Adjudicating Appearance: From Identity to Personhood

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Abstract

Cases involving attires, hairstyles, names, or manners of speaking have been increasingly attracting the attention of constitutional and socio-legal scholars. No longer viewed as marginal or esoteric, claims about the significance of a person’s self presentation are now recognized as testing the limits of basic constitutional principles. Employing an overarching perspective that analyzes appearance cases outside of their doctrinal context, I argue that the legal inquiry, which focuses on whether a plaintiff’s appearance reflects his or her identity accurately and stably, is flawed, since it relies on unattainable conceptions of the nature of identity and the meaning created by appearance. Diverging from current legal scholarship, which treats appearance cases only in the context of minority rights, I suggest that appearance adjudication should shift its focus from inquiring about the extent to which the appearance is connected to its bearer’s identity to inquiring about the significance of appearance to his or her personhood. This shift reflects the notion that the vulnerability and complexity of appearance are part of the universal human experience, and not just the plight of minorities. Such a normative shift will produce a more adequate legal treatment of claims regarding the personal and social significance of appearance. Developing an alternative theoretical framework, I propose understanding appearance as the poetics of personhood. Both in appearance and in poetry the medium is inherent to the meaning it creates, and thus both appearance and poetry are hard to rearticulate in categorical or non-figurative language. My approach can transform the legal discourse from considering identity in the abstract to accommodating the experiences, voices, and interactions of concrete, embodied individuals, who may not always be able to articulate a rational justification for their appearance, but are still certain of its central role in their personhood.
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ABSTRACT: Cases involving attire, hairstyles, names, or manners of speaking have increasingly attracted the attention of constitutional and socio-legal scholars. No longer viewed as marginal or esoteric, claims about the significance of a person’s self-presentation are now recognized as testing the limits of basic constitutional principles. Employing an overarching perspective that analyzes appearance cases outside of their doctrinal context, I argue that a legal inquiry focusing on whether a plaintiff’s appearance accurately and stably reflects his or her identity is flawed, since it relies on unattainable conceptions of the nature of identity and the meaning created by appearance. Diverging from current legal scholarship, which treats appearance cases only in the context of minority rights, I suggest that appearance adjudication should shift its focus from inquiring about the extent to which the appearance is connected to its bearer’s identity to inquiring about the significance of appearance to his or her personhood. This shift reflects the notion that the vulnerability and complexity of appearance are part of the universal human experience and not just the plight of minorities. Such a normative shift will produce a more adequate legal treatment of claims regarding the personal and social significance of appearance. Developing an alternative theoretical framework, I propose understanding appearance as the poetics of personhood. Both in appearance and in poetry, the medium is inherent to the meaning it creates, and thus both appearance and poetry are hard to rearticulate in categorical or non-figurative language. My approach can transform the legal discourse from considering “identity” in the abstract to accommodating the experiences, voices, and interactions of concrete, embodied individuals, who may not

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INTRODUCTION

In 1936, Herman Cohen petitioned a Connecticut court asking that his name be changed to Albert Connelly. The Superior Court of Connecticut denied his request, stating, "Each race has its virtues and faults and men consider these in their relations with one another. The applicant would be traveling under false color, so to speak, if his request were granted."

This Article shows that the principle leading to this decision still guides courts today: a need to maintain a social order in which people’s appearance conforms with what the court perceives them “to be.” At play here is a theory of the appropriate relationship between one’s identity and one’s self-presentation. According to this rationale, a Jew should have a Jewish name and should be prevented from purporting to appear otherwise.

Part I of this Article describes the problem with which this Article is concerned by analyzing contemporary appearance cases and establishing the futility of the law’s approach to identity as an appearance claim. Part II is normative, outlining new principles for an alternative legal approach to personal appearance. Part III is applicative. It revisits the cases discussed in the first Part and shows how the suggested legal principles would apply to them.

A. Appearance Cases

Cases involving attires, hairstyles, names, or manners of speaking increasingly attract the attention of constitutional and socio-legal scholars. A sex-based discrimination claim of a man fired for his long hair, a religious freedom claim of a female Muslim student wearing a headscarf to school, or a Black woman’s claim that should not be required to change her cornrow hairstyle because it is part of her racial identity, are no longer viewed as

1. In re Cohen, 4 Conn. Supp. 342, 343 (1936). I became aware of this case in reading Ellen Jean Dannin, Proposal for a Model Name Act, 10 U. MICH. J.L. REFORM 153, 165 n.80 (1976). The judge added that the Jewish race surely also has its advantages and blessings: “Patently the applicant would lose the respect of Gentile and Jew alike by such a move. He resides with his mother and several brothers and sisters who have retained the name of Cohen. . . . [The court does not believe that] the change would be advantageous in the end, either to the applicant or his fellows.” In re Cohen, 4 Conn. Supp. at 343.

2. Anti-Semitic sentiments prevalent in the 1930s probably played a role in this ruling. But, as this Article shows, each period has its anxieties about the identity boundaries that should be kept clear and thus anxiety about blurring the line between the races is but one instance of a more persistent legal logic. For example, just as courts in the thirties protected the boundary between Jewish and Christian identity, courts in the seventies worried about the boundary between femininity and masculinity, and dismissed sex discrimination claims of men who were forbidden from growing long hair. See, e.g., Karr v. Schmidt, 460 F.2d 609, 618 (5th Cir. 1972) (rejecting the sex discrimination claim of a male high school student asked to cut his hair). As the cases discussed in this Article demonstrate, courts today reflect an anxiety not so much about blurring the lines between the genders, but about blurring the lines between the sexes and between sexual orientations.
marginal or esoteric. Instead, they are recognized as testing the limits of basic constitutional principles.

This Article shows that the legal view that people's names, dress, or other personal markers should correlate with their identity still governs the caselaw today. I seek to develop an alternative legal approach to "appearance" adjudication. Albeit not always conveyed as explicitly as in Cohen, courts reveal unsympathetic sentiments toward vague appearances that allegedly decrease the legibility of a legal subject's identity. Accordingly, women should look feminine, male cross-dressers should be allowed to wear women's dresses provided they are indeed clinically diagnosed as cross-dressers, and Black employees should be allowed to sport an unusual hairstyle only if it is tightly linked to their racial identity.

This legal approach, I argue, is both unwarranted and unattainable. I base my argument on the following two propositions. First, unlike jars of jam, which should be correctly labeled in order to protect consumers, there is no compelling interest that people be "marked" correctly. Second, even if the idea that social actors' identities should be easily and securely decipherable seems at first appealing, this vision of the social world is oppressive, unresponsive to the dynamic interplay between identity and appearance, and inapplicable given the complex nature of appearance.

In submitting his appeal, the name-change applicant in Cohen attempted to convey that his self-presentation impeded his success in the America of his time. By raising issues such as attire or hairstyle, the plaintiffs in the cases I

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3. The term "markers" suggests that the characteristics I am interested in are intermittently located between chosen and unchosen characteristics, or between mutable and immutable traits. We can be marked by a scar from an accident, but we can also mark our skin with a tattoo. A marker can thus refer both to deliberate signs and to traces of our biology, culture, or experience. That is, it can be both something that we "put on"—a jacket we choose for an interview to signal professionalism, a deliberately high-class pronunciation to get good service—and unchosen evidence of our background, such as our accent, the name given to us by our parents, or a gendered way in which we move our bodies. The distinction between the two types of markers is, of course, fragile. An accent can reflect the traces of one's biography as well as be employed for impersonation purposes. This instability about the extent to which a marker should be construed as an intended, manipulated message is at the center of this Article, since it is the central challenge that markers pose to legal reasoning.

4. For the purposes of this research, my working definition of "appearance" is wider than this word's dictionary meaning or common usage. It includes not only visible markers such as attire, hair, jewelry, or makeup. In fact, I refer to personal markers such as names, manners of speech (accent, vernacular, and pronunciation), and language. Why all these features, and why not others? Recalling the proverbial warning not to judge a book by its cover, all these characteristics are considered by our culture as "cover" rather than "book." In other words, they are viewed as being the external packaging of the person rather than his or her internal "essence."

5. According to this approach, an afro hairstyle should be recognized because it is legally considered a natural attribute of Black race, but cornrows, which are viewed as artificial, should not be legally recognized as an important aspect of Black identity.

6. Cohen's aspired name, Albert Connelly, was not considered completely white, but Irish, another racially marked category in that era. See In re Cohen, 4 Conn. Supp. at 342. We do not know what prompted the petitioner to seek an Irish name. It is possible that he felt that obtaining a name that was then considered completely white would be too big a leap, which would risk his possibility to pass. Irish were not considered white, but perhaps they were located a few degrees higher than Jewish people in
examine in this Article complicate the concept of identity by maintaining that external appearance is an important aspect of it. If a different name can make you more American (as Cohen’s petition implies), then national identity is more socially constructed than the law would make it out to be.

I suggest shifting from thinking about appearance through the paradigm of identity to viewing it through the paradigm of personhood. Understanding appearance as an aspect of personhood, rather than of identity, would release the law from searching for appearances that constitute “a fit between inner nature and outer station.” Shifting from the framework of identity to that of personhood would not render identity completely irrelevant to the analysis. Sometimes identity plays a significant role in one’s sense of person. It is not that personhood contains identity such that identity is a particular aspect of personhood. Rather, because there is some overlap between the two concepts, courts would also take into account the role that identity plays in the applicant’s personhood in considering the connection between appearance and personhood.

Social status, or, perhaps, the chosen name reflects a lack of full mastery of the nuances of racial distinctions in this country. For analyses of the change in the racial categorization of Irish and Jews, see Karen Brodkin, How Jews Became White Folks and What That Says About Race in America (1998), and Noel Ignatiev, How the Irish Became White (1995).

7. The term “identity” has become ubiquitous in contemporary socio-legal writing, and thus has many meanings and usages. Here I use it in the political sense of group affiliation, mainly of minority, marginalized, underrepresented, or oppressed groups. In the United States today, this includes groups divided according to race, ethnicity, nationality, gender, sexual orientation, or (dis)ability. See, e.g., David A. Hollinger, “Identity in the United States,” in KEYWORDS: IDENTITY 25, 32 (Nadia Tazi ed., 2004) (discussing this meaning of identity). The way in which I use identity should not be confused with its usage in psychological discourse, in which “to have an identity is to have a unified self, capable of acting effectively in the world”—a definition that will sometimes “involve close ties with this or that group, but group affiliation is incidental rather than definitional to the process.” Id. at 30-31.

8. I juxtapose “identity” and “personhood” in order to stress the way in which the latter term pertains to the more universal aspects of human experience. Personhood refers to the general experience of being human and having a sense of self (which is not, of course, a process detached from society, but depends upon social recognition and interaction). As the Greek origin of the word suggests, personhood is entangled in the experience of appearing, of having a concrete shape, body, and perceived presence. Personhood also relates to individuality, to being socially recognized as somebody, or as a distinct human entity. Jerrold Seigel describes these meanings well:

[T]he word [personhood] echoes with some of its ancient sources, the Greek prsonon meaning the mask worn by characters in a play, taken into Latin as persona, literally animating the mask “by sound” and referring by extension to the occupant of a particular social position or status. Modern usage makes personhood or personality sometimes a dignity conveyed by social recognition, and sometimes a quality deriving from individual talents or gift...

Jerrold Seigel, The Idea of the Self: Thought and Experience in Western Europe Since the Seventeenth Century 16 (2005); see also Paula M.L. Moya, What’s Identity Got to Do With It? Mobilizing Identities in the Multicultural Classroom, in IDENTITY POLITICS RECONSIDERED 96, 97-98 (Linda Martin Alcoff et al. eds., 2006) (contrasting “ascriptive identities,” which are “historical and collective, and generally operate through the logic of visibility,” with “subjectivity,” which “refers to our individual sense of self, our interior existence, our lived experience of being a more-or-less coherent self across time”). Moya’s usage of subjectivity is similar to my usage of personhood. Accordingly, she stresses that subjectivity has a social aspect: “The term also implies our various acts of self-identification, and thus necessarily incorporates our understanding of ourselves in relation to others.” Moya, supra, at 98.

9. SIEGEL, supra note 8, at 353.
While identity would not be completely irrelevant to the inquiry, it also would not be, as it is now, the central question examined by courts in determining whether one’s appearance should be legally protected. Rather, identity would be addressed through the notion of personhood. So, for example, if one’s sexual or racial identity is a significant part of one’s personhood, and if one’s appearance is related to one’s identity, then this appearance would be protected. I suggest that one’s appearance would also be protected if it has nothing to do with one’s sense of identity but only with one’s sense of personhood. Shifting the focus of appearance cases from identity to personhood would open a way for the law to draw a “protective circle” around legal subjects—a circle in which subjects would be relieved of the need to explain why their identity justifies and legitimizes their appearance. Hair, dress, name, and other such symbolic aspects of the person are by nature insubordinate to language, particularly to the analytical language of concepts and propositional statements. Our law and legal theory should recognize that appearance works on a different level of meaning, although this mode of meaning-creation is unfamiliar and counterintuitive to legal logic.

Courts cling to such an understanding of appearance in part because appearance cases present a challenge to the law’s understanding of identity as an objective and natural category. By focusing on names, hairstyle, or clothing, subjects bring to the fore the important role of appearance in shaping social identity. As shown below, courts find it difficult to recognize the importance of appearance in legal subjects’ lives because such recognition could be implied as acknowledging the significance of form over substance, a proposition that might reverse the order of significance governing modern legal thinking. Furthermore, contrary to the account emerging from the decisions examined in this Article, identity categories such as race, sex, national origin, and sexual orientation are not readily apparent to the naked eye.

Thus far, scholarly writing on appearance cases has analyzed them within a specific doctrinal framework, such as Title VII’s10 ban on discrimination against minorities,11 the freedom to wear religious garments,12 freedom of

speech, or name laws. This Article cuts across traditional doctrinal categories and takes an overarching meta-doctrinal perspective, arguing that appearance cases consistently pose the same challenge to the legal logic across different doctrinal and jurisdictional contexts in which they transpire. Namely, appearance cases invoke complex questions pertaining to the relationship between form and substance, or between signifier and signified. While the legal reasoning mode pursues certainties and privileges stable foundations on which to base its conclusions, personal markers such as hair, name, or dress style create meaning in a suggestive, tentative, and unstable way, thus leaving courts puzzled as to the appropriate significance that should be attributed to them. This understanding, I argue, mandates developing new legal tools for treating appearance.

B. Untying the Knot Between Appearance and Identity

Most commentators frame appearance cases in terms of the plight of members of minority groups and analyze the cases from the perspective of identity politics. Kenji Yoshino, a leading voice in the call to recognize appearance as part of antidiscrimination law, is concerned about the way in which appearance requirements reflect an expectation that members of minority groups assimilate. Employing a performative approach to identity, Yoshino demonstrates how requirements that Blacks avoid “ flaunting” their racial identity or that gays act straight are not merely symbolic and do not remain on the surface but work to reshape identity and erase “essential” differences.


15. Yoshino, supra note 11, at 771-83.

16. Id. at 865-75.
Such limitations on the freedom to perform minority identity are discriminatory because they do not impose similar appearance requirements on members of the hegemonic group.

Critics of Yoshino’s approach argue that recognition of appearance as part of the right to equality would have reductive effects on the notion of racial identity. Richard Ford recognizes that, despite good intentions, arguments that use multiculturalism and diversity as rationales for racial equality divert attention from bigotry, political oppression, and economic inequality—where racism lies—to the aesthetic and symbolic dimensions of race. He argues that efforts to protect identity-related appearance exaggerate cultural differences and deny communality between different racial and ethnic groups in order to bolster the multicultural rationale. This entails “an essentially conservative project of cultural preservation and a fetishism of pedigree and tradition . . .”17

Claims that appearance should be protected as part of race will, Ford fears, constrict the freedom of all the members of the racial group, such that in order to be recognized as Blacks, they will be forced to embody the essential Black by retaining their paradigmatic, “authentic” Black appearance.18

I identify with Ford’s unease regarding the conflation of identity and appearance. I agree that identities come in many shapes and forms, and that recognizing appearance claims as part of identity claims might produce a simplistic account of both appearance and identity. I also support, however, Yoshino’s project of widening the scope of the legal conception of human experience so that it will recognize the role of symbolic and performative dimensions.

While both approaches have merits, both are also limited: Yoshino’s approach is ultimately unsuccessful in protecting minority identities from assimilation because it relies on an unattainable model of the nexus between appearance and identity. Ford’s critique, on the other hand, does not leave room for legal recognition of the representative aspects of identity.

I argue that the conflation between appearance and identity contributes to the current analytical impasse. Therefore, I seek to cut the Gordian knot of appearance and identity by adding to the analysis appearance cases that do not involve members of minority or underrepresented groups.19 Such a widening of the analytical scope would reveal that appearance is a central arena of human experience and should not be treated solely as a matter concerning minority

18. Id. at 44.
19. As a feminist legal scholar, I recognize the importance of social movements and activism organized around identity consciousness, and I am generally not opposed to the politics of identity. For a helpful contemporary discussion of the power and contribution of the politics of identity, see Renato Rosaldo, Identity Politics: An Ethnography by a Participant, in Identity Politics Reconsidered, supra note 8, at 118 (reviewing the American debate about identity politics and pointing to the benefits of social mobilization through awareness of the participant’s subject position); see also Hollinger, supra note 7, at 34 (defining identity politics as “political mobilization by, and on behalf of, identity groups”).
identities. In other words, while most commentators approach these cases from the perspective of identity as membership in a minority group, I propose understanding appearance as a matter pertaining to personhood.

Understanding appearance as an aspect of personhood rather than of minority identity would enable courts to concentrate on the role of appearance itself in the lives of social actors, rather than on the role of appearance as a proxy for identity. Turning to appearance as the analytical starting point reveals not only that every identity—even that of members of the unremarkable majority who blend in more easily—is constituted and maintained through its external and symbolic aspects, but also that the relationship between appearance and identity is complex, bidirectional, and unstable. Hairstyles, manners of speech, and names are indeed related to identity, but this relationship is not one of providing proof (one’s hairstyle does not prove that one is Black), but rather one of association or connotation (one’s hairstyle suggests that one may be Black). Hairstyle or dress can be suggestive, insinuative, or evocative of one’s identity, but not indicative or symptomatic of it. A given hairstyle can only resonate or echo a particular identity; it cannot denote it, as the legal logic would expect. This new theoretical framework to understanding personal markers, then, would provide tools for better responding to appearance claims of members of minority groups as well.

C. Appearance as the Poetics of Personhood

I propose integrating a new concept into appearance adjudication, which I dub “the poetics of personhood.” Under my suggested normative model, the law would shift from treating names or clothes as propositional statements that have an informative function of correctly marking the identity of their bearers, to treating such appearances as poetic occurrences. The analogy to poetic language is helpful here because it enables us to recognize that appearance is never just appearance; it is never a matter of form and not content, an external and insubstantial issue. The language of poetry functions not merely to deliver information or develop an argument. Rather, it is a language that calls attention to itself. In poetry, the medium is inseparable from the meaning. It is impossible to rephrase a poem, or to sum up its content in a way that will fully capture what it does, because part of a poem’s effect is produced through texture, rhythm, sound, and connotation. Similarly, asking a legal subject to articulate his or her appearance in a clear and simple identity claim misunderstands the way appearance operates in relation to personhood.

This methodology also departs from existing scholarship by analyzing cases in a comparative context: Canada, the United States, and Israel. The manners in which the issue is framed and addressed bear stark similarities across these three liberal democracies. This Article will show that these diverse
legal systems are similarly puzzled by the fundamental question of the relationship between signifier and signified, or, in our context, the foundation of appearance in legal subjects' lives. Despite the profound differences between these legal systems—in their history and tradition, their institutional structure, and the socio-cultural context within which they operate—they all have similar constitutional commitments to equality and liberty, and demonstrate a similar modernist preference for certainty of meaning. They are therefore similarly challenged by the question of personal appearance.

I. THE PROBLEM: WHAT GOES WRONG IN APPEARANCE CASES

The prevailing mode of legal reasoning finds it necessary to render the question of the plaintiff's appearance into a question of the plaintiff's identity. Furthermore, while claiming to be merely describing or diagnosing that identity, courts in fact produce it. The rulings analyzed in this Part assume that every personal appearance is a clear message and that underneath every personal appearance there is (and should be) a solid, clear, and stable identity of the bearer. This typology of identity enables the courts to examine whether the appearance in question is warranted and worthy of legal protection. Only if the appearance correctly manifests its bearer's identity will the law support the plaintiff's appearance claim. I argue that the judicial inclination to diagnose the identity underlying the plaintiff's appearance is unconvincing and unsuccessful at providing protection to members of the minority identity groups in question.

A. Overture: Law's Persistent Search for Identity Beneath the Appearance

The applicant in Hernandez-Montiel v. INS, 20 a Mexican citizen, sought asylum in the United States because in his home country he was repeatedly harassed, raped, and attacked for wearing women's clothing. He was sexually abused by police, physically beaten by youth in his neighborhood, expelled from school, and required by his family to leave his home. United States law grants asylum to, among others, applicants who demonstrate that they are unable to avail themselves of the protection of their home countries "owing to a well-founded fear of being persecuted for reasons of . . . membership in a particular social group . . . ." 21 But an Immigration Judge and the Board of Immigration Appeals (BIA) denied Hernandez-Montiel's asylum application because "the tenor of the respondent's claim is that he was mistreated because of the way he dressed . . . and not because he is a homosexual." 22

20. 225 F.3d 1064 (9th Cir. 2000).
Additionally, the BIA found it difficult to characterize the petitioner's dress as inherently related to his identity because he could not remember how he was dressed when he was arrested while attempting to cross the border into the United States. This memory failure served as an inference that the petitioner's style of dress was superficial, unessential, and "a volitional act, not an immutable trait." This inconsistency of appearance supported the BIA's distrust of clothing's power to denote a stable identity.

The logic of the decision is based on the BIA's finding of an "actual" identity "underneath" the petitioner's appearance: that of a "homosexual." The BIA sought a nexus between the petitioner's diagnosed identity and his appearance and concluded that since homosexuals do not necessarily wear women's clothing, the petition should be denied: Appearance that is not anchored in identity is not worthy of legal recognition.

On appeal, the Ninth Circuit reversed the decision and granted asylum to the petitioner. However, despite the reversed outcome, the court followed the same logic as the BIA. In order to justify the petitioner's appearance, the court produced an identity category to which the petitioner's dress style could be securely attached—an identity that could account for his appearance. The court explained that the petitioner was not merely gay, nor was he, as the lower instance identified, part of the group of "homosexual males who dressed as females." Rather, he belonged to the group of "gay men with female sexual identities," a group that, as expert witnesses confirmed, was persecuted in Mexico. The court concluded that "[h]is female sexual identity is immutable because it is inherent in his identity; in any event, he should not be required to change it."25

The dynamics of diagnosing the right identity category played a central role in this case. The court explained that it would be appropriate to change the definition of the petitioner's identity group from "homosexual males who dress as females" to "gay men with female sexual identities" since the people in the latter group are not "persecuted simply because they may dress as females or because they engage in homosexual acts. Rather, [they] are singled out for persecution because they are perceived to assume the stereotypical 'female,' i.e., passive, role in gay relationships."26 The change in classification of the

23. Id. at 5. The Immigration Judge opined:
If he wears typical female clothing sometimes, and typical male clothing other times, he cannot characterize his assumed female persona as immutable or fundamental to his identity. The record reflects that respondent's decision to dress as a woman [sic] is volitional, not immutable, and the fact that he sometimes dresses like a typical man reflects that respondent himself may not view his dress as being so fundamental to his identity that he should not have to change it.


24. Hernandez-Mentiel v. INS, 225 F.3d 1064, 1064 (9th Cir. 2000).

25. Id. at 1087.

26. Id. at 1094.
social group seems to go deeper into the reality of identity. It is not only dressing habits that are at play in the petitioner’s social persecution, but also his gender identity. This typology craze dominates the case. At one point, the court notes in a footnote that “[i]n addition to being a gay man with a female sexual identity, [Hernandez-Montiel’s] brief states that he ‘may be considered a transsexual’.”

Particularly interesting is the court’s apparent reservation about relying on dress as a meaningful locus of any legal reality. The petitioner’s legal victory was based on the law’s establishment of who he was, rather than on the social rejection in Mexico of what he wore: Appearance, according to this holding, cannot be a locus of legal recognition and protection, but minority identity can.

For the court to delve into an allegedly more substantial level of identity is neither convincing nor necessary under U.S. asylum law. In this case, the petitioner’s identity not only manifested itself through appearance but also occurred in appearance. In other words, it is unclear which came first—the petitioner’s dressing in women’s clothing or the “female sexual identity” with which he was diagnosed. The court explained that “[g]ay men with female sexual identities outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails.” Thus, the theory suggested by the court is that first, one is of female sexual identity, and only then is this identity represented through one’s clothes.

Like the meaning of a poem, I suggest, appearance is not a reflection of identity, but a part of finding, making, and maintaining an identity. In the words of literary scholar Cleenath Brooks,

[N]ot only our reading of the poem is a process of exploration, but... [the] process of making the poem was probably a process of exploration too. To say that [the poet] ‘communicates’ certain matters to the reader tends to falsify the real situation... [The poet] explores, consolidates, and ‘forms’ the total experience that is the poem.

The deeper move into the petitioner’s underlying identity is not necessary under the statutory framework regarding asylum seekers. U.S. law provides refugee recognition to people who are persecuted in their home country on account of membership in a particular social group. The social group whose members suffer persecution (by state or by private actors without the protection of the state) need not be an established, stable group, with a fixed identity; it can be a social fact established by social perceptions and social views, not by

27. Id. at 1095 n.7.
28. Id. at 1094.
underlying realities. The 2001 UNHCR guidelines on persecuted social groups clarify this point:

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.

Perception as a distinct group which warrants hostilities is key, then, to winning relief. The guidelines also say that the asylum seeker does not have to establish that the trait for which he is persecuted be so immutable or fundamental to human dignity that a person should not be compelled to forsake it:

If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or [sic] fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.

The court thus should not have sought to identify Hernandez-Montiel’s correct, clinically defined, gender or sexual identity, but rather whether his dress habits rendered him a member of a disfavored group in the eyes of his society and attracted hostile reactions.

In addition, the guidelines state that while persecution cannot be the sole defining factor of the group, “persecutory actions towards a group may be a relevant factor in determining the visibility of a group in a particular society.”

In appearance cases, courts should consider identity only to the extent that it is relevant, which is not what the subject’s identity “really” is, but instead what it is taken to be socially. In other words, what the asylum-seeker brought to court was not his identity, but the intolerant social response he received in

31. U.S. asylum law recognizes a persecuted social group, for example, women who object to gender-based restrictions in their home countries, such as wearing a veil, and who would be subject to persecution due to their noncompliance. See Fathim v. INS, 12 F.3d 1233, 1241 (3d Cir. 1993) (stating that this type of "particular social group may satisfy the IIRIRA’s definition of that concept" but denying relief to petitioner); Safaie v. INS, 25 F.3d 636, 640 (9th Cir. 1994) (same).

32. UNHCR, Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, ¶ 11, U.N. Doc. HCR/C/IP/02/02 (May 7, 2002) [hereinafter Guidelines on International Protection] (emphasis added). The interpretive approach of these guidelines was recently affirmed in United States law. See In re C-A-, 23 I. & N. Dec. 951, 956-57 (B.I.A. 2006) (citing the UNHCR guidelines and recognizing that they are in harmony with American law).


34. Id., ¶ 14. The Guidelines also clarify that there is no requirement that the social group be cohesive, i.e., that its members know each other or associate with each other as a group. See id., ¶ 15.
Mexico. Thus, the project of producing an accurate account of the petitioner's identity was irrelevant for the purpose of his asylum claim. Nor was it appropriate here to question the relationship between appearance and identity. In the context of the right to asylum, the court should not have been interested in the identity that actually underlay the appearance, but rather in the identity as it was socially manifested through appearance.

To the extent that a subject's sexual identity exists meaningfully, it exists within its social function. The court should have examined, not the applicant's true identity, but whether the intolerant social response towards his perceived identity was so illegitimate that it would entitle him to asylum under U.S. law. What matters for analyzing the social response is a subject's imputed sex and sexuality, not his real sex and sexuality. As Anne Herrmann points out, gender depends on the apparent naturalness of the sex underneath it. She explains: "[Sex] attribution relies not only on what is visible but on what is assumed to exist . . . . The relationship between sex and gender . . . does not suggest that sex evolves into gender, but rather that gender relies on sex for its meaning." 35 In its quest to determine the petitioner's true sexual identity, the court effectively emulated the intolerant public responses in Mexico. 36

Both for the court and for the intolerant Mexican social actors that harassed the applicant, there was no way to know about his "female sexual identity" except by and through his dress. The ruling itself reflected this epistemology in its description of the applicant's sexual identity: "[Hernandez-Montiel] has known that he was gay from the age of eight and began dressing as a woman when he was 12." 37

The petitioner's female sexual identity was inextricably connected to his dress habits. And yet, the logic of the decision was founded on the premise that the court could separate the existence of an identity from its external manifestations.

To better respond to the way appearance creates social identities, courts must shift their emphasis from what the legal subject is to how he or she appears to be. Since appearance is the terrain in which prejudice occurs, the law

35. Herrmann continues:

Sex itself becomes a gendered category. A "natural" sex is not established prior to culture, functioning as a neutral surface on which culture acts without consideration to sexual politics . . . . What allows sex to appear as "natural" is the assurance that it will not be mistaken for a performance. Even when gender is "performed" through cross-dressing, the performance relies on the reestablishment of a single "true" sex.


36. See Maya, supra note 3, at 98 ("Essentialists about identity suppose that the relationship between the descriptive and the subjective is one of absolute identity. They imagine, for example, that if a person can be assigned to a racial or gender category on the basis of some irreversible characteristic like skin color or genitalia, then everything else of significance, including how he or she self-identifies, his or her propensity for violence, personal characteristics, and even innate mental capacity follows from being a member of that particular group.").

should focus its analytical rigor on whether the intolerant social responses towards people with a certain appearance are justifiable, and not on whether an appearance is justifiable in terms of the identity it allegedly reflects. 38

Sociologist Zygmunt Bauman captures the type of response demonstrated by the Ninth Circuit’s decision in Hernandez-Montiel. The impulse to produce new categories in reaction to vague classifications reflects the modern urge for order and semiotic transparency:

By themselves, hermeneutic problems do not undermine the trust in knowledge and attainability of behavioral certainty. If anything, they reinforce both. The way in which they define the remedy as learning another method of classification, another set of oppositions, the meanings of another set of symptoms, only corroborates the faith in essential orderliness of the world and particularly in the ordering capacity of knowledge. 39

In order to be allowed entrance, both into the legal order and into the country, the petitioner had to cease being what Bauman calls one who is in principle undecided. 40 Temporarily, the applicant was allowed to occupy the place of the “as-yet-undecided,” 41 but only until the law adjusted for this new identity category—not homosexual, not man, not woman, but homosexual with female sexual identity. Bauman explains:

The other of modern intellect is polysemy, cognitive dissonance, polyvalent definitions, contingency; the overlapping meanings in the world of [what the modern intellect assigns to] tidy classifications and filing cabinets. Since the sovereignty of the modern intellect is the power to define and to make the definitions stick—everything that eludes unequivocal allocation is an anomaly and a challenge. The other of this sovereignty is the violation of the law of the excluded middle. In both cases, resistance to definition sets the limit to sovereignty, to power, to the transparency of the world, to its control, to order. 42

Thus, the incident in which the applicant tried to cross the United States border while dressed in women’s clothing threatened America’s integrity and the sovereignty of its borders in more than the literal way. The mismatch between sex and dress style also posed a challenge to the epistemological logic

38. That dress was the central terrain of the social prejudice is further illustrated by a statement of a human rights organization quoted in the decision stating that “[t]he government has said it will not protect transvestites unless they are dressed like men . . . .” Id. at 1096.
40. Bauman adds:
Some strangers are not, however, the as-yet-undecided; they are, in principle, undecideds. They are the premonition of that ‘third element’ which should not be. These are the true hybrids, the monsters—not just unclassified, but unclassifiable. They do not question just this one opposition here and now; they question oppositions as such, the very principle of the opposition, the plausibility of dichotomy it suggests and feasibility of separation it demands.
They unmask the brittle artificiality of division. They destroy the world.
Id. at 58-59.
41. Id.
42. Id. at 9.
of modern society and its laws, for this mismatch challenged the order of neatly classifiable identities.

Evident in the legal treatment of this case was an impulse to draw yet another clear dividing line: a line between appearance, which is framed as contingent and unreliable, and identity, which is more solid and foundational. But identity is apprehended through appearance, and therefore such a clear division misrepresents reality. Moreover, by insisting on framing the petitioner’s persecution with reference to his identity rather than with reference to the social response towards his perceived identity, the court reaffirmed the contention that the plaintiff was indeed different “at the core.” In addition, the judicial opinion presumed that any given dress style has one, clear-cut meaning, and furthermore that this meaning is fully chosen and controllable. The next Section’s analysis demonstrates why it is futile for the legal inquiry to focus on the correctness of the legal subject’s self-labeling.

B. Appearance Cases Are About Appearance, Not Identity

The judicial disposition to evaluate appearance according to the extent to which it is connected to an underlying identity leads to incoherent caselaw. As we see below, similar appearance claims are adjudicated in opposite ways depending on how courts assess the function of appearance in reliably signaling the plaintiff’s identity. I demonstrate this point by reviewing two cases that presented similar facts, but that nonetheless yielded opposite legal conclusions. In both cases, the plaintiffs argued that they were discriminated against on the basis of sex because their gendered appearance did not conform to their biological sex. The difference between the cases was that in one, the plaintiff was able in the court’s eyes to link his appearance claim to his identity, convincing the court that there was no disharmony between his appearance and his (real) identity. In the other, the plaintiff was unable to establish that her appearance was warranted by her identity, and the court therefore declined to protect her appearance.

The plaintiff in *Rosa v. Park West Bank & Trust* entered a bank to apply for a loan. “A biological male, he was dressed in traditionally feminine attire.” After examining his photo identification cards, the bank employee told Rosa that she would not provide him with a loan application until he “went home and changed.” She said that he had to be dressed like one of the identification cards in which he appeared in a more

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44. *Rosa*, 214 F.3d at 213.
traditionally male attire before she would provide him with a loan application...  

Rosa sued the bank for sex discrimination under the Equal Credit Opportunity Act (ECOA), which prohibits discrimination against credit applicants "on the basis of race, color, religion, national origin, sex or marital status, or age..." The district court granted the bank's motion to dismiss the plaintiff's sex discrimination claim, reasoning,

[The issue in this case is not [Rosa's] sex, but rather how he chose to dress when applying for a loan. Because the Act does not prohibit discrimination based on the manner in which someone dresses, Park West's requirement that Rosa change his clothes does not give rise to claims of illegal discrimination. Further, even if Park West's statement or action were based upon Rosa's sexual orientation or perceived sexual orientation, the Act does not prohibit such discrimination.]

On appeal, the bank argued that the dismissal below should be affirmed because the ECOA does not apply to cross-dressers, citing cases referring to homosexuals and transsexuals. The First Circuit reversed the dismissal and remanded the case back to the lower court to determine as a question of fact just what exactly the bank clerk assumed the plaintiff to be: a man, or a homosexual. The First Circuit explained that "[w]hile the district court was correct in saying that the prohibited bases of discrimination under the ECOA do not include style of dress or sexual orientation, that is not the discrimination alleged. It is alleged that the Bank's actions were taken... 'on the basis of... [the appellant's] sex.'" Since the antidiscrimination statute banned only discrimination based on sex and not discrimination based on sexual orientation, the plaintiff would have a successful sex discrimination claim if it were factually established that the bank clerk sent him home "because she thought that Rosa's attire did not accord with his male gender: in other words, that Rosa did not receive the loan because he was a man, whereas a similarly situated woman would have received the loan application." But the evidence would also have to indicate that the clerk did not presume the plaintiff to be gay, for if this were the case, her behavior would amount to discrimination based on sexual orientation, which is not prohibited by the ECOA. The plaintiff would win the case, then, if he were taken to be a man but not a gay man. It is too

45. Id.
48. Rosa, 214 F.3d at 213 (quoting the opinion below).
49. Id.
50. Id.
51. Id. at 215 (bracketed addition and second omission in original).
52. Id.
53. There is a more optimistic way of reading the case, but it is unclear whether future case law will employ this reading. Such an interpretation of the case would focus on the decision's unprecedented recognition of a transsexual's claim for sex stereotyping. If a man wearing women's clothing can win a
early to say what the facts will show; it is apparent, however, that, under some set of facts within the bounds of the allegations and non-conclusory facts in the complaint, Rosa may be able to prove a claim under the ECOA. 54

The game of identity categorization is at the center of the case. It may be that the clerk thought that her client was a man dressed in a manner that was inconsistent with his sex, said the court, but it may also be the case that the clerk "refused to give Rosa the loan application because she thought he was gay, confusing sexual orientation with cross-dressing." 55 The court adopts a reproachful tone regarding the clerk's failure to accurately and correctly diagnose the identity of her client, as if the distinction between these identities were clear, stable, and decipherable at a glance.

If the clerk took the plaintiff to be gay, the court reasoned, then she must have been unaware of any distinction between homosexuals and cross-dressers. This implied that the court itself knew what the plaintiff's identity was: He was a cross-dresser. It also implies that if he were a cross-dresser, then the court felt he had a sex discrimination claim (as a man who can claim that a similarly situated woman would have been treated differently). There are two fascinating elements of this account. First, for the court, a man in a dress was a cross-dresser. In an unbearable lightness of deciphering identity, the plaintiff's behavior (which for all the court or we might know could have been a one-time event) was instantly collapsed, or translated, into a clear and stable identity category. The court left no space for uncertainty, interpretation, or formation between the appearance and the identity. It is against this judicial habit (or urge) to typologize that I write this Article. Rosa did not claim to be a cross-dresser; the court thus should not have assumed unquestioningly that merely because he entered the bank in a dress, he was and could only be a cross-dresser. In fact, as I argue throughout this Article, the question of the apt classification of the plaintiff's identity was not the right one in determining whether he suffered unlawful discrimination.

The court itself recognized that the statute prohibiting sex-based discrimination protects cross-dressers: By saying that the plaintiff would win if the bank clerk perceived him as a man and that the plaintiff was a cross-dresser, the court suggested that cross-dressers are covered by the prohibition on sex-based discrimination. This means that gender has "snuck in" to the sex-based

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54. Rosa, 214 F.3d at 216.
55. Id.

sex discrimination claim, this might mean that the court interpreted the law as forbidding discrimination generated by a perceived gap between one's sex and one's gender. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Brennan, J., plurality opinion), the Supreme Court declared that evaluating a female employee negatively because she did not dress, talk, and behave femininely amounted to sex-based discrimination. *Rosa* is the first case in which this claim was argued successfully by an apparent transsexual. In this respect, *Rosa* is indeed a remarkable achievement that should not be understated. However, it remains to be seen if the case will develop in this way. See also *Simonon v. Rowny*, 232 F.3d 33 (2d Cir. 2000), discussed infra note 91.
discrimination doctrine; if cross-dressers can be protected when the statute prohibits sex-based discrimination, then it is arguable that transgendered people could be protected as well. After all, wouldn’t a cross-dresser and a transgendered person who has not started any hormonal or surgical treatments and only wears feminine attire look the same to the bank clerk (as to anyone else in interacting with them)? Ultimately, regardless of the “correct” classification of the plaintiff’s identity, he was discriminated against because of his sex, since he did not wear clothes that conformed to his sex.

It is not fully clear, then, which of the two questions the Rosa court saw as determinative: the question of the clerk’s perception of the plaintiff’s identity, or the question of the plaintiff’s identity as defined by the court. The tables below represent an attempt to fully understand the reasoning in Rosa according to the two options: Table A assesses the outcomes if the main question is one of the identity of the plaintiff as perceived by the clerk, and Table B assesses the outcomes if the main question is the identity of the plaintiff as defined by the court.

If the main question is one of perceived identity, then as long as the clerk perceived the plaintiff as a heterosexual man (be it a man, a cross-dresser, or a pre-operative transsexual), he would win a sex-based discrimination claim. However, if he were perceived as gay or as a post-operative transsexual (that is, as a woman or as someone who had the social identity of a woman and was thus expected to wear women’s clothes), then the plaintiff would not have a sex-based discrimination claim—because he could not claim that a similarly situated “social” male (for example, a female-to-male transsexual) who wore a dress would have been treated better.

<table>
<thead>
<tr>
<th>Table A</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Plaintiff, while wearing feminine clothes, perceived by defendant as:</strong></td>
</tr>
<tr>
<td>A man</td>
</tr>
<tr>
<td>A gay man</td>
</tr>
<tr>
<td>Cross-dresser</td>
</tr>
<tr>
<td>Pre-operative transsexual</td>
</tr>
<tr>
<td>Post-operative transsexual</td>
</tr>
</tbody>
</table>

56. I am absolutely in favor of broadening the bases for unlawful discrimination so that they include gender identity and sexual orientation. My critique should not be interpreted to suggest that I do not support such broadening of the antidiscrimination standards. However, I insist on developing this critique because, although in the short run this broadening might seem progressive, in the long run it reinforces a skewed understanding of identity and of the dynamics of discrimination.

57. There is little point in classifying a subject’s gender identity when this classification is general and devoid of any particular context. For example, the plaintiff may be classified as transgendered for the purpose of requiring his health insurance to participate in his gender reassignment procedures. But the notion that there is validity or stability to the court’s seemingly factual observation that he is “this” or “that” is troubling.
The other possibility that emanates from the language of the opinion also suggests incoherent outcomes. By saying that the plaintiff “was” a cross dresser, the court might be suggesting that the determinative question in the case was what the plaintiff’s underlying identity was. If this is so, then the legal situation is as follows:

**Table B**

<table>
<thead>
<tr>
<th>Plaintiff classified by the court as:</th>
<th>Does plaintiff have a sex-based discrimination claim?</th>
</tr>
</thead>
<tbody>
<tr>
<td>A man</td>
<td>Yes</td>
</tr>
<tr>
<td>A gay man</td>
<td>No</td>
</tr>
<tr>
<td>Cross dresser</td>
<td>Yes</td>
</tr>
<tr>
<td>Pre-operative transsexual</td>
<td>No</td>
</tr>
<tr>
<td>Post-operative transsexual</td>
<td>No</td>
</tr>
</tbody>
</table>

There is not only incoherence between the two scenarios, but also internal incoherence in each. For example, there seems to be no justification under the prohibition on sex-based discrimination explaining why cross-dressers and some transsexuals are covered while other transsexuals are not.

By focusing on what the clerk assumed the plaintiff to be, the court, as in the asylum case discussed earlier, 58 transformed the case into one that depended on a fit between dress and identity. If the clerk took Rosa to be a man, then he was a cross-dresser, and cross-dressers should not be asked to wear clothes that reflect their biological sex, but clothes that reflect the opposite sex (this is, after all, what cross-dressers wear). But if the clerk thought Rosa was gay, then asking him to change from a dress into male clothing presents a legitimate request, since most homosexual men do not wear dresses.

The point of this analysis is not that Title VII and similar antidiscrimination rules should be expanded to include a ban on discrimination of homosexuals (although this would undoubtedly be a positive development). Nor am I merely arguing that Rosa has a sex-based discrimination claim because his gender did not match his sex. Rather, I posit that the court’s interest in the plaintiff’s identity (either as perceived by the bank clerk or as classified by the court itself) reinforces a flawed conception of the relationship between appearance and identity. We cannot assume that Rosa’s identity (transsexual, cross-dresser, gay, or, for that matter, just a man who ran out of clean pants and borrowed his wife’s dress to run an errand) preceded his attire. The dress that he wore to the bank cannot be taken as merely a reflection of his underlying identity. Just as appearance and identity can never fully overlap (for, as in language, there is always a representation gap between “internal” identity and

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58. Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000); supra Part I.A.
"external" manifestation), so appearance and identity cannot be completely disconnected. Rather, in the context of discrimination, it is the space between identity and appearance that is interesting.

Indeed, discrimination is a matter of perception. The discriminating party perceives the other as having certain stigmatized traits. But the question that the court should have asked is not, "What identity did the clerk perceive Rosa to have?" but rather, "How did she perceive the connection between Rosa’s identity and his appearance?" This is where social meaning is created; this is where social interaction occurs. Social responses towards a social actor never respond to identity alone or to appearance alone. They respond to the meaning created by the synthesis, or the dynamic, between one’s appearance and one’s presumed identity (just as in language, it is neither the signifier nor the signified alone that makes meaning, but their interrelation). In sum, Rosa’s sex was ambiguous to the bank clerk. It was this perceived ambiguity, rather than the identity that she perceived him to be, that prompted the discrimination. The problem with the clerk’s behavior was not her poor literacy of the typology of sexual identities but her intolerant response to a sexually ambiguous appearance.

In a recent case that raised similar facts and legal questions, the Sixth Circuit criticized logic such as the Rosa court’s:

[S]ome courts have held that this latter form of discrimination is of a different and somehow more permissible kind. For instance, the man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination “because of... sex,” but rather, discrimination against the plaintiff’s unprotected status or mode of self identification. In other words, these courts superimpose classifications such as “transsexual” on a plaintiff, and then legitimate discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.59

The decision in Rosa, then, should have concentrated on the biased behavior of the bank clerk, based on the perceived nonconformity between the plaintiff’s sex and gender. For the purpose of reviewing the plaintiff’s sex discrimination claim, the law should be indifferent to the question of what he was. Why should the seemingly ontological fact that he was a transsexual, or a cross-dresser, matter? Whatever his clinically typologized sexual identity,

59. Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) (emphasis added). The judgment’s strongly critical language added that the district court accounted for the plaintiff’s contra-gender behavior “only insofar as it confirmed for the court Smith’s status as a transsexual.” Id. This case is discussed more elaborately infra Section III.A.
shouldn’t the law focus on the clerk’s response and question its legitimacy. Rather than framing the case around the plaintiff’s identity underneath his appearance, I suggest that this case, as most appearance cases, revolved around our desire to decipher identities instantly. More accurately, it was about whether the law should support the expectation that social actors should be readily labeled, that is, easy to figure out at a glance.

Things get more complicated if one considers the information about Rosa available in documents published after the ruling. The case was litigated based on the plaintiff’s identity as a male, and the decision referred to him using male pronouns. After the case was decided at the appellate level, the plaintiff’s counsel referred to Rosa in academic publications related to the case using female pronouns, thus suggesting that Rosa was undergoing a sex change and interested in being perceived as a woman. This variant may change the doctrinal logic of the decision yet again, for if the plaintiff is legally categorized as a woman, this pulls the rug out from under her sex discrimination claim. In other words, if the plaintiff is a woman, she can no longer argue sex-based discrimination, because she cannot argue that a similarly situated person of the opposite sex would have been treated any better.

In the 2004 case of Jespersen v. Harrah’s Operating Co., the plaintiff had an appearance claim similar to Rosa’s. Unlike Rosa’s claim, Jespersen’s was denied. The theoretical framework developed in this Article helps explain this contradictory result.

The plaintiff, Ms. Jespersen, worked as a casino bartender. After 21 years in her job, in which she received outstanding reviews for her performance, her employer introduced new grooming standards, stating that for female employees “[m]akeup . . . must be worn and applied neatly in complimentary colors. Lip color must be worn at all times.” Jespersen’s earlier attempts to wear makeup made her feel emotionally distressed, “sick, degraded, exposed, and violated.” Still, when makeup became mandatory in her workplace, she tried wearing it in order to conform to the new regulations, but again felt extremely unconformable and ill. After refusing to wear makeup, she was fired. The district court granted summary judgment for the casino, rejecting Jespersen’s Title VII claim. The court explained that since the plaintiff could

62. 392 F.3d 1076 (9th Cir. 2004), aff’d, 444 F.3d 1104 (9th Cir. 2006) (en banc).
63. Id. at 1078 n.2.
64. Id. at 1076.
not demonstrate that the grooming requirements burdened women more than they burdened men, the sex discrimination claim was unwarranted. Indeed, the casino’s grooming policy created a thorough regime of separation between the appearance of men and women:

The policy at issue required women to wear makeup, but prohibited men from doing the same. It allowed women to wear their hair up or down without a restriction on length, but prohibited men from having their hair reach below the top of their shirt collars. Men could not wear nail polish; women could wear nail polish, but only in certain colors. Finally, each had to wear solid black leather shoes.

On appeal, the Ninth Circuit similarly rejected Jespersen’s claim. Describing Jespersen’s early experience wearing makeup in even grimmer colors than the lower court, Judge Tashima, writing for the majority, noted that “Jespersen found that wearing makeup made her feel sick, degraded, exposed, and violated. Jespersen felt that wearing makeup ‘forced her to be feminine’ and to become ‘dolled up’ like a sexual object.” While the lower court examined only the tangible burdens that the duty to wear makeup presented to women (time and money), the Ninth Circuit acknowledged the performative aspect of makeup—that is, its effect on the plaintiff’s sense of self and ability to fulfill her duties as a bartender. In other words, the court recognized that “wearing makeup actually interfered with Jespersen’s ability to be an effective bartender (which sometimes required her to deal with unruly, intoxicated guests) because it took away [her] credibility as an individual and as a person.”

Jespersen told a story about the work of appearances “from the outside in” in shaping her sense of self, including her sense of expected and possible conduct. The makeup made her feel too feminine and limited her ability to signal assertiveness and authority with patrons of the casino. Femininity was associated in her mind with submissiveness and service, rather than with setting boundaries and enforcing the rules, as her job required.

A claim concerning the possible effects of appearance on one’s sense of self is foreign to the logic that courts manifest in appearance cases—a logic that treats appearance only as a reflection of a preexisting underlying identity. As Jespersen demonstrates, the existing doctrine regarding appearance provides no tools for courts to understand a claim such as Jespersen’s. According to the judicial logic that seeks a fit between appearance and identity, the makeup

68. Jespersen, 392 F.3d at 1077.
69. Id.
70. Id. (citations omitted).
requirement in Jespersen is not problematic at all. Women wear makeup, and, since Jespersen is a woman, it is perfectly acceptable that the employer requires that she reflect her underlying sex through appearance.71 Had the plaintiff been a man, the employer could not have forced him to wear makeup.72 But makeup for a woman is the way of the world; it keeps navigation in the convoluted social jungle of sexual identities relatively safe. If women did not wear makeup, we would find ourselves in a dreadfully vague social environment, an endless game of fluid identities.73 The courts are happy to help prevent this from happening.

The facts leading to Rosa and Jespersen form an identical legal claim. In both cases, plaintiffs encountered negative treatment because their appearances were perceived as failing to comply with their underlying identity: Rosa was perceived as being too feminine for his male sex, and Jespersen was perceived as too masculine for her female sex.

And yet, although the facts are similar and both plaintiffs relied on a sex discrimination claim, the outcomes differed. The plaintiff in Rosa won (or could win, depending on the facts established in the lower court after remand), while the plaintiff in Jespersen lost. This is because the legal logic seeks harmony between appearance and identity, so that the former reliably reflects the latter. This logic explains why Rosa was successful and Jespersen was not. In Rosa, the court thought that sending a cross-dresser home due to his feminine attire is an illegitimate behavior, for there is no reason to reprimand a man for an appearance that fits his identity.74

71. As the dissent in the en banc decision notes: Makeup... touches delicate parts of the anatomy—the lips, the eyes, the cheeks—and can cause serious discomfort.... If you are used to wearing makeup—as most American women are—this may seem like no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive.

72. Everyone accepts this as a reasonable reaction from a man, but why should it be different for a woman? ... I see no justification for forcing [women] to conform to Harlan's quaint notion of what a 'real woman' looks like.

73. Jespersen, 444 F.3d at 1117-18 (Kozinski, J., dissenting).

74. See Devon Carbado et al., Makeup and Women at Work, 42 HARV. C.R.-C.L. L. REV. (forthcoming 2007) (manuscript at 4-12, on file with author) (reviewing the history of women's makeup conventions and its relationship to female subordination).

75. Courts occasionally express their aversion to a world in which identities are blurred. See, e.g., Devine v. Loomis, 621 F. Supp. 894, 897 (S.D.N.Y. 1985) ("At least until that dreadful day when unisex identity of dress and appearance arrives, judicial officers... are entitled to some latitude in differentiating between male and female attorneys, within the context of decorous professional behavior and appearance.").
The plaintiff in Jespersen could not establish the necessary fit between her identity and the appearance available to her since she could not argue that her desired, unmade-up face fits with her female identity. Furthermore, the court could not see what was wrong with an employer’s grooming requirement that enhances the “intelligibility” of sex and makes sure that men and women look like their sex dictates. The plaintiff in Jespersen might thus have been better off had she claimed that she was a cross-dresser rather than merely a woman refusing to wear makeup and adhere to her sex. Just as the plaintiff in Rosa might win his claim by establishing that he was discriminated against as a cross-dresser (because similarly-situated women would have been treated differently), so might the plaintiff in Jespersen have argued that as a cross-dresser she wanted to maintain a masculine appearance and that for her employer to require her to wear makeup amounted to sex discrimination. Like the plaintiff in Rosa, had Jespersen had an underlying identity that justified not wearing makeup, she would have provided the court with a valid reason, under current law, to accept her claim, and would thus have appealed the court’s concern that her appearance did not accurately reflect her identity.

The opinions in both Rosa and Jespersen make use of progressive approaches to gender identity, only to promote a conservative agenda. In Jespersen, the district court accepted the employer’s argument that current social norms are more liberal and less strict with regard to the differences in appearances between the sexes: “As Plaintiff states, ‘in modern society, both men and women wear makeup’ . . . . Thus, prohibiting men from wearing makeup may be just as objectionable to some men as forcing women to wear makeup is to Plaintiff.”

Indeed, nowadays men can look feminine, and women can walk around looking masculine. Harrah’s Casino, however, will not tolerate such transgressions, and it will realign unfitting social actors to ensure that men look like men, and women look like women. Similarly, in Rosa, the court conveyed the importance of being literate in the complex world of gender identities. The bank clerk should have been able to differentiate a gay man from a cross-dresser or a transsexual. The bank in Rosa should not be expected to be tolerant of men who wear women’s clothing with no apparent reason. This

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such criteria are applied to different classes of people, the practice is not actionable. No Court can be expected to create a standard on such vagaries as attractiveness or sexual appeal.”). I realize that under Title VII doctrine, plaintiffs must establish that they belong to a protected class. My contention is that the attractive type of appearance that was preferred by the employer is indeed related to sex and to race, but not in the direct way that the court unsuccessfully searches for. The fact that one of the employees was Iranian, for example, could plausibly mean that he had too dark or foreign a look to be considered attractive for the employer. Thus, it was not the national origin in itself that prompted prejudice against him, but the embodied and concrete manifestation of that national origin.

75. Jespersen, 392 F.3d at 1193. The court further recognized that while “some women may consider the requirement to wear makeup burdensome . . . some men may feel the same way with regard to the male makeup policy.” Id.

76. Rosa, 214 F.3d 213 (1st Cir. 2000); see also discussion supra Part I B.
deviation from the norm will be limited to men with a note from the
psychiatrist that provides them with the right underlying identity.

With such rulings, courts essentially constitute and protect a dull, if not
oppressive, account of the relationship between appearance and identity.
According to the vision of the social world emerging from, and promoted by,
appearance cases, no sympathy should be granted for vagueness or uncertainty
about social actors’ identities.

Interlude I. The Problematic Account of Identity Emerging from Appearance
Cases

I have suggested that appearance adjudication should shift its emphasis
from tying a given name, hairstyle or dress style to the plaintiff’s identity to
asking about the role of that appearance in relation to the plaintiff’s
personhood. This Interlude explores the problematic account of identity that
emerges from appearance caselaw. The reasons that personhood is a more
appropriate concept in the context of appearance cases will be discussed in Part
II below.

In the past four decades since the civil rights movement’s first significant
achievements, identity has become an ever more prevalent term of art for
lawmakers and legal theorists. As feminists and anti-racist advocates have
insisted (and in their footsteps proponents of gay rights and disability rights),
much is overlooked when questions are examined from a supposed “view from
nowhere.” Accounting for the concrete experiences of people and groups
whose perspectives are markedly different from the hegemonic perspective is
essential since different social positions, material conditions, and access to
political power produce different types of knowledge, concerns, and modes of
action. The success of these claims has meant that categories such as sex, race,
ethnicity, nationality, age, and disability naturally roll off the tongues of
policymakers, lawyers, and judges, and inform their analyses more than ever
before.

There is no denying that introducing a vocabulary of identity into the law
has significantly increased the political voice of underrepresented groups,
narrowed economic gaps, and generally expanded access to cultural and
material resources. The lurking question, however, is what new blind spots the
identity-based analytical framework might produce. How might this new prism,
which has been valuable in enabling us to understand social stratifications and
to notice covert hierarchies, divert our attention from other complexities or
skew our perception of social dynamics?

My project can therefore be understood in the context of an ongoing
conversation in legal theory—a conversation that explores ways to invoke
identity as a basis for political empowerment and legal protection without
erasing its complexity, fluidity, and tentative nature and without regressing into reductive essentialism.

Appearance cases raise questions about the ways in which courts use identity as an instrument organizing the social (and legal) world and as a means of ascribing characteristics and intentions to legal subjects. The picture of identity that emerges from the identity-centered appearance cases is troubling. The legal account of identity and the way in which it operates in relation to appearance renders this question extremely pressing. Appearance cases generate a worrying sense that not much space is left in the courtroom for the voices of actual, concrete people, because it is all taken up by “identities.” One’s appearance claim is assessed not according to one’s own report of the role or importance of the appearance in one’s life, but according to a legal assessment of what one’s assumed identity has to do with the disputed appearance. The actual individuals who stand before the bench convey a set of affiliations, circumstances, and sensibilities that never add up to an ideal-type identity category. Those individuals are subjected by the law to reductive notions of what their supposed identity should look like.

The stipulation that identity and appearance should reinforce one another reductively confines the repertoire and horizon of identity. In other words, when the law requires that appearance be explained in terms of identity, the specific (as opposed to ideal-type) personal stories of litigants’ complex sets of affiliations, aspirations, and subject positions are left unrecognized. The law construes the identity of the persons in front of it as if it were a transparent essence with an already organized narrative, as opposed to a rich, nuanced, and ever-evolving poetic text.

77. We should consider how the assumption that identity and appearance would be mutually reinforcing confines the repertoire and horizon of identity. When the law requires that one’s appearance be explained in terms of one’s identity, it can no longer recognize the concrete (and therefore far from ideal-type) personal stories of its subjects’ complex sets of affiliations, aspirations, and statures. We might say that the “text of the person” is reduced from a rich and nuanced poem of sorts, to a one-dimensional, ready-made narrative.

78. Zygmunt Bauman suggests that our current condition, in which each of us has multiple and only partial affiliations, is essential to understanding contemporary selfhood:

[T]he mode of “being a stranger” is experienced, to a varying degree, by all and every member of contemporary society with its extreme division of labour and separation of functionally separated spheres. . . . The individual is a “displaced person” by definition: it is the very fact that he cannot be fully subsumed under any of the numerous functional subsystems which only in their combination constitute the fullness of his life process (the fact, in other words, that he does not belong fully to any of the subsystems and no subsystem can claim his sole allegiance) that makes him an individual. . . . One is tempted to say that he is “fully at home” only with himself. . . . The self is burdened with the impossible task of rebuilding the lost integrity of the world; or, more modestly, with the task of sustaining the production of self-identity; doing on its own what was once entrusted to the native community. In fact, it is now inside the self that such a “native community,” as the frame of reference for self-identity, must be construed.

BauMaN, supra note 39, at 94-96.

79. See generally SEYLA BENHABIB, SiTUATING THE SELf: Gender, Community and Postmodernism in Contemporary Ethics (1992) (developing a conception of selfhood that interrelates social position, cultural context, and material conditions).
Considerable scholarship in the humanities and social sciences has repeatedly provided cautionary notes about employing identity-based analysis. We know by now that the repertoire of active and meaningful identity categories varies from society to society and from era to era. The same people are categorized under different identities in different cultural contexts. Accordingly, we have learned that one’s identity is constituted within the culturally available classifications and that it is contingent upon how one is socially situated. Finally, we know that identities are dynamic and that they are maintained by repeated social interactions.  

As the cases examined in this Article demonstrate, the use of identity as an analytical framework is not without consequence: It has real ramifications on the lives of law’s subjects. I am interested in the conditions in which it would be possible to keep identity as a useful and viable jurisprudential term, while refraining from flattening and simplifying our understanding of the term beyond recognition. Such successful usage of identity would require the law to develop strategies to accommodate the complex ways in which identity becomes a meaningful social category. Representation and appearance are central to this process. I suggest that drawing on the model of poetic language would be helpful in developing a more compelling way of using identity in lawmaking.

If the law were to recover the possibility of using identity, it would need to recognize that the main locus of identity is not some objective criteria devoid of social context, but, rather, that identities are formed through ongoing social interactions which create and shape their meaning.  Such social interactions do not occur between bodiless, abstract, and general concepts (“Hello, I am Blackness, nice to meet you. You must be Whiteness.”). Contrary to the claim implied in current jurisprudence, the law can ascribe identity to an individual, not by transcendental view from the height of the bench, but through the same straightforward means that any social actor has no choice but to use. That is, through concrete encounters between specific individuals. One becomes identified (i.e., seen as having a particular identity) only through social

80. The scholarship exploring the interplay between culture and identity is large in quantity and diverse in disciplinary domains and methodology. For two essays that review and critique the development of identity as an analytical category in the last half-century and that were particularly illuminating for my project, see Linda Martin Alcoff, Who’s Afraid of Identity Politics?, in RECLAIMING IDENTITY: REALIST THEORY AND THE PREDICAMENT OF POSTMODERNISM 312 (Paula M.L. Moya & Michael R. Hames-Garcia eds., 2000) and Roger Brubaker & Frederic Cooper, Beyond “Identity,” 29 THEORY & SOC’Y 1 (2000).

81. See JAMES A. HOLSTEIN & JABER F. GUBRUM, THE SELF WE LIVE BY: NARRATIVE IDENTITY IN A POSTMODERN WORLD 21-24 (2000) (discussing William James’s conception of self). Holstein and Gubrium describe James’s caution that “to have words for things, such as the I and the me of the self, risks reifying them rather than sustaining their referential status as simultaneous facets of the selves we are . . . . Self is part and parcel of the process of referring to ourselves, to others, and to the world, however that is accomplished. It doesn’t exist separate from, or over and above, communication.” Id. at 23.
interactions that occur among concrete bodies, with particular appearances and habits of going about the world.

For example, in the context of race-based legal claims, such as discrimination or apportioning of voting districts, it would make little sense to talk about race as an objective (historical or biological) category. Blackness in America is anchored in actual history of oppression. If one’s ancestors were forcefully brought from Africa to be traded and enslaved, one is Black. But a great deal of why race matters in law has less to do with determining who in fact is connected to slavery and more to do with who is perceived as being connected to it.82 New immigrants to the United States from Africa find that American society often concludes that they are Black, and treats them in ways informed by this assumption. Correspondingly, Blacks with concrete family histories tracing back to slavery find that having an appearance (skin, hair, manner of speaking) that is not stereotypically perceived as Black requires them to actively define their relationship to their Blackness because their social environment does not immediately associate their visible, manifested characteristics with a racial category.

In appearance cases the question is not the existence of race underneath the appearance, but the social response to bodies that manifest markers of racial identity.83 If one can be Black or gay as long as he or she is not "in your face" about it (that is, as long as he or she “covers,” to invoke Yoshino’s term),84 then the issue in a case in which an employee is fired for wearing cornrows is not race in principle, but the specific way in which racial identity is performed through its various markers.85 There might be less racial discrimination if race

82. See Vivian Grosswald Curran, Semiotics and Law, in Hi-Fives: A Trip to Semiotics 219, 228 (Roberta Kevelson ed., 1998) (“The contextuality and relationality of meaning, the derivation of identity and definition from dissimilarity and contrast, do not imply that there is no reality. They do imply that, although we may know things as they are in reality, we never can be sure that we do.”), see also 1 CHARLES SANDERS PEIRCE, THE ESSENTIAL PEIRCE: SELECTED PHILOSOPHICAL WRITINGS 30 (Nathan Houser & Christian Kloesel eds., 1992) (“We have no power of thinking without signs.”). For studies that explore the ways in which race should be understood through its social perception and function, see, e.g., Ariela J. Gross, Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South, 108 YALE L.J. 109 (1998); Ian F. Haney López, The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice, 29 HARY. C.R.-C.L. L. REV. 1 (1994); and Daniel J. Sharfstein, The Secret History of Race in the United States, 112 YALE L.J. 1473 (2003).

83. Robert Post developed this point in a poignant critique of the blindness myth in American antidiscrimination doctrine. See Robert C. Post, Prejudicial Appearances: The Logic of American Antidiscrimination Law, in PREJUDICIAL APPEARANCES, supra note 11, at 1. My project can be seen as picking up where Post left off, and asking what it would look like were adjudication to abandon this myth of blindness. If it is insufficient to consider race or sex only in the abstract, then can the law maintain protection against race or sex discrimination even if it allows itself to become aware and take into account the concrete appearances of its subjects?

84. See Yoshino, supra note 11.

85. Diana Tietjens Meyers discusses the way in which prejudice is a matter of concrete interpersonal interaction, not of principled negative standpoints. "Cultivating tolerance for diversity, for example, is not just a matter of critiquing false stereotypes—that is changing your mind. Bigoted beliefs are somatized as comportment of which the bigoted individual is unaware—shrinking from contact, keeping distance, and not looking at the Other while she or he is speaking.” Diana Tietjens Meyers, Who’s There? Selfhood, Self-Regard and Social Relations, 20 HYpatia 200, 294 (2005) (citation
were an abstract concept without embodied appearances, ways, meanings, or styles related to it.

The issue, then, is not what legal subjects are but how their habits and practices constitute them to themselves and to the world. To the extent that the question in appearance cases is legal subjects' identity, such identity would not be captured by some stable essence. Any search for the "who" of the subject standing before the law should first carefully define the object of the search. Identity is dynamic and unstable, shaped and projected through constantly negotiated tentative gestures rather than through decisive propositions. Identity is located neither solely in what we think of as the form nor purely in what we think of as the content of identity, but in the space between these two idealized concepts.

In the context of the cases at hand, identities are handy social artifacts, not realities. Our reliance on identity categories such as woman, Protestant, Asian, creative, or disabled is nothing but shorthand for a set of characteristics that have morphed from an accidental collection of qualities into a meaningful amalgam through the creation of an identity category. Identities are ways of seeing; they are a method of quick referencing and generalizing that is certainly useful at times, but should not mislead us to think that what is used as a shorthand reference actually exists, or at least that whatever it actually exists is relevant to adjudicating appearance cases. The picture that emerges from my study of cases involving personal appearance is one of insistent judicial attempts at taming markers and subjecting them to a desire for certainty in the quick decipherability of identity. That is why I propose moving from identity to personhood, a shift that will release us from futile categorization.

C. Appearance Cases of Minority Group Members Are Also About Appearance, not Identity

In the cases examined thus far, the issue that the plaintiffs brought to court concerned their appearance. As we have seen, the judicial inquiry shifted the emphasis of these claims from the negative social response regarding the plaintiffs' appearance to their underlying identity. The question turns from one of epistemology (How do we know what we know about the plaintiffs?) to one of ontology (What are the plaintiffs?). I showed that this focus on an identity

omitted); see also Alison M. Jaggar, Love and Knowledge: Emotion in Feminist Epistemology, in WOMEN, KNOWLEDGE, AND REALITY: EXPLORATIONS IN FEMINIST PHILOSOPHY 129, 143 (Ann Curr
& Marilyn Pernall eds., 1989) ("Within a hierarchical society, the norms and values that predominate tend to serve the interest of the dominant groups... Whatever our color, we are likely to feel what Irving Thalberg has called 'visceral racism'; whatever our sexual orientation, we are likely to be homophobic; whatever our class, we are likely to be at least somewhat ambitious and competitive; whatever our sex, we are likely to feel contempt for women. The emotional responses may be rooted in us so deeply that they are relatively impervious to intellectual argument and may recur even when we pay lip service to changed intellectual convictions") (footnote omitted).
that is supposed to underlie the appearance—and thus anchor it and legitimize it—leads to unproductive and incoherent caselaw. In this Section, I turn to cases in which identity was at the center of the claim in the first place: Plaintiffs argued that their appearance should be protected because it was related to their minority identity (their race, their national origin, etc.). Although there are good doctrinal reasons to focus on identity in these types of appearance cases (as opposed to the ones examined thus far), I argue that the law should refrain from focusing on the plaintiffs' identity and resolve the issue by remaining focused on the level of the role and significance of appearance itself.

1. Not All Black Women Wear Cornrows

Renee Rogers, a Black airport operations agent, refused to abide by her employer’s request to change her cornrow hairstyle.\(^{86}\) Her employer reasoned that cornrows did not correspond with the professional image the airline wanted to project. In its 1981 decision, the district court rejected Rogers’s race discrimination challenge to the policy,\(^{87}\) holding that the policy was not based on race, but on hairstyle. Since hair is not a protected category under Title VII of the Civil Rights Act of 1964, explained the court, Rogers had no discrimination claim.

The decision suggests that in order for the judge deciding the case to be convinced that the ground for her challenge was race and not simply hairstyle, the plaintiff had to establish that cornrows are a reliable indicator of her race. Rogers maintained that the cornrow hairstyle is of special significance for Black women; that it “has been, historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women [sic] in American society.”\(^{88}\) Furthermore, the style had been popularized by public figures such as actress Cicely Tyson\(^{89}\) and acquired political significance through figures such as Malcolm X, who stressed the meaning of afro hairstyles to Black pride.\(^{90}\)

That the cornrow hairstyle was a meaningful part of Rogers’s racial identity, and that there was evidence of a connection between Black women

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87. Rogers also argued sex-based discrimination, as well as a claim commonly referred to as intersectionality, according to which she had been discriminated against as a Black woman. For the purpose of the current discussion, however, it is sufficient to concentrate on her race discrimination claim. The analysis I develop here could be similarly applied to her sex discrimination claim and to the intersectionality claim. I focus on the race claim both because I think it presents more complex challenges to the law and because I address sex discrimination claims in other cases analyzed in this Article.
88. See Rogers, 527 F. Supp. at 231-32.
89. For Tyson’s filmography see The Internet Movie Database, http://www.imdb.com/name/nm0001807 (last visited Feb. 27, 2007).
90. See Rogers, 527 F. Supp. at 232.
and cornrows, was insufficient for the judge. Not all Black women, he noted, wear cornrows, and some white women wear cornrows too. In support of his finding that cornrows are not a feature related to race, the judge observed that the evidence indicated that Rogers had started coming to work with cornrows right around the time when the hairstyle was being popularized by a white actress—Bo Derek in the movie *10.* This judicial exercise in reading popular culture is worthy of attention because it operates to detach the cornrows from their connection to Black identity.

For the judge, Bo Derek’s cornrows indicated that Blacks do not have a distinct relationship to cornrows; at least, not one that should be legally recognized. By reaching this conclusion, the judge completed what political philosopher Ann Norton dubbed as the traitstripping process. Norton offers a compelling analysis of the way in which external features of marginalized groups are appropriated by the hegemonic group:

In the first stage, a particular trait or constellation of traits is identified with a particular liminal group. In the second stage another group, nearer the center but nevertheless alienated from existing structures, appropriates those traits, either rhetorically or through gestures. Finally, the exercise or exhibition of these traits by the original carriers is prevented through structure.  

According to Norton’s analysis, this appropriation of the margin’s attribute by the center (in the present case—Bo Derek’s wearing of cornrows) does not necessarily indicate tolerance or cultural pluralism. Despite the

91. *Id.* at 232. Compare *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000), in which the court denied a homosexual employee’s sex discrimination claim for reasons that resonate with the *Rogers decision*’s logic. The plaintiff argued that he was not harassed because of his sexual orientation but because of his failure to conform to gender norms, regardless of his sexual orientation. The court was willing to consider this line of argument in principle, but refused to accept it in the plaintiff’s case due to a lack of sufficient evidence that the plaintiff indeed behaved in a stereotypically feminine manner. The court was quick to appease the readers’ potential worry that this was a way to introduce sexual orientation into Title VII through the back door, by explaining that “this theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.” In the context of this Article’s argument, this assertion is both promising and disappointing. It is promising because the court is signaling that it would be willing to accept a claim by an individual plaintiff that shows that he was harassed due to gender nonconformity. It is disappointing because prejudice against gays arguably works such that the mere fact that someone is considered gay acts to ascribe feminine qualities to him and causes him to be perceived as a man who does not conform to gender norms. So the fact that the plaintiff was socially perceived as gay should have been an indication for the court that he was harassed because he was seen as nonconforming with gender norms.


94. Furthermore, by appropriating the stereotypical, salient, and almost caricature-like trait, the dominant group rides itself of the need to consider the more subtle qualities of the marginalized group. Qualities of the latter kind are harder to don and doff like a fashion accessory, and understanding them would require a deeper, attentive dialogue with the majority culture. This point is well demonstrated by the work of sociologist Annie Woodhouse, who analyzed the tendency of cross-dressers to adopt the most salient stereotypes of femininity as a way to avoid the more complex and challenging aspects of being a woman.
mainstreaming of some of their traits, members of the marginalized group "may find themselves praised in poetry, subordinate in law, claimed in rhetoric, shunned in the world. The moments of praise and mythic brotherhood that seem to expand the boundaries of the polity may not fulfill their promise." 

It is thus doubtful that the judge's reliance on the appropriation of the cornrow hairstyle by a white actress expresses cultural tolerance and openness to diversity. Another helpful way of understanding this judicial expectation in which the cornrows would function as a stable marker of racial identity is to think of them as what linguist William Labov calls "an accent of an accent." Labov classifies certain pronunciation patterns among minority groups as markers that have particularly high visibility within and outside the community. They are the selection, inflection and reading of a whole system of accents by a hostile community, a recuperation of the deviancy of the accents by reducing it to something simple, manageable and under the control of people outside the accent-community. So English speakers fancy their "Irish" accent, Americans do their "Negro" take-off, and Australians are delighted with their Aboriginal imitations.

Labov notes that such appropriation of a particular element of the accent still leaves the imitated group behind in cultural capital: "In each case, the real accent expresses the identity of the community, and excludes all other speakers. The stereotype constitutes the counter-claim that membership of that speech community is easy but worthless."

These theories of the social understandings of signs characteristic of minority groups indicate that we should interpret white actress Bo Derek's adoption of the cornrows with caution. Her (or the movie creators') seemingly inclusive gesture may be something other than an indication of a tolerant, pluralistic sentiment, or of respect to Black Americans' cultural practices. As in the cases reviewed above, the court in Rogers looked for a clear and stable Nexus between the plaintiff's racial identity and the debated personal marker, but concluded that this nexus was not stable enough to appease the judicial logic.

[An understanding of gender clarifies the tendency for most transvestites to prefer an appearance of extreme femininity, complete with stiletos, frilly underwear and tight clothes. This kind of appearance... permits an understanding of the behavioral changes associated with cross-dressing by pointing to the fact that certain traits are out of bounds for 'real men', and although some are changing these stereotypes, others are unable, or unwilling, to incorporate these traits into their normal lives. 

ANNIE WOODHOUSE, FANTASTIC WOMEN: SEX, GENDER AND TRANSVESTISM 142 (1989).]

95. NORTON, supra note 93, at 89.
96. But cf. FORD, supra note 17, at 26 (claiming that a finding for the plaintiff in Rogers might "reduce the number of non-Black women wearing the style as those women would also internalize the legally disseminated message that the hairstyle was the cultural property of black women and conclude that their adoption of the style would be inauthentic or even a type of cultural trespass. The result would be an increased racial divergence in women's grooming.").
98. id.
In critiquing this case, Kenji Yoshino and others have correctly argued that cornrows are a meaningful part of Black identity, thus suggesting that the law recognize the performative relationship between hairstyle and race, or more generally, between appearance and identity. Although this line of argument importantly reflects the richness of Black identity (and of identity in general), it ultimately fails to provide the tools that courts need when resolving such cases. Essentially, accounts such as Yoshino's aspire to anchor the plaintiff's hairstyle in her Black identity. In other words, they suggest that if the plaintiff can demonstrate a stable nexus between her appearance and her identity, her appearance should be legally recognized and protected.

This suggestion replicates the judicial logic described above. Both judges and scholars assume that the crucial question determining whether a particular appearance should be legally recognized is dependant on the plaintiff's ability to establish a sufficiently tight connection between appearance and "underlying" identity. Thus, the legal thinking becomes dichotomous: Either a marker is telling the truth about one's identity and is thus worthy of protection, or it is false or insufficiently stable, and thus unworthy of legal recognition. I contend that the extent to which a sign is a reliable conveyer of its bearer's identity is simply irrelevant for resolving appearance disputes. The analytical rigor in appearance cases should not be dedicated to questioning the reliability of the connection between appearance and identity, for the semiotics of racial identity are much more multifaceted than such an inquiry suggests. Just because the vocabulary of hairstyles associated with Blacks is not employed exclusively by this group should not empty this vocabulary of its meaning. Judicial and scholarly inquiry into the meaning of appearance should not aspire to unearth the appearance by reaching a deeper and more substantial reality beneath it, but rather to remain on the level of appearance itself.

Rogers' claim that she was discriminated against on the basis of race should have been accepted based on the reasoning that it was indeed not her

99. Yoshino, supra note 11, at 893-6; Caldwell, supra note 11, at 383-5.
100. There is a slightly more complex reading of the Rogers case. Such a reading would suggest that it is precisely because the court recognized the power of cornrows to signify Blackness that it refrained from recognizing this hairstyle as a sign of racial identity. Such a reading would point to the force of the idea of blindness in American antidiscrimination doctrine. According to this interpretation, the court was reluctant to recognize that Blacks might look different (even if only in their hairstyle) because it was operating according to the notion that equality entails similarity: if differences between the races are recognized and legitimized, the ideal of equality before the law might be endangered. Caldwell argues convincingly that this is indeed how American Airlines saw the cornrows. That is, Rogers suffered adverse employment consequences because she looked too Black, which contradicted the image that the company wished to project to its customers. See Caldwell, supra note 11, at 375-80; see also Lauren Berlant, National Brands/National Body: Imitation of Life, in THE PHANTOM PUBLIC SPHERE 173 (Bruce Robbins ed., 1993) (providing a cultural analysis of imposed "covering" in the public lives of Black women); Dorothy E. Roberts, Why Culture Matters to Law: The Difference Politics Makes, in CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW 85, 90 (Austin Sarat & Thomas R. Kearns eds., 1999) (arguing that white conventions of appearance shaped American Airlines' notion of business-like image, and critiquing the court's rejection of the cultural context in analyzing the plaintiff's claim).
race alone that prompted the disparate treatment, but the appearance associated with this race, or the embodied concreteness of her racial identity.101

Interlude II. Considering Volition in Appearance

This is an appropriate place to pause to consider the role of the judicial procedure in shaping the parties’ stories and molding them into an argument comprehensible to the law. According to the account provided by the opinion in Rogers, people know exactly why they choose one hairstyle over another. They intend for their hairstyle to make a specific assertion about their identity. Every hairstyle is a message, and should be a reliable message at that. The cases analyzed in this Article reflect a similar understanding of the meaning of appearance: For example, if one is wearing a dress, one could be understood as claiming to be a cross-dresser. I would like to suggest that the process of becoming a certain appearance is more complex, fragile, and bidirectional than the simple choice model provided by appearance caselaw.

We should take into account the possibility that the reshaping of Rogers’s hair into a legal claim made it seem to have a much more decisive message than it originally had. In other words, it is unclear whether when Rogers braided her hair into cornrows, she did so as a conscious way of conveying her racial identity. We should therefore consider the ways in which legal doctrine and procedure shape our understanding of the issue at hand. We should look for the elements of the story that are being overlooked by those (like us) learning about it from the legal text that depicted it in order to resolve it legally. In the current case, for example, it is important that we ask in what ways the meaning and function of Renee Rogers’s cornrows changed from the day that her lawyer argued about the significance of her hairstyle in a court of law. Rogers’s lawyers argued, as indicated above, that the cornrows were part of her racial identity. But does this mean that this was Rogers’s premeditated, intended purpose in braiding her hair into cornrows?

I suggest that we should allow room for the possibility that when Rogers first braided her hair it was not a result of a crystallized notion and a well-articulated motivation regarding the meaning of the cornrows and the racial message she wanted to convey through them. Plausibly, Rogers did not think of this act solely as an expression of her racial identity. In fact, she may not have thought about the meaning, the motivation, and the message of this act at all.102

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101. See Reva B. Siegel, Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification, in PREJUDICIAL APPEARANCES, supra note 11, at 99 (arguing that formal race discourse is status based and thus maintains “a bizarrely abstract conception of discrimination” in its failing to take into account the social valence of race).

102. Again, the analogy of appearance to poetry is helpful in realizing that intention is not central to the meaning making of appearance.

"A poem should not mean but be." A poem can be only through its meaning—since its medium is words—yet it is, simply is—in the sense that we have no excuse for inquiring
Consider how a certain hairstyle becomes ours. Most of the time, we cannot explain every haircut we get with a well-reasoned rationale. This is not to say that hairstyles mean nothing, or that we should not be interested in their meaning. Rather, I argue that in the context of appearance, relating hairstyles to fully controllable and willful choice is inappropriate. As Don Herzog observed, even a hair choice that attempts to detach itself from any meaning by appearing casual will not escape interpretation. A hairstyle that seems simpler and requires less time, hair products, and accessories should not be interpreted as purely functional or instrumental; rather it’s just a change in the reigning codes. That is, someone whose hairstyle is simple doesn’t escape making any symbolic claims, even if he wants to. Instead, he claims—depending on the local code—to be classically austere, athletically disciplined, vigorously masculine, hardnosed, efficiency-minded, or whatever else. And he will effortlessly be read as pressing those claims, even if he doesn’t intend to, even if he is oblivious to the code.\footnote{Don Herzog, Poisoning the Minds of the Lower Orders 463 (1998).}

There is no escaping interpretation of the way we appear, and we cannot fully control the spectrum of possible interpretations of our appearance. But this is exactly the point that the prevalent legal logic misses: By asking legal subjects to be fully accountable and in control of the meaning and message of their appearance, the law reflects a misunderstanding of the way in which appearance acquires meaning.

Our legal theory needs to develop a more subtle and responsive mode of interpreting the meaning of personal markers. Such an approach will need to reflect an understanding of the way in which appearance ensues, and to incorporate the realization that although hair provides material for “reading” other people, the material to be read does not necessarily make a well-crafted

what part is intended or mean. Poetry is a feast of style by which a complex of meaning is handled all at once. . . . In this respect poetry differs from practical messages, which are successful if and only if we correctly infer the intention.


\footnote{Don Herzog, Poisoning the Minds of the Lower Orders 463 (1998).}

To complicate things even further, we are usually not satisfied with what the hair \textit{itself} tells us—we want to know the intentions of its bearer. When we see a haircut that is “dressed down” we want to know whether its wearer is \textit{really} absent-minded about his or her hair, or whether he or she is studiously dressing the hair down. Thus, again, in reading appearance we are driven to look for what motivations and personality traits lie under the appearance. See also Karen Halldtunen, Confidence Men & Painted Women: A Study of Middle-Class Culture in America, 1830-1870, at 63-66 (1982) (discussing the problem of signaling simplicity through fashion—an artifact which is bound to be constructed and disingenuous); WOODHOUSE, supra note 94, at 77-78 ("[A]ll appearance is constructed. Regardless of whether we are talking about high fashion, anti-fashion or non-fashion, all appearances are making statements in one way or another."); Barbara D. Miller, The Disappearance of the Oiled Braids: Indian Adolescent Female Hairstyles in North America, in Hair: Its Power and Meaning in Asian Cultures 259, 277 (Allan Hitchcock & Barbara D. Miller eds., 1998) ("There is no way to avoid the message power of hair. Even if you cover it with a hat or scarf, it still talks.").}
argument. Hairstyle choices are a result of a mixed, usually unarticulated (and perhaps not even capable of articulation) combination of factors of diverse natures. The reasons or motivations for choosing a hairstyle can run from the practical to the aesthetic, or, indeed, the ideological. Cornrows might be considered practical, in that they are less damaging to the hair than "relaxing" it, and they require time investment only once in a while rather than daily attention. Or cornrows might be considered aesthetic if they are currently in vogue, or if their wearer has a sense that they complement her hair. Finally, cornrows may be an ideological choice if they are construed as an affirmative symbol of Black pride. These considerations, however, often mesh into one another, and it is hard to neatly separate them. In addition, they are always constructed within a cultural context, and thus can never be purely owned and controlled by the individual sporting the hairstyle. Just as any language that we use is never solely ours (for there is no private language), the personal markers we bear, even if we can describe them as chosen to a certain extent, are also a result of the marks that our culture and social settings leave on us.

"There is a formidable affect of language which courses like blood through its speakers," writes Denise Riley. "Language is impersonal: its working through and across us is indifferent to us, yet in the same blow it constitutes the fibre of the personal." Riley's interrogation of the extent to which we choose our words is applicable to the language of personal appearance as well. We should be interested, according to Riley, "not so much [in] How To Do Things with Words, as Austin's title had it, but How Words Do Things With Us. And that 'with us'—as distinct from 'to us'—is pivotal. If language exerts a torsion on its users, it does not immobilize them..."

104. "Reading... is a belated and all-but-impossible act, and if strong is always a mistaking. Literary meaning tends to become more under-determined even as literary language becomes more over-determined. Criticism may not always be an act of judging, but it is always an act of deciding, and what it tries to decide is meaning." HAROLD BLOOM, A MAP OF MISREADING 3 (1975).

105. JAMES BOYD WHITE, THE EDGE OF MEANING 123 (2001) ("[T]he language [a person trying to make sense of his experience] uses is a social and cultural artifact, made largely by others, and the expectations by which it works must be taken as facts of the world with which he must deal. One cannot simply make up a new language, for example, even if such a thing were imaginable."). See also JOHN E. JOSEPH ET AL., LANDMARKS IN LINGUISTIC THOUGHT II, at 25 (2001) (describing linguistic structuralism's understanding that "however arbitrary most linguistic signs may be, the link between signifier and signified is maintained in such a strong form by the social nature of language that no one can change it.").

106. See Charles Taylor, The Person, in THE CATEGORY OF THE PERSON: ANTHROPOLOGY, PHILOSOPHY, HISTORY 257, 275 (Michael Carrithers et al. eds., 1985) ("The ideal of understanding oneself alone strangely ignores the way in which understanding requires language, and language is bound to conversation. The clarity language brings through articulation is linked with the clarity through presentation in public space... We learn language in conversation, and hence the original acquisition of articulation is something we do, rather than I do. Later we learn to do it to some extent on our own. But we do so in a language which is ours, and hence in principle our formulations should always be capable of being common formulations.").


108. Id. at 3. But see JOSEPH ET AL., supra note 105, at 10 (discussing Edward Sapir's notion that language has a tyrannical hold on our experience and orientation in the world).
As sociologists such as Pierre Bourdieu and Erving Goffman have repeatedly reminded us, our taste and our notions of appearance propriety could never be understood as unrelated to our social position, with its covert ideologies, power divisions, and meaningful identity roles and distinctions. Thus, there is an important sense in which to describe our hairstyle choices as choices would be to misrepresent them. Myriad minute motivations and vague sensibilities shape our hair choices, which resist understanding through categories such as "intended message" or "clear meaning." A conscious inquiry about the reason for our hairstyle is not part of how the hairstyle becomes ours.

We should consider the possibility that Rogers's braiding of cornrows was much less premeditated and laden with identity claims than the opinion implies. For Rogers, the cornrows may have been an unremarkable hairstyle, as plausibly as many others, a choice that came naturally and did not require a pause to contemplate its meaning, certainly not its meaning as a claim about identity. I stress that we should consider the extent to which it was the scrutiny of the cornrows by the legal gaze that transformed them into an identity claim. Under the current state of the law, litigating appearance disputes requires articulating the rationale behind appearance. By its nature, though, appearance resists articulation into a clear-cut claim. Personal markers often are not just unarticulated; they are inarticulable.

As literary scholar Susan Stewart notes, when objects are described in detail, they gain an ideological meaning that had not necessarily been there prior to the linguistic description:

Minute description reduces the object to its signifying properties, and this reduction of physical dimensions results in a multiplication of

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110. This reminds me of White's observation that a poem "cannot be reduced to a statement of this or that theory or message, to optimism or pessimism, or any other paraphrase." A poem (and in our context, I would argue, a personal mark), "is in fact a kind of speech with which 'stating views' or 'having a theory' or 'delivering a message' is inconsistent; the very form of the poem is critical of the assumptions on which such speech rests." JAMES BOYD WHITE, JUSTICE AS TRANSLATION 8 (1990) (emphasis added); see also Derek Attridge, Closing Statement: Linguistics and Poetics in Retrospect, in THE STYLISTICS READER 36, 41 (Jean Jacques Weber ed., 1996) ("[H]e poetry, features of language which are usually merely the carriers of semantic content and have no importance in themselves and therefore no relations among themselves other than contiguity, gain that importance and enter into such relations.")

111. The dual meaning of the word "habit" reflects the way in which clothes and bodily practices become involuntary and transparent, unaccounted for, and unthought-of ways in which we get dressed or comb our hair. Compare one of the archaic meanings of "[b]odily apparel or attire, clothing, raiment, dress" with one of the more contemporary meanings, "[a] settled disposition or tendency to act in a certain way, especially one acquired by frequent repetition of the same act until it becomes almost or quite involuntary." Oxford English Dictionary Online, http://dictionary.oed.com (enter "habit"); then click "Find Word") (last visited July 21, 2006).
ideological properties .... When verbal description attempts to approximate visual depicition, we find a further reduction of sensory dimensions and, because of the history of the word as utterance in lived social practices, an even greater ideological significance.\textsuperscript{112}

As Rogers articulated her request for legal protection of her appearance, her hair was molded into an argument that the law could make sense of. But appearance is more analogous to a poetic occurrence than to an argument. It is the search for ways to establish legal protection for the cornrows that attributed to this hairstyle the sole function of signifying race.\textsuperscript{113}

Certain appearances can certainly be related to certain identities, but the existence of this relationship is not (and should not be expected to be) conclusive, whereby the appearance indexes the identity. Like any sign, personal markers will fail a test that expects that they will only be used to indicate the truth. This is inherent in their nature as markers. The very moment that they start functioning as signs, they become unstable—for signs can be appropriated and used by anyone to express anything. As Umberto Eco pointedly observed, this capacity to tell lies is what makes signs what they are: "If something cannot be used to tell a lie, conversely it cannot be used to tell the truth: it cannot in fact be used 'to tell' at all."\textsuperscript{114}

The moment in which a nonsemiotic phenomenon such as a rash on the skin or smoke from afar becomes a sign is, according to Eco, the moment it is conventionally recognized as a vehicle for something else:

The first doctor who discovered a sort of constant relationship between an array of red spots on the patient's face and a given disease (measles) made an inference: but insofar as this relationship has been made conventional and has been registered as such in medical treatises a semiotic convention has been established. There is a sign every time a human group decides to use and to recognize something as the vehicle of something else.\textsuperscript{115}

For judges and lawmakers to stipulate that personal markers should be indexical\textsuperscript{116} of identity in order to be legally recognized is to misunderstand

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\bibitem{112} Susan Stewart, \textit{On Longing: Narratives of the Miniature, the Gigantic, the Souvenir, the Collection} 47-48 (1984).

\bibitem{113} Yoshino similarly suggests causality: American Airlines' rejection of her cornrows made them more important to her because it rendered them a site of resistance, a sign of anti-assimilation. Yoshino, \textit{supra} note 11, at 896.

\bibitem{114} Umberto Eco, \textit{A Theory of Semiotics} 7 (1976); see also Marcel Danesi & Paul Perron, \textit{Analyzing Cultures} 45 (1999) (discussing Eco's definition of semiotics); Socrates, in treating the relationship between things and their names, observed: "But then how ridiculous would be the effect of names on things, if they were exactly the same with them! For they would be the doubles of them, and no one would be able to determine which were the names and which were the realities." \textit{Plato, Cratylus, in the Collected Dialogues of Plato} 427, 466 (Edith Hamilton & Huntington Cairns eds. Lane Cooper et al. trans., 1963).

\bibitem{115} Eco, \textit{supra} note 114, at 17 (internal citation omitted).

\bibitem{116} Drawing on semiotics theory, I mean this term in its Peircean sense, according to which indexical signs bear direct relations to their signifieds. The most intuitively accessible example would be natural symptoms or signals (pain as an index of illness; smoke as an index of fire; a bell-ringing

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both personal markers and identity. There will never be a hairstyle that is or could potentially be worn only by Blacks, or a name that is exclusively and inherently a girl's name, or an accent belonging only to people of French nationality. But this does not mean that there are no hairstyles that convey, maintain, and perform Black identity. Markers such as hair, by their very nature, can never be anchored to a single identity group in a manner stable enough to appease the prevailing legal logic. In the context of appearance cases, the law's search for stability and certainty of signs is therefore a futile search. Cornrows are indeed related to racial identity, but the nature of this relation is poetic, not instrumental. They are neither a biologically "natural" and immutable indication, nor a purely volitional and mutable expression of race.

The markers currently subject to litigation are located at the edge of the self, both literally and conceptually. They are an interface—a boundary between self and other, and at the same time a bridge toward this other. They are also, to draw on James Boyd White's phrase, at the "edge of meaning" because they are meaningful in a way that challenges us to change our impulses and habits of reading appearance. Rather than treating markers as transparent vehicles of the information that supposedly lies beneath them, we should recognize that their materiality is inherent to their meaning. For example, the meaning of appearance depends on the fabric and lines of a shirt; the sound, rhythm, and connotations of a name; or the attitudes and moods evoked by whether one says tomato or tomató. Any meaning that markers might convey is inseparable from such specifics as their particular texture and tone as well as from the contexts in which they are employed. Meaning also emerges from the relations between the shirt and the rest of its wearer's attire, and from the social setting in which the shirt is worn.

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117. The division between girls' and boys' names is often not strict, and is prone to cultural changes. See Stanley Lieberson, Susan Dunais, & Shyön Baumann, The Instability of Androgynous Names: The Symbolic Maintenance of Gender Boundaries, 105 AM. J. SOC. 1249-87 (2000) (studying eighty years of Ohio naming practices and the change in femininity or masculinity ascribed to certain first names).

118. The ways in which meaning resides in language itself, and in qualities such as tone, cadence, or other qualities of form rather than semantic meaning is at the basis of White's exploration in this book. See WHITE, THE EDGE OF MEANING, supra note 105. If White's main interest is in the "way to live as expressive beings in a world full of constraint and limit, including on our own minds and imagination," id. at xii, mine can be described as examining how the law can remain a responsive reader of its expressive subjects.

119. "It's evident that a first name pins you relentlessly into your place of emergence, by its class overtones, its chumsiness or its melody, its religiosity, its cultural timber, its brief fashionability." RILEY, supra note 107, at 118.
Appearance claims challenge the law to acknowledge and accommodate markers' complexity of meaning without subjecting appearance to a mode of reading that seeks clear-cut answers and single meanings.

2. Talking the Talk is Just as Important as Walking the Walk: Language as Appearance

Garcia v. Gloor, a language rights case, illustrates the judicial urge to evaluate markers only insofar as they are tied to identity. Here, the court claimed the ability to transcend appearance in its diagnosis of a subject's true identity.

Hector Garcia was a salesman in a lumber store that served both English and Spanish-speaking clientele. The employer "had a rule prohibiting employees from speaking Spanish on the job unless they were communicating with Spanish-speaking customers," or on break. Garcia testified he was fired when "he was asked a question by another Mexican-American employee about an item requested by a customer and he responded in Spanish that the article was not available. [An officer of Gloor] overheard the conversation. Thereafter, Mr. Garcia was discharged." The plaintiff-appellant argued that his discharge amounted to discrimination based on national origin, contrary to Title VII. He testified that since Spanish was his primary language and the one he was most familiar with, the English-only rule was difficult to follow.

Faithful to the logic of demanding a tight nexus between identity and appearance, the court approached the question of the place of language in the plaintiff's life by examining whether Spanish was inherently related to his identity. What was his identity, then? The court treated the task of determining the plaintiff's national origin as if it were plainly apparent to the

120. 618 F.2d 264 (5th Cir. 1980). The plaintiff's and the defendant's competing accounts about language in this case convey the same uncertainty as in the other cases discussed above. It is an uncertainty about whether to classify language either as an immutable characteristic or as a voluntary choice. The plaintiff suggests that his usage of Spanish neither merely reflects his preexisting Hispanic background nor is a matter of arbitrary preference. It is not a reflection of his Mexicanness, but a way of maintaining Mexican identity through speaking it and marking it. Accordingly, language rights are an unstable and highly debatable category in current law. See Juan F. Perea, English-Only Rules and the Right to Speak One's Primary Language in the Workplace, 23 U. Mich. J.L. Reform 265, 266 (1990) ("[E]ventually the Court will have to resolve this issue [of whether English-only rules amount to employment discrimination]. It is certain to recur. The numbers [of Hispanics in the American employment market] alone guarantee it.").

121. Garcia, 618 F.2d at 266. Seven of the eight salesmen employed at the store were Hispanic. Id. at 267. The court observed that this is "a matter perhaps of business necessity, because 75% of the population in its business area [Brownsville, Texas] is of Hispanic background and many of Gloor's customers wish to be waited on by a salesman who speaks Spanish." Id. at 267.

122. Id. at 266.
123. Id.
124. Id. at 268.
125. Id. at 266.
126. See id. at 270.
naked eye, holding that the plaintiff was not discriminated against based on national origin, since, according to the objective legal diagnosis, he was not of foreign national origin.127 In examining how the court reached this conclusion, we should note the detailed and careful enumeration of the factors contributing to the conclusion that Garcia is truly American:

Hector Garcia, who was twenty-four years of age at the time of trial, completed the first semester of the tenth grade in Texas public schools. He speaks both English and Spanish. His grandparents were immigrants from Mexico; he is a native-born, but he has always spoken Spanish in his own household.128

From Garcia’s number of semesters in public school, the court made the almost clinical inference that “Mr. Garcia was fully bilingual. He chose deliberately to speak Spanish instead of English while actually at work. He was permitted to speak the language he preferred during work breaks.”129 Although he spoke Spanish in reply to a question asked by a colleague, and although the court recognized that he grew up speaking Spanish at home and that he maintains that Spanish is his most familiar language,130 the court asserted:

No claim is made that Garcia and the other employees engaged in sales were unable to speak English. Indeed, it is conceded that all could do so and that this ability was an occupational qualification because of the requirement that they wait on customers who spoke only English or who used that language by choice. Nor are we confronted with a case where an employee inadvertently slipped into using a more familiar tongue.131

My critique is not that the court erred in its fact-finding, that is, that Garcia is in fact “more” Mexican than American. Rather, the problem is the manner in which Garcia’s claim for a connection to Spanish was framed as an issue that depends on a factual determination of his national identity.132 Once the question

127. Id.
128. Id. at 266.
129. Id. at 268.
130. According to the opinion, language is part of one’s national origin only if one is indeed “really” foreign as a matter of factual finding. The court thus recognizes only one direction of the connection between identity and language: if one is of foreign nationality, it is natural that one would speak a foreign language. But it was inconceivable for the court that the practice of speaking Spanish might be part of constituting and maintaining one’s Hispanic identity.

We do not derogate the importance of a person’s language of preference or other aspects of his national, ethnic or racial self-identification. Differences in language and other cultural attributes may not be used as a fulcrum for discrimination. However, the English-only rule, as applied by Gloor to Mr. Garcia, did not forbid cultural expression to persons for whom compliance with it might impose hardship.

131. Id.
132. Historian David Hollinger observes:

Who decides what your identity is? The United States has always practiced identity-ascription, that is, the ascribing of identity to individuals whatever their own personal preferences may be. That’s why it makes sense to speak of “a political economy of identity,” according to which identity is a kind of commodity distributed by authority. A variation on
is presented as one of a tight and natural nexus between nationality and language, no room is allowed for the real question this case warrants.

The apt question in this case is political, involving the envisioned model of the American public sphere: What if Garcia indeed could have spoken English just as well as Spanish, and repeatedly chose the latter as his spoken language? This question goes unnoticed—if not actually suppressed—by the court. Garcia’s claim should not have succeeded or failed according to his linguistic biography. With language, as with any other marker, it is hard to point to the exact moment when it becomes “natural,” even when it might have been chosen in the first place.

However, any claim of a “slip of the tongue” was denied to Garcia, since the court decided that he was not a “true Mexican.” For the court, Garcia’s claim to have an intimate relation to Spanish was disingenuous. Lisa Delpit points to the way in which language is intuitive, and rightfully claims that it is hard to understand it in terms of choice:

Our home language is as viscerally tied to our being as existence itself . . . Just as our skin provides us with a means to negotiate our interactions with the world—both in how we perceive our surroundings and in how those around us perceive us—our language plays an equally pivotal role in determining who we are. 133

As Delpit’s last sentence suggests, even if language is chosen, our choice of language has more than merely technical implications. Our language shapes who we are, what we can think, and what we can say. As White notes, “[M]uch of the meaning of what we say is not to be found in our minds or intentions at all, but in the language itself.” 134

The court did not recognize any intermediate area between choice and habit. 135 Rather, the nature of national identity was taken as self-evident.

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134. WHITE, THE EDGE OF MEANING, supra note 105, at 36.

135. Cf. Gutierrez v. Mun. Ct., 838 F.2d 1031, 1039 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989) (indicating a willingness to perceive language as more than a matter of objective national origin, and stating that “the mere fact that an employee is bilingual does not eliminate the relationship between his primary language and the culture that is derived from his national origin.”). See also Garcia v. Span Steak Co., 988 F.2d 1480 (9th Cir. 1993), reh’g denied, 13 F.3d 256 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994); cf. EEOC v. Premier Operator Serv. Inc., 75 F. Supp. 2d 550 (N.D. Tex. 1999) (observing that Glenn v. Garcia’s ruling did not govern the present case, because employees were forbidden to speak Spanish at all times, including breaks, phone calls, and before and after work on employer’s premises).
“Americaness” and “Mexicanness” were treated as stable and objective categories, impossible to obtain by markers or practices.136

The Garcia decision denies a role for the language one uses in constituting one’s identity. Just as hairstyles or names have no role in constituting identity but merely reflect it, language does not determine one’s national origin. Rather, the court posits national origin as a prior, more basic fact, determined by factors such as where one was born and how many semesters one studied in an American public school.137 The logic of natural, immutable, “real,” identity informs the entire case. Once Garcia was “diagnosed” as being of American national origin, he was not entitled to negotiate assimilation, because assimilation did not pertain to him. The court decided that he was an American and should not only walk the walk but also talk the talk.138

In Rogers, the court demonstrated an inability to consider how race operates socially through concrete, racialized bodies. Race is considered in the abstract, detached from the realities in which people of color physically appear and disconnected from how they are perceived. Similarly, in Garcia, the court defined national origin as nothing more than a birthplace, rejecting any accounts of how environment shapes practice, appearance, preference, and habit.139

136. Both in Glor v. Garcia and in Rogers the question of markers was determined through a judicial assessment of whether it was natural and inherent to the plaintiff’s assumed identity. “To a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth.” Garcia, 618 F.2d at 270. Similarly, the Rogers court stated, “Plaintiff may be correct that an employer’s policy prohibiting the ‘Afro bush’ style might offend Title VII . . . . But if so, this chieflly would be because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics . . . . an all-bridied hairstyle is a different matter. It is not the product of natural hair growth but of artifice” Rogers, 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

137. See Brubaker & Cooper, supra note 80, at 5 (“We should seek to explain the process and mechanisms through which what has been called the ‘political fiction’ of the ‘nation’ . . . . can crystallize, at certain moments, as a powerful, compelling reality. But we should avoid unintentionally reproducing or reinforcing such reification by uncritically adopting categories of practice as categories of analysis.”).

138. Implicit in the plaintiff’s claim in Garcia is a defiance of the ideology of assimilation: Garcia could be accepted into the club of true Americans, and yet he stubbornly chose to cling to the country and culture of his ancestors. As Zygmunt Bauman observed, national acculturation projects expose the ultimate failure of assimilation, by making apparent

[[the evidently acquired character of cultural traits gained in the process of acculturation

jared with the inherited and ascribed nature of national membership only thinly covered by

the formula of common culture . . . . [T]he national community, though itself a product of

culture, could sustain its modality as a nation only through emphatic denial of a ‘merely

cultural’, i.e., artificial, foundation. Instead it derived its identity from the myth of common

origin and naturalness:

BAUMAN, supra note 39, at 142-43.

139. [T]here is no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference. Mr. Garcia could readily comply with the speak-English-only rule; as to him nonobservance was a matter of choice . . . . [Title VII] does not support an interpretation that equates the language an employee prefers to use with his national origin.

Garcia, 618 F.2d at 270. An additional parallel between Rogers and Garcia is that in Rogers, the court was dissatisfied that the plaintiff could not demonstrate that the employer discriminated against Blacks in general (because there were many Black employees in the airline). Similarly, here, the court’s
National origin, like any identity category recognized by the law, is portrayed in the Garcia decision as a matter of plain and apparent fact, unrelated to practices or markers that may be associated with it. Title VII jurisprudence should widen its scope to consider the experience of those who appear to be Hispanic, even if they are not legally defined as such by the factual data relating to their birthplace and degree of fluency in English and Spanish. We should ask whether a legal conception of national origin can hold if it excludes any consideration of the ways of being of that national origin. The judicial attempt to cling to an understanding of identity as an abstract essence of ideal-type categories, stripped from concrete, particular, and embodied manifestations, is neither convincing nor useful.

D. Scholarly Treatments of Appearance Cases Remain in the Identity Trap

Scholarly attention given to appearance cases has flourished in the last decade as jurists recognize that these cases challenge law’s basic analytical tools and raise important questions about the boundaries of constitutional principles. But like the caselaw, the existing appearance scholarship has been unsuccessful in transcending the identity trap and developing alternative normative approaches to appearance. Scholarly treatments of appearance cases usually approach the issue of personal markers as inherently related to the politics of identity. Kenji Yoshino argues that courts should recognize the “covering” burden on minorities—that is, the pressure to assimilate and disguise the remarkable aspects of their racial, sexual, or gendered identity. Exploring the regulation of appearance under the framework of forced assimilation, Yoshino maintains that gays, people of color, and women face a pressure to cover their different appearances, a predicament to which the law fails to respond. Antidiscrimination law, he argues, should integrate into its framework the fact that identities have significant performative aspects. Devon Carbado and Mito Gulati similarly seek to highlight the extra burden on minorities who are required to adopt the attire, lifestyle, and manners of speech of the dominant group in order to be considered professional.

Such analysis is immensely important in that it thickens our understanding of the extent to which appearance is constitutive of social identity. It also

reasoning relied on the fact that there were many Hispanics in the workplace in question. Such an analysis fails to see that the Black or the Hispanic whose presence is accepted is the one who is unmarked by racial and ethnic difference, the one who did not embody racial or ethnic identity as did the plaintiffs in Rogers or Garcia. See id. at 267 (“Of its 39 employees, 31 were Hispanic, and a Hispanic sat on the Board of Directors. There is no contention that Gloor discriminated against Hispanic-Americans in any other way.”).  
140. See Yoshino, supra note 11, at 875.  
141. Id.  
142. See Carbado & Gulati, Conversations at Work, supra note 11; Carbado & Gulati, Working Identity, supra note 11.
provides invaluable accounts of the intricacies of appearance regulation for underrepresented groups. However, concentrating on identity-based appearance claims comes with a price. While I agree that the regulation of personal appearance has more often been the plight of marginalized groups, I maintain that the problems of appearance and of identity have been unnecessarily conflated. Disaggregating appearance from identity would provide better legal protection to appearance claims of minority groups, as well as produce a more coherent legal treatment of appearance.

Indeed, it is no wonder that most appearance cases involve claimants from under-represented groups. Contests over appearance usually reach the court due to intolerant social responses to personal characteristics that stand out since they do not abide by hegemonic conventions. But scholarly analysis that considers markers only to the extent that they are related to identity is bound to repeat the same mistake as the caselaw, namely conceiving of the nexus between identity and appearance as much tighter and more stable than it actually is and thus presenting an unattainable standard to plaintiffs claiming legal protection for their appearance.

Like courts, scholars trying to grapple with appearance cases face the challenge of offering the law, whose logic is averse to uncertainties, a way to deal with the fragile connection between appearance and identity. By focusing on the ways in which the identities of gays, Blacks, and women are visually noticeable, current legal scholarship neglects and thus neutralizes the way in which every identity is constituted and maintained through external markers. Personhood involves an ongoing expressivity—even the unmarked, mainstream identity of, say, the white, able-bodied, straight, middle-class male.

This scholarship does an important job in highlighting the invisible yet prevalent forms in which power operates on oppressed groups on even the subtlest levels. More specifically, it has created a rich account of the voices and experiences of groups who have been blocked from equal participation for generations, and who today, after formal barriers have been officially removed, face the challenge of “sticking out” due to their minority identity. They are often part of a very small group of Blacks in the law firm, Hispanics in the fancy restaurant, women on the bench, or openly gay members of parliament.

While this identity-based approach to appearance cases contributes to the understanding of identity and of the challenges faced by members of minority groups, it does not enhance our understanding of the complexities of appearance. That is, while this scholarship rightfully calls for expanding the scope of the protection of minorities by recognizing appearance as a significant aspect of identity, it does not manage to provide a viable model for this protection because its argument depends on the link between identity and appearance (in other words, the argument depends on the existence of identity in the literal sense: identity between one’s essence and one’s appearance).
Similar to the approach emerging from the caselaw, we end up with a model that would find it hard to provide legal protection to Black women who wear cornrows or to second-generation Hispanics who speak Spanish in their workplaces. If appearance should be protected only as far as it signifies minority identity, then, as we know, there are also white women who wear cornrows, and non-Hispanics who speak Spanish. It is precisely because of this potential appropriation of signs by anyone, regardless of their identity, that courts refuse to recognize the claim that cornrows could be an important aspect of blackness or that Spanish is a meaningful part of Hispanic identity. The alternative to this conceptual trap, developed in the second Part of this Article, is to frame appearance as part of a universal human experience.

Nan Hunter observed that some identities are expressive by the mere fact that they are different (gays, Black, or even pregnant women can be perceived as sending messages without intending to signify anything, through their mere visibility). This, she notes, muddies the legal analysis, since the same issue (such as the right of a private organizer of a St. Patrick’s Day parade to exclude a gay and lesbian group from marching) is sometimes classified as a question of freedom of expression, and sometimes as a question of equality. Accordingly, in certain situations appearance is understood as conduct, and in others, it is understood as status. Hunter offers the term “expressive identity” to help explain how some people, without any intention of expressing a message through their appearance, are more visible and draw more intolerant responses simply because they belong to a minority group.

Hunter’s account is useful in that it shifts the focus of identity to the social event in which identity is performed and perceived. However, her analysis is burdened in that she does not go far enough in its application. By focusing on the ways in which identities of gays, Blacks, and women are “expressive,” that is, visible and salient, Hunter neglects and thus neutralizes the way in which every identity is constituted and maintained through ongoing expressivity—including the identity of members of unmarked, mainstream identity groups. Hunter’s model does not attend to the fragility and performance of every social actor: We all impersonate.

The cases examined in this Article manifest social actors’ irritation or anxiety about the uncertainty of reading appearance. Such uncertainty is inherent to the social condition. As social beings, we live with constant interpretive uncertainty as to the identities of those around us. This is a chronic, incurable state. Our social arrangements prescribe, for example, that our police officers wear a uniform, but we can never be sure that the uniformed man


144. See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) (holding that parade organizers have a right to exclude a group whose mere presence will send a message that the organizers oppose).
asking us to pull over is in fact a police officer, not even if we take the precaution of asking to see his badge. The risk that he is an imposter is always present. 145 Moreover, intentional deceit is not the only source of interpretive uncertainty. Consider a more nuanced case of police impersonation—that of “uniformed security guards employed by stores to discourage shoplifting.” 146

As Paul Fussel comments, “[t]he real police must make sure that the security guards’ uniforms are not—as the stores hope they will be—easily confused with actual police garb. Some commercial guards hope to resemble police by carrying their cell phones in black leather holsters, just as if they were pistols.” 147 Uniforms, like any other marker, inherently depend upon allusions. They receive authoritative meaning for their audience through the homage they pay to other traditions of uniform and insignia. Quotations, associative references, and variations are the means through which uniforms function. The blurry line between the appearance of the real police officer and the ordinary shop guard is something we can do nothing about. Such allusions to other styles are part of the language of clothes and other markers, and most importantly, they are what renders this language viable. The reason that our uncertainty in telling the guard from the true police officer bothers us is that knowing the true nature of the uniform-wearer reinforces our sense of mastery of the vocabulary of appearance. Knowing the actual truth beneath the identity eases our persistent anxiety that we might not be literate enough readers of appearance, or that we might lag behind everyone else in the game of orientation in the social world.

The issue in appearance cases is the basic instability of markers, and the social anxiety that this instability produces. Uncertainties about determining whether to believe appearances are omnipresent, and this challenge of when and how much to trust appearances is an inherent part of life. Appearance cases arise when the state, a school, or an employer surrenders to the idealized longing for a social world in which identities can be safely deciphered by appearance, and rejects people with appearances that it views as open to too many interpretations. Thus, the central question that should guide the jurisprudence of appearance is to what extent the law should be responsive to social unease about markers that resist easy deciphering.

Hunter and other scholars who approach the issue from the perspective of identity politics imply (perhaps unwittingly) that only a marker that could be clearly and tightly connected to an identity could be legally protected. But this line of argument leads to a dead end, for no personal marker, by its very nature as a marker, is ever going to be tied securely enough to any given identity.

146. PAUL FUSSEL, UNIFORMS: WHY WE ARE WHAT WE WEAR 95 (2002).
147. Id.
There will always be the white woman who wears cornrows, and this indeterminacy will pull the rug out from under the Black woman’s claim that cornrows are a stable marker of race. Moreover, to ask an individual to articulate the justifications and the claims behind her marker is to distort what markers do and the way in which they do it. Markers have meaning, but this meaning cannot be reshaped in the form of an identity claim, as judges expect. My suggestion for a poetic understanding of appearance would open up an appreciation of markers as not transparent and instrumental representations of identity, yet still central to the self.

While I agree that the regulation of markers has been more the plight of marginalized groups, I think the two issues have been unnecessarily conflated, and that separating them would provide analytical clarity that would benefit both subjects. An analysis that considers markers only to the extent that they are related to identity is bound to repeat the same mistake as the caselaw, for it assumes, suggests, and affirms a false sense of the tight nexus between identity and appearance.

Kimberly Yuracko has recently proposed an analysis that is driven by insights similar to mine. She criticizes both the courts and the scholarly analyses for their readiness to protect only traits that are strictly associated with group identity. Yuracko rightfully contends that it is unclear which traits would be sufficiently close to a given minority identity to be legally protected. In addition, she notes the danger of reification and stereotyping of particular traits. Accordingly, she proposes a complex set of criteria to determine when a trait should be protected. For example, it would not be sufficient for a person to argue that a given trait signifies his racial identity. Rather, in order to recognize the importance of a particular trait to identity, factors such as the prevalence of a trait among the minority group and its significance for the group would need to be examined as well. The legal response should then be different if sixty percent or one percent of Black people wore cornrows. Similarly, the law should take into account whether or not group members themselves strongly associate the trait with the group. If this is the case, then

148. See generally Yuracko, Trait Discrimination as Race Discrimination: An Argument About Assimilation, supra note 11.

149. See id. at 384 ("As a practical matter, making antidiscrimination protection rise or fall on whether a trait is group-identified puts too much weight on a categorization that is not well-defined enough to bear it. It is not at all clear how one determines whether a trait is group-identified enough to warrant protection.").

150. See id. at 384-85. A similar objection is raised by Richard Ford, who is worried that protecting identity-based differences might limit the freedom of minorities and reinforce flat stereotypical images of them. See FORD, supra note 17, at 123 ("[W]e should resist the temptation to write a speculative sociology of group difference into law or to enlist the state in psychotherapeutic quest to validated (sic) “repressed” identities.").

even if certain members decided not to bear the trait, they might equally be offended if employers requested the specific trait be covered up.\textsuperscript{152}

Despite the more complex approach to the relationship between identity and appearance proposed by Yuracko, her model still focuses on protecting the appearances of minority group members. "The more the motive for the trait discrimination looks status-based, the more the trait requirement becomes illegitimate and deserving of scrutiny," she argues.\textsuperscript{153} This is where my proposed approach departs from Yuracko's. As I show in Part II below, developing a legal approach that would recognize that appearance is a loaded and fragile aspect of all human experience would not only be a more coherent response to the complex dynamics of appearance, but would also provide a better legal response to the appearance claims of minority groups.

To summarize, current appearance caselaw is wrong in focusing on legal subjects' identities rather than on their contested appearances, which are the actual center of the dispute. This leads to law which only recognizes appearance if it can be anchored in an underlying identity. But how can we cut the Gordian knot between appearance and identity? How do we render the law more responsive to claims such as that of a female employee who would not wear makeup, or of a Black employee who wants to keep her cornrows, without searching for the link between appearance and identity? In Part II, I examine a way out of the identity-centered approach to appearance cases. I propose looking at appearance not as a matter relevant only to members of minority groups, but as a universal aspect of human experience. According to this analytical framework, it becomes possible to recognize that appearance is related to identity in more complex ways than simply marking it or accurately reflecting it. It becomes clear, for instance, that it is often difficult to pinpoint the chain of cause and effect and determine which came first: the appearance or the identity. For example, was the plaintiff first a cross-dresser who then started wearing women's clothes, or were the two processes interrelated? It also becomes clear that personal markers such as clothes, hairstyles, or names are related not so much to "what" we are, but to "how" we are. Appearance is a matter of texture, a way of being in the world, and such personal qualities are often hard to articulate in words—especially in the form of propositions or clear-cut categories. This is why I suggest that the law rely on the paradigm of poetic language to understand how appearance creates meaning in individuals' lives.

\textsuperscript{152} Id.
\textsuperscript{153} Id. at 413.
II. TOOLS FOR ESCAPING THE IDENTITY TRAP

This Part examines appearance cases that take a different approach than the identity-centered cases reviewed in Part I. The cases studied below succeed in treating appearance cases without resorting to the plaintiffs' identities, and provide a more responsive and convincing account of appearance adjudication. In reading the following cases, my goal is to extrapolate the principles that guided them in resolving appearance disputes. Section A examines a case in which the plaintiff seeking legal protection for his appearance was a member of the unremarkable majority and studies the way the court treated such an appearance claim. Namely, the court focused on the connection of appearance to personhood, rather than to identity. Section B studies cases in which the identity of the plaintiffs was a central issue in their appearance claims—they were all Canadians of Sikh faith, seeking accommodation of their religious emblems in different contexts. In contrast to the approach used by the American courts, the Canadian courts manage to resolve the appearance claims while remaining in the domain of appearance rather than inquiring into the extent to which appearance is related to identity. Section C summarizes the conceptual approaches that can be extrapolated from these cases. I suggest that the theory of appearance emerging from this identity-free caselaw could serve us well in rethinking the approach to be used in resolving appearance cases.

A. From Identity to Personhood: Nof v. The State of Israel

Even if we agree that the previously described decisions are troubling insofar as they reflect a simplistic understanding of identity, the question still remains: Can we renounce identity as the basis for appearance rights? Can we protect appearance rights without firmly anchoring appearance in identity? And how are we to maintain the political usefulness of the concept of identity and protect identity-based rights while refraining from reifying identities and rendering them confining and oppressive, rather than meaningful and enriching ways of understanding ourselves? In order to keep the vocabulary of identity viable, the law should remain constantly alert to the limitations of this vocabulary. The following case demonstrates such alertness to the complexity of identity and appearance.

During the 1991 Gulf War, Israel distributed gas masks to its population. The standard mask did not properly seal bearded faces, and bearded men had to use a special mask that was more than twice as expensive. The Israeli

154. Riley addresses the dangers of identity categorization in observing that the "proliferating self-descriptions, as encouraged by a present historical moment of petrification in the politics of the personal" only accumulate yet more candidates for embalming in the Museum of Me. This is the sort of practical difficulty which shadows those altering versions of the self pronounced by new kinds of identification which aim to liberalize yet which can paralyze." See RILEY, supra note 107, at 6.
government decided to fund those special masks for bearded men, but only to those who would sign a declaration stating that they grew their beard for religious reasons. Akiva Nof, a bearded man for more than twenty years, petitioned Israel’s High Court of Justice, challenging the government’s decision that secular bearded men had to shave their beards in order to abide by government safety recommendations. The two legal bases for his petition were that the government’s policy treated religious and secular people differently, thus amounting to religious discrimination, and violation of the petitioner’s human dignity.

Israel’s Supreme Court first examined the sources and significance behind growing a beard among religious communities in Israel. It found that the practice of refraining from shaving was not a formal Halakha (Jewish law) requirement. Yet, the Court recognized that, as a convention among observant Jewish men, the practice of growing a beard was a well-established custom with rich meanings, and thus part and parcel of their way of life. It is worth stressing that the Court did not stipulate that for the beard to be legally recognized it needed to amount to a religious duty. Rather, it was sufficient for it to be a meaningful convention, which is part of the personhood and everyday practices of many religious men. We can thus already recognize a departure from the logic delineated in the identity-centered cases we have seen in Part I. The Court was willing to recognize the importance of a certain appearance to a particular identity group even if it was not a stable sign of religion: Not all religious men have beards, and some non-religious men wear them as well. The emphasis of the inquiry moves away from the truthfulness of the information that the marker conveys about its bearer to the marker’s meaning and significance for its bearer. The bearded Israeli citizens who are religious, received recognition of their beard based not on the function of the beard in reflecting their identity, but rather due to the importance of the beard in their world.

But what of the petitioner, who could not ground the beard in religious meaning or community custom? If the Court were to apply the logic of the cases discussed earlier, it would look for an identity in which the beard could be anchored, and would quickly realize that the problem for the petitioner was that no such identity category was available. In other words, this was neither a religious man’s beard nor a hippie’s beard, nor, even, a beard belonging to someone with a note from the doctor confirming that he had skin problems and could not often shave. In the identity-centered cases, this finding would have resolved the matter: no identity category, so no protection for the marker. But here, the Court took another route in describing the significance and function of

156. Recall that in Rogers, the plaintiff’s discrimination claim was dismissed because not all Black women wore corsettes and some White women wore them. Rogers, 527 F. Supp. at 229.
the beard. Rather than looking for an identity underlying the beard, the judges examined the meaning of the beard to the petitioner's personhood. In this, they recognized that, despite the Petitioner's inability to anchor the beard in a clear identity category, the beard had become, for him,

a part not only of his figure but also of his being. In this respect, there is no difference between those who grow their beard for reasons related to their religious faith and those who do so for other reasons. Whether one is religious or secular, with the passage of time the beard becomes an integral part of him. How he perceives himself and how he is perceived by others are one and the same.157

The distinction between one's "figure" and one's "being" reflects an understanding of the interplay between the public persona and the private sense of self, between how one is seen by others and how one understands oneself.158 The beard has become part of how the petitioner is perceived by his social environment, and thus it is important to him and to his sense of self. This case develops a complex and nuanced theory about the role of appearance in human experience. It reflects an understanding that marking, or being marked, is part of individuation: Marking is part of being considered a person by one's social environment and by one's own self-understanding.159 Impersonation, maintaining a persona or a particular figure, is thus inherent to personhood.160

Furthermore, personhood, according to this opinion, does not precede appearance; rather, there is a bidirectional movement between one's look and one's experience of oneself, or self-understanding. This judicial text refuses to inquire about the petitioner's identity prior to his beard and independently of his interactions with others. Like all men, the petitioner is not an autonomous entity whose identity can be examined outside its social context and its concrete, embodied, and socially meaningful manifestations. The Court refuses to imply either that the meaning of the beard was created solely by the

157. Nef, IsrSC 50(3) at 457. The translations from the Hebrew are mine.
158. Our bodies and the material aspects of social interaction are important features as well as signs of who we and others are and, as such, feature our identities in practice . . . . If this self is of all extraordinary, it's extraordinarily mundane. If it has constancy, it is as stable as the patterns and accompanying material signs of our relationships.

Holstein & Oubium, supra note 81, at 24.

159. A labor relations arbitrator overruled an employer's ban on beards on similar grounds. Finding that there was no production-related reason to forbid beards, the arbitrator found the no-beard rule to be inherently suspect, explaining that "[w]earing a beard is a matter of personal image, indeed, it may be an expression of personality." See Fairmont-Zuda Dairy, 106 Lab. Arb. Rep. (DNA) 583 (1995) (cited in Michael J. Yeklo, What Do Unions Do About Appearance Codes, 14 Duke J. Gender L. & Pol'y 521 (2007)).

160. Fictional and biographical narratives that treat the difficulty involved in changing physical appearance abound. Individuals worry that external changes will be perceived by society as too harsh a transformation, as a discontinuity. One of the most moving texts of this sort describes the decision of a middle-aged man to stop dyeing his hair, and his qualms and worries about his white roots revealing the fact that he had been dying his hair. See José Saramago, The History of the Siege of Lisbon 185-88 (Giovanni Pontiero tr., Harvest 1998) (1989).
petitioner, or that it was created solely by his social surroundings. The beard and its bearer occur\textsuperscript{161} within an interplay of meaning making.

The appropriate distinction, according to the Court, is not between religious and non-religious beards (or in our terms, between beards that reference a particular identity and ones that do not), but rather between those whose beards have become part of their personas and senses of self (what the judgment calls "being" and "figure") and those whose beards have not acquired such significance. The Court therefore accepted the Petitioner's arguments that the religious/nonreligious distinction was discriminatory on the basis of religion, and that the beard was part of the petitioner's right to dignity, a constitutionally protected right under Israeli law. Indeed, while the Court recognized that the beard was part of \textit{who the petitioner was}, it saw no need to articulate a clear-cut identity category that defined the petitioner, because it saw no need to anchor the beard in a specific identity.

The terminology used in the opinion indicates its approach. Throughout the judicial opinion, the petitioner is referred to as "a bearded person."\textsuperscript{162} I find this formulation promising, because it manages to grant centrality to the beard as something more than a mere external and mutable appearance without reducing the person to his beard.\textsuperscript{163} The decision acknowledged that when people meet the petitioner, they see him, among other things, through his beard, and that trying to isolate the beard in order to determine what exactly it represents about his identity would be missing the point, for the surface texture of his identity is integral to any understanding of it. Appearance is thus part of the texture and poetics of personhood.\textsuperscript{164}

It seems that this way of refusing to separate the bearer from the beard, and the beard from the social context in which it operates, would correspond to how Renee Rogers (the airline employee) related to her cornrows.\textsuperscript{165} Like poems,
personal markers are not reducible to the ontological information they contain or to an argument they make.\textsuperscript{166} To expect the beard to tell us something about Akiva Nof is to measure it by its usefulness in conveying truthful information. This, the Court realized, is not the main function of appearance. The reasoning in the \textit{Nof} case reflects an understanding that appearance cannot be equated to a propositional statement. I suggest that the Court understood appearance not as a propositional statement, but rather as something closer in its mode of meaning to poetic expression; it found a way to provide legal recognition to a mode of appearing that is neither purely chosen, contingent, and instrumental, nor purely unwitting, natural, and immutable;\textsuperscript{167} a mode not propositional but suggestive, exploratory, and performative.\textsuperscript{168}

Since the Court did not have an identity category on which to base the protection of the petitioner’s beard, it relied on the petitioner’s right to protection of his dignity, and it did so in a way that relates to my suggestions of the limited expressibility of the meaning of markers. By locating the beard as part of the petitioner’s dignity, the Court delineates a protective circle around the indescribable. Realizing that the beard can be important to the petitioner in ways that resist categorical justifications, the Court used dignity as a mechanism to waive the demand that the legal subject articulate that which cannot be articulated.

As if to demonstrate the minor importance of classifications and categories in appearance cases, Justice Mazza explicitly noted that he did not think there was much importance in classifying whether the beard was a matter of freedom of expression, autonomy, or privacy. What mattered to the Court was that the beard mattered to Nof. And here, the subject of dignity was not only the bearded person, but also the inexpressible nature of his plight. In other words, the Court recognized that it would be a violation of dignity not only to have the person shave his beard, but also to ask him to produce a ‘clinical typology’ of how and why the beard mattered.

The last and perhaps most important element of the case that should be stressed is its recognition of the \textit{limitation of language in describing appearance}, and in this case particularly, in expressing the meaning of the beard in its bearer’s life. While the identity-centered decisions we saw in Part I required the litigants to depict and re-articulate their appearances through a

\textsuperscript{166} See \textit{White}, supra note 110.

\textsuperscript{167} Riley similarly draws an axis of traits that vary from the random to the inherent, or from the more chosen to the more unwitting: “The name hovers at some midpoint between the tattoo and the state register: the formal identity displayed by a passport or a social security number can readily be stolen but then replaced by a fresh number because it doesn’t inher; it’s not embedded in the flesh—hence the great strength of the tattoo, which is.” Riley, \textit{supra} note 107, at 117.

\textsuperscript{168} This understanding of the function of markers is parallel to White’s understanding of language: “[L]anguage is not a code into which messages are translated so much as an activity, a set of gestures, like dance, say, or music, and its most important meaning lie in the particulars of performance.” \textit{White}, supra note 105, at 109.
language of categories and propositions in order to justify them, this decision resisted such an impulse. It recognized that the beard is partly idiosyncratic; like a poem, it would be hard to articulate what it is and rephrase what it does. It recognized, in other words, that appearance is non-repeatable.\textsuperscript{169} The following Interlude develops this point and explores the modes in which appearance creates meaning.

\textit{Interlude III. Appearance, Poetics, and the Boundaries of Language}

The task of describing the meaning of a beard, a particular dress style, or a name puts us in touch with the limits of language's capacity. To the extent that personal markers are describable, they are describable through figurative, metaphorical language. The fundamental problem in the prevailing legal treatment of personal appearance is a preoccupation with the extent to which it corresponds to the reality that supposedly lies beneath it. A more apt understanding of markers would have to account for their intermediate nature, as neither purely contingent nor fully intentional. Furthermore, it is futile to treat markers as \textit{either} inherent/natural (and thus reliable representations of their bearer's identity) \textit{or} disconnected/artificial (and thus potentially superficial and misleading with regard to their bearer's identity). Whereas the law treats personal markers as conveyers of \textit{what} the legal subject claims to be through his or her appearance (i.e., as conveyers of identity), markers tell us not \textit{the what} but the \textit{how} of identity: Appearance has more to do with what we might call the texture of the self and its ways of going about the world, and less with a predetermined essence.\textsuperscript{170} This approach to understanding markers such as hair, dress, or names would neither dismiss them as inessential and thus extricable from the legal subject's "true identity," nor elevate them to a status that is inextricably tied to the representation of the subject's identity.

Drawing on certain strands in twentieth-century literary criticism, I suggest poetic language as a model for understanding how external markers create meaning.\textsuperscript{171} Poetic language shifts the focus of reading from looking for


\textsuperscript{170} Recall that in \textit{Hernandez-Montiel}, the Board of Immigration Appeals denied the plaintiff's asylum application because the plaintiff was persecuted "because of the way he dressed... and not because he is a homosexual." Hernandez-Moniald \textit{v. INS}, 225 F.3d 1084, 1089 (9th Cir. 2000).

\textsuperscript{171} I do not wish to make general claims about some universal nature of poetic language. I draw on ways of approaching poetry that are generally associated with twentieth-century criticism. These critical strands represent a heightened awareness to the materiality of poetic language and to the importance of form and internal organization. Most notably, the critics I draw on can be associated with formalism, new criticism, and current articulations of neo-formalist approaches. The sensitivities
meaning outside the poem ("behind" its language, as if its words are only vehicles for a meaning that lies outside of them) to looking for what the poem does on its surface, or within the medium that constitutes it. Similarly, personal markers are not transparent vehicles of information about their bearers, and thus the law’s instrumental approach to markers is erroneous. Rather, like poetry, appearance’s medium itself and the social context in which it occurs are essential to the work it performs. Accommodating this intermediacy of markers would require appearance adjudication to endure much more uncertainty and complexity regarding the meaning of markers than it currently tolerates. However, bold recognition of this complexity is the only convincing and productive path to pursue if we seek to design law that is responsive to the intricate challenges of its subjects’ lives as social beings.

In Nof, the inexpressibility of what appearance does or of why it matters did not discourage the Court—and should not discourage us—from developing a theory for understanding appearance and incorporating personal markers into the visual field of the law. James Boyd White stresses that we should not mistake the inexpressible for the unreal: “Each of us is a circle of experiences and meaning that can occasionally, through language, meet or overlap with others, at least at the edges... What lies beyond language is real all right, but it is not communicable, certainly not in a language of concepts.”

Assessing the significance of the petitioner’s beard, the Court reflected a similar understanding. It recognized that some of what is real to us and about us is inexpressible (at least through general categories), but that such inexpressibility cannot free our political and legal arrangements from attending to those “circles of experiences.” Thus, the law’s treatment of the beard remained respectful, despite the fact that it was difficult to describe its importance to its bearer in concrete and functional terms. Difficulty expressing part of our experience or an aspect of our being does not require that this experience remain completely extralegal; the law need not treat experiences that lack an easily decipherable meaning as meaningless.

Poetic language can, at times, alleviate some of the difficulty of expressing the nature, meaning, and effect of appearance. Metaphorical or poetic language can mitigate the incommunicability of markers. Consider how lovers turn to metaphor to describe their loved-ones, because they feel that there are no

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173. White, supra note 105, at 35.
ready-made words to convey what they see in their love-object and, particularly, how they see it. In the Song of Solomon, which gave us some of the most compelling poetic expressions of love, the lovers say to each other, "As the lily among thorns, so is my love among the daughters. As the apple tree among the trees of the wood, so is my beloved among the sons." 174 Suppose that the fair sister from the Song of Solomon wanted to describe her loved one to a good friend. Turning to generalities such as his age, occupation, or nationality may have the power to typify the lover for technical or bureaucratic identification purposes, but it would not capture "what he's like," or who he is for his lover—and "what he's like," or the "how" rather than the "what" of the individual—is what lovers primarily relate to in one another. 175

But while figurative speech can help capture one's unique "texture" where generalizations would not suffice, sometimes even this non-categorical mode of expression encounters the boundaries of expressibility. Examples of the inability of language to express minute details about one's uniqueness abound in literature and poetry. Consider Ira Gershwin's lyrics for the Fred and Ginger classic, "Shall We Dance": "The way you wear your hat/ The way you sip your tea/ The memory of all that/ No, no they can't take that away from me." 176 No language will suffice to describe the exact way in which the loved-one is unique. In her distress, all the lover can do is point to the fact that her lover is unique in ways words cannot capture. But although the exact nature of these traits is indescribable, they are still the qualities that best capture the loved-one in his lover's eyes: There is a particular way in which he sips his tea, but she cannot quite describe this way beyond pointing to the fact that it exists.

This song asks what it would take to recall someone's identity or person. It replies that what matters for remembering a loved-one is not so much what he was, but the way he was. In bringing markers to the fore, appearance cases are, similarly, much more about people's characteristics—the ones that make them who they are both to themselves and to the world—and not about the general categories to which they belong (such as age, race, sex, occupation, etc.). The cases studied in this Article, then, are about the self's texture and ways, styles and habits, and not its internally fixed core essence.

Poetic expression, like appearance, is located on the blurry line between chosen and unwitting, and between informative and non-instrumental. The meaning of poetry occurs only through the interaction with its reader. That is, talking about the meaning of the poem is only coherent when we talk about its

174. *Song of Solomon* 2:2-3 (King James).
175. See Nussbaum, supra note 169 (presenting the difficulty in the Platonic conception of love, which concentrates the repeatable and generalizable foundations of the loved-one's soul, and siding with Aristotle's conception of love as inherently dependent on repeatable and concrete qualities of the loved-one).
176. Ira Gershwin & George Gershwin, They Can't Take that Away from Me, on SHALL WE DANCE? (RKO Radio Pictures 1937).
meaning to someone, and within a particular context. Similarly, it would not make much sense to talk about the universal and independent meaning of a certain hairstyle or name. Markers never have meaning independent of context, but receive their meaning through the social interactions in which they operate. These meanings, therefore, vary according to cultural context. Thus, the law must relate to the meaning of appearance within the social settings in which it transpires.

Another way in which poetic expression is a helpful analogy to appearance lies in the fact that poetic language works less to represent a reality behind the words or to convey information accurately and functionally and more on the terrain of the medium, of language itself. In poems, words operate not (or at least not mainly) through their definitional meaning, but rather their poetic work is done through their relations to other words in the language system. Poetic statements are not, to quote White, "language-free, but language-bound and language-centered." Analogously, personal markers are not reducible to other terms, but, to continue with White's characterization of poems, express their meaning through their form. A name or a hairstyle does not function as a transparent representation of the identity that supposedly lies underneath it. It is not a proposition or a claim. Markers work mainly on their own terrain, as part of a language of signs. The concrete, non-repeatable, and non re-describable materiality of clothes or names is essential to what they do. The current adjudication of appearance seeks to reduce markers into truth claims, aiming to suggest that they are only important in so far as they accurately reflect their bearer's identity. Drawing on the jargon of semiotics, appearance cases are about what signs do as signs, in relation to other signs and within the system of signs, more than about what signs do with regard to their referents.

Clothes, names, and other external markers are never devoid of meaning. Markers have a semiotic function, and there is no getting around this. But

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177. Stanley Fish illustrates this point vividly in describing a chain of subsequent interpretations to the same text written on a blackboard, depending on the context in which the text was presented. See STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (H. Aram Veeser ed., 1999); see also DAVE & WOMACK, supra note 102, at 60-61 (discussing Jonathan Culler's structuralist approach, by which the same text can have different meanings, depending on the reader and on the genre).

178. "Form," it should be remembered, is a word that has several meanings, some of which are near opposites. Form has to do with the structure or outward appearance of something, but it also has to do with its essence. In discussions of poetry, form is a powerful word for just that reason: structure and essence seem to come together, as do the disposition of words and their meanings.


179. WHITE, supra note 105, at 42.

180. The paradigmatic exposition of this approach was done by Saussure. See FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Wade Baskin trs., 1996) (1916); see also V. TEJERA, SEMIOTICS FROM PEIRCE TO BARTHES: A CONCEPTUAL INTRODUCTION TO THE STUDY OF COMMUNICATION, INTERPRETATION AND EXPRESSION 7 (1988) (discussing semiotics theories that hold that "any social interaction—not just linguistic interaction—necessarily involve significations, selves, shared meanings").
markers do not translate into a clear-cut identity claim. Constraining legal subjects to rearticulate their appearance in the form of an identity claim empties the language of names and dress style (and other ways of being and appearing) of its meaning. Jerome McGann articulates the main locus of poetic meaning:

The object of poetry is to display the textual condition. Poetry is language that calls attention to itself, that takes its own textual activities as its ground subject. To say this is not at all to say that poetic texts lack polemical, moral, or ideological materials and functions. The practice of language takes place within those domains. But poetical texts operate to display their own practices, to put them forward as the subject of attention.\(^{181}\)

The challenge for the law, as my case analysis suggests, is to develop a way of reading personal markers poetically. While names and clothes carry meaning, it is a meaning that resists the narrow true-or-false interpretive approach currently employed by most of the caselaw. Reading markers by their function as identity labels, as is the current mode of judicial analysis, is in fact a misreading. I hope not only to shed light upon these misreadings, but also to suggest an alternative way of adjudicating appearance, which would provide a more nuanced way for the law to talk about identity than the one currently available.

The analogy of personal appearance to poetic language helps to clarify that the law’s expectation that its subjects rephrase, translate, or convert their appearance into a claim about their identity is unmerited. Just as trying to paraphrase a poem into an argument or a message would be not only futile but also disrespectful of the way in which poems operate, it would be wrong for our law to ask its subjects to mark themselves clearly and with determination as to the meaning of their appearance.

B. Canadian Law’s Treatment of Sikh Appearance Cases

My reliance on Nof as a case that could guide new thinking about the identity-centered appearance cases studied in Part I could be challenged with an argument that the Nof Court recognized the appearance claim of a middle-class man who is not part of a sexual, ethnic, or racial minority merely because his appearance was not controversial in any way and did not cross the boundaries of tolerance to subversive or unconventional messages. Nof was part of the hegemonic majority, whereas the plaintiffs in the other appearance cases were members of minority groups. In response to this critique, this Section analyzes Canadian caselaw dealing with the accommodation of Sikh immigrants’ appearance. The plaintiffs in these cases are members of a minority group, and their appearance (which includes turbans, kirpans, and other Sikh insignias and

\(^{181}\) McGann, supra note 161, at 10-11.
items of traditional attire) is related to their minority identity. Nonetheless, like the Israeli Court in Nof, the Canadian courts adjudicating these cases did not resort to an underlying Sikh identity to justify the plaintiffs’ appearance. Instead, the courts concentrated on the legitimacy of the negative social response to Canadians who wear Sikh insignia, and on the meaning and function of the appearance in the lives of the legal subjects.

In Grant v. Canada the plaintiffs challenged a reform in the uniform code of the Royal Canadian Mounted Police (RCMP) (affectionately referred to as “mounties” by Canadians). As part of a policy to incorporate minorities into the police force, the reform created special accommodations for Sikh men who wore customary Sikh emblems such as a beard and turban. The regulations permitted Sikh police members to wear a turban issued by the RCMP, made of the color and material of the suede Stetson cap worn by non-Sikh officers. In addition, Sikh police officers were allowed to keep their facial hair, provided that the facial hair was neat and, if necessary, kept in place by “a fine netting material the same color as the hair.”

The plaintiffs maintained that the Canadian Constitution’s guarantee of freedom of religion would be breached if members of the public were forced to interact with police officers wearing, as part of a uniform, symbols of an unshared religion. They also argued that the plaintiffs’ constitutional right to fundamental justice required that police powers be exercised “in a context free of any reasonable apprehension of bias.” Finally, the plaintiffs claimed that the revised dress code discriminated against other religious groups who were not allowed to display their religious symbols.

The trial court’s opinion, whose appeal was rejected by the Supreme Court of Canada, did not analyze the relationship between Sikh identity and religious emblems. Rather, it focused on the significance of the RCMP officers’ appearance and the implications of allowing officers to wear turbans and beards. The court first recognized that the police officer with his typical cap and uniform had become an icon that symbolized and personified Canada in the minds of Canadians, as well as in governamental and tourist-oriented publications. Yet, the court observed, the symbolic look had not been stagnant but, rather, had adapted to changing social circumstances, as when it had been necessary to deviate in order to accommodate women.

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183. The lawsuit was initiated by wives of police officers and ex-officers. Their petition drives drew more than 200,000 signatures. See id. ¶¶ 45, 48-50.
184. Id. ¶ 42, 55.
185. Id. ¶ 77.
186. Id. ¶ 99.
187. Id. ¶ 98.
188. Id. ¶ 47.
189. Id. ¶ 58.
then examined whether it would be appropriate, as a matter of Canada’s constitutional principles and political atmosphere, to exclude bearded and turbaned Sikhs from police service. Rejecting the claim that the religious freedom of the public would be infringed through interactions with turban-wearing police officers, the court wrote:

In the case of interaction between a member of the public and a police officer wearing a turban, I do not see any compulsion or coercion on the member of the public to participate in, adopt or share the officer’s religious beliefs or practices. The only action demanded from the member of the public is one of observation. That person will be required to observe the officer’s religious affiliation. I cannot conclude that observation alone, even in the context of a situation in which the police officer is exercising his law enforcement powers, constitutes an infringement of the freedom of religion of the observer.  

The quote posits an account of what it means to be Canadian and to live with other Canadians of diverse affiliations and backgrounds. Most interestingly, the court refuses to turn the matter into a clash between “true” religious and ethnic identities, and leaves the issue at the terrain of appearance. Surely, the court was aware that the basis of the plaintiffs’ claim may have been prejudice against foreigners. However, the court defused the identity-based aspect of the case by refusing to frame the issue as one of identities in the abstract and instead examined how identities function in the concrete social interactions in question.

Had the court applied the approach of the cases examined in Part I, it might have concluded that Sikh could serve in the police force only if they refrained from displaying symbols of their religious affiliation. Alternatively, the court could have permitted the turban and the beard if these were strict religious requirements. But like the Nof court, the Grant court saw no need to establish that the turban was part of religious doctrine. The court focused not on whether Sikh men were justified in wearing turbans and beards, but on whether the plaintiffs (as members of the Canadian public) had legitimate grounds for objecting to the idea of turban-wearing policemen. That some Sikhs saw these practices as mere traditional customs, and that many Sikhs did not wear the beard or the turban, had no bearing on the case’s resolution.  

190. Id. ¶ 84 (emphasis added). The court recognized that this was a matter of the culture and society in question. "[A]s a practical matter, in Canada, there is simply no chance that civil strife will be created by allowing the wearing of the Khalsa Sikh turban by some of our police officers. We are a highly tolerant society and perhaps more importantly, today, at least, highly secular." Id. ¶ 10. See also id. ¶ 93 ("One can speculate that the tensions between Sikhs and others, at other times and on other continents, simply do not exist in Canada."); ¶ 59-65 (describing the fact that in the nineteenth century, the police reformed the dress code in order to signal impartiality and neutrality, rather than their political or religious affiliations).  

191. Id. at ¶ 17 (analyzing the history of the Sikh dress code and noting that "[w]hether or not the wearing of the turban is in fact mandatory is not free from debate"). Furthermore, the court relied on evidence that the Sikh symbols are not necessarily perceived by the public as religious symbols, but as "a cultural manifestation [that] signifies only a person coming from India." Id. ¶ 5. See also ¶ 92 ("It
shifted its analysis from the Sikh's claim on his turban to the Canadian public's ways of seeing. The court questioned the legitimacy of the plaintiffs' expectations for simplicity and clarity in recognizing policemen, subtly asking the plaintiffs to complicate and refine their habits of seeing. One could be both a policeman and a Sikh, and the mature response to this fact would be to accommodate this complexity rather than to long for a stable and plain visual order.\textsuperscript{192}

Whereas the Sikh emblems in \textit{Grant} were challenged because of their symbolic interference with the police uniform, \textit{Dhillon v. British Columbia}\textsuperscript{193} involved a challenge on the functional ground that wearing a turban interferes with wearing a motorcycle helmet, preventing compliance with Canada's helmet requirement. In \textit{Dhillon}, the British Columbia Human Rights Tribunal accepted the claim of a Sikh complainant who argued that, by refusing to allow him to take a novice road test on a motorcycle, the ministry of transportation had discriminated against him based on his religion. A devout Sikh who felt prevented from wearing anything on his head but a turban, the complainant refused to wear the safety helmet required by the law. The tribunal found that the helmet requirement had, in general, a bona fide reasonable justification\textsuperscript{194} but that its justification in the case of the Sikh population needed to be assessed in context, based on specific empirical data. The tribunal gathered elaborate data in order to calculate the marginal increase in risk and costs that might result from waiving the helmet requirement for Sikhs. The analysis took into account the baseline risk associated with motorcycling, the marginal risk associated with driving a motorcycle without a helmet, and the marginal risk resulting from the percentage of motorcycling turban-wearing Sikh men in the population. The tribunal concluded that the risk increase would be so small\textsuperscript{195} that it did not constitute undue hardship as a matter of medical cost or safety promotion.\textsuperscript{196} The tribunal said that risk was "ubiquitous":

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\begin{quote}

may very well be that most Canadians... do not interpret the turban as a religious symbol or they may see it as benign or as an indication of integrity and strength.

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\textsuperscript{192} The court rejected the two other claims using similar reasoning. As to the discrimination claim, the court noted that the applicants did not demonstrate that members of other religions were denied the opportunity to manifest their religion, and noted that the police were willing to consider any requests for exemptions on religious grounds. \textit{Id. \S 98}. The fundamental justice argument was rejected along the same lines. \textit{See id. \S 92-93}.


\textsuperscript{194} Under Canadian law, a bona fide justification can sustain a practice that is on its face discriminatory. B.C. Hum. Rts. Code, R.S.B.C. \S 8 (1996) (Can.).

\textsuperscript{195} The assessed increase in annual fatality rate would be between 0.02 percent and 0.16 percent, and the assessed increase in annual brain and head injury rate would be between 0.16 percent and 1.07 percent. Meeting this increase would require 0.05 more rehabilitation beds annually. \textit{See Dhillon}, 35 C.H.R.R. D/293 \S 41, 50.

\textsuperscript{196} \textit{Cf. Panwu v. Skeena Cellosaw}, [2000] B.C.H.R.T.D. No. 55 (QL) (denying a Sikh employer's claim that he was discriminated against because his employer refused to allow him to keep his beard). The plaintiff in \textit{Panwu} worked with dangerous materials that required a gas mask in case of emergency. The tribunal assessed the safety hazards involved in his inability to wear the safety mask, and concluded that they overrode the plaintiff's right to religious equality.
There is a risk involved in driving a car or flying an airplane. Whatever the statistical probability of death or serious injury occurring, millions of people continue to drive their cars and fly airplanes. As a society, we are willing to accept these risks, and many others. Clearly, in licensing helmeted motorcycling, [the Ministry of Transportation] is not governed by a policy of "zero tolerance" for injury and death.  

Whether the plaintiff's marker was volitional, habitual, or immutable was of secondary importance for the tribunal. The scrutiny turned away from the turban-wearer and towards the rule barring him from wearing the turban. As in Grant, the decision constructed an undisturbed circle in which the legal subject could be marked as he chose. Stronger proof of increase in risk or in cost would be needed to justify an intervention in the protected circle of the Sikh's identity. The tribunal focused on the importance of the personal markers to the dignity and personhood of their litigants, and not on whether their identity justified those markers.

Recently, the Supreme Court of Canada took a similar approach in a case involving the right of a student to wear a kirpan (a traditional religious object that resembles a small sword) to school sealed under his clothes. The court held that forbidding the student from carrying his kirpan would violate his constitutional right to religious freedom. Two points are noteworthy for the current discussion. First, the Court did not consider whether all orthodox Sikhs carried a kirpan: "The fact that different people practice the same religion in different ways does not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed."

Second, the Court refused to analyze the meaning of the kirpan outside the context in which it was used and the cultural meanings attached to it. The school authorities argued that the kirpan was a weapon that presented a safety hazard to the students in the school. They contended that even if it was not actually used, "the kirpan is a symbol of violence and ... it sends the message that the use of force is the way to assert rights and resolve conflicts." The Supreme Court rejected this interpretation, and dismissed the claim that

198. Cf. Bhinder v. Canadian National Railway, [1985] 2 S.C.R. 564 (asserting that even if the helmet requirement was a bona fide occupational qualification, it should still be examined in relation to the individuals to which it applied, and that the Sikh employee should be accommodated).
199. "[T]he protection of fundamental rights is usually accompanied by costs, either financial or otherwise. There is a cost associated with making buildings wheelchair accessible for persons with disabilities ... The present case is not unique in this regard." Dhillon, 35 C.H.R.R. D/293 ¶ 52.
200. Cf. Bhatia v. Chevron USA, 734 F.2d 1382 (9th Cir. 1984) (holding that an employer's refusal to enable a Sikh employee to keep his beard when working in a toxic environment that required the ability to wear a tight-face sealed respirator did not amount to religious discrimination).
202. Id. ¶ 35. Recall that in Rogers, the plaintiff's claim that her corova hairstyle was significant for her, was rejected based on the judicial observation that not all black women wear cornrows, and that some white women wear them too.
203. Id. ¶ 55.
"whatever it may symbolize, the kirpan is still essentially a dagger, a weapon designed to kill, intimidate or threaten others,"\textsuperscript{204} The Court explained that such an interpretation "strip[ped] the kirpan of any religious significance."\textsuperscript{205} Rather than extrapolating the kirpan’s meaning from the object itself, the Court looked to the meaning ascribed to it by its carriers. Thus, the Court noted that "the word ‘kirpan’ comes from ‘kirpa’, meaning ‘mercy’ and ‘kindness’, and ‘aan’, meaning ‘honour’,"\textsuperscript{206} and that "Sikh religion teaches pacifism and encourages respect for other religions... the kirpan must be worn at all times, even in bed... and it must not be used as a weapon to hurt anyone."\textsuperscript{207} This contextual assessment of the meaning of personal markers was pivotal to the Court:

There is no denying that this religious object could be used wrongly to wound or even kill someone, but the question at this stage of the analysis cannot be answered definitively by considering only the physical characteristics of the kirpan... [T]he question of the physical makeup of the kirpan and the risks the kirpan could pose to the school board’s students involves the reconciliation of conflicting values...\textsuperscript{208}

For the same reasons that schools do not ban other potentially dangerous objects like scissors, it was inappropriate to ask that the kirpan be completely devoid of risk.\textsuperscript{209} The appropriate solution was to take proportional measures to decrease the potential safety hazard by setting specific rules for kirpan wearing.\textsuperscript{210}

C. An Alternative Approach to Appearance Claims

The above cases provide four principles that can serve as the foundation for an alternative legal approach to appearance claims. All four principles have to do with the modes through which we interpret appearance. They suggest that it is hard to classify appearance as either completely instrumental or completely symbolic, or as either a completely reliable reflection of one’s identity or a marker completely detached from identity.

\textsuperscript{204} Id. § 74.
\textsuperscript{205} Id.
\textsuperscript{206} Id. § 37.
\textsuperscript{207} Id. § 36.
\textsuperscript{208} Id. § 37.
\textsuperscript{209} Cf. Peel Bd. of Educ. v. Ontario Hum. Rts. Comm., [1991] 3 O.R. (3d) 531 (confirming the right of a school student to wear a kirpan to school, provided that it was securely held under the student’s clothes, and rejecting the safety hazard argument since no evidence of the usage of kirpan for violent purposes was provided).
\textsuperscript{210} Cf. Nijjar v. Canada 3000 Airlines Ltd., [1999] C.H.R.D. No. 3 (QL) (affirming an airline’s ban on wearing a kirpan aboard the plane). The Multani decision held that airplanes and airports are different from schools, in that they are a unique environment, in which people stay only for limited duration in a confined space. In this, they are substantially different from schools, which aspire to reflect the values of the community. Multani, 1 S.C.R. 256 § 63.
1. **Maintaining a category-free protective circle around the person.** The cases we read do not ask the subjects of law to self-report about the identity category that they occupy. Even if one wants to wear Sikh insignia because he is Sikh, these courts do not question whether the person is really Sikh and whether the insignia is inherent to Sikh identity. Accordingly, I suggest that legal systems dealing with appearance cases should draw a “categorization-free circle” around plaintiffs in appearance claims. This category-free protective circle can be defined through liberty (for example, free speech or freedom of religion), dignity, autonomy, or privacy. Every legal system should use the concepts most fitting its own toolbox. 211

2. **Recognizing that everybody impersonates.** Since every individual maintains personhood through appearance, the question that should interest the law is not whether the petitioner impersonates, but whether the impersonation, including its poetic dimensions, is part of his or her personhood. 212 In other words, the question should be whether the appearance is essential in maintaining one’s sense of who one is, or rather, one’s sense of “what one is like.”

As we saw in *Nof*, appearance can be a significant part of one’s personhood even if it is not anchored in a recognizable identity category. For a man who has sported a beard for most of his adult life, and who recognizes himself and is recognized by others with and through this physical characteristic, a beard could be significant even if it could not be grounded in religious or other neatly classifiable identities.

Appearance should be adjudicated in the context of personhood because the concept of personhood already contains a recognition of the semiotic. Personhood recognizes the masks that human existence entails—masks that, when significant and part of personhood, are never completely detached from their wearer (and are therefore not completely masks).

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211. It is beyond the scope of this article to outline the doctrinal ways in which each legal system could incorporate my suggested model into its treatment of appearance cases. I would like to note in passing that U.S. law has recently demonstrated openness to recognizing certain life practices as pertaining to dignity and autonomy. See e.g., *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (recognizing the right to intimate relationships as part of personal dignity, which is part of the constitutionally protected right to liberty); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (recognizing personal decisions relating to marriage, parenthood, and family relationships as a constitutionally protected aspect of personal dignity and autonomy); see also Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 Neb. L. Rev. 740 (2006) (analyzing the usage of dignity in American constitutional law); R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 San Diego L. Rev. 527 (2006) (reviewing the meaning of the concept of dignity in American constitutional case law).

212. [L]ike it or not, we are stuck with faking it. If we try to avoid it by refusing to don masks or strip our veils we are only playing a role that has a lengthy and complex history, predicting the covenants, and ever so susceptible to hypocritical and false norms. Some accommodation with faking it is in order... [T]he attempts to get back to true basics mostly succumb to the vanity of human wishes; they never quite measure up to the hopes we had for them.

3. **Questioning the legitimacy of an appearance’s social rejection rather than assessing its legitimacy.** The cases in Part I are, in part, expressions of social intolerance to appearances that resist neat classification into identity categories. What, then, makes courts produce decisions reflecting a substantive difference between everyday social uncertainties and the uncertainties that “our” plaintiffs bring to the court, leading them to attend to the latter by protecting against the uncertainty of appearance? Stated differently, what is it that prompts courts to attend to social actors’ frustrations about interpretive uncertainty in reading appearances?

These decisions reflect the desire for a stable order of identities and appearances. In contrast, the decisions discussed in Part II question the political legitimacy of such a narrow approach to markers. Rather than legitimating the social longing for a world in which identities are clearly distinct, these decisions throw the question back at the anxious or impatient reader of the appearance and require him or her to produce a convincing reason for the negative response. James Boyd White writes: “When we discover that we have in this world no earth or rock to stand or walk upon but only shifting sea and sky and wind, the mature response is not to lament the loss of fixity but learn to sail.”¹¹³ The opinions discussed in Part II tell the social actors who lament the complexity of appearance to learn to sail. These judgments refuse to validate the legitimacy of irritation about uncertainty of appearance.

The adjudication of appearance should not revolve so much around *who one is* as much as about *how one is perceived*. For example, instead of asking the Mexican asylum seeker to justify his appearance by reference to a “true” identity, we should ask the Mexican police to account for *their* intolerance towards his attire. It is *their* inability to accept that males wear feminine clothes that prompted the plaintiff’s persecution, not the plaintiff’s “real” sexual identity. It is *their* animosity and resentment that needs to be challenged, not his “justifiable” or “unjustifiable” choice of clothing. What an asylum seeker should have to establish to receive refuge is not that his (stable, clear, and clinically proven) identity renders him a part of a persecuted social group, but rather that he is socially perceived in his home country as belonging to that social group.²¹⁴

In *Naf*, the Court signaled that the State of Israel and its officials would have to learn to live with the fact that beards may signal things other than

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²¹³ JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 278 (1984).

²¹⁴ Justice Blackmun’s dissent in *Goldman v. Weinberger*, 475 U.S. 503 (1986), revealed a similar approach to the one I suggest here. The Goldman majority held that it was not a violation of religious freedom to prevent a religious Jewish air force sergeant from wearing the yarmulke required by his faith. Justice Blackmun argued that the military had not provided any empirical proof of its claim that religious garments would undermine military uniformity: “The Air Force simply has not shown any reason to fear that a significant number of enlisted personnel and officers would request religious exemptions that could not be denied on neutral grounds such as safety, let alone that granting these requests would noticeably impair the overall image of the service.” *Id.* at 527 (Blackmun, J., dissenting).
religious belief. Consequently, policymakers will need to accept that secular people’s beards can be important to their bearers and to tolerate the risk that it will be harder to determine whose beards are worthy of legal recognition. Such judicial decisions signal an understanding that uncertainty about the meaning of appearance is unavoidable, for where there are signs, there is uncertainty. My contention is that courts should take part in alleviating such uncertainties only when there are good reasons for doing so.

The cases discussed in Part II offer ways to protect appearance practices when such protection is due, without trapping the subjects of this protection in fixed and flat notions of identity. The courts in these cases manage to produce a nuanced picture of identity (and of appearance) without losing identity’s usefulness in informing the legal understanding of the diverse perspectives of the law’s subjects. The central difference between the two groups of cases lies in their approach to the kind of meaning produced by personal markers.

Here the metaphor of poetry becomes central. Just as the medium of poetry is essential to what poetry does,215 markers are a medium where selfhood is not expressed or projected but occurs. Appearance, some courts realize, does not represent some essence that lies beneath it. Thus, unlike the identity-centered decisions discussed in Part I, the decisions in Part II do not require that the subject re-articulate his or her appearance in identity terms. As these decisions convey, insisting on the propositions made by one’s appearance would be just as irrelevant as insisting upon the argument of a poem. Like poems, personal markers marvel in the medium.

In taking this approach, the decisions I examined do not free markers or their bearers of responsibility for the meaning of their appearance. They simply shift the location of that meaning from what lies underneath the marker to the terrain of the medium itself and its social functioning. These decisions reflect a realization that, like poems, markers receive their meaning and significance through their occurrence.216

4. Accommodating the inherent multiplicity of appearance and examining personal markers in context. According to the account produced by the caselaw, markers function at one of two extremes: Either they are one’s “real”

215. In the words of Brooks: “[F]orm and content, or content and medium, are inseparable. The artist does not first intuit his object and then find the appropriate medium. It is rather in and through his medium that he intuits the object.” BROOKS, supra note 29, at 183. Far from being “transparent pane(s) of glass through which the stuff of poetry is reflected, directly and immediately,” poetic words function through their rich materiality and as a function of their place in language. Poetic texts refuse to shift their center of gravity to what lies behind the words; they refuse to dedicate themselves to the task of reliable depiction of external referents, to mediation that aspires to minimize the distorting effect of language. Id. at 203.

216. See BROOKS, supra note 29, at 69:

[Not only our reading of the poem is a process of exploration, but . . . [the] process of making the poem was probably a process of exploration too. To say that [the poet] "communicates" certain matters to the reader tends to falsify the real situation . . . . [The poet] explores, consolidates, and "forms" the total experience that is the poem.]
face or they are a mask. Ironically, however, the main work of a marker occurs in the space between those two extremes. In fact, markers at either extreme are no longer markers, because they lose their capacity to convey meaning.

Martin Hollins treats the way in which the mask and the self are intertwined through the example of theater actors:

The relation of actors to the characters they play does not yield an easy distinction of men from masks. We may be inclined to view actors as donning and doffing masks like hats but that is not the only way to conceptualise theatre ... Here the self cannot be the mask alone, as the point of the analogy is to deny that we are merely being-for-others; nor can it be the man alone, without destroying the analogy; so it must be some fusion of man and mask, which therefore reinstates the initial perplexity.²¹⁷

As we have seen throughout this Article, appearance is contested when it invites uncertainty about how it should be read. It is only when appearance can be classified neither as a mask nor as an inherent feature of one’s identity that it becomes appearance—a sign that can be read. It is only then that appearance may end up at the center of a dispute, for resolution in a courtroom. The intermediate space between intended and unintended appearance, or between appearance as speech and appearance as status, is where markers reside—and yet this is precisely the space denied by prevailing law. The law should discard its nomenclature approach, according to which each legal subject has an identity that should be correctly packaged and labeled.

In looking at its subjects, the law should operate more as a reader and less as a decoder: It should approach personal markers as more tentative, suggestive, and performative than instrumental, natural, or propositional.²¹⁸ Identity is an ongoing project, not a static fact. Thus, it would be wrong to ask whether an appearance reflects a preexisting identity.²¹⁹ Just as identities are too complex and open-ended to be captured by single-word nouns, appearances never convey the kind of one-to-one labels of identity that the law seeks. Playful and ambivalent gestures, multilayered collages of intersecting and competing affiliations, allusions and experimentations—all characterize our appearance practices. Such practices cannot be captured within a binary formula of either true or false representations of identity.

²¹⁷. Martin Hollins, Of Masks and Men, in The Category of the Person, supra note 106, at 222.

²¹⁸. This form of meaning-making is parallel to the way poetry acquires meaning:
The theory of communication throws the burden of proof upon the poet, overwhelmingly and at once. The reader says to the poet: Here I am; it’s your job to “get it across” to me—when he ought to be assuming the burden of proof himself. Now the modern poet has, for better or worse, thrown the weight of responsibility upon the reader. The reader must . . . be prepared to accept a method of indirectness.

²¹⁹. Cf. Yoshino, supra note 11, at 873 (asserting that the law should protect traits that are constitutive of identity).
Whereas the personhood-centered cases examine the meaning of appearance in its context, the identity-centered cases examine a single marker, artificially pulled out of its context. There is no room in these cases for the entirety of the person’s appearance, or for the broader context in which the appearance operates and is read. Markers, like words, make sense in clusters; the message that they carry cannot be read in isolation. The same blond wig means markedly different things when worn by a cancer patient who has lost her hair, an orthodox Jewish woman whose conventions of religious modesty prevent her from exposing her natural hair in public, or a drag queen gesturing towards heightened femininity. What could possibly be learned about the wig-wearer, or about the meaning of the wig, if one were to examine the wig in isolation, detached from the overall “look” and from the social context in which it is worn? This is, however, the mode of examination in the majority of appearance cases: The way legal subjects carry themselves and project themselves to the world is dissected into such tiny pieces that each piece becomes devoid of meaning and thus easy to render insignificant. In the cases examined in Part II, by contrast, courts refused to turn the issue into one that depends on the marker in isolation. The Canadian public, resenting the idea of turban-wearing police officers in Grant, was not allowed to assert, “We have nothing against Sikhs, it is just that there should be tradition and uniformity in police look.” The court examined the turban in the context of the overall police uniform. It also examined the issue within the concrete backdrop of Canadian society and political culture. Even an apprehension that seemed reasonable, such as the Canadian government’s concern for the safety of motorcycle riders

220. Cf. Joseph et al., supra note 105, at 60-61 (discussing linguist John Rupert Firth’s approach in which “linguistic forms are not . . . in themselves containers of ideas or meaning: ‘words do not in any sense ‘hold’ or ‘contain’ or ‘express’ the ‘meaning’ shown against their written form in a dictionary.’ . . . A joy sentence, as such, is an abstraction, and abstractions do not in themselves have meaning. Meaning is to be sought in actual speech events embedded in particular ‘contexts of situation’”).

221. See White, supra note 105, at 110-12 (“[W]ords in fact do not have stable and consistent prior meaning, to be employed as units in the construction of the sentence, but change their meaning as they are used. Indeed, it can be one of the most important functions of a sentence is to pivot upon and redefine the words with which it is made.”).

222. As Mark Rabbert notes, Blackmun’s dissent in Goldman v. Weinberg, 475 U.S. 503 (1986), asserted that

Judging whether a particular religious practice is “obtrusive,” for example, invites discrimination between what we think of as “normal” and “abnormal” religious conduct: a turban would seem quite normal and unobtrusive in India, as would a saffron robe in Southeast Asia, whereas against the background of this country’s Judeo-Christian traditions those articles of religious clothing seem strange and stand out. Banning them on grounds that they are “obtrusive” might well betray a hidden prejudice against the religions that prescribe them.

Rabbert, supra note 12, at 39.


224. The court concluded that, in the context of Canada’s political culture, the turban would not be seen as a sectarian symbol that compromised the neutrality of the police.
who do not wear helmets, was carefully assessed.\textsuperscript{225} The tribunal examined the extent to which the helmet requirement was supported by data on the connection between helmets and motorcycle injuries. The more promising opinions, then, saw no point in thinking about the marker without considering its concrete usage.

Personal markers have a semiotic function. As with any language, what renders the language of markers meaningful is not \textit{which} markers are used but \textit{how} they are invoked. Tone, mood, allusion, irony, inflection, rhythm—these, not dictionary meanings (if there are any), are the significant elements of markers.

If personal markers are subjected to reading by others, then, as we do with poems, we should incorporate the social context in which the reading is done into our understanding. The poetic reading of personal markers depends on its interaction with a particular reader and grounded in time, place, and cultural codes. Thus, we should not talk about the abstract or general meaning of the marker but examine what the marker does in the social setting in which it is invoked. The cases examined here, in short, develop a way of reading personal markers poetically.

III. APPLICATION

\textit{A. How Would the Conceptual Tools Apply to Appearance Cases?}

How should the cases of Rosa and Jespersen have been decided in light of the principles described above? My contention is that the plaintiffs in Rosa and Jespersen sought to maintain an appearance that should have been legally recognized and protected, but on different grounds.

Like the bearded, secular petitioner in \textit{Nof}, the problem of the plaintiff in Jespersen was that she was unable to anchor her resistance to makeup in some underlying identity. She was not gay (or more accurately, she did not claim to be gay, nor was she classified by the court as gay) and she was not (or did not claim to be) transgendered or a cross-dresser, but she still strongly felt that “it wasn’t her,” or “wasn’t like her” to wear makeup. In fact, she felt so strongly that she would rather lose a job she had held for more than twenty years than comply with the makeup requirement. The plaintiff in Jespersen clearly had a personhood claim, of which her sex identity was a subset. She felt that wearing makeup impinged on her personhood, because the extent to which she looked feminine or masculine was pivotal to her sense of self. To find discrimination on the basis of sex, it should have been sufficient to establish that, as a woman, she was constricted to specific appearance requirements that violated her

personhood. Similarly, the *Rosa* court should not have asked whether or not the plaintiff could be defined as a cross-dresser or transgendered, but whether it was legitimate of the bank to prevent him from appearing in clothing perceived as not matching his underlying sex. Once we realize that the dilemmas and fragility of appearance are part of every identity and that personhood entails impersonating, then we can see that the plaintiffs in both *Rosa* and *Jespersen* had valid claims about the significance of their appearance to their sense of self. Asking them to fit into identity categories that would match their appearance ignores the pains of becoming and being a person, a social entity whose body, speech, name, and other manners of being in the world persistently operate as signs, ever subject to interpretation and reading.

In *Rosa* and *Jespersen*, the courts should have focused on the intolerant response of the employer or the bank to the perceived mismatch between the plaintiffs' identities and their appearance. The makeup in *Jespersen* and the dress in *Rosa* should have been understood not according to their nexus with their bearers, but according to their meaning in the semiotic field of appearance. Re-invoking Martin Hollins,\(^\text{226}\) it is "some fusion of man and mask" that creates the person, and not the man or the mask alone.

Instead of asking whether the plaintiff's dress style fits his or her sex or sexual identity, courts should ask the defendant to articulate the exact nature of the appearance problem. Is there, for example, a cost or a burden connected with enabling the plaintiff to appear as he or she wishes? Such an articulated cost, if provided by the defendant, would then be assessed vis-à-vis the interest of the plaintiff in leaving his appearance intact. Such interests could be based in legal principles such as autonomy, expression, or the dignity of the marker-bearer; each legal system should rely on terms that are coherent with its jurisprudence. Indeed, Ninth Circuit judge Sidney Thomas, dissenting from an earlier panel opinion in *Jespersen*, defined the cost of the makeup requirement on women not only in terms of time and money, but also in terms of personal dignity: Requiring women to wear "a uniform of makeup" is to require that they abide by "outdated and impermissible sex stereotypes."\(^\text{227}\)

Recent developments in American adjudication indicate a potential willingness to entertain this approach and see appearance as an aspect of personhood. In *Smith v. The City of Salem*, the Sixth Circuit accepted the sex discrimination claim of a transgendered firefighter.\(^\text{228}\) The plaintiff argued that he suffered an adverse employment action because of his feminine appearance and behavior, because a similarly situated woman with feminine appearance would have been treated differently. The trial court held that the plaintiff was treated adversely because of his status as transsexual and not because of gender

\(^{226}\) See Hollins, *supra* note 217.


\(^{228}\) 378 F.3d 566 (6th Cir. 2004).
Adjudicating Appearance

stereotyping. As the Sixth Circuit characterized it, “The district court implied that Smith’s claim was disingenuous, stating that he merely ‘invokes the term-of-art . . . that is, ‘sex stereotyping,’ as an end run around his ‘real’ claim, which, the district court stated, was ‘based upon his transsexuality.’” Criticizing previous caselaw that reflected logic similar to the district court’s, the Sixth Circuit stated:

[S]ome courts have held that this latter form of discrimination is of a different and somehow more permissible kind. For instance, the man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination “because of . . . sex,” but rather, discrimination against the plaintiff’s unprotected status or mode of self identification. In other words, these courts superimpose classifications such as “transsexual” on a plaintiff, and then legitimate discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.

This reasoning moves away from the prevailing judicial tendency to diagnose a plaintiff’s status or identity as a means for deciding whether his or her appearance is coherent with that identity. The judicial inquiry remains in the level of social interaction, for this is where the discrimination occurs. It reflects a realization that the plaintiff should not bear the burden of convincing the court that he has a well-established or medically-recognized justification for appearing a certain way. Rather, the defendant who exhibits intolerance should be required to provide good reasons for this intolerance.

B. How Would the Conceptual Tools Apply to Appearance Claims of Minority Group Members?

How should the court have approached the Rogers case if not by concentrating on the connection between the cornrow hairstyle and its signification of racial identity? A more productive reading of the cornrows would have shifted the focus from what the hairstyle was supposed to signify (racial identity) to the place and meaning of the cornrows within the hairstyle repertoire in which Rogers operated (for example, its position between afro

229. Id. at 571.
230. Id. at 574 (emphasis added). The judgment’s strongly critical language adds that the district court accounted for the plaintiff’s contra-gender behavior “only insofar as it confirmed for the court Smith’s status as a transsexual.” Id.
231. See discussion supra Part I.C.
and "relaxed" hair and its relation to the "pony tails and shag cuts" invoked by Rogers as hairstyles permitted in her workplace.\textsuperscript{233}

Reading Rogers's hairstyle for its truth-value is like reading poetic texts in order to gain information or to establish their truth or falsity. The reading misses what they do. For Brooks, the attempt to measure poems by their truth-value is a "heresy of paraphrase." If we allow ourselves to be misled by this heresy, "we distort the relation of the poem to its 'truth,' we raise the problem of belief in a vicious and crippling form, we split the poem between its 'form' and its 'content'—we bring the statement to be conveyed into an unreal competition with science or philosophy or theology."\textsuperscript{234} To ask what single, solid piece of information we can establish about the plaintiff by her act of styling her hair flattens the complexity and tentativeness of this act. It also ignores the rich materiality of the hair, and suppresses a whole array of factors that are essential to establishing its meaning, such as the context and manner in which it was invoked. The questions that should be considered according to my suggested approach include whether the rest of the plaintiff's appearance was "professional," and whether the corrows were employed ironically, playfully, or defiantly. However, in the account emerging from the judicial opinion, we are not supposed to care or show interest in such questions of tone and nuance. This judicial stipulation that corrows should be protected only if they index racial identity in a one-to-one relationship of referentiality produces a flat and erroneous account of how markers such as hairstyle receive their meaning.

Similarly, in Garcia v. Gloor the court posits that only first-generation immigrants from Mexico are native Spanish speakers who can argue that their connection to the Spanish language should be legally recognized and protected. I propose that we aspire to adopt legal and political arrangements that discharge people such as the plaintiff in Garcia, a second-generation immigrant, from the need to establish that his biographical facts warrant his everyday usage of Spanish.

The identity narrative emerging from Garcia (and from most current law) is one in which we use language and signs of appearance only to reflect a pre-existing identity. However, it is impossible to expect that individuals will not use performance and appearance, including the use of a particular language, to maintain their personhood. The law should enable people to signify themselves through speech as part of their right to develop their personhood, including the relationship of that personhood to a national or cultural origin.

\textsuperscript{234} Brooks, supra note 29, at 184.
CONCLUSION

An old joke asks: "Why do firefighters wear a red belt?—So that their pants won't fall off!" What makes this joke both funny and irritating is the puzzlement we experience in determining the meaning of the belt. This vague area between appearance's instrumental function and its symbolic value is at the center of the cases discussed in this Article. Whether the firefighter likes it or not, his or her belt prompts an observer to wonder about the meaning of its color. I do not know why firefighters' uniforms are red, but I still take note of the color and assume that there is some meaning to it.

This longing to escape being read through appearance is an inherent part of being human in society. Much of the human experience can be described as an ongoing attempt to mitigate the pains involved in the gap we experience between who we understand ourselves to be and how we are perceived outwardly. The cases studied here suggest that we cannot escape such meaning-making and meaning-ascription by our mere presence in the social world as concrete, embodied entities.

In one of her poems, Denise Riley describes the frustration of reading her poetry in public and wishes that the poem could transcend its reader to reach the audience without the mediation of her body: "If, if only! I need not have a physical appearance!" Similarly, Margaret Atwood articulates the unattainable wish that clothes be celebrated without their semiotic weight and merely through the joy of color, fabric, and design:

My sister and I are sewing/ a red shirt for my daughter... Children should not wear red/ a man once told me/ Young girls should not wear red// In some countries it is the color/ of death; in others passion/ in others war, in others anger/ in others the sacrifice// of shed blood... The shirt we make is stained with our words, our stories... My/ daughter, I would like your shirt to be just a shirt,/ no charms or fables. But fables/ and charms swarm here.

As both poets demonstrate, fragility and vulnerability are inherent in having a body and a social persona. This Article argues that the current law does a poor job in accommodating this basic human state and in responding to it with due care.

In discussing my alternative approach with colleagues, the conversation often turns to extreme, implausible, or bizarre appearance claims. I am asked, for example, whether I think employers should allow employees to come to

235. Jerrold Seigel describes this sense of a gap between one's sense of self and one's outward performance, and he considers conforming to cultural demands a central part of selfhood. See SEIGEL, supra note 8, at 22-26; see also MEYER, supra note 85, at 202 (discussing the danger of a psychological crisis when there is no match between one's self-perception and one's external circumstances).
236. DENISE RILEY, DEAR LOOKS, in SELECTED POEMS 74 (2000).
work with purple hair, or whether my approach means that anybody could walk around naked, or whether people claiming that they practice a new religion could ask the law to recognize their belief that their genitals should not be covered. Considering such radical cases is a good philosophical tool for examining the scope and nature of an idea. But I think it is unwarranted, at least at this stage. The cases that arrive in court raise much more mundane and straightforward questions of appearance. They involve reasonable people who recount stories of the fragility of having a social presence and a concrete appearance. The concrete and minute details of our bodies, our movements, our style of dress, our manner of speech, and other forms of manifestation mediate our relations with others and our understanding of ourselves.

Our legal arrangements should respond to the social pains involved in having an appearance. The cases reviewed here challenge the law to accommodate the complexity and vulnerability of appearance's meaning without subjecting it to an interpretive framework that seeks clear-cut answers and singular meaning. Incorporating into the law an understanding of appearance as the poetics of personhood would achieve this goal.