"IMMUTABLE" INCARCERATED BODIES & THE SOCIAL DEATH OF MINORITY IDENTITIES IN PRISON

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I. INTRODUCTION

Eric McGill, a Black Rastafarian inmate in Pennsylvania, spent over 400 days in solitary confinement while awaiting trial.[1] For twenty-three hours a day or more, for five days a week, McGill was confined to his cell and cut off from any connection to his family and friends.[2] While solitary confinement is designed to isolate dangerous or disruptive behavior, McGill was confined for more than a year for refusing to shave his dreadlocks.[3] According to McGill, cutting his hair is against his Rastafarian beliefs.[4] McGill sued the institution, alleging violation of his First and Fourteenth Amendment rights, as well as the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[5] Since his lawsuit, the Lebanon County Correctional Facility has changed its grooming policy to allow an exemption on dreadlocks for religious reasons, and McGill has been released from solitary confinement.[6]

Though McGill's case proceeds on his right to religious expression, this issue indelibly involves race. Rastafari theology was developed in Jamaica in the 1930s from the ideas of Marcus Garvey, a Black activist whose goal was to unify and connect people of African descent.[7] Rastafari

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[1] Andrea Finney, *Lebanon Co. Inmate Spends 400 Days in Solitary Confinement for Length of His Hair*, CBS 21 NEWS (Feb. 25, 2020), https://local21news.com/news/local/inmate-seeks-end-to-solitary-over-refusal-to-cut-dreadlocks [https://perma.cc/DR9T-DDYS].

[2] *Id.*

[3] *Lebanon Co. Correctional Facility Changes Hair Policy Over Inmate's Religious Beliefs*, CBS 21 NEWS (May 6, 2020), https://local21news.com/news/local/lebanon-co-correctional-facility-changes-hair-policy-over-inmates-religious-beliefs [https://perma.cc/Y47G-W95P].

[4] Finney, *supra* note 1.

[5] McGill v. Clements, No. 3:19-cv-01712, 2021 U.S. Dist. LEXIS 12416, at *2 (M.D. Pa. Jan. 22, 2021).

[6] *Lebanon Co. Correctional Facility Changes Hair Policy Over Inmate's Religious Beliefs*, *supra* note 3.

[7] Rumeana Jahangir, *How Does Black Hair Reflect Black History?*, JACKSONVILLE FREE PRESS, Feb. 16, 2017, at 7, ProQuest, File No. 1874992662; *see also Marcus Garvey*, HISTORY.COM, https://www.history.com/topics/black-history/marcus-garvey [https://perma.cc/NV2C-8DQL]

promotes pride in African heritage as expressed through "the coarse, tightly curled hair of African people, the black skin tone, and the preoccupation with Africa and its diasporic children."[8] As a result, McGill's religious beliefs in Rastafari and his wearing of dreadlocks is also an expression of his racial identity.

Expressions of racial identities, without citation to a religious belief, remain unprotected under most prison grooming policies. In this case, while the new policy allows dreadlocks under religious exemptions, the prison is still free to place other Black inmates with dreadlocks into solitary confinement. Why are prisons permitted to regulate and punish inmates of color for these racial performances? What is the cost of these grooming regulations to racial and gender minorities?

This Note argues that because courts define race and gender as fixed, unchangeable statuses that exclude mutable expressions and performances, prisons are left unchecked by the Fourteenth Amendment and can use grooming regulations to systematically strip racial and gender minorities of their identities. By violently disciplining racial and gender minorities for expressing their identities, prisons can exercise absolute authority over these individuals and subject them to a social death—that is, the process of "terminat[ing] a person's social existence in the dominant culture."[9] Racial and gender minorities experience social death twice. The first death occurs in a divorce from the culture-at-large, the "free world," their families and friends, and their communities. The second death occurs within the very walls of the prison, where queer inmates and inmates of color are forced to conform to a white, heteronormative narrative under threat of violence.[10] In this second instance, the inmate is divided from their very sense of self and identity.

This Note primarily focuses on the impact of the immutability doctrine and grooming violations on racial minorities. However, this Note also includes case law and narratives involving gender minorities for two reasons. First, examining race separately from gender issues may be misleading. As noted by Kimberlé Crenshaw, "the intersection of racism and sexism factors into Black women's lives in ways that cannot be

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(describing how Marcus Garvey's goal was to "unify and connect people of African descent worldwide").

[8] Simboonath Singh, *Resistance, Essentialism, and Empowerment in Black Nationalist Discourse in the African Diaspora: A Comparison of the Back to Africa, Black Power, and Rastafari Movements*, 8 J. AFR. AM. STUD. 18, 27–28 (2004).

[9] A. Elizabeth Stearns, Rick Swanson & Stephanie Etie, *The Walking Dead? Assessing Social Death Among Long-Term Prisoners*, 4 CORR. 153, 153–54 (2019).

[10] *See infra* Section III.

captured wholly by looking at the race or gender dimensions of those experiences separately."[11] That is, people facing multiple forms of subordination are targeted in ways that cannot be analyzed and centered unless we consider all dimensions of that subordination.[12] Second, trans identities are generally accepted as fluid and changeable. As societal understandings of race have evolved to include dimensions of fluidity,[13] this Note compares the two experiences of minority racial and gender identities to show multiple ways in which fluidity can be a central part of an individual's lived experience and yet remain unprotected by the courts.

Section II provides an overview of the traditional immutability doctrine, which requires that classes of people or interests that receive heightened scrutiny (such as race) exhibit a fixed or immutable characteristic. First, this section discusses the origins and definition of immutability in case law. Then, this Note challenges the assumption that race is an immutable status by looking at the fluidity of racial identification in federal recordkeeping and racial data. Here, race can be mutable because the government permits individuals to self-designate their race, racial categories in the Census have shifted and evolved over time, and individuals may change their self-identification over the course of their lifetime due to socioeconomic status, gender, and physical appearance. This section concludes by examining two cases, *Betts v. McCaughtry* and *Wolfe v. Horne*, to analyze how the immutability doctrine is applied in issues involving racial and gender performances in prison. These cases demonstrate how the immutability doctrine allows courts to apply a deferential rational basis standard to issues involving the regulation of racial and gender identities, thus leaving prisons unchecked by the Fourteenth Amendment.

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[11] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991).

[12] For example, the experience of a Black transgender woman is not summed up as white women's experience plus Black men's experience plus transgender people's experiences. A Black trans woman may be marginalized in anti-racist discourses constructed around the experiences of Black men and feminist discourses surrounding white and cisgender women. Rather, trans women of color experience unique forms of violence that stand apart from the experiences of other more privileged groups facing racism and sexism. *Id.* at 1243–45; *see also* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, *in* FRAMING INTERSECTIONALITY: DEBATES ON A MULTI-FACETED CONCEPT IN GENDER STUDIES 25, 26 (Lutz et al. eds., 2012) ("Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which black women are subordinated.").

[13] *See infra* Section II(B).

After establishing the framework of immutability, Section III demonstrates how prisons, when left unchecked by the courts, perpetuate a social death of racial and gender minorities by disciplining these inmates for grooming violations. This section first introduces the theoretical framework of carceral necropolitics, which posits that prisons are spaces in which the state exerts absolute power over life and death. The state exerts this power unevenly in prison populations and specifically singles out racial and gender minorities.

This section examines case law, federal and state grooming policies, and disciplinary codes to illustrate how prisons identify these inmates as racially and sexually "other" and punish them for performance of their identity. Case law provides examples of inmates who, by being barred from racial and gender performance, suffer a loss of identity in these carceral institutions. Comparing federal and state grooming policies shows how racially coded language and deference of the immutability doctrine empowers jurisdictions to implicitly and explicitly mark racial and gender minorities as "other." This section concludes with an overview of disciplinary repercussions and shows how these punitive responses, such as forced haircuts, solitary confinement, and forced labor, contribute to the stripping of minority identities and the process of social death.

Section IV explores the new immutability doctrine, which posits that immutability should be based not on whether a class of people have fixed, unchangeable traits, but rather whether these traits are so central and important to their identities that the government cannot compel them to change or punish them for these characteristics. This section opens with a brief overview of new immutability doctrine in sexuality cases and describes its success in lower courts such as in California's *In Re Marriage* cases. Next, this section discuss the problems associated with fully embracing new immutability and expanding its application beyond sexuality and into race cases. Specifically, this section identifies and responds to two issues: the fear of essentializing identities and the perpetuation of fraud.

Finally, the last section concludes that although the new immutability is an imperfect solution, courts cannot adhere to the traditional immutability standard without perpetuating the social death of racial and gender minorities in prison. The traditional immutability standard proves to conflict with current societal understandings of race and gender, gives prisons far too much deference to abuse inmates, and is too narrow to protect the full range of the lived experiences of racial and gender minorities. To fully realize the aspirations of the Fourteenth Amendment

and confront all forms of racial subordination, courts must recognize and protect mutable identities.

II. IMMUTABILITY

A. ORIGINS OF IMMUTABILITY

Generally, the Equal Protection Clause of the Fourteenth Amendment prohibits the government from unfairly discriminating between equivalent groups,[14] but it does not preclude the state from line drawing if the government has sufficient reasons for doing so and if it does not act in an invidious or arbitrary manner.[15] To determine if line drawing is acceptable, courts scrutinize these government actions at varying levels. The Supreme Court has articulated three tiers of scrutiny, from most to least deferential: rational basis,[16] intermediate,[17] and strict scrutiny.[18]

In considering whether to give heightened scrutiny to a government action, courts look to the nature of the group of people involved or the interest affected, though the Supreme Court has not produced an explanation as to what factors trigger heightened scrutiny or the weight given to each factor.[19] However, a factor the Court has continually revisited is whether group members exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group.[20]

Despite inconsistencies in the weight courts give to immutability, this issue continues to surface in cases involving fluid characteristics, such as

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[14] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).

[15] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 744–45 (8th ed. 2010).

[16] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991); Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[17] *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976).

[18] *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Miller v. Johnson, 515 U.S. 900 (1995).

[19] Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 UNIV. MIAMI L. REV. 107, 141 (1990) ("The Court has failed to develop a single, coherent theory to determine suspect class status. . . . [It] uses a mixture of criteria to determine suspectness, creating an analytical muddle, and the boundary line between suspect classes and non-suspect classes is drawn in a haphazard way."). For further discussion on the inconsistencies of the factor tests used to determine suspect class classification, *see generally* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE UNIV. L. REV. 135 (2011).

[20] *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion) (finding that sex is an "immutable characteristic determined solely by accident of birth" and thus requires quasi-suspect classification); Strauss, *supra* note 19, at 139 n.23 (describing the lack of a definable factors test and the varying emphasis different courts give to these factors).

sexual orientation[21] and racial expressions.[22] Typically, courts adhere to the traditional immutability doctrine, which first surfaced in *Weber v. Aetna Casualty and Surety Company*, a case in which the Supreme Court held that a statute that deprived dependent and illegitimate children of equal death benefit recovery rights violated the Equal Protection clause.[23] The Court reasoned that illegitimacy was a condition of birth that the children had no control over, and thus was a trait for which the state should not punish them.[24] A year later, *Frontiero v. Richardson*—the first case in which the Supreme Court recognized heightened scrutiny of sex classifications—solidified this doctrine.[25] In order to extend heightened scrutiny to gender issues, the Court had to find a way to analogize sex to suspect classes like race and national origin, which receive more protections. Ultimately, the Court found that sex, like race and national origin, is an "immutable characteristic determined solely by the accident of birth."[26]

That is, in order to receive heightened scrutiny, a targeted group had to demonstrate a fixed or unchangeable condition—essentially a trait that it has no choice over. The next section questions the *Frontiero* court's key assumption that race, a long-standing suspect class, is fixed.

B. MUTABILITY OF RACE

Traditionally, an individual's classification in race data collection was determined through "observer identification" or identification by a third party.[27] For instance, until the 1970 census, American census takers went from door to door to make determinations of individuals' race.[28] In

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[21] *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

[22] *See, e.g.*, Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016) (holding that the EEOC failed to state a claim for disparate treatment of a Black employee because although dreadlocks are a manner of wearing hair that is common for Black people and suitable for Black hair texture, they are not an immutable characteristic of Black persons); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981) (dismissing plaintiff's racial discrimination claims, except for the enforcement portion, because Black hairstyles are not an immutable characteristic).

[23] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972).

[24] *Id.* at 175.

[25] *Frontiero*, 411 U.S. at 686.

[26] *Id.*

[27] Karly S. Ford, *Observer-Identification: A Potential Threat to the Validity of Self-Identified Race and Ethnicity*, 48 EDUC. RESEARCHER 378, 379 (2019).

[28] *Id.*

90% of public schools, teachers and school personnel decided students' racial classifications well into the 1990s.[29] In this identification process, the observer presumptively correlates physiognomy with an individual's race and thus imposes a racial identity on said individual. Of course, how fixed or determined this observation is varies. For people with racially ambiguous physical characteristics, third parties may not accurately identify which race the individual self-identifies as.[30] As a result, for light-skinned Black and Latinx people and others who appear racially ambiguous, the aspect of choice in one's race arises as part of commonplace social interactions.[31] For people with less ambiguous physical characteristics, such opportunities to correct or clarify are not as common.

Today, racial mutability in record keeping is even more apparent. The primary reason is that voluntary racial identification has become the accepted norm and is a process that values an individual's lived experiences and right to self-identification.[32] For example, individuals can choose their own race and self-designate as part of the Census and state efforts to track racial data.[33] This method is also the standard in other federal recordkeeping measures and in educational and employment programs seeking diverse candidates.[34]

Racial identification is also fluid for two additional reasons: (1) shifts in racial categories and (2) changes in individuals' self-identification over the course of their lives. First, although the government does not impose strict rules as part of racial data collection, understandings of whiteness and race evolve over time, causing categories to shift. For instance, in 1930, the Census gave individuals of Indian ancestry their own separate

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[29] *Id*.

[30] *See* Anthony R. Enriquez, *Assuming Responsibility for Who You Are: The Right to Choose "Immutable" Identity Characteristics*, 88 N.Y.U. L. REV. 373, 384 (2013).

[31] *Id*. at 382.

[32] In 1997, the Office of Management and Budget stated that "the preferred means of obtaining information about an individual's race and ethnicity" is through self-identification. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,788–90 (1997); *see also* MARGO J. ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 200–01, 207 (Yale Univ. Press 2d. ed.) (noting that prior to the 1960 census, official census interviewers would mark race based on their perception of the individuals rather than allowing individuals to self-identify, which led to inconsistent answers, such as a 13% undercount for Black men); Ford, *supra* note 27, at 379.

[33] Ford, *supra* note 27, at 379.

[34] Sharona Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1107–08 nn. 98–99 (2004) (listing federal programs which mandate or instruct administrators to record participants' races).

racial category ("Hindu"); in 1970, those with Indian ancestry were considered white; by 2000, this group was identified as "Asian/Asian Indian."[35] Second, a person's understanding of their own identity can shift during their lifetime. In one study tracking multiracial and monoracial adolescents as they transitioned into young adulthood, researchers found that individuals' racial identification (as multiracial or monoracial) was unstable and often determinable by factors such as socioeconomic status, gender, and physical appearance.[36]

Though race is traditionally defined by courts as a fixed status, this understanding conflicts with how the government currently classifies populations and how individuals understand their own racial identity and experience. Thus, an individual's race turns on more than the supposedly fixed status at their birth, but also their own choices. The next section illustrates how the application of traditional immutability in two prison cases curtailed protections over racial and gender performances, turning a blind eye to the full range of racial and gender minorities' lived experiences.

C. IMMUTABILITY IN PRISON CASES

The government has shifted its methods for racially categorizing populations away from "observer identification" to voluntary identification out of recognition that individual lived experiences and self-identification are valuable. Why, then, are expressions of race, such as changeable hairstyles, not treated as part of an individual's race and identity? *Betts v. McCaughtry* demonstrates how the court's adherence to immutability precludes protection over mutable race-related traits and leaves inmates of color vulnerable to discipline based on their racial performance.

Betts v. McCaughtry is an Equal Protection case in which a group of Black inmates challenged the constitutionality of prison regulations barring carved hairstyles and rap music.[37] According to the inmates, this

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[35] John Tehranian, *Changing Race: Fluidity, Immutability, and the Evolution of Equal-Protection Jurisprudence*, 22 UNIV. PA. J. CONST. L. 1, 16, 19 (2019) ("The tectonics of race continue to shift, and racial schemata are still in the process of flux.").

[36] Jamie Mihoko Doyle & Grace Kao, *Are Racial Identities of Multiracials Stable? Changing Self-Identification Among Single and Multiple Race Individuals*, 70 SOC. PSYCH. Q. 405, 405 (2007) (using the National Longitudinal Study of Adolescent Health to estimate changes in individual racial identifications).

[37] Betts v. McCaughtry, 827 F. Supp. 1400, 1402 (W.D. Wis. 1993), *aff'd*, 19 F.3d 21 (7th Cir. 1994).

regulation targeted Black inmates because wearing carved hairstyles and listening to rap music were "expressions of African-American heritage" and "black pride."[38] In response, the court found that this regulation was facially neutral and applied a deferential rational basis review, which the prison easily met by arguing that the prison had a legitimate interest in preventing gang-related identification.[39] The court reasoned that "[a]lthough plaintiffs characterize[d] the grooming, hairstyle and fingernail practices as expressions of African-American heritage, they have not produced evidence to support a finding that they are exclusively so."[40] In regard to the censorship of rap music, the court found that "it is questionable whether the censorship of African-American rap music can be equated with discrimination against African-American inmates."[41] According to the *Betts* court, exclusivity or fixedness in Black heritage is necessary to show that a trait is race-bound. This application of immutability doctrine raises several issues.

First, the court set out a nearly impossible standard to meet—in order to show that the regulation was racially-coded, the inmates had to provide evidence that *only* people of African-American heritage used these expressions, regardless of whether these expressions are established as part of Black history and culture. It is questionable whether there exists any racial heritage that has a complete monopoly over a specific expression, and the court readily pointed out that a few white inmates at the institution wore carved hairstyles.[42]

Second, based on the *Betts* court's application of immutability, dark skin would not be an exclusive expression of Black heritage because other non-Black people of color, such as people of indigenous or Indian descent, may also have dark skin. And what if medical advances allowed people to change their skin tone as easily as their hairstyle? Would skin color remain an "accident of birth" worthy of heightened protection? Applying the immutability doctrine to these circumstances would allow courts to give a deferential rational basis review of prison regulations that segregate inmates based on skin color.

Indeed, the traditional immutability doctrine allows courts to avoid making determinations on what expressions and performances constitute

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[38] *Id*. at 1405, 1407.
[39] *Id*. at 1407.
[40] *Id*.
[41] *Id*. at 1405.
[42] *Id*. at 1403.

part of a Black identity and thus, deserve heightened protection.[43] However, because these grooming regulations are accompanied by disciplinary measures, adherence to immutability contributes to the violent and often unchecked power of prisons over inmates of color.

In researching judicial treatment of mutable traits in prisons, one of the consistent challenges was identifying cases in which the court discusses its reasoning for why rational basis review is applied. In that sense, *Betts v. McCaughtry* stands apart for its lengthier discussion on immutability.

However, even if courts do not bother justifying their application of rational basis review in these cases involving identity performance, their silence hints at how courts conceptualize these types of prison cases. Cases involving the regulation of mutable traits are not considered issues regarding classification, but rather, an application of the Turner Test—a deferential four-factor, "rational connection" test for determining the reasonableness of a prison regulation.[44] No rationale or explanation for the court's application of rational basis is required because the idea that race and suspect class identities are fixed is entrenched and a given. This lack of consideration by the court ignores a whole dimension of the lived experience of trying to retain autonomy and a sense of self through racial expressions. For inmates of color, whatever is fluid is ignored and treated separately from their identity.

For transgender inmates, for whom identity exists on a fluid continuum,[45] courts are quicker to dismiss any right to gender

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[43] *See, e.g.*, Quinn v. Nix, 983 F.2d 115 (8th Cir. 1993) (applying rational basis review of grooming policy regulating shag haircuts and of prison's use of force); Prior v. Goord, No. 9:04-CV-354, 2007 WL 2088885 (N.D.N.Y. July 19, 2007) (finding that plaintiff failed to show that grooming policy that barred cornrows led to differential discipline of black inmates versus non-black inmates). *But cf.* Brooks v. Wilson, No. C 95-1677 SI, 1996 U.S. Dist. LEXIS 6819 (N.D. Cal. May 1, 1996) (finding that plaintiff stated a cognizable equal protection claim because his race and hairstyle may be inextricably linked, but nonetheless analyzed the policy under rational basis review, not strict scrutiny).

[44] The Turner Test is the default test in prison cases that do not involve specially protected rights, such as the right to be free from discrimination. Turner v. Safley, 482 U.S. 78 (1987). The first factor is whether there is a "valid, rational connection" between the regulation and legitimate penological interest, mirroring the rational basis standard used for non-suspect class interests. *Id.* at 89.

[45] Transgender and gender non-conforming people may change their sex or external gender expressions through medical (for example, gender affirming surgery and hormone therapy) and non-medical means (for example, hairstyles, clothing, cosmetic applications, change of names or sex classification on documentation). Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 754 (2008); *see also* Dylan Vade, *Expanding Gender and Expanding the Law: Conceptualization of Gender that Is More Inclusive of Transgender People*, 11 MICH. J.

expression,[46] and often question whether the loss of a transgender inmate's right to gender expression can even be compared to other fluid and protected expressions, like religion. For example, in *Wolfe v. Horne*, in which a transsexual inmate[47] sued a prison for prohibiting her from wearing makeup and feminine clothing, the court stated that "it is far from clear that such a therapeutic purpose [from feminine presentation] would render Wolfe 'similarly situated' to inmates with a sincere religious objection to the hair-length rule."[48]

III. THE COST OF RACIAL AND GENDER PERFORMANCE IN PRISONS

A. NECROPOLITICS & SOCIAL DEATH

In both the "free world" and the spaces of a prison, the pressure to conform to white, heteronormative ideals can create a sense of loss and exact a psychological toll on minorities. For example, for those who can pass as white, passing can mean a loss of "a sense of embeddedness in a community or a collectivity" because publicly presenting oneself as white means no longer "sharing experiences, stories, and memories of times

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GENDER & L. 253, 268 (2005) ("[T]ransgender people make many different choices for their bodies. . . . [T]he person chooses for themselves how best to express their gender identity physically. . . . Thus, to assume that transgender people all have, want, or able to have the same type of body is incorrect."). For further discussion on the diversity and fluidity of gender identity for transgender and gender non-conforming people, *see* Vade, *supra*, at 265, 267–68 ("We are all limited by imposing socialized binary gender norms on our complex real life experiences."). Note that while cisgender people may seek out gender-affirming health care, they do not encounter the same obstacles to access. *Five Things to Know About Gender-Affirming Health Care*, ACLU (July 15, 2021), https://www.aclu.org/news/lgbtq-rights/five-things-to-know-about-gender-affirming-health-care/ [https://perma.cc/2Z5V-ZSHR] (describing critical care used to treat precocious puberty and polycystic ovarian syndrome in cisgender children). Thus, there seems to be some societal acceptance for undergoing medical care related to gender expressions—as long as this expression lies squarely within a gender identity conforming with a person's birth-assigned sex.

[46] *See, e.g.*, Battista v. Dennehy, No. 05-11456, 2006 U.S. Dist. LEXIS 12484, at *21 (D. Mass. Mar. 22, 2006) ("[The facts that other transgendered inmates were allowed hormone therapy, female clothing, and makeup] alone do not establish that Plaintiff and the inmates were similarly situated or that Defendants had no legitimate justification for treating Plaintiff as they did."); Lamb v. Maschner, 633 F. Supp. 351, 353 (D. Kan. 1986) ("[T]he prison authorities must have the discretion to decide what clothing will be tolerated in a male prison . . . . [T]he court is not convinced that a denial of female clothing and cosmetics is a constitutional violation.").

[47] Wolfe v. Horn, 130 F. Supp. 2d 648, 650 (E.D. Pa. 2001) (stating that Wolfe is a "male-to-female operative transsexual" and using Wolfe's preferred pronouns).

[48] *Id*. at 654.

past."[49] In Cheryl Harris's "Whiteness as Property," she tells a story of her grandmother who, as a Black woman with "fair skin, straight hair, and aquiline features," worked at a major retail store.[50] Harris details how her grandmother was able to "enter the white world, albeit on a false passport, not merely passing, but *tres*passing" and describes the toll this took on her grandmother:

> Each evening, my grandmother, tired and worn, retraced her steps home, laid aside her mask, and reentered herself. Day in and day out, she made herself invisible, then visible again, for a price too inconsequential to do more than barely sustain her family and at a cost too precious to conceive. She left the job some years later, finding the strain too much to bear.[51]

Harris's grandmother recounted her experience passing as a white woman—listening to her coworkers make racist comments in her presence because of her presumed whiteness, remaining silent and suppressed, and accepting the cost of her family's well-being: the risk of self-annihilation.[52] Yet, although Harris's grandmother undoubtedly suffered a cost from the years of passing as white, she was able to lay aside her mask each night and reenter herself in her own home and with her family.

Locked away and divorced from the "free world," incarcerated racial and gender minorities have no brief reprieve and no temporary reentry into self. Because prisoners are subject to panoptic control of the prison,[53] the

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[49] ALLYSON HOBBS, A CHOSEN EXILE: A HISTORY OF RACIAL PASSING IN AMERICAN LIFE 14–15 (2014) (providing a narrative history of African Americans who have passed as white). However, note that although these discussions regarding the experience of passing include themes of loss of community, not every person who has passed as white may feel the same sense of loss. *Id.* at 15. Such an assumption risks essentializing minority identities to shorthand, immutable concepts. However, discussing the potential psychological toll of conforming to whiteness reveals that while racial identity "may begin with superficial markers such as skin color, speech, and dress," such traits are only partial indicators of a person's associative relations and overall mutable and personal lived experience. *Id.* at 14.

[50] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1710 (1993).

[51] *Id.* at 1711.

[52] *Id.*

[53] *See Internalized Authority and the Prison of the Mind: Bentham and Foucault's Panopticon*, JOUKOWSKY INST. ARCHAEOLOGY & ANCIENT WORLD, https://www.brown.edu/Departments/Joukowsky_Institute/courses/13things/7121.html [https://perma.cc/55GN-7V7B] ("The sociological effect is that the prisoners are aware of the presence of authority at all times, even though they never know exactly when they are being observed."). Prison reforms to better "protect and transform everyone" call for a better panopticon where there are fewer "locations and periods of time when prisoners know they will

toll on incarcerated minorities can be differentiated from those in the "free world." For minority inmates, there is not only a risk of self-annihilation for conforming to a white, cisgender, and heteronormative hierarchy, but also a purposeful and physically violent destruction of their racial and gender identities—a social death at the hands of carceral powers. Michael Foucault and Achille Mbembe provide two theories that add context to the world in which these incarcerated minorities exist.

Biopolitics, a theory of sovereignty developed by Foucault, posits that contemporary state sovereignty is defined by its role in producing life through managing populations.[54] In 2003, Mbembe expanded upon Foucault's theory of biopolitics and introduced his theory of necropolitics, positing that these formations of power actively mark out certain populations for social death and create "death-worlds" or "new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of living dead."[55] While Mbembe discusses subjugation in the colonial context, Jessi Lee Jackson identifies prisons as "dead zones" where the state can exercise nearly absolute power over life and death.[56] Prisons deny individuals public civic life (such as denying voting rights) and private life (through the absence of home, family, and sexual expression).[57] Buried from the world, prisoners are given a "new non-status" through nondescript uniform and strict regulation of appearances.[58]

According to Jackson, the necropolitical power of prisons does not act evenly on all prisoners, but rather singles out poor, racialized, and disenfranchised populations for a social death.[59]

> The differences between those who experience state biopolitical power and those who experience state

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not be watched" and disciplined. Jessi Lee Jackson, *Sexual Necropolitics and Prison Rape Elimination*, 39 SIGNS 197, 209 (2013).

[54] MICHAEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL. 1: AN INTRODUCTION 139–40 (1990) ("[The supervision over propagation, births and mortality, health, life expectancy, and longevity] was effected through an entire series of interventions and *regulatory controls: a biopolitics of the population*. . . . The old power of death that symbolized sovereign power was now carefully supplanted by the administration of bodies and the calculated management of life.").

[55] Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 40 (Libby Meintjes trans., 2003) (emphasis omitted).

[56] Jackson, *supra* note 53, at 209.

[57] *Id*.

[58] Stearns, *supra* note 9, at 154.

[59] Jackson, *supra* note 53, at 208.

> necropolitical power are not random. Rather, the different bodies that occupy the space of the prison are affected by the prison in different ways depending on how their bodies are socially marked as racially and sexually other.[60]

What role does the regulation of racial and gender expressions play in singling out these populations? This next section examines case law, prison grooming regulations, and disciplinary policies to identify the ways in which incarcerated racial and gender minorities are subjected to a social death, stripped of their identity and agency, and marked as racially and sexually "other" because of their racial and gender performance.

B. EFFECTS OF JUDICIAL TREATMENT OF RACIAL AND GENDER EXPRESSIONS

Because the immutability doctrine frames race as a fixed status unrelated to race-related traits, prisoners are barred from expressing their racial identity through historically and culturally significant performances. Angela Denise Wilson, an incarcerated Black woman, sued the Arkansas Department of Correction, alleging that she received disciplinary reports for wearing her hair in an Afro.[61] The disputed regulations were as follows:

> Inmate's hair must be worn loose, clean and neatly combed. No extreme styles are permitted, including but not limited to corn rows, braids, dread locks, mohawks, etc. The hair of male inmates must be cut so as to be above the ear, with sideburns no lower than the middle of the ear lobe and no longer in the back than the middle of the nape of the neck. Female inmates may wear their hair no longer than shoulder length.[62]

Wilson received at least three disciplinary charges for wearing her hair in an Afro.[63] Though Warden Maples reversed these charges and issued a memo approving the wearing of an Afro hairstyle that did not

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[60] *Id.*

[61] Wilson v. Maples, No. 1:08CV00041 BSM/HDY, 2010 WL 2179963, at *2 (E.D. Ark. Feb. 11, 2010), *report and recommendation adopted*, No. 1:08CV00041 BSM, 2010 WL 2179961 (E.D. Ark. May 27, 2010), *aff'd*, 414 F. App'x 898 (8th Cir. 2011).

[62] *Id.*

[63] *Id.*

exceed four inches in length, Wilson continued to be disciplined.[64] In response to Wilson's complaint, the court found that "[n]othing in the ADC's hair style policy is unreasonable, and it is therefore not unconstitutional on its face."[65] In the court's view, unless Wilson could identify "any inmate of a different race who has been allowed to wear a similar hairstyle which did not comply with the restrictions imposed by ADC policy," her Equal Protection claim would fail.[66] To the court, white inmates could wear natural Afros and likewise be disciplined by the prison.

The court's reading of the policy as reasonable and facially neutral ignores the historical and cultural significance of the Afro hair style and punishes a Black woman for asserting her Black identity. Since the 1960s, the Afro hair style has been "a symbol of rebellion, pride, and empowerment."[67] The hairstyle especially reflects the sexualization of Black women. For these individuals, wearing a full Afro risked "implicit associations [with] . . . unpopular political views, and uncontrolled and dangerous sexuality, growing out of national media coverage of the hunting down and subsequent trial of the activist and scholar Angela Davis."[68] We need look no further than the language in the Arkansas regulation to see how the prison views traditionally Black hairstyles—cornrows, braids, and dreadlocks are "extreme." Choosing the Afro hairstyle was and continues to be a confrontation of white supremacy and standards of respectability.

In addition, a natural Afro can be a reflection of class and financial ability. The prison continued to discipline Wilson despite her meeting the four-inch length requirement. Thus, her only other option was to perm her hair, a costly and often inaccessible procedure in prisons. By punishing Wilson for wearing her Afro or compelling her to pay to change her natural hair, the court and prison barred Wilson from engaging in a

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[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Jahangir, *supra* note 7.

[68] Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 384 (1991); *see also* Suza Lambert Bowser, *Race, Beauty & 'Good Hair' in Prison*, ANDERSON VALLEY ADVERTISER (Nov. 6, 2014), https://www.theava.com/archives/36764 [https://perma.cc/KXA2-5CWE] ("[T]he natural look or the 'Afro' smacks of radicalism. One young woman here at Decatur wears her hair in a small Afro, sculpted into a jutting cliff, and held by some stretched-out hair ties. Marketta told me that she was 'young and militant' and that she was going for an 'Angela Davis' look.").

historical symbol of resistance and empowerment, stripping her connection to her Black identity and self.

Prisons similarly bar queer and LGBTQ prisoners from gender performances that fall outside of the heteronormative scope, even though these expressions are linked to queer identity and image. For example, in *Jones v. Warden of Stateville Correctional Center* and *Star v. Gramley*, Tonya Star Jones, an inmate in Illinois, alleged that two prison institutions barred him from accessing female clothing and makeup.[69] Jones identifies as an "effeminate homosexual" and "drag queen"[70] but does not identify as transgender[71] or "transsexual." In these cases, the court applied a rational basis review of the grooming policies, noting that allowing Jones to wear female clothing and makeup in an all-male prison would threaten institutional security by "provoking homosexual activity and assault."[72] In fact, to the *Jones* Court, Tonya Jones was simply "an Illinois inmate with a penchant for lingerie . . . [that] has gotten him in trouble with a few of his fellow prisoners."[73]

To these courts, Jones's choice to express himself in feminine ways was a security risk, unrelated to his identity as a drag queen and LGBTQ individual and a mere "penchant" that could be discarded with little cost to Jones. However, though drag may be viewed as frivolous to the courts, it serves several functions for LGBTQ individuals. First, drag allows inmates who feel ambiguity with their gender identity to experiment and negotiate with their identity.[74] Second, the drag identity is neither masculine nor feminine, "but rather a complex collective of characteristics that challenges society's traditionally polarized view of gender."[75] Drag

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[69] Jones v. Warden of Stateville Corr. Ctr., 918 F. Supp. 1142 (N.D. Ill. 1995); Star v. Gramley, 815 F. Supp. 276 (C.D. Ill. 1993).

[70] *Jones*, 918 F. Supp. at 1146.

[71] The *Star* Court points out that Jones is not "transsexual" and thus, has "no medically documented need" to wear women's clothing. *Star*, 815 F. Supp. at 278 n.2. Thus, even if Jones were transgender, the court and the prison frames a right to wear feminine clothing as a medical issue, not a right based in the Equal Protection clause. A discussion of the harms of medicalizing transgender rights is beyond the scope of this paper. For further discussion, *see generally* JUDITH BUTLER, *Undiagnosing Gender*, *in* UNDOING GENDER 75 (2004); Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713 (2005); Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15 (2003).

[72] *Jones*, 918 F. Supp. at 1146; *Star*, 815 F. Supp. at 279.

[73] *Jones*, 918 F. Supp. at 1145.

[74] Jessica Strübel-Scheiner, *Gender Performativity and Self-Perception: Drag as Masquerade*, 1 INT'L J. HUMAN. & SOC. SCI. 12, 13 (2011).

[75] *Id.*

performance is thus a means for inmates to resist the heteronormative and violent carceral system and empower themselves. As a result, by barring access to feminine clothing and makeup, the prison took away Jones's agency and right to explore and develop his queer identity.

In both Wilson and Jones's cases, each prisoner was stripped of their identity—as a Black woman, as a gay man—and expected to conform to their "new non-status" as prisoners. To call attention to oneself through an "extreme" Afro hairstyle or to "provoke homosexual activity" through feminine presentation is to possess an identity that lies outside the non-status of a mere incarcerated body: an identity either as an individual or as part of a larger group of Black or LGBTQ people existing within and outside the walls of a prison. There is no space for these identities within the white, heteronormative, cisgender narrative. The loss of this belonging, to oneself or to a greater marginalized community, is part of the process of social death in prisons.

C. PRISON GROOMING REGULATIONS

The survey of federal and state prison grooming policies[76] identifies twenty-four jurisdictions with general grooming policies (i.e., no stated restrictions on racial expressions), seventeen jurisdictions that expressly target racial performance, and eight policies that expressly exempt selected racial performances. The research also identifies which grooming policies explicitly allow the use of reasonable force in response to grooming violations and which provide complete or partial restrictions on the use of reasonable force.[77] Six jurisdictions appear to have no publicly stated or written requirements on prison dress and appearance. Nonetheless, racial and gender expressions may still be regulated through orders from prison officials or harassment from both officials and other inmates. In identifying what constitutes a "racial expression," the survey focuses on race-related traits that have appeared in case law examined in this paper (primarily hairstyles).[78]

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[76] *See infra* Appendix: Federal and State Inmate Grooming Policies.

[77] *See infra* Section III(D).

[78] Though this paper discusses the treatment of racial, gender, and religious expressions, for the purposes of scope, the Appendix only covers racial expressions. However, note that some of these expressions may be expressions of different types of identities. For example, long hair can express the racial, cultural and religious identity of Native Americans or be representative of non-conforming gender identity. Likewise, dreadlocks have both a racial and religious component. For a survey of jurisdictions with restrictions on hair length in men's facilities, *see* Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through*

This section concludes that (1) generally stated policies may still be interpreted broadly to target racialized expressions, (2) regulations that expressly cite Black hairstyles use language that marks Black prisoners as racial others, and (3) even if some jurisdictions have written policies allowing certain racial expressions, because of the immutability doctrine, it is unlikely that courts will provide a check on prisons and ensure that these policies are upheld in practice.

1. General Policies

In the jurisdictions that do not expressly restrict or protect racial expressions, grooming policies typically cite a balance between freedom of personal expression and state penological interests. For example, Hawaii's grooming policy states that "inmates will be allowed freedom in personal grooming, except where a valid penological interests [sic] justifies otherwise."[79] Hawaii also states that "hair should be maintained as needed to support good hygiene."[80] Some jurisdictions elaborate on what constitutes a penological interest, such as safety, security, sanitation, and identification issues.[81] These penological interests can be interpreted broadly to target expressions because prisons are only expected to show a rational connection between the grooming policy and state objectives for running a prison. Black hairstyles considered "nappy" can be targeted for sanitary and hygiene interests; an inmate housed in a male facility who wears makeup and feminine clothing presents a security issue; a Native American inmate's long hair can store contraband and weapons.

2. Policies That Target Racial Expressions

Several grooming regulations explicitly ban Black hairstyles and identify these expressions through common descriptors such as extreme, fads, exotic, radical, and bizarre. For example, Florida's policy states that:

Dress, 87 N.Y.U. L. REV. 859, 948 (2012). For a survey of prison grooming policies covering religious expressions, *see* Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 UNIV. MIAMI L. REV. 923, 964–72 (2012).

[79] HAW. DEP'T PUB. SAFETY, CORRECTIONS ADMINISTRATION POLICY AND PROCEDURES MANUAL, INMATE CLOTHING AND PROPERTY CONTROL Cor.17.04(5.3) (2020).

[80] *Id.*

[81] *See, e.g.*, KAN. ADMIN. REGS. § 44-12-106(a) (2020); D.C. DEP'T CORR., POLICY AND PROCEDURE, INMATE PERSONAL GROOMING No. 4010.2G(2) (2016); ME. DEP'T CORR., POLICIES AND RULES, PRISONER PERSONAL HYGIENE, GENERAL RULES No. 17.3(VI)(C)(3) (2013).

> [N]o inmate shall be permitted to have his or her hair, to include eyebrows and facial hair, dyed, cut, shaved or styled *according to fads or extremes* that would call attention to the inmate or separate inmates into groups based upon style. This would include, for example, dreadlocks, tails, woven braids, cutting, sculpting, clipping or etching numbers, letters, words, symbols or other designs into the hair. . . . Female inmates shall be prohibited from having their hair braided or styled in any area other than the institutional beauty shop.[82]

South Carolina and Texas likewise ban "extreme" hairstyles and then list common Black hairstyles as examples.[83] "Braids, plaits, Afros, blow-outs, Mohawks, etching of designs or patterns, or other extreme styles are not allowed."[84] Arizona does not expressly identify Black hairstyles, but instead provides similar descriptions of prohibited styles: "Radical[,] bizarre, carved, double-parted or other types of exotic hairstyles shall be prohibited."[85] Though Arizona does not mention race explicitly, "exotic" is often associated with the non-white and non-Western,[86] and suggests a racialized nature to these prohibited hairstyles.

Why do these policies, supposedly facially neutral from a judicial standpoint, include such descriptors when referencing Black hairstyles? These descriptors have the purpose of marking inmates with these race-related traits as "other" and as incarcerated bodies that lie outside of the white dominant forms. Under these grooming regulations, Black expressions—as natural as Angela Wilson's Afro—are extreme and part of a Black incarcerated body that lies at the fringes of what is acceptable and orderly in a carceral state. Carceral institutions already exist to segregate inmates from the rest of the world and to mark them as devalued.[87] The language of these grooming policies reveals how prisons further impose categories within the carceral space, marking racial

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[82] FLA. ADMIN. CODE ANN. r. 33-602.101(4) (2020) (emphasis added).

[83] TEX. DEP'T CRIM. JUST., OFFENDER ORIENTATION HANDBOOK § III(A)(6) (2017); S.C. DEP'T CORR., POLICIES AND PROCEDURES, INMATE GROOMING STANDARDS No. OP-22.13(1.1)–(1.2) (2006).

[84] S.C. DEP'T CORR., *supra* note 83, at No. OP-22.13(1.1).

[85] ARIZ. DEP'T CORR., REHAB., & REENTRY, INMATE REGULATIONS § 704.1(1.2) (2020).

[86] Jean-François Staszak, *Other/Otherness*, *in* INTERNATIONAL ENCYCLOPEDIA OF HUMAN GEOGRAPHY 1, 6 (Rob Kitchin & Nigel Thrift eds., 2009).

[87] *See* Jackson, *supra* note 53, at 198–99 (discussing the role of prisons in "constructing the new social status of former slaves as human beings whose citizenship status was acknowledged precisely in order to be denied") (quotation marks omitted) (citation omitted).

"others" for further punishment and discipline and perpetuating a white dominant narrative of non-white expressions being disorderly, dangerous, and in need of regulation.

3. Policies That Exempt Racial Expressions

My research also identified a few policies that expressly allow Black hairstyles or expressions. In these jurisdictions, the policies provide a list of hairstyles that are accepted rather than classifying these expressions under a particular exemption (for example, religion). For example, New York provides that "[o]nly basic haircuts will be allowed" and that "basic haircuts are defined as: . . . 'afro-natural' styles."[88] Braids are permitted but only in the corn row style.[89] Similarly, Ohio allows braids and dreadlocks, but regulates the thickness of each braid.[90] Oftentimes, inmates with these hairstyles must be ready to undo or unbraid their hair at any point to be searched for contraband.

Though it is promising to see exemptions for these expressions in grooming policies, these protections are few and far between. Furthermore, in the situation where prison officials do not follow these written procedures in practice, because of the immutability doctrine, it is unlikely for these inmates of color to find redress through judicial intervention.

D. DISCIPLINARY POLICIES AND IMPACT

Prisons discipline inmates for grooming violations through the use of force, loss of good time credit, loss of privileges, solitary confinement, and obligatory labor. This section focuses on the effects of forced haircuts, solitary confinement, and prison labor as means to regulate racial and gender expression as identified in prison inmates' narratives and academic studies. Each of these disciplinary measures results in bodily injury, a cost to mental health, or loss of identity and dignity that results in the social death of racial and gender minorities in prison.

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[88] N.Y. DEP'T CORR. & CMTY. SUPERVISION, INMATE GROOMING STANDARDS NO. 4914(III)(D)(2) (2019).
[89] *Id.*
[90] OHIO ADMIN. CODE 5120-9-25(D) (2020).

1. Forced Haircuts & Brutalization

In my survey of grooming policies, only the District of Columbia provides a complete bar against forced haircuts: "[n]o inmate's hair shall be cut through the use of force."[91] New York's grooming policy bans the use of forced haircuts or other disciplinary measures during both the intake process and while inmates' requests for grooming exemption are under review.[92] However, inmates may be subject to disciplinary measures if they fail to submit a request for exemption within fourteen days of the initial written order to shave.[93] Other jurisdictions limit the circumstances in which prison officials are permitted to give forced haircuts to only when there are sanitation or hygiene issues,[94] legitimate medical reasons,[95] documentation of hidden contraband,[96] or potential for inmate self-mutilation or self-harming behavior.[97] Restrictions on use of force may also require approval from a managing officer[98] or medical physician,[99] or the issuance of a conduct report from a disciplinary board.[100]

Several jurisdictions explicitly allow the use of reasonable force "to the extent needed to bring the offender into compliance with requirements."[101] A majority of jurisdictions remain silent on the issue of force in their written grooming policies or broadly state that physical force is not allowed "except as permitted by existing law or with a court order."[102] Of course, in practice, prison officials may still exert force or harassment to coerce compliance.

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[91] D.C. DEP'T CORR., *supra* note 81, at 4010.2G(10)(h)(5).

[92] N.Y. DEP'T CORR. & CMTY. SUPERVISION, *supra* note 88, at No. 4914(III)(A)(5).

[93] *Id*. at No. 4914(III)(D)(1)(b).

[94] COLO. DEP'T CORR., ADMINISTRATIVE REGULATION, OFFENDER PERSONNEL: HYGIENE AND GROOMING, No. 850-11 § IV(J)(4)(a) (2020), https://drive.google.com/file/d/1pzc9tLw00QnShQB1WcJPG-xaMrp8V1K8/view [https://perma.cc/4QZ6-2DJX]; IOWA ADMIN. CODE r. 201-50.14(356, 356A)(3c) (2011).

[95] MD. DEP'T PUB. SAFETY & CORR. SERVS., INMATE PERSONAL GROOMING OPS.200.0011.05(.05)(B)(6) (2020).

[96] COLO. DEP'T CORR., *supra* note 94, at No. 850-11 § IV(J)(4)(a).

[97] *Id*.

[98] OR. ADMIN. R. 291-123-0015(2)(b), (d) (2020).

[99] TENN. DEP'T CORR., ADMINISTRATIVE POLICIES AND PROCEDURES, HAIRSTYLES/DRESS CODE/GROOMING No. 502–03(IV)(H) (2018).

[100] OHIO ADMIN. CODE 5120-9-25(I).

[101] VA. DEP'T CORR., OPERATING PROCEDURE No. 864.1(I)(A)(3) (2019); *see also* S.C. DEP'T CORR., *supra* note 83, at No. OP-22.13(3.3).

[102] CAL. CODE REGS. tit. 15, § 3062(m) (2020).

Despite cited penological concerns for sanitation and security, forced haircuts exact a physical and mental toll on minority inmates and often serve as a traumatic induction into the carceral system. For example, a transsexual woman described her experience of being incarcerated in a men's state prison:

> I would like to see the [Department of Corrections] respect each person's identity and legal name changes; an individual who lives as a woman getting stripped of their legal name, clothing, having their head shaved . . . was truly shocking and harmful to me, not just for coming into prison but also for re-entry into society.[103]

Fresalinda Angelica Corporan, a transgender inmate at Valdosta State Prison, describes a similar experience with forced haircuts.[104] She is suing the institution for forcibly handcuffing her and cutting her hair, an experience that left her bleeding.[105] Corporan alleges that the former warden told her that "[t]his was an all-male prison" before ordering the forced haircut.[106] Corporan argues that her needs as a transgender woman are the same as other women.[107] "Transgender women are not lying when we say we are woman [sic] and that our needs match and conform to no other classification."[108] Despite the prison's violent disciplinary measures, she continues to grow out her hair; "[the prison officials] know my weakness, and I feel they are exploiting it to rid themselves of me . . . . Suicide may follow others . . . I refuse to die that way."[109] Thus, forced haircuts reflect prisons' bodily dominion over minority inmates, as grooming policies provide another justification for the state to create bodily injury and strip prisoners of autonomy.

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[103] PASCAL EMMER, ADRIAN LOWE & R. BARRETT MARSHALL, THIS IS A PRISON, GLITTER IS NOT ALLOWED: EXPERIENCES OF TRANS AND GENDER VARIANT PEOPLE IN PENNSYLVANIA'S PRISON SYSTEMS 48 (2011), https://www.prisonpolicy.org/scans/thisisaprison.pdf [https://perma.cc/XTZ4-QTNW].

[104] Patrick Saunders, *Trans Inmate Sues Georgia Prison Over Violent Forced Haircut*, PROJECT Q ATLANTA (Dec. 20, 2018), https://www.projectq.us/trans-inmate-sues-georgia-prison-over-violent-forced-haircut/ [https://perma.cc/657A-48MF]. Note that Corporan's name appears as "Benjamin Rafael Corporan" in her lawsuit filed in the U.S. District Court for the Middle District of Georgia. Corporan v. Williams, No. 717CV00124WLSTQL, 2018 WL 10162385 (M.D. Ga. June 21, 2018), *report and recommendation adopted*, No. 717CV124WLSTQL, 2018 WL 10162384 (M.D. Ga. July 11, 2018).

[105] *Corporan*, 2018 WL 10162385.

[106] Saunders, *supra* note 102.

[107] *Id*.

[108] *Id*.

[109] *Id*.

2. Solitary Confinement

Because solitary confinement facilities are designed to physically isolate and restrict violent or disruptive behavior, there is a misconception that segregated or restricted housing is reserved for the most dangerous inmates.[110] However, solitary confinement facilities also house "nuisance prisoners": prisoners who break minor rules, file grievances or lawsuits against the prisons, or present management challenges to the staff.[111] Grooming code violators or "program failures" are examples of such "nuisance prisoners" and demonstrate the abuse of solitary confinement.[112]

In fact, my research identified prisons with solitary confinement facilities reserved for grooming code violators.[113] For example, Virginia runs a Grooming Standards Violator Housing Unit ("VHU").[114] Like other grooming policies that allow restricted housing as a disciplinary measure, the objective of the VHU is to "manage and encourage compliance of male offenders determined to be in violation of Department of Corrections grooming standards."[115] However, numerous academic reports and inmate narratives demonstrate the negative consequences of solitary confinement. Indeed, what prisons describe as encouragement of compliance is condemned as "inhuman and degrading treatment" by several international human rights bodies.[116] Thus, prisons present inmates with an impossible

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[110] ACLU, BRIEFING PAPER: THE DANGEROUS OVERUSE OF SOLITARY CONFINEMENT IN THE UNITED STATES 8 (2014) [hereinafter THE DANGEROUS OVERUSE OF SOLITARY CONFINEMENT], https://www.aclu.org/report/dangerous-overuse-solitary-confinement-united-states [https://perma.cc/7AU9-K6N9].

[111] *Id.*

[112] *Id.*; *see also* CAL. CODE REGS. tit. 15, § 3062(m) (2020) ("An inmate who fails to comply with these grooming standards may be deemed a program failure, pursuant to Section 3062, subject to progressive discipline and classification committee review for appropriate housing and program placement.").

[113] VA. DEP'T CORR., *supra* note 101, at No. 864.1(V)(A); S.C. DEP'T CORR., *supra* note 83, at No. OP-22.13(3.3).

[114] VA. DEP'T CORR., THE REDUCTION OF RESTRICTIVE HOUSING IN THE VIRGINIA DEPARTMENT OF CORRECTIONS 10 (2019) [hereinafter THE REDUCTION OF RESTRICTIVE HOUSING], https://vadoc.virginia.gov/media/1452/vadoc-research-restrictive-housing-report-2019.pdf [https://perma.cc/Z2G5-3XA8] (describing the Grooming Standards Violator Housing Unit).

[115] *Id.*

[116] *See, e.g.*, EUR. COMM. FOR THE PREVENTION OF TORTURE & INHUMANE TREATMENT OR PUNISHMENT, 21ST GENERAL REPORT OF THE CPT 76 (2011), https://rm.coe.int/1680696a88 [https://perma.cc/C5AK-R3QP]; *see also* Nils Melzer (Special Rapporteur on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment), *Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 40, U.N. Doc. A/73/207 (July 20, 2018) ("High-level, official policies may, deliberately or

choice: endure solitary confinement or conform to white and heteronormative standards.

Solitary confinement impacts inmates in several ways, including mental deterioration, heightened physical abuse by prison officials, and recidivism and reentry problems. Though the psychological impact of short-term isolation is empirically undetermined, several studies track the negative mental health consequences of long-term disciplinary segregation on prisoners.[117] For example, the American Psychological Association found that:

> solitary confinement is associated with severe harm to physical and mental health among both youth and adults, including: increased risk of self-mutilation, and suicidal ideation; greater anxiety, depression, sleep disturbance, paranoia, and aggression; exacerbation of the onset of pre-existing mental illness and trauma symptoms; [and] increased risk of cardiovascular problems.[118]

In addition, studies show that prisoners in segregated housing exhibit difficulties exercising self-control, a lack of self-efficacy, and a diminishing capacity to test reality.[119]

While in solitary confinement, inmates are more likely to be subjected to excessive force by prison officials, as officials "often misuse physical restraints, chemical agents, and stun guns, particularly when

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inadvertently, create an environment conducive to the practice of torture and ill-treatment. . . . [T]he widespread overuse of solitary confinement may in itself amount to a form of torture or ill-treatment and also increases the risk of additional abuse and the likelihood that violations will go unchallenged.").

[117] *See, e.g.*, Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365 (2018); *see also* Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124 (2003). *See generally* BRUCE A. ARRIGO, HEATHER Y. BERSOT & BRIAN G. SELLERS, THE ETHICS OF TOTAL CONFINEMENT: A CRITIQUE OF MADNESS, CITIZENSHIP, AND SOCIAL JUSTICE 60–92 (2011) (discussing the psychological effects of solitary confinement on prisoners with and without prior known psychiatric disorders).

[118] *The Psychological Effects of Solitary Confinement: A Systematic Critique*, *supra* note 117, at 368.

[119] *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, *supra* note 117, at 135–37. A capacity to test reality refers to an inmate's ability to distinguish between their internal thoughts and feelings and events based in reality. *See* Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 622, 627 (2008). Prolonged lack of social contact with others degrades this ability and inmates become "highly malleable, unnaturally sensitive, and vulnerable to the influence of those who control the environment around them." *Id.* (citation omitted).

extracting prisoners from their cells."[120] Physical abuse is likely exacerbated in segregated housing units for two reasons: (1) isolation from the general population of prisoners makes it more difficult to detect abuse, and (2) administrators are more willing to ignore and remain apathetic to abuse exacted on prisoners in solitary confinement because they are often seen as "the worst of the worst."[121]

Unsurprisingly, solitary confinement causes exacerbated or unique harms to specific vulnerable populations outside of prisoners with existing mental illnesses. For example, women are more likely to be sexually harassed and abused by prison guards in solitary confinement, and the violent nature of cell extractions in long-term solitary confinement can retraumatize women prisoners and trigger post-traumatic episodes.[122] Transgender inmates similarly experience increased risk of assault and harassment, as well as further stigmatization.[123] In addition, transgender and physically disabled prisoners experience a loss of adequate services, treatment and programming.[124]

Ras-Solomon Tafari, a Black Rastafarian inmate incarcerated in a Virginia state prison, is one such physically disabled prisoner faced with the decision to conform to grooming policies or receive inadequate treatment.[125] Tafari was confined in a VHU unit for ten years for wearing his hair in dreadlocks before he suffered a stroke and injuries from being beaten.[126] In the restricted confines of his segregated unit, Tafari was not allowed to use his walker and continue his recovery.[127] Prison officials told Tafari he would be moved out of segregated housing in two weeks if he cut his hair.[128] Ultimately, Tafari relented and received a haircut in order to be moved; he reported feeling deeply depressed after cutting his

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[120] *See The Dangerous Overuse of Solitary Confinement*, *supra* note 110, at 5.
[121] *Id*.
[122] ARRIGO ET AL., *supra* note 117, at 92 n.4.
[123] SYLVIA RIVERA L. PROJECT, IT'S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 17–19 (2007), http://srlp.org/files/warinhere.pdf [https://perma.cc/L6SB-ZPND].
[124] *Id*.; ACLU, CAGED IN: SOLITARY CONFINEMENT'S DEVASTATING HARM ON PRISONERS WITH PHYSICAL DISABILITIES 6, 11 (2017) [hereinafter CAGED IN], https://www.aclu.org/report/caged-devastating-harms-solitary-confinement-prisoners-physical-disabilities [https://perma.cc/2ZUV-PJY6].
[125] Frank Green, *Rastafarian Inmate Relents on Haircut After 10 Years*, RICHMOND TIMES-DISPATCH (June 8, 2013), https://richmond.com/news/virginia/rastafarian-inmate-relents-on-haircut-after-10-years/article_f88c5840-eb05-5cce-b65e-482e0e6fabbe.html.
[126] *Id*.
[127] *Id*.
[128] *Id*.

dreadlocks, which took him years to grow.[129] Some inmates are able to endure solitary confinement in exchange for expressing their racial and cultural identity. One Kumeyaay Native American prisoner incarcerated at San Quentin described why he refused to cut his braids: "[M]y braids are my prayers, they make me an Indian, they remind me of my home, they are my power, and I refuse to cut them."[130]

Yet, regardless of whether these inmates choose to conform or not, the damage of solitary confinement follows inmates long after their release and return to communities. After enduring the trauma and abuse of solitary confinement for months or years, and experiencing diminished social and life skills, prisoners struggle to reenter communities. For instance, in California, return rates to prison are 20% higher for solitary confinement inmates.[131] In a 2001 study in Connecticut, 92% of prisoners held in administrative segregation were rearrested within three years of release compared to 66% of former prisoners who were not confined in segregated housing.[132] Inmates who are released directly from solitary confinement into communities also showed higher recidivism rates (at 64%) than prisoners who were first released from segregated housing to general population prison units (at 41%).[133] Thus, the lasting damage of solitary confinement and the increased likelihood of recidivism for isolated inmates demonstrates how the process of social death often continues long after an inmate's release.

These negative effects of solitary confinement indeed occur in white, cisgender prison populations. Nonetheless, the use of solitary confinement as discipline for banned racial and gender performances demonstrates how carceral powers can use grooming policies to systematically identify and isolate minority prisoners, marking these individuals for heightened physical and mental abuse. By marking certain

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[129] *Id*. Tafari noted, "I can't speak for all the others' experience, but for me, being in [solitary confinement] for as long as I have been . . . has created a deep rooted bitterness, frustration, and depression . . . my normal day . . . is a repetitive cycle of stress and frustration." Jean Casella & James Ridgeway, *Rastafarians Spend a Decade in Solitary for Refusing Haircuts*, SOLITARY WATCH (Feb. 11, 2010), https://solitarywatch.org/2010/02/11/rastafarians-spend-a-decade-in-solitary-for-refusing-haircuts/ [https://perma.cc/V9D5-TXB7].

[130] Philip M. Klasky, *Bringing Back the Drums: Native American Inmates at San Quentin Prison Revive Their Cultural and Spiritual Traditions*, NEWS FROM NATIVE CAL., Winter 2013, http://newsfromnativecalifornia.com/blog/article/bringing-back-the-drums-native-american-inmates-at-san-quentin-prison-revive-their-cultural-and-spiritual-traditions/ [https://perma.cc/95CW-QFDS].

[131] *The Dangerous Overuse of Solitary Confinement*, *supra* note 110, at 10.

[132] *Id*.

[133] *Id*. at 10–11.

incarcerated bodies as racially or sexually other, prisons create social death for these inmates more than their white, heterosexual, and cisgender counterparts.

3. Obligatory Labor

When initially compared to other methods that prisons use to discipline racial and gender performance, increased obligatory labor may not seem as violent or harmful to inmates. For example, Kansas categorizes grooming violations as a Class III offense[134] or offense "of a less serious nature"[135] and provides the following policies on prison labor related discipline: "extra work without incentive pay for not more than two hours each day for a period not to exceed 10 days . . . work without incentive pay, not to exceed five days. This penalty shall not include a fine and shall apply only to ordinary inmate work assignments."[136]

However, obligatory prison labor draws its exploitative roots from slavery, work farms, and chain gangs, in which Black and brown prisoners were literally worked to death for economic profit.[137] Though chain gangs were abolished nationwide by the 1950s, today, private corporations are able to lease factories of prison workers out of these institutions.[138] With the mass incarceration of Black and brown people due to the over-policing of communities of color and high criminal penalties for nonviolent drug offenses,[139] prisons have seen a resurgence in prison labor exploitation.

For instance, through the Kansas Correctional Industries ("KCI"), inmate labor is used to produce products like office furniture, park equipment, and clothing for the state government.[140] KCI states that by employing inmates in both high and low-skilled opportunities, prison labor "provide[s] a large number of inmates with highly marketable job skills upon release from prison."[141] Yet, because these job programs are usually not funded at a level that allows substantial training in marketable skills

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[134] KAN. ADMIN. REGS. § 44-12-106(b) (2020).
[135] *Id*. § 44-12-1303(a).
[136] *Id*. § 44-12-1303(b)(3), (4).
[137] Jaron Browne, *Rooted in Slavery: Prison Labor Exploitation*, 14 RACE, POVERTY & ENV'T, no. 2, 2007, *reprinted in* RACE, POVERTY & ENV'T, Spring 2010, at 78–80.
[138] *Id*. at 79–80.
[139] Katherine E. Leung, *Prison Labor as a Lawful Form of Race Discrimination*, 53 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 681, 692 (2018).
[140] Kan. Corr. Indus., *About Us*, http://kansasci.com/shop/custom.aspx?recid=11 [https://perma.cc/2SCC-EWWA].
[141] *Id*.

(for example, plumbing, computer coding, or carpentry) for a significant number of prisoners, it is more likely that these prison workers are performing low-skilled work in low demand, such as stitching together clothing.[142]

With this additional lens, we can see the more insidious impact of Kansas's disciplinary policy. Under such a system, a Black prisoner under Kansas's grooming code may be targeted for a racial expression that fails to "follow reasonable health and safety standards"[143] and then disciplined by being forced to work without pay in order to produce products for the state of Kansas—work that is unlikely to provide the type of training that will expand employment opportunities when this inmate is released from prison. Thus, such disciplinary policies not only systematically punish inmates of color for their racial performance, but also allow the prison to profit from this loss of identity.

IV. NEW IMMUTABILITY

As indicated so far, the definition of race under traditional immutability doctrine does not capture the full range of lived experiences of inmates of color and other vulnerable prison populations. Cases involving racial and gender performances are dismissed as frivolous, and the violent, necropolitical power of prisons is left unchecked. This section explores new immutability, a different way to understand race under the Fourteenth Amendment, and the potential issues with fully embracing this softened form of immutability.

A. ORIGINS OF NEW IMMUTABILITY

From the 1980s onwards, a more malleable standard of new immutability doctrine[144] began to surface in sexuality cases in lower

[142] Leung, *supra* note 139, at 681, 683.

[143] Kansas has a general policy that does not expressly restrict racial expressions. KAN. ADMIN. REGS. § 44-12-106(a) (2020).

[144] "New immutability" is a term coined by Jessica A. Clarke to describe this revised version of immutability. Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 5–6 (2015) ("Scholars have been optimistic about the so-called 'new immutability' for its potential to expand those aspects of identity covered by antidiscrimination law."). She notes that the newness of this iteration is based on its recent rise to prominence and that this notion of immutable traits constituting fundamental but not fixed traits was discussed as early as 1981. *Id.* at 23–24; *see also* Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 VA. J. SOC. POL'Y & L. 169, 169 (2011) (arguing for an "autonomy-based model of immutability premised on a respect for human dignity that protects critical constitutive aspects of personhood, which allows

federal and state courts.[145] The earliest illustration of new immutability arose in *Watkins v. U.S. Army*, a Ninth Circuit decision that ruled on an Equal Protection challenge to the military's decision to bar a soldier's reenlistment based on grounds of his sexual orientation.[146] Here, the court originally held that government distinctions based on sexual orientation were subject to strict scrutiny[147]—a departure from previous judicial treatment of fluid identities. "[I]t is clear that by 'immutability' the [Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class."[148] In a case involving sexual orientation, the *Watkins* court also discussed the problems with treating traditional suspect classes, including race, as wholly fixed, when people can pass or cover as different races.[149] "Lighter skinned blacks can sometimes 'pass' for white, as can Latinos for Anglos, and some people can even change their racial appearance with pigment injections."[150] The panel in *Watkins* then describes the new immutability standard:

> '[I]mmutability' may describe those *traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them*, regardless of how easy that change might be physically. Racial discrimination, for example, would not suddenly become constitutional if medical science developed an easy, cheap, and painless method of changing one's skin pigment.[151]

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courts to offer heightened-scrutiny protection to groups whose public identities are often not obvious").

[145] Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) (plurality); Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); *In re* Marriage Cases, 183 P.3d 384 (2008), *superseded by* CA. CONST. art. I, § 7.5, *as stated in* Hollingsworth v. Perry, 570 U.S. 693 (2013); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008). A similar development of immutability doctrine can be tracked in asylum law. *See* Enriquez, *supra* note 30, at 388–93 (arguing that asylum law's "fundamental immutability" standard belongs in Equal Protection jurisprudence and resolves inconsistencies caused by a biological immutability standard).

[146] *Watkins*, 875 F.2d at 701.

[147] *Id.* at 728.

[148] *Id.* at 726.

[149] *Id.*; *see also* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (defining "covering" as a means to tone down a stigmatized identity and passing as a way to hide, but not alter one's identity).

[150] *Watkins*, 875 F.2d at 726.

[151] *Id.* (emphasis added).

Under new immutability doctrine, the question is not whether a trait can be changed or is a matter of choice, but rather, whether a person should be compelled to change that trait at all. This development in immutability doctrine can be tracked to later sexuality cases in the late 2000s. In 2008, the Supreme Court of California legalized same-sex marriage by applying the *Watkins* court's new immutability doctrine, finding that "a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."[152]

Later that year, the Supreme Court of Connecticut decided a case involving the denial of marriage licenses to same-sex couples and offered a narrower approach to classifying sexual orientation.[153] The court refused to decide whether sexual orientation was immutable to the same extent as race, national origin, and gender are treated.[154] Instead, the court found that because choices regarding sexual intimacy are "an integral part of human freedom," and sexual orientation is "a significant part of a person's identity," these choices "are central to the liberty protected by the [F]ourteenth [A]mendment."[155] Thus, though the court does not expressly liken sexual orientation to suspect classes, the court ultimately rules in favor of same-sex couples and protects choices regarding sexual intimacy as part of an individual's identity.

B. CHALLENGES OF FLUIDITY

If gay rights activists have found success in sexuality cases through this new doctrine of immutability, can this revised version be applied to cases involving racial and gender performance in prisons? Admittedly, a wholesale acceptance of new immutability and an integration of racial and gender fluidity into the Fourteenth Amendment leads to several complications, including potential for essentialization and fraud.

Critics of new immutability argue that adopting a new immutability doctrine requires that courts inquire into what protected traits are "central to a person's identity"—a determination that could risk essentializing race

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[152] *In re* Marriage Cases, 183 P.3d 384, 443 (2008), *superseded by* CA. CONST. art. I, § 7.5, *as stated in* Hollingsworth v. Perry, 570 U.S. 693 (2013).
[153] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 437 (Conn. 2008).
[154] *Id.*
[155] *Id.* at 437, 466.

and gender.[156] If courts choose to apply the new immutability doctrine, they will need to differentiate between mutable traits "that are so central to a person's identity that it would be abhorrent for government to penalize"[157] and traits that are perhaps less imbued with race and gender, and thus, less necessary to protect. Inevitably, members of these marginalized communities will disagree as to which identified traits should be ascribed to their racial and gender identity.[158]

Proponents of new immutability may counter that the facts of each instance of a grooming violation should be placed in a historical or contemporary context to determine if the prison's actions perpetuate racial or trans stigma.[159] Still, even requiring context allows room for discord over what historical narratives are relevant and thus, what makes a trait integral or central to race. Here, there is a risk that some members of the marginalized group would "stifle differences and dissent within their own ranks in order to present a credible case that a certain trait is 'constitutive.'"[160]

Another issue that arises with a full acceptance of racial fluidity is the potential for fraud. New immutability allows for a dimension of self-identification, choice, and agency, but it can also be abused, as some people might disingenuously claim racial and gender affiliations in order to access certain benefits. For example, what would prevent a white inmate from claiming a Black identity to access certain racialized hairstyles that can be used to hide contraband? John Tehranian suggests turning to religious expressions, another fluid identity trait that can be compared to transgender identities, to address this issue.[161] According to

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[156] Clarke, *supra* note 144, at 5, 39 (noting that in the context of sexual orientation, scholars have argued that the personhood definition is not universal); *see also* Roberto J. Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2210 (2003) ("Thus, when a court is called upon to recognize a cultural right, it may do so only by endorsing a partial and contested image of that group's identity, thereby placing a heavy thumb on one side of a group's internal struggle over its self-narrative.").

[157] Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (plurality).

[158] Clarke, *supra* note 144, at 39; Gonzalez, *supra* note 156.

[159] In the employment context, *see* D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 UNIV. COLO. L. REV. 1355, 1385–86 (2008) (arguing that in the context of Title VII cases involving employment policies that prohibit mutable and racialized traits, courts should assess the facts of these cases within a historical and contemporary context and allow plaintiffs to establish a *prima facie* case of racial stigma).

[160] *See* Gonzalez, *supra* note 156, at 2212.

[161] Tehranian, *supra* note 35, at 74; *see also* Dallan F. Flake, *Using Religion to Protect Transgender Employees from Discrimination*, 2020 UNIV. ILL. L. REV. 851, 873 (2020) ("The similarities between sex and religion vis-à-vis their centrality to personal identity make these two traits apt for comparison. Both are deeply personal and can feature prominently in a

Tehranian, statutes such as the Religious Freedom Restoration Act and the Selective Service Act, which provide exemptions when religious beliefs conflict with certain state regulations, can be used to ensure religious freedom and balance these competing interests.[162]

In the carceral context, prisoners can bring claims under RLUIPA, which protects inmates who are unable to freely attend to their religious needs and are dependent on prison institutions' accommodation for exercise of their religion.[163] Currently, prisoners like Eric McGill, whose dreadlocks express different dimensions of religious, cultural, and racial identity, have brought claims under RLUIPA in conjunction with the Equal Protection clause.[164] The court scrutinizes attempts to qualify for these exemptions by examining whether a person's belief is sincerely held.[165] One can imagine a similar framework for scrutiny of racial or gender identity fraud.

Of course, such an approach does not save the courts from the Rachel Dolezals of the world. Dolezal self-classified as an African American woman despite her parents releasing images showing Dolezal with blonde hair, blue eyes, and fair skin as a child.[166] Even after public ridicule and media scrutiny, Dolezal maintains to this day that she is African American.[167] In fact, Dolezal has dug her heels in, and after widespread backlash to her claims to Blackness, has taken on a name of African

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person's sense of self. Both derive from internal genesis rather than a fixed external referent. And both can be, and often are, experienced and expressed in a variety of ways.").

[162] Tehranian, *supra* note 35, at 74.

[163] 42 U.S.C.A. § 2000cc-1 (West, Westlaw through Pub. L. No. 116-216).

[164] McGill v. Clements, No. 3:19-cv-01712, 2021 U.S. Dist. LEXIS 12416 (M.D. Pa. Jan 22, 2021).

[165] The plaintiff has the initial burden to make two showings: (1) they have a "sincerely held religious belief" and (2) the government's action or policy "substantially burden[s] that exercise" by, for example, forcing the plaintiff "to 'engage in conduct that seriously violates [their] religious beliefs.'" Holt v. Hobbs, 574 U.S. 352, 360–61 (2015) (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014)).

[166] *See Disgraced NAACP Leader Rachel Dolezal Now Struggling to Get By: 'My Life is Not a Soundbite*,*'* ABC ACTION NEWS (Mar. 24, 2017, 7:44 AM), https://www.abcactionnews.com/news/national/disgraced-naacp-leader-rachel-dolezal-now-struggling-to-get-by [https://perma.cc/2JUT-T9S9]; *see also* Denene Millner, *Why Rachel Dolezal Can Never Be Black*, NPR (Mar. 3, 2017, 4:15 PM), https://www.npr.org/sections/codeswitch/2017/03/03/518184030/why-rachel-dolezal-can-never-be-black [https://perma.cc/FJ8K-WCV5].

[167] *Disgraced NAACP Leader Rachel Dolezal Now Struggling to Get By: 'My Life is Not a Soundbite*,*' supra* note 166.

origin.[168] Even to Dolezal's critics, arguably, she appears to have a genuine and sincere belief that she is Black. Attempts to draw a distinction between Dolezal's race at birth and her chosen race in order to prevent Dolezal from seeking benefits under these exemptions might lead us back into issues regarding biological or fixed status conceptions of race.[169]

V. CONCLUSION

A full embrace of new immutability would present complications, but as this paper has argued, adherence to traditional immutability doctrine perpetuates violence and subordination of racial and gender minorities in prisons. The traditional immutability standard makes invisible the fluid components of inmates' lived experiences and leaves these prisoners vulnerable to abuse and exploitation. Further, the assumption that race and gender are fixed and immutable does not reflect current societal treatment of these identities nor individuals' day-to-day experiences.

Recognition of the mutability of identities is necessary to realize the aspirations of equal protection and to confront all forms of subordination that threaten racial and gender minorities. In confronting the reality of mistreatment of trans prisoners and inmates of color, we must perhaps also confront the reality that prisons are essentially violent spaces, manufactured to create social death. Nevertheless, as long as there are incarcerated racial and gender minorities, the courts have a duty to respect and protect their right to self-identification, autonomy, and personhood.

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[168] Ijeoma Oluo, *The Heart of Whiteness: Ijeoma Oluo Interviews Rachel Dolezal, the White Woman Who Identifies as Black*, STRANGER (Apr. 19, 2017), https://www.thestranger.com/features/2017/04/19/25082450/the-heart-of-whiteness-ijeoma-oluo-interviews-rachel-dolezal-the-white-woman-who-identifies-as-black [https://perma.cc/7E8C-V9HW]; Millner, *supra* note 166.

[169] Camille Gear Rich, *Rachel Dolezal Has a Right to Be Black*, CNN (June 16, 2015), https://www.cnn.com/2015/06/15/opinions/rich-rachel-dolezal/index.html [https://perma.cc/AWK8-2L7F] ("She forces us to consider whether our biology or our action is more important to identity, and should we act in ways that honor our chosen identity in meaningful ways.").

APPENDIX: FEDERAL AND STATE INMATE GROOMING POLICIES

JURISDICTIONS WITHOUT EXPRESS RESTRICTIONS ON EXPRESSIONS

Jurisdiction	Applicable Policy
Alaska	"A prisoner must be permitted to adopt any hair style or length, including a beard and mustache if they are kept clean."[170]
Connecticut	"Hair shall be clean and appropriately groomed."[171]
Delaware	"It is the policy of the Department of Correction to require all offenders . . . to conform to reasonable standards of grooming and attire. These standards . . . should promote personal hygiene, safety, identification, and security. No personal hygiene needs shall be denied for punitive reasons nor shall the standards conflict with the valid religious beliefs of offenders."[172]
District of Columbia	"It is the policy of DOC . . . to permit inmates freedom in personal grooming as long as their appearance does not conflict with requirements for safety, security, identification and hygiene."[173]

[170] ALASKA ADMIN. CODE tit. 22, § 05.180(c) (2020).
[171] CONN. DEP'T CORR., ADMINISTRATIVE DIRECTIVE, INMATE PROPERTY No. 6.10(36)(B) (2013), https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad0610pdf.pdf [https://perma.cc/4XV5-BK3B].
[172] DEL. DEP'T CORR., RIGHTS OF OFFENDERS: STANDARDS FOR OFFENDER GROOMING AND ATTIRE, No. 5.3 § V (2015), https://doc.delaware.gov/assets/documents/policies/policy_5-3.pdf [https://perma.cc/69LV-FPD6].
[173] D.C. DEP'T CORR., *supra* note 81, at 4010.2G(2).

Hawaii	"Inmates will be allowed freedom in personal grooming, except where a valid penological interests [sic] justifies otherwise."[174]
Illinois	"Committed persons may have any length of hair, sideburns, mustaches, or beards so long as they are kept neat and clean and do not create a security risk."[175]
Indiana	"Hair shall be kept neat, clean and well-groomed at all times. All offenders are expected to wear hairstyles appropriate for safety and sanitation issues."[176]
Iowa	"Offenders are permitted choice in personal grooming as long as their appearance does not conflict with the institution's requirements for safety, security, identification, medical, and hygiene."[177]
Kansas	"Each inmate shall keep the inmate's hair neat and clean and follow reasonable health and safety standards."[178]
Kentucky	"The jailer may establish a written policy on hair length or beards if based on actual concerns for safety, security, identification, or hygiene. A prisoner may be permitted freedom in personal grooming if not in conflict with the jail's policy. Caution shall be taken to protect prisoner rights in accordance

174 HAW. DEP'T PUB. SAFETY CORR. ADMIN., *supra* note 79, at 17.04(5.3d).

175 ILL. ADMIN. CODE tit. 20, § 502.110(a) (2021).

176 IND. DEP'T CORR., POLICIES, OFFENDER GROOMING, CLOTHING AND PERSONAL HYGIENE No. 02-01-104(X) (2019).

177 IOWA DEP'T CORR., POLICY & PROCEDURES No. IS-SH-01 IV(D)(1) (2019).

178 KAN. ADMIN. REGS. § 44-12-106(a) (2020). Though Kansas does not expressly allow the use of force in regulating personal appearances in prison, it does identify grooming violations as a Class III offense. *Id.* § 44-12-106(b). Class III offenses are penalized by restriction to the inmate's cell, privileges restrictions, extra work without incentive pay, or a fine, with limitations to each of these restrictions. *Id.* § 44-12-1303.

	with court decisions regarding religious practice."[179]
Maine	"Prisoners shall be permitted freedom in personal grooming as long as their appearance does not conflict with the facility's requirements for safety, security, identification, and hygiene."[180]
Massachusetts	No stated policy on personal appearance.[181]
Michigan	"Prisoners shall be permitted to maintain head and facial hair in accordance with their personal beliefs provided that reasonable hygiene is maintained."[182] "Prisoners shall be encouraged to maintain a 'well groomed' appearance."[183]
Missouri	No stated policy found. Unknown.
Montana	"Facilities will allow offenders freedom in personal grooming as long as their appearance does not conflict with the facility's safety, security, identification, and hygiene regulations. Grooming requirements may be more restrictive in specific training programs."[184]
Nebraska	No stated policy on personal appearance.[185]

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[179] 501 KY. ADMIN. REGS. 3:120 § 3(3) (West, Westlaw through 48 Ky. Admin Reg.).
[180] ME. DEP'T CORR., *supra* note 81, at 17.03(C)(3).
[181] MASS. DEP'T CORR., No. 103 DOC 750.10 (2020).
[182] MICH. DEP'T CORR., HUMANE TREATMENT AND LIVING CONDITIONS FOR PRISONERS No. 03.03.130(D) (2019).
[183] *Id*. at No. 03.03.130(C).
[184] MON. DEP'T CORR., OFFENDER HYGIENE, CLOTHING, AND LINEN SUPPLIES No. 4.4.1(IV)(A)(2) (2013).
[185] NEB. CORR. SERVS., SANITATION & HYGIENE No. 111.01 (2019).

Nevada	"Inmates shall be permitted freedom in personal grooming as long as their appearance does not conflict with the institution's requirements for safety, security, identification and hygiene."[186]
New Hampshire	"[H]air must be kept clean and neat. Hair length is a personal choice as long as there is no safety hazard when working around machinery or a sanitation hazard when working around food."[187]
New Jersey	"Inmates shall be permitted to have the hair style or length of hair they choose, including beards and mustaches, provided their hair is kept clean and does not present a safety hazard, or a health, sanitary or security problem."[188]
North Carolina	"[O]ffenders will be required to maintain their hair in a state of cleanliness."[189]
North Dakota	"Staff will screen atypical haircuts, such as shaving your head and leaving a small patch of hair. When the length or style of your hair is a security, health, sanitation, or safety concern you may be required to trim or cut your hair or wear a hair net or other covering."[190]
Oklahoma	"Except when a valid interest justifies otherwise (as described in this procedure), facilities will allow freedom in personal grooming."[191]

[186] NEV. DEP'T CORR., INMATE GROOMING AND PERSONAL HYGIENE No. 705.01(1) (2014).
[187] N.H. DEP'T CORR., MANUAL FOR THE GUIDANCE OF INMATES § II(B)(4)(c) (2011).
[188] N.J. ADMIN. CODE § 10A:14-2.5(a) (2022).
[189] N.C. DEP'T PUB. SAFETY PRISONS, POLICY & PROCEDURES No. .2107 (2020).
[190] N.D. DEP'T CORR. & REHAB., FACILITY HANDBOOK § 6(1) (2018).
[191] OKLA. DEP'T CORR., POLICIES AND PROCEDURES, PERSONAL HYGIENE AND APPEARANCE CODE No. OP-030501(III) (2019).

	"[M]ale hairstyles and appearances, including facial hair, will not conflict with security, sanitation, safety, or health requirements of the agency."[192]
Oregon	"Head and facial hair must be maintained daily in a clean and neat manner."[193] "Head and facial hair must be worn in a manner that does not draw undue attention or otherwise compromise internal order and discipline, institutional security, or the health and safety of the adult in custody, other adults in custody, and staff."[194]
Pennsylvania	"Hairstyles of different types will be permitted provided they do not conflict with the facility's procedures for safety, security, identification, and sanitation efforts."[195]
Rhode Island	No stated policy on personal appearance.[196]
South Dakota	"Hair, including facial hair, must be kept clean and neat in appearance and cannot pose a threat to the safety, security, or sanitation of the institution."[197]
Vermont	No stated policy found. Unknown.
Virginia	"Offenders are permitted freedom in personal grooming. Hair styles and beards that could promote identification with gangs or create a

[192] *Id*. at No. OP-030501(III)(A)(2).
[193] Or. Admin. R. 291-123-0015(2)(a) (2020).
[194] *Id*. at 291-123-0015(2)(d).
[195] Penn. Dep't Corr., Policies, Inmate Grooming and Barber/Cosmetology Programs No. 807 § 1(A)(1) (2016).
[196] R.I. Dep't Corr., Personal Hygiene No. 18.47-3 (2019).
[197] S.D. Dep't Corr., Inmate Living Guide 9 (2019).

	health, hygiene, or sanitation hazard are not allowed."[198]
Washington	"Offenders will be permitted freedom in personal grooming as long as their appearance does not conflict with the facility's requirements for safety, security, identification, and hygiene."[199]
West Virginia	No stated policy found. Unknown.

[198] Va. Dep't Corr., *supra* note 101, at No. 864.1(IV)(B).
[199] Wash. Dep't Corr., Policies No. 440.080(II) (2017).

JURISDICTIONS WITH EXPRESS RESTRICTIONS FOR RACIAL EXPRESSIONS

Jurisdiction	Applicable Policy
Alabama	Though Alabama does not expressly identify racialized hairstyles, its policy explicitly states that “no exceptions [are] granted for religious reasons” and “[m]ustaches and beards are not permitted.”[200] Thus, members of certain non-white ethnic groups who may be protected in other states (for example, New York’s policy that identifies exemptions for Native Americans, Rastafarians, Sikhs, etc.) would not be able to express their religious, ethnic, or racial identity here.
Arkansas	“All inmates must maintain a hair style that is worn loose, clean and neatly combed. No styles are permitted that make it difficult to search the hair, including cornrows, braids, ponytails or dreadlocks. . . . If an inmate chooses to maintain facial hair, the inmate will be required to shave so that his appearance without facial hair can be documented.”[201]
California	“An inmate’s hair and facial hair shall have no lettering, numbering, or designs of any kind cut, shaved, dyed, painted or in any way placed in the hair or on the scalp or face of the inmate.”[202]

[200] ALA. DEP’T CORR., MALE INMATE HANDBOOK 10 (2017).

[201] ARK. DIV. CORR., INMATE HANDBOOK 8 (2020), https://doc.arkansas.gov/correction/inmates/inmate-handbook/ [https://perma.cc/3KZY-5P6U].

[202] CAL. CODE REGS. tit. 15, § 3062(b) (2020).

Colorado	"No lines, designs, patterns, or symbols will be shaved or woven into hair."[203]
Florida	"[N]o inmate shall be permitted to have his or her hair, to include eyebrows and facial hair, dyed, cut, shaved or styled according to fads or extremes that would call attention to the inmate or separate inmates into groups based upon style. This would include, for example, dreadlocks, tails, woven braids, cutting, sculpting, clipping or etching numbers, letters, words, symbols or other designs into the hair. . . . Female inmates shall be prohibited from having their hair braided or styled in any area other than the institutional beauty shop. . . . Inmates shall not sculpt nor edge their beards. No numbers, symbols, letters, nor other designs shall appear in inmate beards[204]."
Georgia	"Each inmate shall have a conventional haircut. Hair shall not be longer than three (3) inches; shall not extend beyond a point which would reach the collar on an ordinary shirt; and shall not cover any part of the ears or eyebrows."[205]
Idaho	"Inmates . . . are prohibited from . . . [c]utting or forming symbols or any other wording or depictions into their scalp or facial hair."[206]
Kentucky	"An inmate shall not have cutouts or symbols cut into body hair or eyebrows."[207]

[203] COLO. DEP'T CORR., *supra* note 94, at No. 850-11 § IV(J)(1)(e).
[204] FLA. ADMIN. CODE ANN. r. 33-602.101(4) (2020).
[205] GA. COMP. R. & REGS. 125-2-3-.04(6) (2020).
[206] IDAHO DEP'T CORR., HYGIENE OF OFFENDERS, OFFENDER BARBERS, AND FACILITY HOUSEKEEPING No. 306.02.01.001(5) (2019).
[207] KY. CORR., POLICIES AND PROCEDURES, HAIR, GROOMING, AND ID CARD STANDARDS POLICY No. 15.1(II)(B) (2018).

Louisiana	"An offender's appearance and hair style or length not conflict with institutional requirements for security, safety, identification and hygiene. These are valid penological goals . . . .We control the length of the offender's hair [i]n order to accomplish safety of offenders, volunteers and staff. We do not make religious exceptions nor allow offenders to wear their hair at the length they choose. We require they keep it short, but not shaved or military style."[208]
Maryland	Written procedures concerning personal grooming must at minimum address "that an inmate may only receive a basic haircut (e.g., no graphics, words, or complex shapes)."[209]
Minnesota	"Hair, including facial hair and eyebrows, must be kept clean and may not be styled or cut to contain lettering, signs, or symbols."[210]
Mississippi	"Male inmate's hair will be kept clean and neatly cut so the hair does not fall below the collar and is not more than 3 [inches] in length."[211] Contrast with Mississippi's policy for female inmates: "Female inmates will keep their hair clean, neat, and properly maintained at all times."[212]
New Mexico	"All male inmates' hair will be cut neatly and will not exceed three inches in length. Hair

[208] Sidhu, *supra* note 78, at 964.
[209] MD. DEP'T PUB. SAFETY & CORR. SERVS., *supra* note 95, at OPS.200.0011.05(A)(4)(a).
[210] MINN. DEP'T CORR., POLICY DIRECTIVE NO. 303.020(C)(1) (2020).
[211] MISS. DEP'T CORR., RIGHTS, RESPONSIBILITIES, AND REGULATIONS 12 (2016), https://www.mdoc.ms.gov/Inmate-Info/Documents/CHAPTER_VI.pdf [https://perma.cc/BR4Z-WNBC].
[212] *Id*.

	must be cut and trimmed so as not to touch the shirt collar when wearing a properly fitted inmate uniform. Hair shall not touch or cover any portion of the ears."[213] "All male inmates' haircuts shall be reasonably uniform in that there shall be no designs cut into the hair, no partially shaved heads, no styles such as those that might be associated with a 'gang' or security threat group or other such hairstyle."[214]
South Carolina	"All male inmates' hair must be neatly cut (not to exceed one [1"] inch in length) and must remain above the shirt collar and above the ear (not touching the ear). . . . Braids, plaits, Afros, blow-outs, Mohawks, etching of designs or patterns, or other extreme styles are not allowed."[215] Dreadlocks and twists are likewise banned for women.[216]
Texas	"Male offenders shall keep their hair trimmed up the back of their neck and head. Hair shall be neatly cut. Hair shall be cut around the ears. Sideburns shall not extend below the middle of the ears. No block style, afro, or shag haircuts shall be permitted. No fad or extreme hairstyles/haircuts are allowed. No mohawks, tails, or designs cut into the hair are allowed."[217] Compare with Texas's policy for female inmates: "Female offenders shall not have

[213] N.M. Dep't Corr., Policies, Inmate Grooming and Hygiene No. CD-151100(H)(1) (2018).
[214] *Id*. at No. CD-151100(H)(2).
[215] S.C. Dep't Corr., *supra* note 83, at No. OP-22.13(1.1).
[216] *Id*. at No. OP-22.13(1.2).
[217] Tex. Dep't Crim. Just., *supra* note 83, § III(A)(6).

	extreme hairstyles. No mohawks, "tailed" haircuts or shaved/partially-shaved heads shall be allowed. Female offenders may wear braids in accordance with unit policy."[218]
Wisconsin	"The department has the authority to regulate the length of hair, mustaches, and beards based upon institution health and safety concerns."[219] "No designs, lines, numbers, letters or symbols."[220]
Wyoming	Wyoming allows a religious exemption for hairstyles as long as the hair is searchable and does not present a health or safety hazard or draw undue attention.[221] "Haircuts and styles which draw undue attention to an individual inmate or group will not be allowed."[222] Further, "[i]nmates will not be permitted to cut designs, patterns, letters, or numbers into their hair."[223] However, mohawks and other similar styles are acceptable as long as they do not draw undue attention or create an undue security risk.[224]

[218] *Id*. § III(A)(7).
[219] WIS. ADMIN. CODE DOC § 309.24(3)(b) (2011).
[220] WIS. DEP'T CORR., DIVISION OF ADULT INSTITUTIONS POLICIES No. 309.24.01(I)(E)(2) (2018).
[221] WYO. DEP'T CORR., POLICY AND PROCEDURE No. 4.201(IV)(D)(3) (2019).
[222] *Id*.
[223] *Id*. at No. 4.201(IV)(D)(3)(ii).
[224] *Id*. at No. 4.201(IV)(D)(3)(ii)(a).

JURISDICTIONS WITH EXPRESS EXEMPTIONS ON RACIAL EXPRESSIONS

Jurisdiction	Applicable Policy
Arizona	"Inmates may wear their hair braided. Whenever it becomes necessary to search the inmates' hair for contraband, staff shall direct inmates to remove braids or other concealing hair styles."[225]
Federal Bureau of Prisons	"The Warden may not restrict hair length if the inmate keeps it neat and clean."[226]
Kansas	"Hair care services that are culturally appropriate and comply with applicable regulatory requirements, shall be available to all offenders."[227]
Kentucky	"An inmate may . . . [c]hoose the length of his hair."[228]
New York	"Only basic haircuts will be allowed. Only one straight part will be allowed, with no other lines, designs, or symbols cut into the hair."[229] Basic haircuts include "afro-natural" styles.[230] "Hair may be permitted to grow over the ears to any length desired by the inmate. . . . The only braids allowed are the corn row

[225] ARIZ. DEP'T CORR., *supra* note 84, at §§ 704.1(1.4)–(1.4.1)

[226] 28 C.F.R. § 551.4(a) (2022).

[227] KAN. DEP'T CORR., INTERNAL MANAGEMENT POLICY & PROCEDURE, CLOTHING & LINEN ISSUE; INMATE HYGIENE AND APPEARANCE No. 12-129(VIII)(C) (2016).

[228] KY. CORR., POLICIES AND PROCEDURES, HAIR, GROOMING, AND ID CARD STANDARDS No. 15.1(II)(A) (2018).

[229] N.Y. DEP'T CORR. & CMTY. SUPERVISION., *supra* note 87, at No. 4914(III)(D)(2).

[230] *Id*.

	style. . . . The dreadlock hairstyle is allowed."[231] Native Americans involved in scheduled and approved Native American cultural ceremonies do not have to have the hair tied back in a ponytail when leaving their housing unit.[232]
North Dakota	"Inmates are allowed to braid other inmates' hair but inmates are not allowed to braid anything into their hair on any part of the body, including beads, rubber bands, colored string, or cloth."[233]
Ohio	"Braids and dreadlocks may be worn subject to the limitations of this rule and provided that the thickness of each individual braid or dreadlock does not exceed one-half inch."[234]
Pennsylvania	"Inmates are not restricted with regard to the length of their hair. All hair must be maintained in a manner that does not pose a concern relating to the health, safety, and security of the facility."[235]

[231] *Id*.
[232] *Id*. at No. 4914(III)(D)(2)(d).
[233] N.D. Dep't Corr. & Rehab., *supra* note 183, at 6(5).
[234] Ohio Admin. Code 5120-9-25(D) (2020).
[235] Penn. Dep't Corr., Policies, Inmate Grooming and Barber/Cosmetology Programs No. 807 § 1(A)(2)(a) (2016).

JURISDICTIONS WITH EXPRESS RESTRICTIONS ON FORCE OR DISCIPLINE

Jurisdiction	Applicable Policy
District of Columbia	"Inmates will not be required to loosen or cut their dreadlocks, braids, cornrows, hair extensions, weaves (glued or sewn-in) when they are committed to DOC pursuant to the limitations indicated in ¶ 10 of this directive."[236] "No inmate's hair shall be cut through the use of force."[237]
California	"An inmate who fails to comply with these grooming standards may be deemed a program failure, pursuant to Section 3062, subject to progressive discipline and classification committee review for appropriate housing and program placement. Physical force shall not be used to enforce compliance with these regulations, except as permitted by existing law or with a court order."[238]
Colorado	Colorado sets out four criteria for the use of force in accomplishing the cutting of hair: (1) documentation that the inmate has hidden contraband and refused orders to cut their hair; (2) clinical staff recommended the haircut because of a contagious/unsanitary condition of the hair or scalp; (3) clinical staff recommended the haircut to avoid self-mutilation or self-harming behavior; and (4) documented refusal by the inmate to cut their

[236] D.C. DEP'T CORR., *supra* note 81, at 4010.2G(9)(a).
[237] *Id*. at 4010.2G(10)(h)(5).
[238] CAL. CODE REGS. tit. 15, § 3062(m) (2020).

	hair "that has lines, designs, patterns, or symbols cut or woven into it."[239] Inmates "may be subject to use of force to cut or unbraid/unweave hair."[240]
Iowa	"Prisoners may be required to shave or cut their hair only for sanitation."[241]
Maryland	"Inmates may not be forced to shave, or have their hair cut, unless there is a legitimate medical reason for doing so, and then only upon written orders by a physician."[242]
New York	At the reception stage, if an inmate or returned parole violator professes to be transgender or gender nonconforming, or a member of any religious sect, they cannot be forced to comply with the initial haircut requirements.[243] These inmates "cannot be disciplined or placed in administrative segregation for their refusal, on religious or gender identity grounds, to have an initial haircut."[244] However, inmates may be subject to disciplinary measures if the inmate fails to request and receive a permit after this initial intake process.[245]
Oregon	"If a hair search needs to be conducted by

[239] COLO. DEP'T CORR., *supra* note 94, at No. 850-11 § IV(J)(4)(a).
[240] *Id.*
[241] IOWA ADMIN. CODE r. 201-50.14(356, 356A)(3c) (2011).
[242] MD. CODE REGS. 12.02.03.10(F)(33) (2020).
[243] N.Y. DEP'T CORR. & CMTY. SUPERVISION, *supra* note 87, at No. 4914(III)(A)(5).
[244] *Id.*
[245] *Id.* at No. 4914(III)(D)(1)(b). New York's policy discusses possible disciplinary repercussions if someone applying for a religious exemption fails to receive the permit but does not elaborate on whether these processes are identical for transgender inmates. *Id.* It is also unknown what test transgender inmates are subject to in order to continue receiving this initial exemption. *Id.*

	staff, it may be necessary to require that the adult in custody unbraid, loosen, or cut the hair to complete the search. If an adult in custody's hair must be cut it requires the review and approval of the Officer-in-Charge."[246] "If an adult in custody's hair must be cut it requires the review and approval of the Officer-in-Charge."[247]
Tennessee	"Forcible cutting or trimming of hair shall not be done except upon orders of a physician for health reasons."[248]

[246] OR. ADMIN. R. 291-123-0015(2)(b) (2020).
[247] *Id*.
[248] TENN. DEP'T CORR., *supra* note 97, at No. 502-03(VI)(H).

JURISDICTIONS WITH EXPRESS ALLOWANCES FOR FORCE OR DISCIPLINE

Jurisdiction	Applicable Policy
Nevada	“During the intake process inmates may be required, for health and/or security reasons, to submit to a haircut and/or shave. If the inmate declines to have a haircut or shave as required, staff should use the appropriate method, including reasonable force, to ensure that the inmate complies.”[249]
Ohio	At the reception stage: “In the interest of maintaining security and sanitary conditions, unless the inmate is asserting a sincerely held religious belief as a condition of the inmate’s hair, forced haircuts may also be issued to reception inmates without a conduct report or rules infraction board approval.”[250] After reception: “Forced haircuts shall only be given if the inmate has not been given an exemption from the grooming restrictions set forth in paragraph (D) of this rule, the inmate has been given an order to cut his hair, has disobeyed the order, has been issued a conduct report and the rules infraction board determines that the hairstyle is contrary to this rule.”[251]
South Carolina	“Inmates may be given forced haircuts or shaves by security staff only if they refuse to comply with the haircut and shave

[249] NEV. DEP’T CORR., INMATE GROOMING AND PERSONAL HYGIENE NO. 705.01(3) (2014).
[250] OHIO ADMIN. CODE 5120-9-25 (I) (2020).
[251] *Id*.

	policy. . . . If an inmate refuses to cooperate, the use of reasonable force or restraints is authorized to the extent needed to bring the inmate into compliance with grooming standards. Inmates who chronically refuse to comply with inmate grooming standards will be subject to more restrictive housing pursuant to SCDC Policy/Procedure OP-21.04."[252] "Inmates not in compliance with the Inmate Grooming Standards are not allowed general visitation privileges unless authorized . . . ."[253]
Virginia	"If an offender refuses to cooperate, the use of reasonable force or restraints is authorized to the extent needed to bring the offender into compliance with requirements."[254] Prisons in Virginia operate a segregated housing unit for inmates who violate the grooming standards.[255]

[252] S.C. DEP'T CORR., *supra* note 83, at No. OP-22.13(3.3).
[253] *Id*. at No. OP-22.13(3.4).
[254] VA. DEP'T CORR., *supra* note 101, at No. 864.1(I)(A)(3).
[255] *Id*. at No. 864.1(V)(A); *see also* THE REDUCTION OF RESTRICTIVE HOUSING, *supra* note 114, at 10 (describing the Grooming Standards Violator Housing Unit as "an offender housing unit designated to house Grooming Standards Violators with the objective to manage and encourage compliance of male offenders determined to be in violation of Department of Corrections grooming standards").