (recommending a claim concerning inadequate clothing in prison be dismissed as frivolous), *recommendation adopted*, No. CIVS-06-0791FCDGGHP, 2008 WL 2573302 (E.D. Cal. June 27, 2008).

cases as frivolous can have particularly severe consequences on imprisoned litigants under the Prison Litigation Reform Act's "three strikes rule"[384] and certain prison disciplinary rules.[385]

A number of these dismissals have involved claims brought by trans litigants.[386] For example, when a trans woman brought suit after she was held in administrative segregation, prevented from accessing makeup, and criticized for carrying a purse, the Sixth Circuit affirmed the district court's dismissal of her case as frivolous.[387] In rejecting her First Amendment claim, the court accepted with little discussion two of the justifications discussed above: (i) that she would be a victim of violence if permitted to dress according to her gender identity and (ii) that makeup would make it harder for prison officials to identify her.[388] In rejecting her equal protection claim, the court described comments made to her and others as "hav[ing] the tenor of warnings regarding the possible dangers lifestyle choices might have in the prison environment" rather than any form of discrimination.[389]

The court in *Jones v. Warden of Stateville Correctional Center* also rejected a trans person's claim as frivolous.[390] In its opinion, the court belittled the plaintiff as well: "Anthony Jones, who sometimes refers to himself as Tonya or Tasha Star Jones, is an Illinois inmate with a penchant for lingerie and litigation. The former has gotten him into trouble with a few of his fellow prisoners. The latter has been troublesome to the courts."[391] The "trouble" the court referred to with "fellow prisoners" is sexual violence.[392] The court then drily recited: "In this case, Jones sues for the right of access to bras and panties. . . . Jones is upset because he does not have the same rights as female

384 28 U.S.C. § 1915 (2006) (preventing imprisoned people from bringing additional law suits after three have been dismissed).

385 *See, e.g.*, KY. CORR., POLICY NO. 15.2, RULE VIOLATIONS AND PENALTIES 9 (2011) ("An inmate who has filed a civil action that results in dismissal by a court based upon a finding that the action is malicious, harassing, or factually frivolous shall be charged with violating this section, which shall be a major violation, and issued a disciplinary report.").

386 *See, e.g.*, Lee v. Young, No. 99-6012, 2000 U.S. App. LEXIS 28068 (6th Cir. 2000) (dismissing the suit—for the right to wear makeup and feminine hairstyles and be protected from verbal abuse—as frivolous); Claybrooks v. Tenn. Dep't of Corr., No. 98-6271, 1999 U.S. App. LEXIS 15174, at *3 (6th Cir. July 6, 1999) (dismissing as frivolous on grounds of sovereign immunity a trans woman's claim for hormones and female clothing); Jones v. Warden of Stateville Corr. Ctr., 918 F. Supp. 1142, 1145 (N.D. Ill. 1995) (dismissing as frivolous a suit seeking access to bras and panties).

387 *Young*, 2000 U.S. App. LEXIS 28068, at *1–2.

388 *Id.* at *2.

389 *Id.* at *3.

390 *Jones*, 918 F. Supp. at 1145.

391 *Id.*

392 *See id.* at 1146.

inmates."[393] The court noted that it had previously rejected a similar claim as frivolous and declined to further elaborate, concluding that neither the Equal Protection Clause nor the First Amendment arguably accorded Jones the right of access to women's clothing while imprisoned.[394]

Even in those cases where the plaintiff's claims are not dismissed as frivolous, courts often rule in favor of prison officials with little discussion.[395] The Sixth Circuit affirmed the dismissal of a trans woman's Eighth Amendment claim that she was deprived of hair and skin products necessary to maintain a feminine appearance, stating: "Cosmetic products are not among the minimal civilized measure of life's necessities."[396]

A number of factors come together to make courts particularly likely to view dress as unimportant in claims brought by imprisoned trans people. First, it does not seem abnormal to treat trans people of color as strange in a culture where Whiteness and gender conformity are held up as a norm. Trans people and transgender identities and expressions, including dress, are often seen as suitable subjects for ridicule.[397] Trans women of color are often stereotyped as deceptive, violent, promiscuous, and otherwise suspect.[398] Decisions devaluing trans people's ability to dress in the ways they choose are thus consistent with broader societal stereotypes.

Second, the judges deciding these cases may have never faced restrictions on their ability to dress in accordance with their core gender identity. The first and only two openly trans judges were appointed and elected in 2010.[399] It may be difficult for non-trans

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393 *Id.* at 1145–46.

394 *Id.* at 1146.

395 *See, e.g.*, Fegans v. Norris, 537 F.3d 897, 900 (8th Cir. 2008) (holding that a prison rule against long hair and beards did not violate the First Amendment or RLIUPA); Longoria v. Dretke, 507 F.3d 898, 900 (5th Cir. 2007) (holding that a prison rule prohibiting long hair in men's prison did not violate RLUIPA); Henderson v. Terhune, 379 F.3d 709, 711 (9th Cir. 2004) (holding that a rule against long hair in men's prison did not violate the First Amendment); Hines v. S.C. Dep't of Corr., 148 F.3d 353, 356 (4th Cir. 1998) (holding that a prison rule prohibiting beards did not violate the First Amendment); Battista v. Dennehy, No. 05-11456, 2006 U.S. Dist. LEXIS 12484, at *21 (D. Mass. Mar. 22, 2006) (holding that a policy allowing some trans women but not others to have "female clothing" and cosmetics did not violate the Fourteenth Amendment); Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986) (holding that a prohibition against "female clothing" and cosmetics in men's prison did not violate the Constitution).

396 Murray v. U.S. Bureau of Prisons, No. 95-5204, 1997 U.S. App. LEXIS 1716, at *5 (6th Cir. Jan. 28, 1997) (per curiam).

397 *See* GRANT ET AL., *supra* note 20, at 7.

398 *See, e.g.*, SYLVIA RIVERA LAW PROJECT, *supra* note 39, at 15.

399 *See* John Wright, *Phyllis Frye Becomes Texas' 1st Trans Judge*, DALLASVOICE.COM (Nov. 17, 2010, 2:59 PM), http://www.dallasvoice.com/phyllis-frye-texas-1st-transgender-

judges to imagine the importance of dress because they have been able to take it for granted.

Third, fashion has been feminized,[400] and in a sexist society feminine concerns are frequently perceived to be frivolous.[401] Women are often accused of silly preoccupation with their appearance, even though women are judged based on their appearance more often than men—and even though men adhere to strict fashion norms as well.[402] In the cases mentioned above, the litigants were emphatically feminine and sought the ability to express their femininity more fully. Therefore, the trope of frivolous concern with dress was present in full force.

Finally, courts are often reluctant to protect the rights and freedoms of imprisoned people. In U.S. society, imprisoned people are racialized and often constructed as sub-human or non-human; they have also been viewed as socially or civically dead.[403]

Courts considering the cases of Black non-trans women have also minimized the importance of issues of dress. In *Wilson v. Maples*, Angela Denise Wilson, an imprisoned Black woman, sued when she was disciplined for wearing her hair in an Afro.[404] The prison crossed a line that at least one court suggested an employer should not cross in the context of employment discrimination—for the "natural" hair of a Black woman, not her "styled" hair, was targeted.[405] The *Wilson*

judge-1052664.html; *Victoria Kolakowski, First Openly Transgender U.S. Trial Judge, Elected in California*, HUFFPOST LOS ANGELES (Nov. 16, 2010, 6:31 PM), http://www.huffingtonpost.com/2010/11/16/victoria-kolakowski-first-transgender-trial-judge-us_n_784490.html.

400 HUNT, *supra* note 7, at 231.

401 JULIA SERANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 15 n.1 (2007).

402 *See generally* NAOMI WOLF, THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN (1991) (discussing appearance norms as a form of sexist social control).

403 *See* RODRIGUEZ, *supra* note 22, at 198 ("Death as *logic* implies something else, a necessary contradiction and impossibility that simultaneously revises our conception of death by inscribing it onto *living* bodies/subjects (here the imprisoned), while constituting a different kind of absence, a ritualized finality that articulates through the statecraft of imprisonment."); Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 288 (2011) (describing process by "which criminal offenders become not just nonhuman but something inherently scarier and more threatening").

404 Wilson v. Maples, No. 1:08CV00041 BSM/HDY, 2010 WL 2179963, at *2 (E.D. Ark. Feb. 11, 2010).

405 *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981) ("Plaintiff may be correct that an employer's policy prohibiting the 'Afro/bush' style might offend Title VII and section 1981. But if so, this chiefly would be because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics."). Caldwell critiques the court's emphasis on a biological conception of race and devaluation of Black women's culture. Caldwell, *supra* note 21, at 378–81.

court, however, rejected her equal protection claim and recommended that any appeal of the decision be considered frivolous.[406]

According to the court, Wilson was disciplined three times for having an Afro, but this discipline resulted from guards misinterpreting prison policy as forbidding all Afros.[407] However, even after this misunderstanding was addressed, prison officials continued to discipline her for wearing her hair in an Afro.[408] A "neutral" prison policy dictated that women could not have hair that was longer than four inches. In finding that no equal protection violation existed, the court reasoned that Wilson could not point to another woman of a different race who was allowed to have a "similar hairstyle" without discipline.[409] It appears that, without evidence of people who were not Black wearing Afros with impunity, a Black woman could not prove that punishment for having an Afro constituted racial discrimination.

The court thus pretended that the prison's action is racially neutral, as if Afros were in no way a racialized characteristic. In fact, not only is the kinky hair that grows naturally into an Afro one of the physical characteristics that has been racialized as Black, but also Afros have had a significant role in Black politics and culture. Caldwell explains:

> During the 1960s, in the midst of the violent upheaval and the rapid social change that characterized that period, many blacks chose to wear "natural" or Afro hairstyles as a celebration of self-esteem, a rejection of the shackles of racist oppression, or a claim to cultural identity. . . . In the case of black women, few escaped implicit associations among full Afro hairstyles, unpopular political views, and uncontrolled and dangerous sexuality.[410]

The racial, political, sexual, gender, class, and cultural connotations of the Afro may have been part of the interests Wilson sought to vindicate and may also have been part of the prison's and the guards' choice to punish her for her choice of hair. The court's reasoning, however, is consistent with the previously discussed notion of Whiteness as an enforced norm.

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406 *See Wilson*, 2010 WL 2179963, at *3 n.2.

407 *See id.* at *2 ("[S]ome . . . officials may have initially misinterpreted the policy to prevent all Afro hairstyles . . . .").

408 *See Wilson*, 2010 WL 2179963, at *3 ("[I]t is clear that the disciplinaries and denial of privileges were related to Plaintiff's refusal to comply with the grooming policy, which, as discussed above, is constitutionally valid.").

409 *Id.* at *2.

410 Caldwell, *supra* note 21, at 384.

B. Giving Weight to Government Interests

In the cases I have discussed thus far, courts have ruled in favor of prison official defendants largely through minimizing the interests of the imprisoned litigants or minimizing the importance of dress generally. Concluding that dress is unimportant does not necessarily indicate which party in a dispute over dress should win. If dress is, in fact, trivial, courts could respond with greater skepticism to prison officials' claims that it is sufficiently grave to merit serious punishment. The fact that courts frequently rule in favor of the government, rather than in favor of imprisoned people, may indicate that they are inclined to take individuals' and communities' interests in self-determining their dress less seriously than the government's interests in controlling it.

Explicit examples of this inclination of courts can be found in several cases. In *Smith v. Ozmint*, a Rastafarian man who refused to cut his hair was gassed, beaten, shackled, and dragged across the floor to a barber who forcibly shaved his hair.[411] He sought a preliminary injunction under RLUIPA against further forced shaving.[412] The court declined to grant a preliminary injunction, explaining that while the plaintiff would experience a substantial and irreparable harm, the risk of damage to "security and discipline" in the prison outweighed it.[413]

In another case, male guards removed an Orthodox Jewish woman's headscarf, over her objections and in violation of her religious beliefs, in order to take her picture for her identification photo.[414] Afterward, she was "seated on the floor, visibly upset and banging her head against the wall."[415] While the court did not question the sincerity of her religious beliefs, it found the government's interests of much greater concern.[416] Specifically, the court focused on the need to identify imprisoned people through photographing them with nothing covering their hair: "If an inmate's habit is to wear a hat or headdress, she could change her appearance, perhaps dramatically, in an instant by removing that hat or headdress."[417] The court valued this interest highly despite the fact that one could also easily change one's appearance through donning a hat or headdress—or wrapping any sort of cloth around the head. Her convictions, religious practice, and feelings

411 Smith v. Ozmint, 444 F. Supp. 2d 502, 503 (D.S.C. 2006).

412 *See id.*

413 *Id.* at 505.

414 Zargary v. City of New York, 607 F. Supp. 2d 609, 612 (S.D.N.Y. 2009), *aff'd*, 412 F. App'x 339 (2d Cir. 2011).

415 *Id.* at 612.

416 *Id.* at 613.

417 *Id.*

may or may not have been important to the court, but, regardless, the government's interests easily overcame them.

C. Exceptions

Though plaintiffs have rarely prevailed in prison dress cases, they have achieved victories on some significant occasions. A few cases where dress involves exercise of religion have fared better under RLUIPA than they may have under the First Amendment. While imprisoned Muslim women have usually lost their cases about wearing hijab,[418] at least one survived initial screening.[419] The Ninth Circuit reversed a district court decision that denied a preliminary injunction to a Native man who was punished for refusing to cut his hair.[420] While the court of appeals acknowledged that prison security was a compelling government interest, it concluded that prohibiting long hair was not the least restrictive alternative to meet that interest, particularly since some other prison systems do not restrict hair length.[421]

A case from the Eastern District of Wisconsin is also significant, as one of the first to take seriously the dress-related claims of an imprisoned trans woman. In this case, the plaintiff was not allowed to dress or present herself as a woman despite medical evidence that she needed to do so for her mental health.[422] She repeatedly tried to castrate and kill herself.[423] While prison officials raised concerns about her vulnerability to violence and about increased demands on staff time, the court ruled that sufficient evidence existed for a reasonable jury to find in her favor, denying summary judgment on these claims.[424] The court noted that her experts had stated the following:

> [T]he hair-related items may appear superficial or not medical but in fact play a prominent role in the treatment of G[ender] I[dentity]

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418 *See, e.g.*, Safoune v. Fleck, 226 F. App'x 753, 764 (9th Cir. 2007) (rejecting plaintiff's challenge to ban on wearing hijab); Muhammad v. Wash. Mut., No. 1:05-CV-0634-JOF, 2007 WL 1020840, at *4 (N.D. Ga. Mar. 28, 2007) (finding that mandatory removal of hijab did not violate the plaintiff's Fourth Amendment rights due to an overwhelming government interest).

419 *See* Pressley v. Madison, No. 2:08-CV-0157-RWS, 2009 WL 3878260, at *1, *3 (N.D. Ga. Nov. 17, 2009) (finding that a Muslim woman in jail who had her headscarf taken from her forcibly in front of men, and was not permitted access to a head covering even during prayers, had alleged a viable cause of action). Under the Prison Litigation Reform Act, courts must screen cases brought by prisoners against government officials and may dismiss them if they are frivolous, malicious, or fail to state a claim for which relief may be granted. 28 U.S.C. § 1915A (2011). Thus, prisoners' rights cases may be dismissed in a screening phase before issue has been joined by the opposing party.

420 *See* Warsoldier v. Woodford, 418 F.3d 989, 1002 (9th Cir. 2005).

421 *Id.* at 1001–02.

422 Konitzer v. Frank, 711 F. Supp. 2d 874 (E.D. Wis. 2010).

423 *Id*. at 883–84, 905.

424 *Id.* at 906, 908–11, 913.

> D[isorder] and allow the patient to move from a discordant and uncomfortable life that interferes with their functioning into a safer and more comfortable gendered ecology. . . . [M]akeup and female underwear were necessary to alleviate [her] psychological distress . . . .[425]

Recently, in a First Amendment case, Judge Richard Posner of the Seventh Circuit ruled for an African Hebrew Israelite whose dreadlocks were forcibly cut despite his religious objections.[426] The prison system's written rules did not prohibit dreadlocks and permitted any hair length absent a security risk.[427] In practice, however, only Rastafarians were permitted to have dreadlocks.[428] Judge Posner ruled that if the prison permitted imprisoned people to practice any religion through having dreadlocks, they could not choose only one religion to accommodate.[429] While limited in scope, this decision exhibits less deference to prison officials than is typical in First Amendment dress-related cases.

Altogether, while some courts have shown more consideration of plaintiffs' interests and skepticism of governments' purported interests, most courts have valued government interests in regulating dress considerably more than they have valued individual or community interests in dress. This tendency on the part of courts is important to keep in mind when considering potential reforms.

VI
Avenues for Change

Prison dress regulations violently enforce social hierarchies through the criminal legal system. Historically, as one type of dress regulation formally disappears, others emerge or related enforcement continues under a different guise.[430] Tweaks in doctrine will not resolve these problems. Nonetheless, law reform can reduce some of the harm of prison dress regulation and play a role in larger-scale change if situated within broader grassroots mobilization strategies.[431]

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425 *Id.* at 910.

426 Grayson v. Schuler, 666 F.3d 450, 451 (7th Cir. 2012) (reversing the lower court's decision granting defendants summary judgment).

427 *Id.*

428 *See id.* at 452 (noting that a prison chaplain had so stated to the plaintiff).

429 *Id.* at 455.

430 *See supra* Part II.A (discussing history of dress regulations in the United States).

431 Several authors have discussed when and how law reform can play an appropriate role in effecting major social change. *See, e.g.*, Spade, *supra* note 23, at 39 (describing four appropriate roles for law reform projects in the context of trans resistance: (1) "helping trans people survive" in order to lead organizing work, (2) serving as a "point of politicization" for trans people, (3) developing new leaders, and (4) "expos[ing] contradictions in systems of control"); Gabriel Arkles, Pooja Gehi & Elana Redfield, *The Role of Lawyers*

A. Regulatory Change

While there is no "right" way to incarcerate people, much less to regulate their dress while incarcerated, there are ways that are less wrong. Agency officials who seek to make dress regulations less harmful may consider two main forms of change. First, "negative change" removes regulations that enforce racialized gender norms or infringe on self-determination in dress. Second, "positive change" provides for access to a wider range of dress and prevents discipline for particular expressions of racial, gender, or other identity.

New York's juvenile detention policy for LGBTQ youth is an example of both kinds of change. The Office of Children and Family Services (OCFS) policy indicates that "[g]rooming rules and restrictions, including rules regarding hair, make-up, shaving, etc., shall be the same in male and female facilities. A resident should not be prevented from, or disciplined for, a form of personal grooming because it does not match gender norms."[432] It also provides specific direction. For example, it provides that "[r]esidents may, but are not required to, shave their faces and bodies, as permitted by OCFS practice, in keeping with safety and security concerns."[433] Boxers and panties are also available to young people in both male and female facilities: "All residents may receive undergarments of their choice among available agency supplies regardless of gender, except where therapeutically not indicated."[434] The policy thus not only refrains from requirements that, for example, people in boys' facilities have short hair, but also seeks to reduce less formalized gender norm enforcement. It also grants these rights comprehensively to youth in the agency's custody,

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in Trans Liberation: Building a Transformative Movement for Social Change, 8 SEATTLE J. SOC. JUST. 579, 616–19 (2010) (indicating that lawyers may play important and accountable roles in (1) sharing information with marginalized people, (2) meeting the survival needs of marginalized people, and (3) supporting organizations led by and for marginalized people); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 468 (1994) (suggesting that community organizations only engage in litigation strategies when (1) "defending the organization and its members," (2) "serving the organization's development," or (3) "terminating causes from which the organization has no other way to exit"); *see also* Gowri Ramachandran, *Antisubordination, Rights, and Radicalism*, 40 CONN. L. REV. 1045, 1065 (2008) ("While I am skeptical about the ability of those of us with so much cultural capital and power to be radical enough to effect major change, there is something funny about the law, which is that sometimes it actually does something in the service of radicalism.").

[432] N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., PPM 3442.00, LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH 8 (Mar. 17, 2008), *available at* http://srlp.org/files/LGBTQ_Youth_Policy_PPM_3442_00.pdf.

[433] *Id.*

[434] *Id.* app. § XIII(B).

rather than requiring youth to demonstrate that they meet a particular diagnostic or identity category.

Despite these positive points, the OCFS policy has shortcomings. The policy is silent on racial and other norms besides gender. It continues to provide an exception for the agency with regard to underwear, allowing officials to deny certain imprisoned young people access to boxers or panties. While rules about hair, jewelry, and "grooming"[435] are consistent between male and female facilities, rules still restrict what jewelry may be worn and the length of fingernails.[436] Through this reform, some harmful agency practices have been reduced, but they have not been eliminated. Staff members are given latitude to make discretionary decisions that may reinforce the same controls the policy sought to eliminate. Further, as with many reforms in correctional settings, there are few oversight mechanisms to ensure that staff are not acting contrary to the written policies. More fundamentally, these regulations remain a part of incarcerating and controlling many youth, the overwhelming majority of whom are youth of color and many of whom are also gender nonconforming.

B. Doctrinal Change

Many administrators of prison systems will not change policies without pressure from litigation, organization, or the political process. Here, I consider three very different proposals for doctrinal change that could offer tools to increase that pressure. In the first, Gowri Ramachandran considers free dress; in the second, Taylor Flynn looks at gender expression; and in the third, Giovanna Shay examines transparency in prison rules. While Ramachandran is the only scholar to apply her theories to prison dress, they all have significant implications for the regulation of dress in carceral settings.

1. Freedom To Dress

Ramachandran suggests the large-scale adoption of "protection of the freedom of dress" in a way that recognizes the interests in personal identity and autonomy at stake in dress choices.[437] She argues for acknowledgment of freedom of dress as a distinct right, not as an

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435 I generally avoid the term *grooming* because of connotations that grooming is something done to animals; however, I use it in quotation marks here to refer to the term used by the agency. Thank you to Anna Roberts for helping me to consider the ramifications of this language.

436 N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., *supra* note 432, app. § XV (noting that nails must be kept at a "length that supports safety and security" and making reference to other OCFS rules regarding jewelry).

437 Ramachandran, *supra* note 6, at 17–18.

adjunct to freedom of speech, and she recognizes dress's embodiment of multiple types of expression that make it "not just [a] politically and culturally significant decision[ ]" but a "highly personal one[ ], too."[438] She envisions this right as potentially constitutional or statutory in origin and describes how it would apply in the context of schools, streets, employment, and prison.[439]

Her theory offers several doctrinal strengths. First, she escapes the difficulties of trying to align dress with a category such as speech that might seem an inelegant textual fit. Second, she acknowledges the importance of dress for individuals and communities. Third, she provides a stronger and fairer basis for people to challenge state control over their dress than those currently available. Fourth, she acknowledges that this right should survive incarceration.[440]

However, at the same time, her theory has a few key weaknesses that prevent the right to free dress from solving the core problems I have identified. First, it has shortcomings in the prison context. She proposes "a reasonable accommodation framework" for both prisons and workplaces, yet she concedes that "the concept of undue hardship would rightly be far broader in the context of a prison than a workplace."[441] This formulation leaves the door open for a deferential judiciary to impose few meaningful limits on government control of dress in prisons.

Next, her prescription relies on existing anti-discrimination law to incorporate analysis of power differentials and social hierarchy. Courts, however, have not adequately or consistently used anti-subordination principles in resolving anti-discrimination cases.[442] Thus, nothing in current anti-discrimination law explicitly provides that a form of dress that perpetuates subordination of marginalized groups will receive different or lesser consideration than a form of

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438 *Id.* at 37.

439 *See generally id.*

440 *See id.* at 91 (arguing that freedom of dress should be akin to freedom of speech and equal protection rights, which also survive incarceration).

441 *Id.* at 92.

442 Anti-subordination is an approach that focuses on changing societal power disparities between groups. *See generally* Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (discussing courts' inconsistent use of anti-differentiation versus anti-subordination principles in race and sex discrimination cases and arguing for a stronger focus on anti-subordination); Freeman, *supra* note 32, at 29 (discussing the historical development of anti-discrimination law and how the "perpetrator perspective" triumphed over an anti-subordination approach or "victim perspective"). Ramachandran argues for rights to protect the radical potential of those "maladjusted" to racial and other forms of subordination in some of her other work. *See, e.g.*, Ramachandran, *supra* note 431, at 1048.

dress that expresses resistance to such subordination.[443] While concepts of reasonable accommodation in existing law can prevent some extremes of hateful or oppressive expression,[444] Ramachandran's proposal would benefit from a more explicit incorporation of anti-subordination principles.

Furthermore, while the specificity of Ramachandran's proposal for freedom to dress has advantages, it also limits the scope of the doctrine. Ramachandran states:

> Many behaviors are a part of identity formation and reformation. Law cannot protect the freedom to engage in all such behaviors; an attempt to do so would collapse into an attempt to transcend all norms and all coercion—a foolish task. However, there are more reasons to care about dress, reasons that make it unique among other types of speech, art, or identity performance.[445]

While I agree that dress is a particularly important component of identity formation for many individuals and communities, I question the implication that many, or perhaps all, other forms of identity performance are less important. It may be that not everything that could be framed as an expression of identity should receive legal protection, but I believe that there are a number of other categories as worthy of protection as dress.[446] A theory that encompassed dress, but also had the flexibility to go beyond it, would be more effective as a legal tool for those seeking reparation for the type of enforcement of racialized gender norms with which I am concerned.

Finally, the practical impact of judicial review on conditions in prisons remains uncertain. The elimination of most criminal prohibitions on cross-dressing have not eliminated police targeting of people

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[443] In the context of hate speech, a number of scholars and activists have critiqued the "neutral" approach that erases the power imbalances and particular harms of certain types of expression coming from socially dominant groups against marginalized groups. *See, e.g.*, Thomas Kleven, *Free Speech and the Struggle for Power*, 9 N.Y.L. SCH. J. HUM. RTS. 315, 319–20 (1992) (arguing that permitting racist or sexist speech is no better than suppressing speech under a personhood theory of free speech).

[444] *See* Peterson v. Hewlett-Packard Co., 358 F.3d 599, 606 (9th Cir. 2004) (finding that religious accommodation did not require a business to permit a Christian heterosexual man to post biblical condemnations of homosexuality in the workplace).

[445] Ramachandran, *supra* note 6, at 33.

[446] For example, many people express their religious, cultural, gender, ethnic, or sexual identity through their choice of name. *See, e.g.*, *In re* Simpkins, 599 N.W.2d 170, 171–72 (Minn. Ct. App. 1999) (discussing the efforts of an imprisoned man to change his name after his conversion to Islam); *In re* Daniels, 773 N.Y.S.2d 220, 221 (Civ. Ct. 2003) ("Petitioner seeks . . . to change her surname to that of her same-sex life partner."); *In re* Guido, 771 N.Y.S.2d 789, 789–91 (Civ. Ct. 2003) (granting petition of transgender woman who sought a name change to reflect her gender identity and to insulate her from ethnicity-based employment discrimination).

who do not match gender norms in dress on the street.[447] The passage of RLUIPA has not eliminated punishment of people for the expression of religious beliefs in prisons.[448] Given the fundamental role of prisons in maintaining social hierarchy, a considerable amount of enforcement of social norms in dress may continue to take place even beyond the formal latitude prison officials enjoy.

2. *First Amendment (Re)Visions*

Taylor Flynn presents a proposal for increased emphasis on First Amendment expression-based claims for trans people, gender nonconforming people, and gender conforming women.[449] Flynn argues that expressions of gender nonconforming identity, including dress, convey a message that most people understand and that should be recognized as a form of speech.[450]

Flynn further argues that government enforcement of particular conforming modes of dress compels some people to express a message with which they deeply disagree. The message that the government seeks to force people to convey "reflects the prevailing view: there are two (and only two) distinct sexes with congruent gender identities, fixed by nature and immutably different. . . . This messaging has as its foci the dehumanization of trans people, the insistence on traditional gender roles for women, and the disapprobation of homosexuality."[451] Flynn proposes that practitioners integrate expression-based claims into their litigation on behalf of trans people and that courts give credence to these claims.[452]

Flynn's work has a number of strengths. Flynn identifies the importance of communicating one's identity through dress and other means, but also refuses to let the burden rest entirely on gender nonconforming people to justify the importance of dress.[453] Instead, Flynn's approach reveals the investment the government has in communicating its own messages about gender and questions the legiti-

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447 *See supra* Part II.A.6 (providing examples of such targeting).

448 *See supra* notes 302–04 and accompanying text (explaining that RLUIPA has been interpreted to require deference to prison officials and thus may not be much more protective of religious expression than the First Amendment).

449 Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 TEMP. POL. & CIV. RTS. L. REV. 465, 467–68, 474–75 (2009).

450 *See id.* at 492–93 (positing that "the statement in gender expression cases is one of identity," a message received "at the speed of light").

451 *Id.* at 466–67.

452 *See id.* at 467–68 (suggesting lawyers supplement their existing toolbox of autonomy- and equality-based claims with expression-based challenges).

453 *See id.* at 466–67 (noting how gender norms and stereotypes harm non-trans women).

macy of government enforcement of coerced orthodoxy in matters of gender.[454] With an emphasis on expression-based claims, Flynn also avoids the need to focus on showing membership in a particular identity category as often demanded in equality-based claims.

Flynn acknowledges that these claims will be "uphill" for plaintiffs, even considering them outside of prisons.[455] In the prison context, where First Amendment claims of all kinds are already circumscribed, these claims become even more difficult for plaintiffs. Still, a difficult path to implementation does not make her ideas any less compelling.

However, Flynn undermines the power of her gender analysis with a shallower analysis of race. Flynn draws on Critical Race Theory, particularly when discussing the concept of transparency. The transparency phenomenon is "the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific."[456] Flynn applies the concept to gender conformity, arguing that gender conforming people tend not to notice gender conformity because it has been inscribed as a social norm, making only deviations from it visible.[457] However, Flynn does not incorporate an analysis of race except to note that trans people might have more success with expression-based claims than Native people because of the potential for using medical or other evidence to impress upon courts the importance of identity-based expression for trans people.[458]

Flynn's ideas hold promise, particularly if extended beyond a single-issue focus on gender to encompass intersections with other forms of social identity and hierarchy. Flynn's proposed reforms would not solve the problems of deeply entrenched enforcement of racialized gender norms in the criminal legal system, but they could lead to normatively better outcomes in some cases challenging particular exercises of state power over dress.

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454 *See id.* at 467 (voicing concern over gender expression compelled by the state in its coercive power).

455 *Id.* at 490.

456 Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

457 *See id.* at 501 (discussing the Ninth Circuit majority's inability to view a woman's wearing makeup as subordinating "precisely because it is something that many [women] wear routinely" in a Title VII case).

458 *See id.* at 497 ("[T]hose who are able to convey to the court the fundamental nature of gender identity and its centrality to our health and well-being may be able to succeed where other . . . claimants have failed.").

3. *Transparency in Rulemaking*

Without discussing dress, Giovanna Shay proposes that general administrative law principles should apply to rules that prison agencies make.[459] When prison officials make rules outside of those parameters, Shay proposes, courts should not accord the same level of deference to them that they do to rules promulgated through notice-and-comment rulemaking.[460] She points out that prison agencies receive more deference from courts than almost any other administrative agency,[461] yet in many states are not bound by the rulemaking procedures that bind other agencies.[462] Courts defer to a variety of prison official-created "rules," without regard to how or by whom they were created.[463]

Shay argues that "[g]iven the vast numbers of incarcerated people, transparency, accountability, and democratic participation in corrections policies are more important than ever."[464] She points out that many modes of political participation are closed to imprisoned people and their communities, through formal mechanisms such as felon disenfranchisement in addition to practical limitations imposed by loss of liberty.[465] Her concern is that the "lack of scrutiny of corrections policies further reinforces the race and class hierarchies of mass incarceration."[466] Thus, Shay's analysis grapples meaningfully with issues of hierarchy, subordination, and mass incarceration.

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459 *See* Shay, *supra* note 3, at 361 ("In light of their significant impact, critical corrections regulations should be subject to notice-and-comment rulemaking or should be awarded less deference by courts, at least when they affect prisoners' substantive rights or impact free communities.").

460 *Id.*

461 *See id.* at 340 ("While courts vigorously scrutinize regulations that may implicate constitutional rights in other administrative law areas, in the prison context, courts defer even to regulations that impinge on constitutional rights.").

462 *See id.* at 346–47 & nn.133–36 (listing states that do and do not exempt prison regulations from notice-and-comment rulemaking). Approximately thirty-four states exempt at least some rules affecting prisoners from otherwise-applicable administrative procedures. *Id.*

463 *See id.* at 333, 343 ("In reality, the category of administrative documents containing corrections policies encompasses a wide-range of edicts, ranging from full-fledged state regulations subject to notice-and-comment rulemaking to informal memoranda circulated by sheriffs.").

464 *Id.* at 362.

465 *See id.* at 362–63 (noting that incarcerated persons are counted for apportionment in the districts in which they are imprisoned, causing their home jurisdictions to lose political power).

466 *See id.* at 333.

Shay anticipates many possible objections to her proposal.[467] In response to potential concerns that rulemaking procedures would be too cumbersome for correctional agencies, she offers possibilities of "designing a notice-and-comment rulemaking procedure for the corrections context that includes only critical elements or limiting judicial review."[468] However, these changes are vulnerable to Shay's own critiques of the current system.

Shay also anticipates a concern "that by focusing on the regulation of mass incarceration, we inadvertently strengthen an ever more bureaucratized prison system, one that is clothed with an illusion of legitimacy."[469] Unfortunately, her response does not fully address this issue. Shay notes that "many commentators have concluded that, on balance, increased bureaucracy protects prisoners and improves their living conditions, albeit at the cost of some flexibility."[470] Protection of imprisoned people is of paramount importance, yet "the cost of some flexibility" does not seem to adequately characterize concerns that increased bureaucratization of prisons can further entrench, normalize, and legitimize the prison system to the ultimate detriment of imprisoned people.[471]

Shay also notes that "greater opportunities for public participation will not necessarily translate into more enlightened corrections regulations."[472] My own research shows that jurisdictions bound to formal rulemaking procedures may be slightly less likely to have rules restricting hair length than those that are not.[473] Thirty-two percent of those totally exempt from rulemaking procedures restrict hair length, while only twenty-seven percent of those partially or fully bound to rulemaking procedures restrict hair length. While any conclusions about causation, or even robust correlation, based on this data would be mere speculation, further research could be illuminating. Even if notice-and-comment rulemaking does not necessarily result in more just rules, Shay responds that the answer is "more politics."[474] She may be right.

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467 *See id.* at 369 (stating that possible criticisms may arise from fear of undermining prison security and concerns over the impracticability of notice-and-comment procedure for each correction rule).

468 *Id.* at 371.

469 *Id.* at 372.

470 *Id*.

471 *Id*.

472 *See id.* at 374 (noting that "criminal punishment has become more punitive since the 1960s, fueled in part by racial fears and stereotypes").

473 *See infra* Figure 3.

474 *Id.* (internal quotation marks omitted).

However, I am skeptical about the extent to which notice-and-comment rulemaking is genuinely democratic. Ultimate authority on the rules remains with the agency and a number of commentators have discussed how transparency and democracy in the rulemaking process are commonly subverted.[475] Even agencies that are bound to notice-and-comment rulemaking procedures at times disregard them entirely.[476] These difficulties are compounded in a prison setting, where imprisoned people face a variety of barriers to full participation. The contents of state and federal registers are not common knowledge to the general public. In prisons, they may not be available at all; law libraries may not stock them[477] and internet access is commonly prohibited.[478]

In my experience of communicating with imprisoned people who sought to comment on proposed National Prison Rape Elimination Commission standards for the Prison Rape Elimination Act, I found that some prisons would not provide access to the full standards, at times objecting that they were "too long."[479] Imprisoned people with

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[475] *See, e.g.*, Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1163 (2009) (discussing how administrative agencies may strategically time announcements to manipulate which of the entities monitoring them will respond); Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1016 (2001) (noting that in rulemaking settlements "administrative agencies face strong incentives to ignore the interests of important stakeholders—principals who otherwise would be afforded procedural protections").

[476] *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-126, REPORT TO CONGRESSIONAL COMMITTEES, FEDERAL RULEMAKING: AGENCIES OFTEN PUBLISHED FINAL ACTIONS WITHOUT PROPOSED RULES 11, 13 (Aug. 1998), *available at* http://www.gao.gov/archive/1998/gg98126.pdf (reporting that approximately one-fifth of major final rules published in 1997 did not have a notice-and-comment period).

[477] *See* Lewis v. Casey, 518 U.S. 343, 351 (1996) (holding that imprisoned people may not bring claims about the inadequacy of a law library unless they can demonstrate they suffered an "actual injury" because of the deficiency); Gonzalez v. Wright, No. 09-cv-234-JD, 2010 WL 3419396, at *2–3 (D.N.H. Aug. 30, 2010) (listing all of the contents of a prison law library in New Hampshire and noting that unavailable content would need to be formally requested); Mona Lynch, *Behind Bars: The War on Prison Law Libraries*, CHANGING LIVES, CHANGING MINDS (Mar. 18, 2009), http://cltlblog.wordpress.com/2009/03/18/books-behind-bars-the-war-on-prison-law-libraries/ (describing the dismantling of prison law libraries and replacement of legal research materials with pre-printed forms).

[478] *See, e.g.*, OHIO DEP'T OF REHAB. AND CORR., 5120-9-51, INTERNET ACCESS FOR PRISONERS (2005), *available at* http://www.drc.ohio.gov/web/administrative_rules/documents/9-51.pdf (stating that incarcerated people are prohibited from accessing computers, unless in an approved educational program and under direct supervision); *Frequently Asked Questions*, ILL. DEP'T OF CORR., http://www.idoc.state.il.us/subsections/faq/default.shtml#06 (last visited Aug. 12, 2012) (same).

[479] *See* N.Y. DEP'T OF CORR. SERVS. & CMTY. SUPERVISION, DIRECTIVE NO. 4422, INMATE CORRESPONDENCE PROGRAM 7 (2011), *available at* http://www.doccs.ny.gov/Directives/4422.pdf ("A limit of 5 pages of printed or photocopied materials . . . may be received within a piece of regular correspondence . . . .").

no income also reported to me that they could not afford to mail their comments to the agency. In addition to these barriers, retaliation often confronts politically active imprisoned people,[480] and most proposed regulations are written in language that is inaccessible to a prison population where many people are not literate in English, have limited formal education, or have cognitive or sensory disabilities.[481]

Finally, Shay acknowledges that some insist that decarceration must be our top priority. Without disagreeing, she states: "So long as prisons and jails exist, the policies that regulate them should be subject to public scrutiny."[482] I agree. Marginalized people have taken and continue to take advantage of opportunities to influence the political process, including notice-and-comment rulemaking.[483] However, we should not assume that rulemaking procedures will accomplish true transparency or democracy or that they will solve the severe injustices of our criminal legal system, including its enforcement of racialized gender norms through dress.

C. Transformative Change

These proposals for doctrinal change are a part of the constellation of work required to address some of the core issues of enforcement of racialized gender norms manifested in prison dress regulations. Grassroots mobilization and individual resistance are also

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480 *See* Arkles, *supra* note 214, at 539 ("Jailhouse lawyers and prisoners who speak with the media are often targeted for solitary confinement.").

481 *See* DÍAZ-COTTO, *supra* note 186, at 212 (noting the increased need for translation services with increased numbers of monolingual Latin American immigrants in prison); CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NO. NCJ 195670, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), *available at* http://www.bjs.gov/content/pub/pdf/ecp.pdf ("About 41% of inmates in the Nation's State and Federal prisons and local jails in 1997 and 31% of probationers had not completed high school or its equivalent. In comparison, 18% of the general population age 18 or older had not finished the 12th grade."); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., OFFICE OF EDUC. RESEARCH & IMPROVEMENT, NO. NCES 1994-102, LITERACY BEHIND PRISON WALLS: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY 17 (1994), *available at* http://nces.ed.gov/pubs94/94102.pdf ("This means that approximately 237,000 to 306,000 of 766,000 prison inmates perform in the lowest level on each of the literacy scales."); Leigh Ann Davis, *People with Intellectual Disabilities in the Criminal Justice System: Victims & Suspects*, THE ARC (2009), http://www.thearc.org/page.aspx?pid=2458 ("While those with intellectual disabilities comprise 2% to 3% of the general population, they represent 4% to 10% of the prison population, with an even greater number of those in juvenile facilities and in jails." (citation omitted)).

482 Shay, *supra* note 3, at 375.

483 *See, e.g.*, Joseph Shapiro, *504 Sit-In: Winning Rights for the Disabled*, NPR (Apr. 28, 2002), http://www.npr.org/templates/story/story.php?storyId=1142484 (discussing the sit-ins of disabled people in 1977 that forced the passage of regulations of Section 504 of the Rehabilitation Act).

central to these efforts. The potential of all of these methods of change can be maximized when used in coordination with one another and consistent with an abolitionist analysis.

1. Abolitionist Analysis

Prison reform generally has proven to be a double-edged sword: providing vital assistance to imprisoned people in their struggle to survive while often simultaneously expanding and legitimizing the prison system.[484] Prison abolition offers possibilities for larger scale change that *can* address fundamental injustices in current systems. Abolition can also operate as a framework for evaluating and advocating for or against particular reforms. I use guiding questions about the anticipated outcome of a reform to evaluate whether that particular reform is abolitionist or not; that is, whether it shifts society closer to the movement's ultimate transformative goals or further away. The questions serve to assess whether an intervention will ultimately reentrench the very problems it seeks to solve or whether it has the potential to maintain a transformative change.

Within this frame, the questions I find particularly helpful include: Is this reform likely to result in more or less prison construction, funding for prisons, and rhetorical legitimation of prisons? Will this reform likely lead to more people being incarcerated or fewer? Will this reform likely lead to less harm and increased resources, political power, and self-determination among marginalized communities, or will it further consolidate wealth, power, and opportunities among existing elites? Will this reform increase solidarity or division among and within marginalized groups? Will this reform address root causes of poverty and violence, or will it lead to greater poverty and violence?[485]

In applying these questions to the proposals I just discussed, it becomes apparent that Ramachandran's and Flynn's proposals both rely on litigation approaches that generally maintain power in the

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484 *See* Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731, 760 (2010) (describing prison litigation that has the effect of legitimizing the prison system).

485 *See* SPADE, *supra* note 23, at 156 (concluding that it is important to avoid proposals that expand prison budgets or capacities and instead to propose improved access to defense counsel, alternatives to imprisonment, resources for those released from prison, and support for those currently incarcerated); Vanessa Huang, Gabriel Arkles & Jazzie Collins, Strategizing for Trans Abolitionist Prison Change, Presentation at INCITE! Pre-Conference Institute (Sept. 28, 2008) (identifying key inquiries for evaluating social change and applying them to efforts to ameliorate the criminalization of transgender people).

hands of elites (lawyers and courts).[486] Shay's approach seeks to open political participation to imprisoned people, their families, and their communities, although the difficulties accompanying notice-and-comment rulemaking may undermine that goal. All of the proposals risk increasing the apparent legitimacy of prisons by implying that reforms could create acceptable conditions or increasing their bureaucratization. None is likely to release people, prevent them from being incarcerated, or alleviate root causes of poverty and violence on a large scale.

On the other hand, to the extent that these proposals could lead to less punishment of imprisoned people, they could achieve modest reductions in terms of imprisonment. Any time people are punished in prison, they can lose good time and programming opportunities and add to their disciplinary records, dramatically decreasing their chances of parole or early release.[487] All of these proposals could, to some extent, help imprisoned people survive, express political dissent, and reduce some of the harm they experience. Shay's proposal could open another means for political participation. All of them (although Flynn's would need considerable expansion) can be used by a number of communities and can identify common problems that those communities experience, without requiring line-drawing that excludes some as "less deserving" of relief.

When synthesized, the proposals also present greater prospects for change. Ramachandran's emphasis on freedom of dress can expand the potential for Flynn's analysis beyond gender-based or other identity categories, while Flynn's emphasis on freedom of expression can extend Ramachandran's proposal beyond dress to other acts core to self-determination of identity. Shay's proposal can address some of the problematic deference to prison administrators that would otherwise constitute a major hurdle to successful implementation of either Flynn's or Ramachandran's proposal in the prison context. Shay's proposal also creates another opening for political participation that organizers and marginalized communities could leverage.

Overall, these reforms would likely do more good than harm toward abolitionist goals. However, even if all three proposals are fully implemented, they would not be nearly enough. Multiple grassroots and other strategies that grapple with mass incarceration,

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[486] *See* Arkles, Gehi & Redfield, *supra* note 431, at 604–05 (stating that when lawyers set the agenda for a movement, the outcomes legitimize the legal system and the preexisting imbalance of power).

[487] *See* Arkles, *supra* note 214, at 542; *see also* EMMER, *supra* note 187, at 12 (finding that trans people disproportionately served their maximum sentences before release).

enforcement of social hierarchy through dress regulation, and racialized gender violence are needed. Law reform efforts should be used to support grassroots mobilization for maximum impact.[488]

2. *Broad Mobilization*

Broad mobilizations may push for systemic change in conditions of confinement. In New York, years of self-advocacy from detained trans youth, litigation, and coalition work led to the changes in the policy for LGBT youth in juvenile detention described above.[489] Recently, the Pelican Bay hunger strikes have been a major means of mobilization.[490] The people involved in that action made demands including an end to long term solitary confinement and group punishment, changes to the ways people are identified as gang members, and permission to wear sweat suits and watch caps.[491] Several other solidarity actions have followed those at Pelican Bay, and the prison administrations agreed to many of the demands of protesters.[492]

Many groups and movements also work to keep people out of prisons altogether. Critical Resistance has organized resistance to the imposition of gang injunctions in Oakland.[493] Individuals and organizations around the country, including in Los Angeles, New Orleans, New York, and Seattle, have mobilized against the building of new

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488 For a detailed discussion of examples of these forms of collaboration, see Arkles, Gehi & Redfield, above note 431, at 620–26, where my colleagues and I discuss three examples of social justice work with transgender people in which lawyers play secondary assisting roles for larger client-led community organizing efforts.

489 *See supra* notes 432–34 and accompanying text (describing dress rules that are the same in both male and female facilities).

490 *See* Julie Small, *Pelican Bay Prisoners Renew Hunger Strike over Conditions*, KPCC (Sept. 26, 2011), http://www.scpr.org/news/2011/09/26/29052/prison-medical-staff-prepare-new-hunger-strike/ (noting that the Pelican Bay hunger strikes were the largest in California prisons, involving six thousand imprisoned people).

491 Matt McCoy, *Five Demands of the Pelican Bay Hunger Strikers*, ALTERNET (July 14, 2011), http://www.alternet.org/vision/151648/five_demands_of_the_pelican_bay_hunger_strikers/.

492 *See, e.g.*, *Take Action!*, PRISONER HUNGER STRIKE SOLIDARITY, http://prisonerhungerstrikesolidarity.wordpress.com/take-action/ (last visited Aug. 12, 2012) (describing the strike's growth across California); Prisoner Hunger Strike Solidarity, *Hunger Strikers at Pelican Bay End Strike After Nearly Three Weeks; Strike Continues at Other Prisons*, S.F. BAY VIEW NAT'L BLACK NEWSPAPER (Oct. 13, 2011), *available at* http://sfbayview.com/2011/hunger-strikers-at-pelican-bay-end-strike-after-nearly-three-weeks-strike-continues-at-other-prisons/ (discussing the California Department of Corrections and Rehabilitation's consent to review an existing policy in response to the striker's demands).

493 *See Critical Resistance Releases a Report on Oakland Gang Injunctions*, PRISON ACTIVIST RESOURCE CENTER, http://www.prisonactivist.org/alerts/critical-resistance-releases-report-oakland-gang-injunctions (last visited Aug. 12, 2012) (announcing release of report organization created concerning gang injunctions).

jails and prisons, often with great success.[494] Many groups and individuals also are fighting for decriminalization of drugs and prostitution.[495]

Some groups work more directly on models of community accountability and transformative justice to create true safety and support for survivors of interpersonal and state violence.[496] For example, Generation Five has pioneered a model of addressing child sexual

494 *See Uncaging the Valley: Slowing Convictions in Los Angeles*, CALIFORNIA PRISON MORATORIUM PROJECT, http://www.calipmp.org/uncagingvalley (last visited Aug. 12, 2012) (announcing meetings to organize against proposed jail expansion in Fresno, California); CRITICAL RESISTANCE, CRITICAL RESISTANCE 2011 ANNUAL REPORT 6 (2011), *available at* http://crwp.live.radicaldesigns.org/wp-content/uploads/2012/03/CR-Annual-Report-2011-final.pdf (reporting "a major victory against the Orleans Parish Prison, cutting back expansion plans and winning a cap on the overall size of that notoriously violent, decrepit jail"); *Stop OPPression in New Orleans*, CRITICAL RESISTANCE, http://crwp.live.radicaldesigns.org/?page_id=79 (last visited Aug. 12, 2012) (describing the work of Critical Resistance to stop a new jail in New Orleans); Joshua Philipp, *Bronx Community Speaks Out Against $500 Million Jail*, EPOCH TIMES (Dec. 18, 2008), http://www.theepochtimes.com/n2/united-states/bronx-jail-new-york-cui-8747.html (describing the work of several organizations to stop new jail in the Bronx); Joe Hirsch, *City Drops Plan for New Hunts Point Jail*, THE HUNTS POINT EXPRESS (Aug. 12, 2010), http://brie.hunter.cuny.edu/hpe/?p=4235 (reporting vocal public outcry against the building of a Bronx jail later abandoned due to economic constraints); *Seattle-King County Suspend New Jail Plan*, THE SEATTLE TIMES (May 13, 2010), http://seattletimes.nwsource.com/html/localnews/2011856456_apwaseattlekingcountyjail.html?syndication=rss (reporting suspension of plans to build new jail in Seattle); *Act Queer! Teleconference: Police, Prisons and Queer Organizing*, QUEERS FOR ECONOMIC JUSTICE, http://q4ej.org/tag/queer-and-trans-jail-stoppers (last visited Aug. 12, 2012) (describing a Seattle-based organization's work to stop jail construction).

495 *See* 6 SOLIDARITY PROJECT, SEX WORKERS ORGANIZING: WORKERS IN THE SEX INDUSTRY FIGHT DISCRIMINATION, VIOLENCE, AND HIV 1 (2007), *available at* http://www.champnetwork.org/media/sp07No.6.pdf (documenting organized resistance which aims to reduce the risk of violence and HIV to sex workers); *About the Drug Policy Alliance*, DRUG POLICY ALLIANCE, http://www.drugpolicy.org/about-drug-policy-alliance (last visited Aug. 12, 2012) (describing the drug decriminalization work of the Drug Policy Alliance); PROSTITUTES' EDUCATION NETWORK, http://www.bayswan.org/penet.html (last visited Aug. 12, 2012) (compiling information about organizing around sex work and decriminalization); *The Campaign*, DROP THE ROCK COALITION, http://www.droptherock.org/?page_id=122 (last visited Aug. 12, 2012) (describing the drug decriminalization work of Drop the Rock). But, for a critique of drug legalization from a racial justice perspective, see Ernesto, *Three Good Reasons Why People of Color Should Question the Drug Legalization Movement*, PEOPLE OF COLOR ORGANIZE! (May 11, 2010), http://www.peopleofcolororganize.com/analysis/three-good-reasons-people-color-question-drug-legalization-movement/.

496 *See* GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE 2 (2007), *available at* http://www.generationfive.org/downloads/G5_Toward_Transformative_Justice.pdf (discussing child sexual abuse prevention and community organizing to end violence); *About INCITE!*, INCITE! WOMEN OF COLOR AGAINST VIOLENCE, http://www.incite-national.org/index.php?s=35 (last visited Aug. 12, 2012) (describing INCITE! movement projects on police violence, reproductive justice, and media justice); *Safe Neighborhood Campaign*, AUDRE LORDE PROJECT, http://alp.org/safe-neighborhood-campaign (last visited Aug. 12, 2012) (describing the goals of the Safe

abuse through societal transformation of power dynamics, intervention and accountability directed at those who have engaged in child sexual abuse, and support and healing for those who have experienced the abuse.[497] The Safe OUTside the System Collective of the Audre Lorde Project educates queer and trans communities of color and their allies on how to intervene to stop street-based hate violence and police violence.[498] They have also recruited local businesses as "Safe Spaces" for queer and trans people of color who are being harassed.[499] INCITE! Women of Color Against Violence shares strategies from groups resisting violence against women of color and trans people of color.[500]

3. Direct Resistance and Support

Smaller scale subversion and survival tactics also play an important role in sustaining imprisoned people and creating conditions necessary for larger-scale resistance. A number of groups have offered direct assistance to imprisoned people harmed by prison dress regulations. For example, members of United Sikhs drove nine hours to deliver turbans to Sikh immigration detainees after learning they did not have any.[501] The Sylvia Rivera Law Project successfully advocated for a number of trans women to have access to bras in New York State prisons and New York City jails.[502]

However, it is those individuals most impacted by prison regulatory systems who have instituted the most creative and transformative disruptions and reforms to these schemes. For example, people incarcerated in women's prisons frequently must do the laundry for the men, and some people in women's prisons have subverted this enforced patriarchal gender normativity through appropriating articles of the men's clothing—especially boxers—and claiming the clothing as their own or distributing it to other people in women's

Neighborhood Campaign in ending violence against the lesbian, gay, bisexual, Two-Spirit, transgender, and gender nonconforming community).

497 *See* GENERATION FIVE, *supra* note 496, at 5 (discussing Generation Five's organizational goals).

498 *See Safe Neighborhood Campaign*, *supra* note 496 (describing a campaign aimed at preventing violence without relying on law enforcement).

499 *Id.*

500 *See About INCITE!*, *supra* note 496 (describing INCITE!'s work with women and trans people of color).

501 Ilana Ofgang, *UNITED SIKHS Delivers Turbans and Prayer Books to Sikh Detainees at Port Isabel Detention Center in Southern Texas*, UNITED SIKHS (June 30, 2011), http://www.unitedsikhs.org/PressReleases/PRSRLS-30-06-2011-00.html.

502 When I worked at the Sylvia Rivera Law Project, I personally conducted these advocacy efforts. As a member of the Board of the Sylvia Rivera Law Project, I am aware that the attorneys working there currently continue this work.

prisons to wear.[503] Of course, possession of such contraband comes with serious risks, but some find those risks worthwhile.[504]

A number of people modify what they *can* access, again, even in violation of the rules. Insane, a masculine person in a women's prison, explains, "They try to make you look all feminine, I'm not wearing that. We just cut the sleeves, get it sewed up, get something to taper [the neck] a little bit, make it so we can deal with it."[505]

The strength that Paula Ray Witherspoon, a trans woman, showed when a guard tried to forcibly remove her nail polish also constitutes a form of powerful resistance.

> When the polish wouldn't come off, I informed [the captain] it would require polish remover to take it off and his face turned so red I thought it would pop, as he stormed off saying 'We'll see about that.' The Capt came back with a nurse and more pads. When she couldn't take off the polish he said, 'You don't WANT it to come off, do you?' I said, 'Not really.' The other inmates screamed, 'Guess she showed you Captain.'[506]

Ultimately, any reform or resistance to these systems must honor and centralize the daily acts of survival employed by the individuals living under these regimes. While remembering the limitations of reform projects for transforming the landscape of racialized gender regulation, it is also important to recognize the limitations of these regulatory imperatives in wholly controlling the bodies and lives of those incarcerated and the legacy of their resistance.

Conclusion

Prison dress regulations enforce racialized gender norms in intersection with class, sexuality, disability, age, and religion. They do so by: depriving imprisoned people of the opportunity to self-determine their dress; forcing imprisoned people to adhere to dominant social norms through dress even when they deeply object to doing so; using the criminal legal system to severely punish those people who still refuse to adhere to those norms of dress; and using dress as a form of punishment and humiliation. Regulations give detailed directions about what types of dress are and are not permitted, making different rules for those the prison administrations classify as men than for those the administrations classify as women. These regulations also

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503 Girshick, *supra* note 61, at 197.

504 *See id.* (quoting one person incarcerated in a women's prison as saying, "I have a few pairs [of boxers], but you try not to get caught. I would be removed from my job.").

505 *Id.* at 196.

506 Paula Rae Witherspoon, *My Story*, *in* Captive Genders, *supra* note 61, at 209, 211–12.

prohibit or restrict clothing and hairstyles associated with communities of color or non-Christian religious communities.

The importance of dress is disputed, particularly in courts, despite the fact that imprisoned people and prison officials often value dress highly. People value self-determination in dress for diverse reasons. Such reasons include the expression of individual and group identity, dignity, political dissent, religious beliefs, cultural traditions, bodily integrity, health, happiness, survival, pleasure, communication, and artistic creation. Prisons' investment in dress originates in: a drive toward social control; "rehabilitation" or "salvation" of certain imprisoned people into dominant, orderly racialized gender norms; maintenance of clear hierarchical distinctions; suppression of political dissent; and destruction of cultural traditions and individual and group identities considered socially undesirable. With some important exceptions, courts usually give deference to the interests of prison administrators and validate the use of prison dress regulations in these ways.

These practices and interests in some ways represent continuity with past and current repression and control of marginalized communities through dress during colonization, slavery, immigration control, cross-dressing laws, and other forms of regulation. In other ways, however, they have shifted and changed—not only in content[507] but also in justification.[508]

Some scholars have proposed law reforms that could partially address enforcement of racialized gender norms through dress. The scope of Ramachandran's proposal for freedom of dress could be widened to other forms of self-expression if implemented in combination with Flynn's vision of broadened First Amendment claims for expression of identity. Shay suggests opening up the political process by requiring prison agencies to follow notice-and-comment rulemaking procedures—or through restricting the discretion courts afford to rules made through other means.[509] If combined with mass grassroots organizing, her proposal could create more room to shift power toward those most directly impacted by prison rules. Regardless of

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[507] For example, pink only became associated with girls in the 1940s, so it is hard to imagine someone like Joe Arpaio making the people in his men's jail dye their underwear pink for the same reasons a century ago. *See* Jeanne Maglaty, *When Did Girls Start Wearing Pink?*, SMITHSONIAN.COM (Apr. 8, 2011), http://www.smithsonianmag.com/arts-culture/When-Did-Girls-Start-Wearing-Pink.html.

[508] The "protection" of imprisoned people from violence is a relatively new purported justification for dress regulations. The earliest example I could find of this justification was from a case in the late 80s, and most instances came from 2000 or later. *See supra* notes 326–228 and accompanying text.

[509] *See supra* Part VI.B.3.

which theories are implemented, a long-term vision of prison abolition and transformative justice should inform any reform project undertaken in this area.

Appendix A: Charts and Figures
Restrictions on Hair Length in Men's Facilities

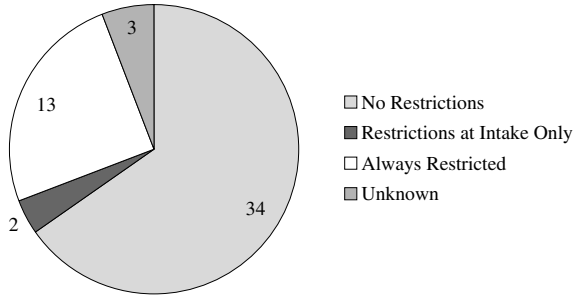

Figure 1. Most prison systems do not restrict hair length.

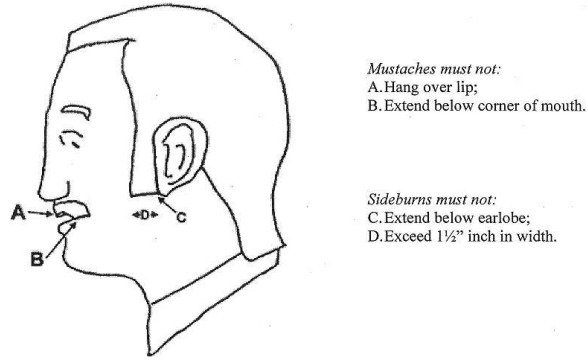

Figure 2. This image comes directly from rules for imprisoned people in New Hampshire.[510] It is likely distributed to people in men's and women's facilities. The figure represents norms of White Christian masculinity to which imprisoned people are expected to conform.

Percent of Jurisdictions with Restrictions on Hair Length in Men's Facilities

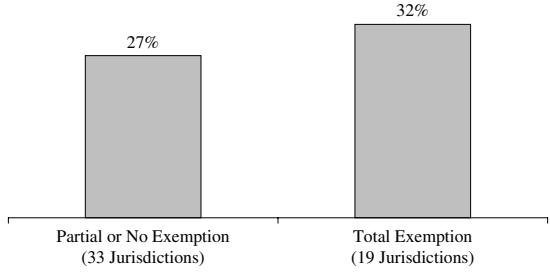

Figure 3. More prison systems that are not bound to use notice-and-comment rulemaking have restricted hair length than prison systems that are not bound to use notice-and-comment rulemaking.

[510] N.H. Dep't of Corr., Manual for the Guidance of Inmates 10 (2011).

APPENDIX B: INDEX OF STATE PRISON REGULATIONS

JURISDICTION	SOURCES	HAIR LENGTH RESTRICTED M	HAIR LENGTH RESTRICTED F	OTHER DRESS RULES DIFFER M/F
Alabama	MARK SABEL, GROOMING SURVEY OF CORRECTIONAL SYSTEMS' POLICIES AND PRACTICES (2009) (on file with the *New York University Law Review*); ALA. DEP'T OF CORR., ADMIN. REG. NO. 338, INMATE PROPERTY (2009)	YES	UNKNOWN	YES
Alaska	ALASKA DEP'T OF CORR., POLICIES AND PROCEDURES NO. 806.02, PRISONER HYGIENE, GROOMING AND SANITATION (1995); ALASKA DEP'T OF CORR., FORM NO. 811.05: PERSONAL PROPERTY INVENTORY (2007)	NO	NO	YES
Arizona	ARIZ. DEP'T OF CORR., DEP'T ORDER NO. 704, INMATE REGULATIONS 2, 5 (2010)	YES	YES	YES
Arkansas	ARK. DEP'T. OF CORR., GUIDE FOR FAMILY AND FRIENDS 3 (n.d.); ARK. BD. OF CORR., DEP'T ORDER NO. 841, INMATE PROPERTY CONTROL (2009)	YES	YES	YES
California	CAL. CODE REGS. tit. 15, § 1260 (2012); CAL. CODE REGS. tit. 15, § 3030 (2011); CAL. CODE REGS. tit. 15, § 3062 (2011)	NO	NO	YES

JURISDICTION	SOURCES	HAIR LENGTH RESTRICTED M	HAIR LENGTH RESTRICTED F	OTHER DRESS RULES DIFFER M/F
Colorado	COLO. DEP'T OF CORR., REG. NO. 850-11, HYGIENE AND GROOMING (2012); COLO. DEP'T OF CORR., REG. NO. 850.05, OFFENDER BEDDING AND CLOTHING ISSUE AND DRESS CODE (2011)	NO	NO	YES
Connecticut	CONN. DEP'T OF CORR., DIRECTIVE NO. 9.5, CODE OF PENAL DISCIPLINE (2008); CONN. DEP'T OF CORR., DIRECTIVE NO. 6.10, FEMALE PROPERTY MATRIX, attach. B1 (2010); CONN. DEP'T OF CORR., DIRECTIVE NO. 6.10, MALE PROPERTY MATRIX, attach. B1 (2010)	NO	NO	YES
Delaware	DEL. DEP'T OF CORR., POLICY NO. 5.3, STANDARDS FOR OFFENDER GROOMING & ATTIRE (2009)	NO	NO	UNKNOWN
District of Columbia	D.C. DEP'T OF CORR., NO. 4010.2E, INMATE PERSONAL GROOMING (2012); D.C. DEP'T OF CORR., INMATE HANDBOOK 4 (n.d.)	NO	NO	YES
Florida	FLA. ADMIN. CODE ANN. r. 33-602.101 (4) (2012)	YES	NO	YES
Georgia	GA. COMP. R. & REGS. 125-3-2-.04 (2010); GA. DEP'T OF CORR., NO. IIB06-0001, INMATE PERSONAL PROPERTY STANDARDS (2008)	YES	NO	YES

JURISDICTION	SOURCES	HAIR LENGTH RESTRICTED M	HAIR LENGTH RESTRICTED F	OTHER DRESS RULES DIFFER M/F
Hawaii	HAW. DEP'T OF PUB. SAFETY, CORR. ADMIN. AND PROCEDURES, NO. Cor.17.03, INMATE CLOTHING (2010); HAW. DEP'T OF PUB. SAFETY, CORRECTIONS ADMINISTRATION AND PROCEDURES, NO. Cor.10.1F.05, PERSONAL HYGIENE (2008); LETTER FROM TOMMY JOHNSON, DEP. DIR. FOR CORR., HAWAII DEP'T OF PUB. SAFETY, TO DANIEL M. CLUCK, SENIOR STAFF ATTORNEY, ACLU OF HAWAII (Dec. 5, 2008) (on file with the *New York University Law Review*)	NO	NO	YES
Idaho	IDAHO DEP'T OF CORR., CONTROL NO. 306.02.01.001(5), HYGIENE OF OFFENDERS, OFFENDER BARBERS, AND FACILITY HOUSEKEEPING (2008); IDAHO DEP'T OF CORR., CONTROL NO. 320.02.01.001, PROPERTY: STATE-ISSUED AND OFFENDER PERSONAL PROPERTY, at app. E (2010)	NO	NO	YES
Illinois	ILL. ADMIN. CODE tit. 20, § 502.110(a) (2010)	NO	NO	UNKNOWN

JURISDICTION	SOURCES	HAIR LENGTH RESTRICTED M	HAIR LENGTH RESTRICTED F	OTHER DRESS RULES DIFFER M/F
Indiana	IND. DEP'T OF CORR., POLICY NO. 02-01-104, OFFENDER GROOMING, CLOTHING AND PERSONAL HYGIENE (2010); IND. DEP'T OF CORR., POLICY NO. 02-01-101, PROPERTY—ADULT FEMALE FACILITY (n.d.); IND. DEPT. OF CORR., POLICY NO. 01-01-101, PROPERTY—ADULT MALE—WORK RELEASE (n.d.)	YES, INTAKE ONLY	NO	YES
Iowa	IOWA ADMIN. CODE r. 201-50.14 (2010); IOWA DEP'T OF CORR., POLICY NO. IS-SH-01, OFFENDER HYGIENE/GROOMING (2009)	NO	NO	UNKNOWN
Kansas	KAN. DEP'T OF CORR., INTERNAL MGMT. POL'Y & PROC., NO. 12-129(VII)(A), CLOTHING & LINEN ISSUE: INMATE HYGIENE & APPEARANCE (2010); KAN. DEP'T OF CORR., INTERNAL MGMT. POL'Y & PROC., NO. 12-120, CONTROL OF INMATE PERSONAL PROPERTY (2010)	NO	NO	YES
Kentucky	501 KY. ADMIN. REGS. 3:120(3) (2011); KY. CORR., POLICY NO. 17.1, INMATE PERSONAL PROPERTY, at attach. I (2009)	NO	NO	YES

JURISDICTION	SOURCES	HAIR LENGTH RESTRICTED M	HAIR LENGTH RESTRICTED F	OTHER DRESS RULES DIFFER M/F
Louisiana	MARK SABEL, GROOMING SURVEY OF CORRECTIONAL SYSTEMS' POLICIES AND PRACTICES (2009) (on file with the *New York University Law Review*); LA. DEP'T OF PUB. SAFETY AND CORR., NO. C-03-007, OFFENDER PERSONAL PROPERTY LISTS, STATE ISSUED ITEMS, PROCEDURES FOR THE RECEPTION, TRANSFER AND DISPOSAL OF OFFENDER PERSONAL BELONGINGS (2010)	YES	UNKNOWN	YES
Maine	E-mail from Esther Riley, Policy Dev. Coordinator, Me. Dep't of Corr., to G. Sullivan (Jan. 14, 2009) (on file with the *New York University Law Review*)	NO	NO	UNKNOWN
Maryland	MD. COMM'N ON CORR. STANDARDS, STANDARDS, COMPLIANCE CRITERIA, AND COMPLIANCE EXPLANATIONS FOR ADULT CORRECTIONAL INSTITUTIONS 56 (n.d.)	NO	NO	UNKNOWN
Massachusetts	MASS. DEP'T OF CORR., NO. 103 DOC 750.10, HYGIENE STANDARDS (2011); 103 MASS. CODE REGS. 403.10 (2012)	NO	NO	YES

JURISDICTION	SOURCES	HAIR LENGTH RESTRICTED M	HAIR LENGTH RESTRICTED F	OTHER DRESS RULES DIFFER M/F
Michigan	MICH. DEP'T OF CORR., POLICY DIRECTIVE NO. 03.03.130(D), HUMANE TREATMENT AND LIVING CONDITIONS FOR PRISONERS (2009); MICH. DEP'T OF CORR., POLICY DIRECTIVE NO. 04.07.110, STATE-ISSUED ITEMS AND CELL/ROOM FURNISHINGS (2007)	NO	NO	YES
Minnesota	MINN. DEP'T OF CORR., POLICY DIRECTIVE NO. 303.020(C), OFFENDER DRESS/HYGIENE/HAIR CARE (2011); MINN. DEP'T OF CORR., POLICY DIRECTIVE NO. 04.07.112, PRISONER PERSONAL PROPERTY (2010)	NO	NO	YES
Mississippi	MISS. DEP'T OF CORR., RIGHTS, RESPONSIBILITIES, AND REGULATIONS (2012), *available at* http://www.mdoc.state.ms.us/Inmate_Handbook/CHAPTER%20VI.pdf	YES	NO	YES
Missouri	MO. DEP'T OF CORR., NO. IS22-1.1, POLICY & PROCEDURES MANUAL: OFFENDER AUTHORIZED PERSONAL PROPERTY (2010)	NO	NO	YES
Montana	MONT. DEP'T OF CORR., POLICY DIRECTIVE NO. 4.4.1(c), OFFENDER HYGIENE, CLOTHING, AND LINEN SUPPLIES (1997)	NO	NO	UNKNOWN

JURISDICTION	SOURCES	HAIR LENGTH RESTRICTED M	HAIR LENGTH RESTRICTED F	OTHER DRESS RULES DIFFER M/F
Nebraska	NEB. CORR. SERVS., ADMIN. REG. NO. 111.01, SANITATION & HYGIENE (2011), *available at* http://www.corrections.nebraska.gov/pdf/ar/rights/AR%20111.01.pdf; NEB. CORR. SERVS., ADMIN. REG. NO. 204.01, INMATE PROPERTY CONTROL (2010), *available at* http://www.corrections.nebraska.gov/pdf/ar/mail/AR%20204.01.pdf	NO	NO	YES
Nevada	NEV. DEP'T OF CORR., ADMIN. REG. 705.01, INMATE HAIR STYLES (2010); NEV. DEP'T OF CORR., ADMIN. REG. 711.01, INMATE PERSONAL PROPERTY (2003)	NO	NO	YES
New Hampshire	N.H. DEP'T OF CORR., MANUAL FOR THE GUIDANCE OF INMATES 10 (2011)	NO	NO	NO
New Jersey	N.J. ADMIN. CODE § 10A:14-2.5(a) (2010)	NO	NO	UNKNOWN
New Mexico	N.M. CORR. DEP'T, NO. CD-151100, INMATE GROOMING AND HYGIENE (2010); N.M. CORR. DEP'T, NO. CD-150201, INMATE PROPERTY (2012), *available at* http://www.corrections.state.nm.us/policies/current/CD-150200.pdf	YES	NO	YES

JURISDICTION	SOURCES	HAIR LENGTH RESTRICTED M	HAIR LENGTH RESTRICTED F	OTHER DRESS RULES DIFFER M/F
New York	N.Y. DEP'T OF CORR. SERVS., DIRECTIVE NO. 4914, INMATE GROOMING STANDARDS (2010); N.Y. DEP'T OF CORR. SERVS., DIRECTIVE NO. 4913, INMATE PROPERTY (2011)	YES, INTAKE ONLY	NO	YES
North Carolina	N/A	UNKNOWN	UNKNOWN	UNKNOWN
North Dakota	N.D. DEP'T OF CORR. & REHAB., NO. 5(E)(1), POLICIES & PROCEDURES MANUAL (2006); N.D. DEP'T OF CORR. & REHAB., INMATE HANDBOOK (5)(7)(a) (2011), *available at* http://www.nd.gov/docr/adult/docs/INMATE_HANDBOOK_2010.pdf	NO	NO	NO
Ohio	OHIO ADMIN. CODE 5120-9-25(D) (2007); OHIO DEP'T OF REHAB. & CORR., NO. 61-PRP-01(F)(1), INMATE PERSONAL PROPERTY (2010)	YES	YES	YES
Oklahoma	OKLA. DEP'T OF CORR., NO. OP-030501, PERSONAL HYGIENE & APPEARANCE CODE III(A) (2008); OKLA. DEP'T OF CORR., NO. OP-030120, OFFENDER PROPERTY (2011)	NO	NO	YES
Oregon	OR. ADMIN. R. 291-123-0015 (2012); OR. DEP'T OF CORR., NO. 291-117-0080(*l*), PERSONAL PROPERTY (INMATE) (2012)	NO	NO	YES

JURISDICTION	SOURCES	HAIR LENGTH RESTRICTED M	HAIR LENGTH RESTRICTED F	OTHER DRESS RULES DIFFER M/F
Pennsylvania	PA. DEP'T OF CORR., NO. DC-ADM 807, INMATE GROOMING AND BARBER/ COSMETOLOGY PROGRAMS 6(A)(2)(a) (2004); PA. DEP'T OF CORR., NO. DC-ADM 815, PERSONAL PROPERTY, STATE ISSUED ITEMS, AND COMMISSARY/OUTSIDE PURCHASES (2009)	YES	NO	YES
Rhode Island	R.I. DEP'T OF CORR., NO. 18.47-1 PERSONAL HYGIENE (2007); R.I. DEP'T OF CORR., NO. 14.03-3, INMATE PROPERTY ACCOUNTABILITY (2007)	NO	NO	YES
South Carolina	N/A	UNKNOWN	UNKNOWN	UNKNOWN
South Dakota	S.D. DEP'T OF CORR., INMATE LIVING GUIDE 5 (2007)	NO	NO	UNKNOWN
Tennessee	TENN. DEP'T OF CORR., INDEX NO. 502.03, HAIRSTYLES/ DRESS CODE/ GROOMING (2006); TENN. DEP'T OF CORR., INDEX NO. 504.01, INMATE PERSONAL PROPERTY (2007)	NO	NO	YES
Texas	TEX. DEP'T OF CRIMINAL JUSTICE, OFFENDER ORIENTATION HANDBOOK 10, 11 (2004)	YES	NO	YES

JURISDICTION	SOURCES	HAIR LENGTH RESTRICTED M	HAIR LENGTH RESTRICTED F	OTHER DRESS RULES DIFFER M/F
United States (BOP)	DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, NO. 5230.05, GROOMING § 551.4(a) (1996); DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, NO. P5580.07, PERSONAL PROPERTY, INMATE (2005)	NO	NO	YES
Utah	UTAH DEP'T OF CORR., NO. 09-003, DIVISION OF INSTITUTIONAL OPERATIONS, INMATE PROPERTY (2009); UTAH DEP'T OF CORR. NO. FDr14, INMATE PROPERTY (2006)	NO	NO	YES
Vermont	N/A	UNKNOWN	UNKNOWN	UNKNOWN
Virginia	MARK SABEL, GROOMING SURVEY OF CORRECTIONAL SYSTEMS' POLICIES AND PRACTICES (2009) (on file with the *New York University Law Review*)	YES	UNKNOWN	UNKNOWN
Washington	WASH. DEP'T OF CORR., POLICY NO. 440.080, HYGIENE & GROOMING FOR OFFENDERS (2012); WASH. DEP'T OF CORR., POLICY NO. 440.050, STATE ISSUED CLOTHING/LINEN (2010).	NO	NO	YES
West Virginia	MARK SABEL, GROOMING SURVEY OF CORRECTIONAL SYSTEMS' POLICIES AND PRACTICES (2009) (on file with the *New York University Law Review*)	YES	UNKNOWN	UNKNOWN

JURISDICTION	SOURCES	HAIR LENGTH RESTRICTED M	HAIR LENGTH RESTRICTED F	OTHER DRESS RULES DIFFER M/F
Wisconsin	WISC. ADMIN. CODE DEP'T OF CORR. § 309.24(3) (2008)	NO	NO	UNKNOWN
Wyoming	WYO. DEP'T CORR., POLICY AND PROCEDURE NO. 4.201, INMATE GROOMING, HYGIENE & SANITATION (2010)	NO	NO	YES