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## Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees

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This article was published in: 22 *Journal of Corporation Law* 295 (1997), 35 pages.

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# THE JOURNAL OF CORPORATION LAW

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VOLUME 22 / NUMBER 2 / WINTER 1997

SMART WOMEN, STUPID SHOES, AND CYNICAL EMPLOYERS: THE  
UNLAWFULNESS AND ADVERSE HEALTH CONSEQUENCES OF SEXUALLY  
DISCRIMINATORY WORKPLACE FOOTWEAR REQUIREMENTS FOR FEMALE  
EMPLOYEES

*Marc Linder*



# Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees

Marc Linder\*

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## I. INTRODUCTION

[T]he least important subject, were it but a shoe, . . . might become interesting in the hands of someone who had a thorough knowledge of it and spoke with knowledge of causes.<sup>1</sup>

How greatly to be lamented it is that . . . the shoe, which is intended to befriend and protect the foot, and which, if well fitted, would . . . make

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\* ©Marc Linder, Professor of Law, University of Iowa College of Law. Without the impetus provided by Dr. Charles Saltzman this article could never have been written. Peter Blanck, Arthur Bonfield, Bev Heitt, Gail Hollander, Jean Love, Larry Norton, Dr. Ingrid Nygaard, Roberta Till-Retz, Jacki Williams, and Larry Zacharias read drafts and made valuable suggestions. Special thanks to Jane Dolkart, *dea ex machina* and P.S. 153 co-pupil.

1. PETRUS CAMPER, DISSERTATION SUR LA MEILLEURE FORME DES SOULIERS iii (1781).

some amends to it for the rough hard roads upon which it is compelled to tread, should be thus perverted into a means of galling it and impairing its functions.<sup>2</sup>

A house, according to Maxim Gorky, can kill as surely as an axe—but a shoe? Can the lowly shoe really be so pernicious? Orthopaedic foot surgeons and podiatrists have long known that the fact that they perform ninety percent of all forefoot surgery on women<sup>3</sup> is overwhelmingly associated with the pointy-toed, excessively narrow, high-heeled shoes that millions of women wear.<sup>4</sup> By one recent estimate, seventy-five percent of the problems eventuating in the more than 600,000 bunionectomies, hammer toe repairs, neuroma excisions, and bunionette corrections performed annually in the United States “either result from or are greatly aggravated by the use of high-fashion footwear.”<sup>5</sup>

For more than 250 years medical science has warned of the deleterious impact of high heels. A U.S. surgeon noted during World War II that high heels were “utterly destructive of normal foot physiology.”<sup>6</sup> Even the leading post-World War II foot surgeon of the world’s fashion hub, France, warned his fellow “femme élégante” that each step she takes in high heels causes her lumbar column to become hollowed out, resulting in hyperlordosis.<sup>7</sup> Physicians have seen innumerable women whose feet have been permanently damaged by long-term use of these “fashionable” shoes and whose hopes of remaining active later in life have vanished. Heels and narrow-toe boxed shoes cause progressive foot ligament and joint injury that, over a period of years, leaves many women unable to walk without pain. The surgical treatment of these hobbled feet (estimated at 300,000 new cases annually in the United States) never restores them to normal.<sup>8</sup>

Despite this hoary tradition of awareness of the perils of fashionable footwear—which even orthopaedists in Nazi Germany kept alive<sup>9</sup>—“[h]igh heels evidently die hard.”<sup>10</sup> In the 1950s, a London physician, after peering in the window of a women’s shoe store, suggested this truth-in-advertising sign: “Hallux valgus guaranteed

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2. G. M. HUMPHRY, *THE HUMAN FOOT AND THE HUMAN HAND* 104 (1861).

3. Dudley Morton, *Foot Disorders in Women*, 10 J. AM. MED. WOMEN’S ASS’N 41 (1955) (estimating that women exhibit six to ten times as many foot disorders as men); see also Andrea Grill, *Wenn dem Fuß ein Überbein wächst*, SÜDDEUTSCHE ZEITUNG, Dec. 16, 1993, available in LEXIS, News Library, Ttxtnews File (stating that 15 times as many women as men develop bunions requiring surgery).

4. “[T]he fashions of shoes have see-sawed around the shape of the toe from point to cow-mouth and the height of the heel from nothing to six inches.” Martin Miller, *Foreword* to EUNICE WILSON, *A HISTORY OF SHOE FASHIONS* v (1969).

5. Francesca Thompson & Michael Coughlin, *The High Price of High-Fashion Footwear*, 76 AM. J. BONE & JOINT SURGERY 1586, 1587 (1994).

6. S. Stewart, *Physiology of the Unshod and Shod Foot with an Evolutionary History of Footgear*, 68 AM. J. SURGERY 127, 137 (1945).

7. JEAN LELIÈVRE, *PATHOLOGIE DU PIED* 108 (3d ed. 1967).

8. Oral Communication from Dr. Charles Saltzman, University of Iowa College of Medicine (Jan. 1996).

9. PETRUS CAMPERS, *ABHANDLUNG ÜBER DIE BESTE FORM DER SCHUHE* 99 (Wilhelm Thomsen ed., 1939).

10. Norman Lake, *High Heels and Low Heels*, 163 PRACTITIONER 221, 221 (1949).

in three months and bunions in one year." In order to reduce public expenditure on health care, he offered the Swiftian proposal of new sumptuary laws regulating the wearing of such shoes.<sup>11</sup> Yet a few years later a female medical director complained that it was still "quite impossible to purchase a dress shoe free of the . . . pointed toe and thin heel" on any continent in the industrial world.<sup>12</sup>

Because the outline of men's shoes conforms to that of male feet,<sup>13</sup> their shoes do "not compress or constrict" their feet; consequently, the prevalence of compressive foot problems among men in the United States is quite low.

In contrast, the typical woman's high-fashion shoe does not conform to the outer dimensions of a woman's foot. . . . When one looks at the rectangular shape of the foot and the triangular shape of the toe box in high-fashion footwear, it is obvious that the forefoot becomes constricted in the toe box. The addition of a high heel to this shoe increases the downward pressure with which the forefoot is forced into the constricting, triangular toe box. Over time, this deforming force leads to bunion deformity of the great toe and bunionette formation on the lateral aspect of the foot. As the lesser toes become contracted, hammer toes develop. This constriction of the forefoot can cause injury to the interdigital nerves and neuroma formation . . . . The lower rate of foot problems in men demonstrates that forefoot problems can be reduced or even eliminated with the use of roomy, non-constricting footwear.<sup>14</sup>

While some women recognize the link between their required footwear and their foot ailments, others think that their problems are either a natural effect of aging or genetically programmed. Yet aging alone does not cause toes to curl and twist around each other. The view that most of these problems are inherited is also clearly wrong.<sup>15</sup>

This Article raises a critical but curiously neglected medical and legal issue for working women: do they have the right to wear whatever shoes are best for their health at work? No published clinical studies yet have focused on the subset of foot problems caused by dress-code policies that employers discriminatorily impose as conditions of employment on female employees.<sup>16</sup> Even a podiatrist who thinks that because high-heeled shoes have "no redeeming qualities . . . it almost seems like the shoe industry is

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11. Reginald Payne, *Women's Footwear*, BRIT. MED. J., May 18, 1957, at 1180-81 (letter to editor).

12. M. Naomi Wing, *The Influence of Modern Footwear on Foot Disabilities*, 48 MED. J. AUSTR. 818, 820 (1961).

13. A professor of surgery at Leipzig, who in the 1860s published a small book on the consequences of ill-fitting shoes which barely mentioned high heels, asserted that men's shoes were far more inappropriate than women's. G.B. GÜNTHER, *UEBER DEN BAU DES MENSCHLICHEN FUBES UND DESSEN ZWECKMÄßIGSTE BEKLEIDUNG* 7 (1863).

14. Thompson & Coughlin, *supra* note 5, at 1587-88; see also Benjamin Ricci & Peter Karpovich, *Effect of Height of the Heel upon the Foot*, 35 RESEARCH Q. PT. 2, 385 (1964) (stating that high heels cause "various foot ailments in women which are absent in men who do not wear high heels").

15. Compare DAVID KUNZLE, *FASHION AND FETISHISM: A SOCIAL HISTORY OF THE CORSET, TIGHT-LACING AND OTHER FORMS OF BODY-SCULPTURE IN THE WEST* xviii, 54 n.31 (1982), who in addition to believing that corsets were emancipatory, appears to be alone in his skepticism of the deleterious impact of high heels.

16. But see Charles Saltzman & Marc Linder, *untitled* (unpublished manuscript, on file with author).

in cahoots with medicine to keep these things around,"<sup>17</sup> fails to include employers in this sadistic cabal. And the Left, mesmerized by the prospect of a "postindustrial . . . 'eroticization' of the workplace,"<sup>18</sup> "the freedom to make self-realizing choices,"<sup>19</sup> and the promotion of "cultural diversity,"<sup>20</sup> is more interested in such "sites of political contestation"<sup>21</sup> as vindicating the right to wear tank-top shirts as an expression of personal "autonomy"<sup>22</sup> than in anything as materialistically pedestrian as the health consequences of employer-imposed shoe requirements.

This Article takes up the challenge by surveying a high-profile occupational group, female flight attendants, who have long been subject to strict employer policies requiring them to wear certain kinds of shoes. As a result, these women have faced a Hobson's choice between getting or keeping a job and their continued ability to walk unimpaired. By the same token, it is undeniable that some female employees, even factory workers, have worn high heels at work without any pressure from employers.<sup>23</sup> Some telephone operators, who in the early part of the century "were as physically restricted as the assembly-line workers of a later era,"<sup>24</sup> not only wore high heels (probably by company rule) at work,<sup>25</sup> but, having been "drawn into th[e] culture of consumption," walked picket lines in them; indeed, on the occasion of an impromptu parade in Boston in 1919 striking operators "had difficulty keeping up with the parade because of the height of their heels and the tightness of their skirts."<sup>26</sup>

17. Bruce Douglas, *High Heels Deplored as Torture Devices*, MONEYSWORTH, Nov. 1979, at 7 (quoting Dr. Richard Lotwin).

18. Karl Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1395 (1992).

19. *Id.* at 1443.

20. *Id.* at 1431.

21. *Id.* at 1396.

22. *Id.* at 1397.

23. NEW YORK STATE DEPT. OF LABOR, BUREAU OF WOMEN IN INDUSTRY, INDUSTRIAL POSTURE AND SEATING, 27 fig. 25-a (Spec. Bull. No. 104, 1921) (providing photograph of steam laundry machine operator wearing high heels); MAURINE GREENWALD, WOMEN, WAR, AND WORK: THE IMPACT OF WORLD WAR I ON WOMEN WORKERS IN THE UNITED STATES 16 fig. 1, 140 fig. 22 (1980) [hereinafter GREENWALD, WOMAN, WAR, AND WORK] (providing World War I-era photographs of female airplane factory worker and streetcar conductors wearing high heels).

24. STEPHEN H. NORWOOD, LABOR'S FLAMING YOUTH: TELEPHONE OPERATORS AND WORKER MILITANCY, 1878-1923, at 38 (1990).

25. By the end of the 19th century, telephone operators, who were soon almost entirely female, were "[d]ressed for work in [their] finest shirtwaist and long skirt . . ." GREENWALD, WOMEN, WAR, AND WORK, *supra* note 23, at 193 fig. 25, 201. An official A.T. & T. photograph from 1917 shows both operators and supervisors wearing high heels. *Id.* at 193. After World War II and until about 1980, A.T.&T. was still requiring operators to wear heels. Sara Rimer, *Once a Friendly Fixture, a Telephone Operator Finds Herself Obsolete*, N.Y. TIMES, June 4, 1996, at A7 (quoting Rose DiMaggio Trela, operator who began in 1946); Telephone Interview with Rose DiMaggio Trela, Operator, North Andover, Mass. (June 5, 1996).

26. NORWOOD, *supra* note 24, at 182. The telephone operators were apparently not unique. During a textile mill strike in Lawrence, Massachusetts in 1931, Edmund Wilson observed "a fresh-faced, cheeky, pretty, round-shouldered girl who marches in high heels." EDMUND WILSON, THE AMERICAN EARTHQUAKE 422 (1958). In this context must be judged the presumably not entirely dispassionate contemporaneous blame-the-victim approach of Harry Mock, professor of industrial medicine and chief surgeon to Sears, Roebuck & Company, that statutes requiring employers to provide female employees with seats "were largely necessary because of the illogical shoes girls wear when working. It is obvious that the high Cuban or French heel, with



Even some employers in the early part of the century objected, for a mixture of sexist and productivity-driven reasons, to female employees' wearing high heels at work. The *Ladies Home Journal* cautioned its readers in 1907 that the employer of a woman who wore high heels "guesses pretty correctly that her mind is running more to Jack and ice cream than it is to business."<sup>27</sup> An illustrated magazine reported that an employer who had recently advertised in a newspaper for stenographers specified that: "Only those who wear low-heeled shoes need apply." The manager reasoned that when stenographers sat rigidly for hours in one position in high heels, they vainly tried to find a comfortable angle for their feet; the resulting discomfort detracted from their performance.<sup>28</sup>

Although some female workers may voluntarily wear high heels at work for the same social-psychological and cultural reasons that they wear such shoes in other settings—"[b]ecause they make me feel like a woman"<sup>29</sup>—the legal analysis here focuses solely on the circumstances of employees who are subject to formal or informal dress codes that they find objectionable.<sup>30</sup> The particular perniciousness of requirements that women wear high heels at work was emphasized by Dudley Morton, a professor of anatomy at the College of Physicians and Surgeons at Columbia University, in the midst of the Great Depression:

[T]he reason why women are so prone to common types of foot disorder is not the high heel itself, but the continuous use of the high heel . . . High-heeled shoes are to be regarded as a powerful and vicious factor in the development of foot disorder when worn during working hours. The restriction of their use to evening hours would very nearly eliminate their baneful influence in producing foot disorder.<sup>31</sup>

This Article begins by examining the history of the medical establishment's reaction to high-heeled footwear in Part II. Part III then presents a unique set of data on the footwear rules that U.S. airlines unilaterally prescribe for female flight attendants. Parts IV and V analyze the right that flight attendants and other female workers have under

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the thin turned sole, or the low pumps, were never made to work in, especially if the work require standing." Mock asserted that:

[the] high-heeled shoe [was] hazardous in occupations about machinery, tending to increase the accident rate . . . If women can be persuaded to wear shoes modelled after those recommended for soldiers they will develop strong feet and will be able to qualify for many more positions than have been opened to them in industry in the past.

HARRY MOCK, *INDUSTRIAL MEDICINE AND SURGERY* 421 (1919).

27. *As Business Women Should and Should Not Dress*, *LADIES HOME J.*, Nov. 1907, at 25.

28. *Low-Heeled Shoes for Office Work*, *ILLUSTRATED WORLD*, Oct. 1918, at 30(2).

29. Melinda Voss, *Sole Support*, *DES MOINES REG.*, June 17, 1996, at 1 (quoting student's explanation as to why she wears 2½" heels).

30. The phenomenon, for example, of "dressed-for-success women executives" who reputedly wear high heels voluntarily in order to preserve "the last vestiges of femininity" in the wake of "the desexualization of the workplace" would have to be explored outside the framework of this paper. Stephen Bloom, *Under the Heel of Fashion*, *SACRAMENTO BEE MAG.*, Mar. 13, 1988, at 23, 25 (citing Paul Scherer, professor of biomechanics at California College of Podiatric Medicine).

31. DUDLEY MORTON, *THE HUMAN FOOT: ITS EVOLUTION, PHYSIOLOGY AND FUNCTIONAL DISORDERS* 174 (1937).

Title VII of the Civil Rights Act of 1964 not to be required to wear unhealthful shoes as a condition of employment. Finally, Part VI turns to the applicability of other statutory regimes. A dress code might seem to some a petty complaint, yet the total lack of justification for imposing a proven health-hazard on employees sheds uncommon light on one segment of the seamless web of the undemocratic workplace.

## II. PHYSICIANS ON HIGH HEELS<sup>32</sup>

Only to people of deficient imagination, unable to visualize the crowded crippled toes, the corresponding atrophies and hypertrophies, the strained muscles . . . is the shoe with its satanic heel a thing of beauty.<sup>33</sup>

[I]n human beings the heel should be the weight-bearing part of the foot; the anterior portion, relatively weak and degenerate, being merely for the preservation of balance and to help in the "take off." The wearing of high heels brings about effects which are in opposition to this evolutionary trend in that it throws the strains on to the anterior half of the foot and so reverses the natural indications as to the destiny of the anterior and posterior limbs of the arch. Upon such a broad pathological basis the author believes many of the present-day foot troubles to be founded, and it is impossible to agree with those who maintain that the wearing of high heels has very little etiological relationship to these conditions.<sup>34</sup>

The reasons for the advent of fashionable high-heeled shoes in Europe at the beginning of the seventeenth century still await clarification,<sup>35</sup> but their introduction constituted "one of the most revolutionary achievements [which] ushered in a whole new epoch of the presentation of corporeality, in which we today are still living and with the effects of which we are still working."<sup>36</sup> Although originally, and through the eighteenth century, both men and women adopted this new style of shoe, its capacity for altering human posture was exerted most strikingly on women. It forced the stomach in and the breast out, drawing in the back, making the pelvis more prominent, straightening the knees, and making the thighs firmer.<sup>37</sup> During the reign of Louis XIV, the elegant aristocratic leg became fashionable, and for the first time women's shoes developed along their own path. High-heeled buckled shoes remained obligatory courtly attire

32. For a comprehensive discussion, see Charles Saltzman & Marc Linder, untitled (unpublished manuscript, on file with the author).

33. Mark Millikin, *Heels and Taxes? A Parallel*, 16 J. MED. 629, 632 (1936).

34. NORMAN LAKE, *THE FOOT* 88-89 (3d ed. 1943).

35. Anneliese Durst & Lerke Gravenhorst, *Frauenschuhe: Spannungen, Paradoxien, Entwicklungen in der Inszenierung von Weiblichkeit*, in Z.B. SCHUHE: VOM BLOßEN FUß ZUM STÖCKELSCHUH: EINE KULTURGESCHICHTE DER FÜßBEKLEIDUNG 202 (M. Andritzky et al., 1988) [hereinafter Z.B. SCHUHE].

36. 2 EDUARD FUCHS, *ILLUSTRIERTE SITTENGESCHICHTE VOM MITTELALTER BIS ZUR GEGENWART: DIE GALANTE ZEIT* 166 (1910). One psychologist speculated that high heels remained fashionable after World War I, despite the de-emphasis of the breast, because they enhanced height, reduced the foot and abdomen, and constituted a phallic symbol. J. C. FLUGEL, *THE PSYCHOLOGY OF CLOTHES* 161 (1930).

37. 2 FUCHS, *supra* note 36.



for men through the eighteenth century.<sup>38</sup> That women wearing six-inch high heels "seldom or never went out" comes as little surprise.<sup>39</sup>

### A. The Enlightenment Critique

It was not long before physicians began issuing warnings about the deleterious effects of wearing such shoes. In the wake of the Enlightenment's attack on unreason and unnatural conditions, Jacob Benignus Winslow, a prominent Danish anatomist, delivered a talk in 1740 before the French Académie Royale des Sciences in which he sharply criticized women's high shoes for their adverse impact on the wearers' health.<sup>40</sup> Winslow's work, *Anatomical Reflections on the Discomforts, Infirmities etc. . . . which Happen to the Human Body as a Result of Certain . . . Clothing*, was largely couched in biomechanical terms still acceptable to orthopaedic surgeons. Winslow traced the loss of the free movement of the foot bones in their natural state to shoddy shoeing:

[W]omen's high footwear totally changes the natural conformation of these bones, renders the feet extraordinarily bent and bowed, and even incapable of being flattened, as a result of the unnatural union or forced anchylosis of these bones . . . ; for these high shoes bring it about that posterior extremity of the calcaneum bone, to which the large Achilles tendon is attached, is continually much more elevated, and the front of the foot much more depressed, than in the natural state. Consequently, the muscles that cover the leg in the posterior, and that serve by attachment of their tendon to extend the foot, are continually in an unnatural shortening, whereas the anterior muscles, which serve to flex the foot in front, are on the contrary in forced elongation.<sup>41</sup>

In 1781 Petrus Camper, an outstanding European comparative anatomist, wrote a treatise in which he devoted special attention to the class distribution of shoe wear.<sup>42</sup> Whereas "bourgeois women" adopted "this absurd fashion" of high and slender heels from the old and young women of "good form," "our peasant women are wiser . . . providing themselves with shoes that make their body steady and render walking

38. IRIS BROOKE, FOOTWEAR: A SHORT HISTORY OF EUROPEAN AND AMERICAN SHOES 65, 74-77 (1971); Tamara Spitzing, *Auf Schusters Rappen durch die Geschichte*, in Z.B. SCHUHE, *supra* note 35, at 47, 51-54. Women's high heels became fashionable in Germany during the last decades of the 17th century. LISELOTTE EISENBART, KLEIDERORDNUNGEN DER DEUTSCHEN STÄDTE ZWISCHEN 1350 UND 1700: EIN BEITRAG ZUR KULTURGESCHICHTE DES DEUTSCHEN BÜRGERTUMS 160 (1962). Of Louis XIV himself, Thackeray said: "But a king is not every inch a king. . . . Majesty is made out of the wig, the high-heeled shoes. . . . As for the little lean, shrivelled, paunchy old man, of five feet two, . . . [p]ut the wig and shoes on him, and he is six feet high." William Makepeace Thackeray, *The Paris Sketch Book of Mr. M.A. Titmarsh*, in 12 THE WORKS OF WILLIAM MAKEPEACE THACKERAY 404 (Cornhill ed., 1911) (1840).

39. MAX VON BOEHN, DIE MODE: MENSCHEN UND MODEN IM 18. JAHRHUNDERT 169-70 (1963) (1909).

40. Jacob Winslow, *Reflexions anatomiques sur les incommodités, infirmités, etc. qui arrivent au Corps humain à l'occasion de certains attitudes & de certains habillements*, in MÉMOIRES DE MATHÉMATIQUE ET DE PHYSIQUE: HISTOIRE DE L'ACADÉMIE ROYALE DES SCIENCES, 1740, at 59, 63 (1742).

41. *Id.* at 65; see also Ulrich Linse, *Procrustes ante Portas! oder: Wo dem Bürgertum der Schuh drückt*, in Z.B. SCHUHE, *supra* note 35, at 72.

42. CAMPER, *supra* note 1.

easy.”<sup>43</sup> Camper went so far as to warn that: “The wealthy women walk . . . by reason of the height of their heels, on the fore-ends of their feet, and consequently, very badly; they walk, if it is permitted to make this comparison, like the majority of quadrupeds—on their toes only.”<sup>44</sup> In addition to the deformation of the toes, Camper focused on the greater risk of sprains caused by the fact that high heels displaced the whole body’s center of gravity. In particular he speculated that high heels explained the much greater incidence of kneecap fractures suffered by women in Amsterdam—an injury that occurred very rarely to men.<sup>45</sup>

The medical Enlightenment’s campaign against the high heel bore fruit in the wake of the French Revolution, whose popular-class advocates brought about a “déclassement” that led to the disappearance of high heels, which they associated with the aristocracy.<sup>46</sup> Moreover, at least for men, the sans-culottes’ abolition of the aristocrats’ knee breeches undermined the heels’ function of accentuating “a well-turned leg.”<sup>47</sup> But the new clothing orientation, paired with Rousseau’s back-to-nature philosophy,<sup>48</sup> also quickly led to women’s high heels’ becoming and remaining passé for several decades.<sup>49</sup> In England, too, “[t]he flat ‘pump’ . . . supplanted the heeled shoe, and remained in fashion for some 40 years . . .”<sup>50</sup> The elimination of the high heel on women’s shoes effected by the Revolution in France<sup>51</sup> extended to the United States as well: “The levelling spirit of the French revolution, seems to have reached even to ladies’ shoes; for we find that about 1790, the high heel was dispensed with, and shoes without heels were introduced.”<sup>52</sup>

### B. The Nineteenth-Century Resurgence of High Heels

I have heard a story that a lady who had been wearing these high-heeled shoes went to one of the most celebrated orthopedic surgeons in New York City for some spinal trouble, and when, after examining the case, he found that she was wearing a pair of these fashionable shoes, he immediately

43. *Id.* at 7.

44. *Id.* at 46; *see also* M. ANDRY, L’ORTHOPÉDIE OU L’ART DE PRÉVENIR ET DE CORRIGER DANS LES ENFANTS, LES DIFFORMITÉS DU CORPS 72 (1741) (because high heels cause curvature of spine in young people, girls should not wear them before the age of 15).

45. *Id.* at 30-31. A century later a British surgeon warned readers that the small size of high heels tended to trip wearers, leading to serious accidents. FREDERICK TREVES, THE INFLUENCE OF CLOTHING ON HEALTH 106 (1886).

46. PAUL LACROIX ET AL., HISTOIRE DES CORDONNIERS PRÉCÉDÉE DE L’HISTOIRE DE LA CHAUSSURE 95-100 (1852); AILEEN RIBEIRO, FASHION IN THE FRENCH REVOLUTION 85-86, 132 (1988).

47. J. SPARKES HALL, THE BOOK OF THE FEET: A HISTORY OF BOOTS AND SHOES 139 (1847).

48. “[L]es plus pompeuses parures annonçaient le plus souvent de laides femmes . . .” JEAN-JACQUES ROUSSEAU, ÉMILE OU DE L’ÉDUCATION 466 (Garnier, 1964) (originally published in 1762).

49. Spitzing, *supra* note 38, at 54; Günther Gall, *Der Absatz im Wechselspiel der Mode*, in Z.B. SCHUHE, *supra* note 35, at 58-59.

50. BROOKE, *supra* note 38, at 80.

51. HALL, *supra* note 47, at 55.

52. *Id.* at 143-44; *see also* 1 ALICE MORSE EARLE, TWO CENTURIES OF COSTUME IN AMERICA: MDCXX-MDCCCXX 386 (1903) (“In 1790 heels disappeared.”); 1 JOHN WATSON, ANNALS OF PHILADELPHIA AND PENNSYLVANIA, IN THE OLDEN TIME 192 (1857) (1842) (deeming high heels “unfitting for pretty feet”).

seized them and with language more forcible than elegant pulled off the heels and flung them away, following them with a shower of denunciations, and prophesying all sorts of ill results should the abominable fashion be continued.<sup>53</sup>

Yet, by the third quarter of the nineteenth century, high heels had once again become fashionable—but this time only for women's shoes in Europe and the United States.<sup>54</sup> Historians of material culture speculate that industrialization crucially determined new sets of dichotomized gender roles, which found expression in clothing. Whereas before the French Revolution, the great dividing line ran between aristocracy and the people, industrialization created a sharp "opposition between the active, financially independent and thus more powerful husband, and the domestically dependent wife. Men's and women's fashion thus began for the first time in history to develop completely away from each other."<sup>55</sup> In contrast to the employed bourgeois men who needed practical clothing, the wives of the bourgeoisie, remitted to the private and family sphere, "remained true to the ideal of visible idleness"<sup>56</sup> for which the "erotic-unpractical high-heel shoe" attained representative status.<sup>57</sup>

This resurgence of high heels helped give rise in the 1870s and 1880s both to a dress reform movement in the United States and Britain, which protested the wearing of high-heeled and narrow-toed footwear,<sup>58</sup> and to renewed interest by the medical profession.<sup>59</sup> In 1876, a Dr. Onimus read a paper to the Medical Society of Paris on recent cases of patients' foot problems caused by high- and thin-heeled shoes. The wearing of these so-called Louis XV ankle boots by women and young girls was a then recent and rapidly expanding custom after the style, which had caught on early in the eighteenth century, had begun to disappear by the end of the century. Onimus developed a biomechanical explanation of the pain, in opposition to the view that attributed the problem to young girls' "pathological nervous state . . . which one considered a more or

53. Fordyce Barker, "Discussion," *Transactions of the Am. Gynecological Soc'y* 7:261-63, at 262 (1882).

54. VALERIE STEELE, *FASHION AND EROTICISM: IDEALS OF FEMININE BEAUTY FROM THE VICTORIAN ERA TO THE JAZZ AGE* 66 (1985) (dating without documentation the reappearance of high heels to the 1870s).

55. Spitzing, *supra* note 38, at 55-56.

56. *Id.*; see also PHILIPPE PERROT, *FASHIONING THE BOURGEOISIE: A HISTORY OF CLOTHING IN THE NINETEENTH CENTURY* 104-06 (Richard Bienvenu trans., 1994).

57. Spitzing, *supra* note 38, at 55-56.

58. BARBARA BAINES, *FASHION REVIVALS: FROM THE ELIZABETHAN AGE TO THE PRESENT DAY* 51, 53 (1981); 2 GEORGIANA HILL, *A HISTORY OF ENGLISH DRESS: FROM THE SAXON PERIOD TO THE PRESENT DAY* 282 (1893); Mercy B. Jackson, M.D., *Lecture III, reprinted in DRESS-REFORM: A SERIES OF LECTURES DELIVERED IN BOSTON, ON DRESS AS IT AFFECTS THE HEALTH OF WOMEN* 68, 75 (Abba Gould Woolson ed., 1974); STELLA NEWTON, *HEALTH, ART & REASON: DRESS REFORMERS OF THE 19TH CENTURY* 116-17 (1974); Helene E. Roberts, *The Exquisite Slave: The Role of Clothes in the Making of the Victorian Woman*, 2 *SIGNS* 554, 566-67 (1977); FREDERICK TREVES, *THE DRESS OF THE PERIOD IN ITS RELATION TO HEALTH: A LECTURE DELIVERED ON BEHALF OF THE NATIONAL HEALTH SOCIETY* (n.d.) (1884). For a different perspective, see David Kunzle, *Dress Reform as Antifeminism: A Response to Helene E. Roberts's "The Exquisite Slave: The Role of Clothes in the Making of the Victorian Woman,"* 2 *SIGNS* 570 (1977). For an erroneous claim that high heels had never been fashionable before the 1870s, see TOBY FISCHER-MIRKIN, *DRESS CODE: UNDERSTANDING THE HIDDEN MEANINGS OF WOMEN'S CLOTHING* 196-97 (1995).

59. See, e.g., James Paget, *Notes of a Clinical Lecture on Maladies Produced by Boots and Shoes*, 2 *STUDENTS' J. & HOSP. GAZETTE* 195 (1874).

less peculiar manifestation of a hysterical state." In order to relieve the lancinating pains caused by the cramps associated with the constant muscular tension needed to maintain their equilibrium while wearing high heels, young girls were forced to rest in bed for several days.<sup>60</sup>

By the early 1880s the medical profession in the United States also began to report on the consequences of wearing high heels. Samuel Busey read a paper at the annual meeting of the recently founded American Gynecological Society in which he speculated that the deflections of the skeleton associated with wearing high heels might be the cause of postural disturbances and spinal curvatures such as lordosis.<sup>61</sup> So much medical knowledge had permeated popular consciousness by the 1880s that even Oscar Wilde knew about high heels' deleterious impact on the gait.<sup>62</sup> Perhaps the medical warnings did have some practical effect. By the turn of the century, Mary Melendy, a physician, could remark that: "In purchasing shoes at one time it was next to impossible to find them with low heels." Indeed, the attendant misery of corns and bunions led to a reaction against high heels and a turn toward "commonsense shoes."<sup>63</sup>

The beginning of the twentieth century witnessed a turn in fashion away from restrictive clothing and toward flowing dresses and higher hemlines: "For the first time in history, legs and feet had become a center of fashion attention."<sup>64</sup> Even as shoes assumed this new role, physicians complained that "[t]he vast importance of the question of proper shoes is not rightly appreciated by our profession."<sup>65</sup> The *Ladies Home Journal* in 1908 published a piece replete with x-ray photographs of the foot in a high- and

60. Onimus, *Des Déformations du pied et des troubles généraux déterminés par les chaussures à talon haut et étroit*, 23 L'UNION MÉDICALE 244, 245 (1877). For earlier critiques, see HERMANN VON MEYER, *DIE RICHTIGE GESTALT DER SCHUHE* (1858); JAMES DOWIE, *THE HUMAN FOOT AND ITS COVERING* (1861). Charles Dickens' magazine noted in 1861 that this flurry of scientific activity had made it possible to ruin "a fashion that has put thousands of people into actual torment of pain. . . ." *Easy Boots*, 5 ALL THE YEAR ROUND 511, 512 (1861). Yet by 1868, a British women's magazine observed that: "High-heeled boots and shoes are universal, notwithstanding that medical men have been writing very severely against them." *The Fashions: Description of Fashion Plate*, 4 LADIES TREASURY 85 (June 1, 1868). On the other side of the Atlantic, HARPER'S BAZAAR editorialized against "inordinately high and narrow heels [which] deform the foot." *The Foot*, 1 HARPER'S BAZAAR 17 (Feb. 22, 1868).

61. Samuel Busey, *The Influence of the Constant Use of High-Heeled French Shoes upon the Health and Form of the Female, and upon the Relation of the Pelvic Organs*, 15 AM. J. OBSTETRICS 954 (1882); *idem*, *The Influence of the Constant Use of High-Heeled French Shoes upon the Health and Form of the Female, and upon the Relation of the Pelvic Organs*, 7 TRANSACTIONS AM. GYNECOLOGICAL SOC'Y 242, 261 (1882); see also Rodríguez Góngora, *Juicio crítico, bajo el punto de vista médico-artístico, sobre la moda de los exagerados tacones que usa el bello sexo*, 8 CRONICA MÉDICO-QUIRURGICA 107 (1882). More recently, a urologist has stated that: "I have seen women who wear way-too-high heels throw their posture off and end up with pelvic floor problems, and they say, I have to go to the bathroom all the time." Carey Quan Gelernter, *Urinary Tract Infections—There are Gaps in Understanding How to Prevent this Ailment, Which is Probably Even More Common than Thought*, SEATTLE TIMES, Feb. 19, 1997, at E1 (quoting Prof. Tamara Bavendam).

62. Oscar Wilde, *Woman's Dress*, in COMPLETE WORKS OF OSCAR WILDE 945 (1994) (1884).

63. MARY MELENDY, *VIVIORE: THE PATHWAY TO MENTAL AND PHYSICAL PERFECTION* 198 (1904). For a representative example of an advertisement for women's heels, see the *Brooklyn Daily Eagle*, Apr. 29, 1894, at 14.

64. Stefania Ricci, *From Artist to Couturier*, in SALVATORE FERRAGAMO: THE ART OF THE SHOE 1898-1960, at 21 (1992); see also ERIK NØRGARD, *WHEN LADIES ACQUIRE LEGS* 60 (1967).

65. Arthur F. Wheat, *The Fashionable Shoe as Worn by the Human Foot Seen Through an X-Ray*, in TRANSACTIONS OF THE NEW HAMPSHIRE MED. SOC'Y 213 (1909).

low-heel shoe demonstrating how "the bones of the foot are forced into an unnatural relation to each other."<sup>66</sup> From World War I on, a steady flow of articles in the scientific and popular press stressed that high heels deranged equilibrium.<sup>67</sup>

From the 1930s on, medical texts consistently warned that: "High-heeled shoes, if worn for long periods, lead to serious changes in body mechanics and in the alignment of the foot."<sup>68</sup> Just as significantly, however, the tone of women's magazines changed during the post-World War II period. Driven perhaps by the interests of their powerful fashion-industry advertisers,<sup>69</sup> these publications, instead of educating their readers as to the health risks posed by high heels, tended either to glamorize the shoes (especially as paired with nylon stockings)<sup>70</sup> or, to pooh-pooh the pain of wearing them as an inescapable natural fate.<sup>71</sup>

### III. FLIGHT ATTENDANTS IN HIGH HEELS

[O]ur feet were designed for the heel to be used on the ground; feminine departure from that manner of use has been the most potent cause of women's clinical disorders.<sup>72</sup>

Exploitation is not confined to sweatshops or lettuce fields. It operates just as effectively seven miles in the air, at seven miles a minute.<sup>73</sup>

#### A. Precursors to the Flight Attendants' Struggle

Medical-legal conflicts concerning mandatory workplace dress codes for women are not new. As large numbers of women began working as sellers, especially in clothing stores and department stores<sup>74</sup>—women in sales occupations in the United States

66. Alexander Magruder, *High Heels and Low Heels: The Difference Shown in X-Ray Photographs*, LADIES HOME J., Jan. 1908, at 33.

67. See, e.g., G. Dagon, "Inconvénients de la mode actuelle de la chaussure féminine," 6 CLINIQUE 651 (1911); C. Crane, "Hygienic Shoeing: Anatomical Facts vs. Convention and Style," 12 CAL. ST. J. MED 208 (1914); Mark Millikin, "The Foot as Affected by the Modern Shoe," 10 OHIO ST. MED. J. 674 (1914); EVA FARNSWORTH, THE ART AND ETHICS OF DRESS: AS RELATED TO EFFICIENCY AND ECONOMY 6 (1915); Jacques Boyer, *The High Heel in Motion Picture and X-ray*, SCI. AM., Feb. 2, 1918, at 118; LEAH THOMAS & JOEL GOLDTHWAIT, BODY MECHANICS AND HEALTH 64 (1922); Charlotte West, *High Heels*, LADIES HOME J., Jan 1920, at 39; S. Van Duyne, *Are High Heels Injurious?*, 7 HYGEIA 31 (1919); Iza Merchant & Katherine Cranor, *The Effect of Various Types of Shoes Upon the Feet and Posture of High School Girls*, 19 AM. J. PUB. HEALTH 197 (1929); V. Wright, *French-Heel Fractures of the Tarsal Scaphoid*, 87 ANNALS OF SURGERY 587 (1928).

68. JOEL GOLDTHWAIT ET AL., ESSENTIALS OF BODY MECHANICS IN HEALTH AND DISEASE 295-96 (5th ed. 1952).

69. An unsystematic perusal of random volumes of *Ladies Home Journal* during the 20th century reveals that clothing, and especially high-fashion high-heel shoe advertising, became much more prominent by the 1950s.

70. Spitzing, *supra* note 38, at 56.

71. E.g., *What Do They Have in Common?*, REDBOOK, Feb. 1966, at 74, 117.

72. DUDLEY MORTON, OH, DOCTOR! MY FEET! 82-83 (1942).

73. *Pay and Safety Issues Discussed at Flight Attendants Conference*, DAILY LAB. REP., Nov. 5, 1984, at A-13 (containing speech by AFL-CIO president Lane Kirkland).

74. 7 REPORT OF THE INDUSTRIAL COMMISSION ON THE RELATIONS AND CONDITIONS OF CAPITAL AND

increased 24-fold from 1870 to 1900<sup>75</sup>—they were subjected to formal pressure by employers as well as informal cultural pressure to wear precisely the kinds of fashionable shoes that their customers wore. The “rule of the establishment” requiring shop-girls “to dress neatly,” a Massachusetts physician observed in 1875, really meant dressing “showily.”<sup>76</sup> Shop-girls’ particular vulnerability to foot problems was exacerbated by managers’ “[i]nsistence . . . that the girls shall be found standing at their posts,” which seemed to investigators “a primitive way to recognize the psychological value of a well-coming smile. Horses that are checked up to appear spirited, hardly counterfeit the free lift of a well-bred horse’s head.”<sup>77</sup> Thus, one manager “pitched out all the old shoes the girls had there to make it easier to stand” because “she wasn’t going to have the store turned into an old-clothes shop.”<sup>78</sup> In other instances: “The kind of ladies that saleswoman [sic] mostly see in first-class stores . . . renders them more particular in their attire. They want to dress and look well.”<sup>79</sup> Scrutinizing the attire of these customers, “whom she despises, even when longing most to be one of them,” “the shop-girl . . . imitates where she can, and her cheap shoe has its French heel . . .”<sup>80</sup> Consequently, saleswomen were “often forced to practice economies which are unwise in order to reach or maintain the standard in dress.”<sup>81</sup>

The phenomenon of large numbers of saleswomen in dry goods, clothing, and department stores wearing high heels twelve to fourteen hours a day six days a week prompted physicians in Paris, London, and New York not only to report on their patients’ foot ailments, but also to launch campaigns to reform women’s dress and enact statutes requiring employers to provide seats for their female employees. As early as 1881, a British physician reported an occupationally related backache caused by “the wearing of high-heeled boots, which necessitates the continuous action of the muscles of the lower part of the spine, in order to maintain the proper balance and erect position.”<sup>82</sup> When one patient, a seventeen-year-old assistant in a large London dry goods store, complained of backache and aching in the calves of her legs, the physician could find nothing wrong with her. But as he was about to leave the examining room, he “noticed that she was wearing very high-heeled boots.”<sup>83</sup> He instructed her to “wear

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LABOR EMPLOYED IN MANUFACTURES AND GENERAL LABOR, H.R. DOC. NO. 56-495, at 453 (1901) (testimony of John Wanamaker); RALPH HOWER, HISTORY OF MACY’S OF NEW YORK, 1858-1919: CHAPTERS IN THE EVOLUTION OF THE DEPARTMENT STORE 193-94 (1967).

75. U.S. WOMEN’S BUREAU, WOMEN’S OCCUPATIONS THROUGH SEVEN DECADES 212 (Bull. No. 218, 1947) (written by Janet Hooks); see also SUSAN PORTER BENSON, COUNTER-CULTURES: SALESWOMEN, MANAGERS, AND CUSTOMERS IN AMERICAN DEPARTMENT STORES, 1890-1940, at 297 (1988) (1986).

76. AZEL AMES, JR., SEX IN INDUSTRY: A PLEA FOR THE WORKING GIRL 55-56, 137 (Garland 1986) (1875).

77. ELIZABETH BUTLER, WOMEN AND THE TRADES: PITTSBURGH, 1907-1908, at 300 (1911) (1909).

78. HELEN CAMPBELL, PRISONERS OF POVERTY: WOMEN WAGE-WORKERS, THEIR TRADES AND THEIR LIVES 180 (Robert Bros. 1895) (1887).

79. VIRGINIA PENNY, HOW WOMEN CAN MAKE MONEY 126 (Stein & Philip Taft eds., Arno & the New York Times 1971) (1870).

80. CAMPBELL, *supra* note 78, at 183.

81. 5 REPORT ON CONDITION OF WOMAN AND CHILD WAGE-EARNERS IN THE UNITED STATES: WAGE-EARNING WOMEN IN STORES AND FACTORIES, S. DOC. NO. 61-645, at 129 (1910).

82. C.D. Hill Drury, *Backache*, 1 BRIT. MED. J. 467 (1881).

83. *Id.*



ployers took the position that "I would dismiss any clerk who dared to sit down during working hours,"<sup>97</sup> the laws' impact on women's health was apparently limited "since it is impossible to see that employers and foremen allow the seats to be used even when provided" and compliance and enforcement were spotty.<sup>98</sup> By the turn of the century, the principle, however, was established that it was "universal knowledge with all reasonably intelligent people of the present age that continuous standing on the feet by women for a great many consecutive hours is deleterious to their health."<sup>99</sup>

The author of the 1916 advice manual, *The Ambitious Woman in Business*, may have wistfully asked whether such innovations as "high-heeled, unhygienic pumps" were really an advance beyond the "mannish" clothing that business women had once worn.<sup>100</sup> But it was hardly surprising that John Molloy in his influential guidebook for female professional dress in the 1970s and 1980s, *The Woman's Dress for Success Book*, authoritatively announced that: "The best shoe for a businesswoman is the plain pump . . . with closed toe and heel. The heel should be about an inch-and-a-half."<sup>101</sup> Yet even this height is injurious to women's feet—a "low" ¾" heel increases the peak pressure in the forefoot by 22% compared to 57% in 2" and 76% in ¾" heels.<sup>102</sup>

### B. The U.S. Airline Industry

In spite of such medical findings, a large segment of the U.S. airline industry requires female flight attendants to wear even higher heels. Table 1 shows the current shoewear policy at the eleven largest U.S. airlines, all of whose flight attendants, except Delta's, are unionized.<sup>103</sup> These airlines account for 97.6% of U.S. airline industry revenue passenger miles.<sup>104</sup>

97. *Id.* (quoting statement from 1895).

98. COMMONS & ANDREWS, *supra* note 88, at 204; *see also* REPORT AND TESTIMONY TAKEN BEFORE THE SPECIAL COMMITTEE OF THE ASSEMBLY APPOINTED TO INVESTIGATE THE CONDITION OF FEMALE LABOR IN THE CITY OF NEW YORK, Documents of the Assembly of the State of New York, 119th Sess., No. 97, Pt. I, 23, 39 1896; ELIZABETH BUTLER, SALESWOMEN IN MERCANTILE STORES: BALTIMORE, 1909, at 19-30 (1912).

99. *Anchley v. Stobbins*, 29 P. 52, 54 (Wash. 1902). A letter to the N.Y. TIMES in 1915 complained that: "The vogue of French heels is even on the increase. The shopgirl who stands all day wears them. . . ." N.Y. TIMES, Aug. 9, 1915, at 6, col. 7.

100. ELEANOR GILBERT, *THE AMBITIOUS WOMAN IN BUSINESS* 147 (1916).

101. JOHN T. MOLLOY, *THE WOMAN'S DRESS FOR SUCCESS BOOK* 79 (1977).

102. Rebecca Snow, *The Effects of Wearing High-Heeled Shoes on Pedal Pressure in Women*, 13 FOOT & ANKLE 85, 88 (1992).

103. The following unions have collective bargaining agreements with the following airlines: Association of Flight Attendants: Alaska, America West, American Trans Air, United, and USAir; International Association of Machinists: Continental; International Brotherhood of Teamsters: Northwest; Transport Workers Union: Southwest; Association of Professional Flight Attendants: American; Independent Federation of Flight Attendants: TWA. *Status of Airline Labor Contracts*, AVIATION DAILY, Jan. 3, 1996, at 15.

104. United: 21.0%; American: 19.3%; Delta: 16.0%; Northwest: 11.7%; Continental: 7.5%; USAir: 7.2%; TWA: 4.7%; Southwest: 4.4%; America West: 2.5%; American Trans Air: 1.7%; Alaska: 1.6%. *U.S. Industry Traffic Market Share*, AVIATION DAILY, Jan. 23, 1996, at 114. The data are for 1995. In terms of total number of employees, the 10 largest airlines are: American, United, Delta, USAir, Northwest, Continental, TWA, Southwest, America West, Alaska. *The Fortune 500*, FORTUNE, May 15, 1995, at F-43, F-44.

TABLE 1  
HEEL HEIGHT REQUIREMENTS FOR FLIGHT ATTENDANTS  
AT MAJOR U.S. AIRLINES<sup>105</sup>

AIRLINE	HEEL HEIGHT	OTHER GUIDELINES
Alaska	½-2½"	
American West	1½-3"	must also be worn while boarding, deplaning and during safety demonstrations
American	½-2½"	
American Trans Air	1-3"	
Continental	see other guidelines	flats acceptable with uniform slacks; otherwise classic pump with heel
Delta	½"	
Northwest	½-3"	in-flight: minimum ½"
Southwest	tennis shoes	
TWA	1-2½"	in-flight: minimum ½" wedge
United	no minimum	
USAir	2"	no flats to or from aircraft

105. ALASKA AIRLINES, FLIGHT ATTENDANT MANUAL § 1.510 at 3 (July 14, 1995); Telephone Interview with Eileen O'Rourke, Human Resources Dept., American Trans Air (Jan. 29, 1996); AMERICA WEST AIRLINES, CUSTOMER SERVICE MANUAL § 7.950.006 (1995); AMERICAN AIRLINES, UNIFORM & APPEARANCE REGULATION (Aug. 1993) (Telephone Interview with Pat Miraglia, Flight Service Administration (Jan. 15, 1996)); CONTINENTAL AIRLINES, POLICY & PROCEDURES, APPENDIX: CREWMEMBER GUIDE: APPEARANCE STANDARDS § 1, at 5 (Sept. 15, 1995); Delta Airlines, Telephone Interview with Roz Lewis, Employee (Jan. 22, 1996); NORTHWEST AIRLINES, POLICY AND PROCEDURES, FLIGHT ATTENDANT UNIFORM AND APPEARANCE STANDARDS, INITIAL FLIGHT ATTENDANT TRAINING, at 1-9 (Jan. 1997); SOUTHWEST AIRLINES, FLIGHT ATTENDANT MANUAL § 2, at 1 (rev. 35; Jan. 15, 1996); TWA, IN-FLIGHT SERVICE MANUAL § 1.40.11 (Aug. 15, 1993); UNITED AIRLINES, IN-FLIGHT SERVICES REGULATIONS § 30-5, at 5 (Aug. 15, 1995); U.S. AIR, POLICY & PROCEDURES § 10-30-18 (Aug. 1, 1993).

woollen stockings, a pair of soft-soled house-slippers . . . and, when she went out, [to] put a pair of galoshes over them."<sup>84</sup> After she ceased wearing the high heels, she never suffered from backache again. Thereafter, whenever "young ladies from shops in the City" consulted the physician, he invariably asked them whether they wore high-heeled boots.<sup>85</sup>

It is no wonder, then, that by 1874 the Massachusetts Bureau of Statistics of Labor announced that "[t]he barbarous practice of keeping shop-girls all day upon their feet cannot be too severely reprehended."<sup>86</sup> In order to counteract this "needless physical weariness,"<sup>87</sup> by the end of the 1870s, "the dangers of constant standing for salesgirls were recognized, and it was urged that they be furnished seats and allowed to use them."<sup>88</sup> In 1875, Dr. Azel Ames, Jr., a physician and special commissioner for investigation of the Massachusetts Bureau of Statistics of Labor, believed that "there are certain occupations at which a Hercules has no right to labor a full day." Accordingly, he recommended seats for saleswomen whose employers cruelly forced them to stand all day.<sup>89</sup> Under the heading, "Slavery in the West-End," Dr. Arthur Edis wrote a letter to the *London Times* in 1878 warning of the health consequences of constant standing,<sup>90</sup> and two years later *The Lancet*, Britain's leading medical journal, launched an editorial campaign against this "Cruelty to Women."<sup>91</sup> One of the most revealing responses elicited emphasized that "Fashion has a great influence with these women, it may almost be considered a part of their business, and . . . misshapen boots . . . seriously impair their general health."<sup>92</sup>

In response to medical testimony about the lasting injuries suffered by saleswomen who were required to stand all day,<sup>93</sup> New York State enacted the first seat law in 1881,<sup>94</sup> and eventually almost all states in the United States enacted laws requiring retail store and other employers to provide seats to their saleswomen.<sup>95</sup> However, it was "one thing to provide stools and another thing to permit the use of them."<sup>96</sup> Where em-

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84. *Id.*

85. *Id.*

86. MASSACHUSETTS BUREAU OF STATISTICS OF LABOR, FIFTH ANNUAL REPORT 47 (Pub. Doc. No. 31, 1874).

87. BUTLER, *supra* note 77, at 300.

88. JOHN COMMONS & JOHN ANDREWS, PRINCIPLES OF LABOR LEGISLATION 203 (4th ed. 1936).

89. AMES, *supra* note 76, at 54-59, 137, 145.

90. *Letter to the Editor*, LONDON TIMES, Nov. 7, 1878, at 9.

91. *Cruelty to Women*, LANCET, May 8, 1880, at 729.

92. E. Noble Smith, *Letter to the Editor*, LANCET, July 17, 1880, at 120.

93. ELIZABETH BAKER, PROTECTIVE LABOR LEGISLATION: WITH SPECIAL REFERENCE TO WOMEN IN THE STATE OF NEW YORK 268-74 (1925).

94. 1881 N.Y. Laws ch. 298, at 402.

95. By the 1930s, all states except Mississippi had enacted seating laws; prior to enactment of Title VII in 1964, only Florida's statute applied to men as well. U.S. WOMEN'S BUREAU, LABOR LAWS FOR WOMEN IN THE STATES AND TERRITORIES: HOURS, HOME WORK, PROHIBITED OR REGULATED OCCUPATIONS, SEATS, MINIMUM WAGE 3 chart 1 (Bull. No. 98, 1932). Male shop assistants in the nineteenth century also experienced continuous standing as extraordinarily fatiguing and injurious; supporters of seat laws, however, considered it unlikely that they could secure enactment of statutes applying to men. THOMAS SUTHERST, DEATH AND DISEASE BEHIND THE COUNTER 6, 85, 157, 192, 219 (1884) (discussing Britain).

96. MAUD NATHAN, THE STORY OF AN EPOCH-MAKING MOVEMENT 40 (1926).

Women flight attendants have, as Stewardesses for Women's Rights observed in 1973, "long chafed under the petty regulations and unfair employment practices within the airline industry."<sup>106</sup> From the inception of female flight attendant service by United Airlines in the 1930s, "appearance 'counselors' . . . checked to be sure they wore girdles, skirts, and high heels."<sup>107</sup> As early as 1945, TWA required its "air hostesses" to wear uniform shoes with 2 to 2½-inch heels.<sup>108</sup> Not until the beginning of the 1970s did airlines relax their policies requiring female flight attendants to wear high heels during the entire flight as well.<sup>109</sup> This relaxation was a boon for the "girl" who each year had to walk about 225 miles up and down airplane aisles and thus expose herself to the strain and backache associated with the pelvic tilt that high heels cause.<sup>110</sup> Even today, airlines enforcing heel-height rules require female attendants to wear heels while boarding, demonstrating safety procedures on board, and deplaning. Attendants are permitted to switch to non-high-heel shoes only while serving food and drinks. The time constraints of short flights may, however, make it infeasible for attendants to change shoes—especially when they must walk up a steep incline during take-off in two-inch heels to reach the other end of the airplane where their flat shoes are stored.<sup>111</sup>

Heel-height requirements have undergone considerable change over time, in large part as a result both of flight attendants' resistance to subjecting themselves to pain and deformation, and of their unions' demands for relaxation of the rules. The fact that three airlines, Continental, Southwest, and United, which account for about a third of the total U.S. market, have already eliminated their high-heel requirement undercuts any argument that competition compels other airlines to enforce such a dress code.<sup>112</sup>

A brief survey of the policy changes at two of these airlines illustrates both the remaining substantive limitations and the quirkiness of the process. For many decades<sup>113</sup> until September 27, 1994, United required female attendants to wear 1½ to

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106. STEWARDESSES FOR WOMEN'S RIGHTS 1(1):1 (Feb. 15, 1973) (instancing the fact that "[w]omen have their underwear inspected, men do not").

107. FRANK TAYLOR, *HIGH HORIZONS: DAREDEVIL FLYING POSTMEN TO MODERN MAGIC CARPET—THE UNITED AIRLINES STORY* 197 (rev. ed. 1962) (providing photograph showing high heels as part of the stewardess's uniform in 1930 and 1960); Alice Cook, *Introduction to GEORGIA NIELSEN, FROM SKY GIRL TO FLIGHT ATTENDANT: WOMEN AND THE MAKING OF A UNION* xiii, xvii (1982).

108. HELEN McLAUGHLIN, *FOOTSTEPS IN THE SKY: AN INFORMAL REVIEW OF U.S. AIRLINES INFLIGHT SERVICE 1920S TO THE PRESENT* 111 (1994).

109. Telephone Interview with Maureen Vieck, flight attendant with Northwest since 1972 and member of the executive board of the flight attendants division of the Teamsters Union (Jan. 23, 1996).

110. Gary Jennings, *Wanted: Girls for the Wide Blue Yonder*, *READER'S DIGEST*, Jan. 1966, at 83, 85 (stating that the average attendant walked 600 miles in a career lasting two years and eight months); PHILIP LEWIN, *THE FOOT AND ANKLE: THEIR INJURIES, DISEASES, DEFORMITIES AND DISABILITIES* 98 (3d ed. 1947).

111. Interview with Barbara Randall, former Continental Flight Attendant, in Iowa City, Iowa (Feb. 20, 1996).

112. In January 1996 the director of Human Resources at Northwest Airlines stated that a proposed change in its dress code would permit female flight attendants to begin wearing flats in April; in July, however, the proposed policy, still not in effect by Fall 1996, increased the height to one half inch. Telephone Interview with Sheri Leonardo, Director of Human Resources, Northwest Airlines (Jan. 30, 1996); Telephone Interview with Linda Hoffman, Secretary to Sheri Leonardo (July 26 and Nov. 21, 1996).

113. Sara Dornacker, Staff Specialist for Communications, United Airlines, who was a flight attendant from 1967 to 1973, stated that the two-inch heel requirement had been in effect during her tenure as an atten-

2½-inch heeled pumps with a skirt or optional dress and one- to two-inch heels with uniform pants. In-flight, attendants had to wear at least ½-inch businesslike serving shoes to "complement and maintain the flight attendant's professional image." Male attendants, in contrast, both before and after that date, were permitted to wear dress loafers.<sup>114</sup> When United became a so-called employee-owned company, the attendants and their union were able to persuade management to rescind the heel-height requirement. Nevertheless: "To complement the conservative, businesslike design of the uniform, plain black pumps with a closed heel and toe, as shown, should be worn." Significantly, however, the three pumps that United's policies and procedures manual depicts all have pointy toes.<sup>115</sup> Because a pump "requires a short fitting to retain it on the foot," foot specialists have taught for decades that "this type of shoe contributes to a malalignment of the great toe, with resulting increase of pressure medially on the first metatarsophalangeal joint."<sup>116</sup> That female flight attendants at United still lack discretion to wear what is good for their feet is underscored by the fact that the company's Medical Department must review "medical reasons for exceptions to appearance regulations regarding shoe styles. If the Medical Department recommends an exception, the approval will include the amount of time allowed for the exception and the type of shoe permitted."<sup>117</sup> Moreover, even under the current, less rigid, rules at United, neither men nor women are permitted to wear in-flight shoes with crepe or rubber soles<sup>118</sup> despite the fact that one of the complaints that attendants have voiced most insistently is that wearing hard-soled shoes for long hours in flight is very uncomfortable and painful.<sup>119</sup> Although the softer-soled shoes "are much less fatiguing due to their absorption of significant amounts of vibrational energy," the companies prohibit their wear "merely for aesthetic purposes."<sup>120</sup>

At some other airlines, shoe requirements have been similarly relaxed. Strong evidence that not even sexist corporate policies are an insuperable obstacle to health-promoting employment practices is provided by the changes effected by Southwest. In the 1970s, Southwest cultivated an extreme sexist image and refused to hire male flight attendants; when sued under Title VII for having engaged in sexually discriminatory practices, the company brazenly defended on the grounds that it was marketing female "sex appeal" as witnessed by the two- to three-inch "high boots and hot-pants" it required the attendants to wear until 1982.<sup>121</sup> Yet, in the past eight years it has become the on-

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dant. Telephone Interview with Sara Dornacker, Staff Specialist for Communications, United Airlines (Jan. 22, 1996).

114. UNITED AIRLINES, *supra* note 105, at 5-6.

115. *Id.* at 5.

116. FRANK CARLETON, SHOES AND FEET: A TEXT BOOK FOR STUDENTS AND PRACTITIONERS 112 (1940).

117. UNITED AIRLINES, *supra* note 105, at 5.

118. *Id.* at 6.

119. In-flight Interviews by Dr. Charles Saltzman with United flight attendants, United Airlines (Jan. 20, 1996).

120. *FAA-OSHA Jurisdiction over Workplace Safety in the Aviation Industry: Hearing Before a Subcommittee of the House Committee on Government Operations*, 96th Cong., 2d Sess. 69 (1980) (statement of Richard Wagner, secretary-treasurer, Indep. Fed'n of Flight Attendants) [hereinafter *FAA-OSHA*].

121. *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 295 (1981); Telephone Interview with Megan

ly major airline to permit, and even to encourage, male and female flight attendants to wear tennis shoes<sup>122</sup>—even if the company's motivation is marketing a unique informal "funwear" look rather than its employees' well-being. Although it is only during the last three years that attendants (and all employees) have been permitted to wear tennis shoes all the time, they had been authorized to wear them Fridays through Sundays and during certain months from the late 1980s to the early 1990s. Significantly, Southwest management began permitting flight attendants to wear tennis shoes all the time as a reward after the airline had won the industry's award for best service. In other words, management, aware that employees were pained by the formal shoe requirement, released them from the imposition only after they had secured customers' approval.<sup>123</sup>

#### IV. FLIGHT ATTENDANTS AND THE RIGHT DEFENDANTS UNDER TITLE VII

High heels are the only shoe style that men respond to in an emotional way. This is because they make your legs look great, your ass stick out, and your chest pitch forward. High heels throw you off your natural sense of balance, and this is what men like most. Some women report the odd sensation of not being able to think at all when wearing high heels—some men especially like this.<sup>124</sup>

Flight attendants serve here as an illustration because the firms they work for are unusual in still maintaining written procedures and policies expressly prescribing health-threatening shoes. Flight attendants are thus well positioned to test the scope of Title VII's ban on sex-related employment discrimination because they face no evidentiary obstacles in proving that their employers promulgate and enforce a sex-biased high-heel rule. Failure to wear the mandated shoes exposes an attendant to the risk of being written up in her file for "not conforming to uniform standard."<sup>125</sup>

In many other white-collar occupations, including millions of secretarial, clerical, administrative, and professional positions, employers are more sophisticated. They rely on unwritten and informal codes, which may be just as stringent and whose violation may also trigger disciplinary measures ranging from reprimands to termination.<sup>126</sup>

At the workplace, a good deal of control over appearance is exercised at the hiring stage, when the absence of formal dress and appearance codes is not likely to prevent an employer from excluding applicants who would not appear to "fit in" . . . . Once on the job, oral traditions of dress and appear-

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Cagle, Flight Attendant, Southwest Airlines (Jan. 25 & 29, 1996).

122. SOUTHWEST AIRLINES, FLIGHT ATTENDANT MANUAL § 2, at 1 (revised 35, Jan. 15, 1996).

123. Telephone Interview with Paul Lawrence, 1st Vice President, Local 556, Transportation Workers Union (Jan. 25, 1996); Telephone Interview with Megan Cagle, Flight Attendant, Southwest Airlines (Jan. 25 & 29, 1996).

124. MIMI POND, SHOES NEVER LIE 65 (1985).

125. Undated Written Communication from Northwest flight attendant to author (June 1996) (on file with author).

126. For an example of female office employees "required to wear high heels," see *Coblentz v. Hotel Employees & Restaurant Employees Union Welfare Fund*, 925 P.2d 496, 502 (Nev. 1996).



ance prevail in many business settings, again making formal codes unnecessary.<sup>127</sup>

This point is underscored by two female college professors who leave nothing unsaid in a textbook that bears the inadvertently jocular title, *Individuality in Clothing Selection and Personal Appearance*:

You need to . . . be sensitive to the kind of apparel that seems to win approval and be worn by the people who run the company and those who appear to be favored for advancement . . . [I]f you are planning on advancement, your wardrobe strategies may need to conform to what has been established.<sup>128</sup>

Because the airline industry does not rely on the subtlety of unspoken rules, flight attendants may be able to make out a prima facie case of sex discrimination merely by pointing to the undisputed existence and enforcement of the sex-biased shoe requirements. In contrast, female employees in other industries might have to take the additional step of practically challenging an invisible rule and subjecting themselves to discipline for its breach in order to prove its existence.

The flight-attendant phenomenon, far from being unique, is part of a larger sex-based employment structure that includes all women-as-servers type jobs, ranging from cocktail waitresses and waitresses generally to hat-checkers. This category includes women on their feet serving (mainly male) customers, to whom employers offer them as an attraction. This role was nicely captured in the mid-1960s when Congress held hearings on airlines' rules requiring stewardesses to resign at age thirty-two. Commenting on the perception that some stewardesses were too old to keep male passengers titillated, one airline executive was quoted as saying, "Put a dog on an airplane and 20 businessmen are sore for a month."<sup>129</sup> The president of the Airline Stewards and Stewardess union, testifying on age discrimination, attacked companies "selling flesh and sex ('fly the friendly thighs of United') by appeal[ing] to the predatory male."<sup>130</sup>

For decades, in fact, "the airline industry has sold the flight attendant as part of its product. [T]he stewardess image became a highly profitable marketing commodity . . . . By the 1960s, the lifestyle of the stewardess was depicted in X-rated films and

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127. Katharine Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2551 (1994).

128. MARY KEFGEN & PHYLLIS TOUCHIE-SPECHT, *INDIVIDUALITY IN CLOTHING SELECTION AND PERSONAL APPEARANCE: A GUIDE FOR THE CONSUMER* 448 (4th ed. 1986).

129. Russell Baker, *Up in the Air with the Girls*, N.Y. TIMES, Sept. 5, 1965, at D4, reprinted in *Employment Problems of Older Workers (The Airline Stewardesses Case): Hearings Before the Select Committee on Labor of the House Committee on Education and Labor*, 89th Cong., 1st Sess. 472 (1966). A United Airlines official glossed the attendants' male-oriented role thus: "a stewardess is an absolutely vital part of our image with the passenger. It is she who has to supply the magic that makes him come away smiling, even when his steak was cold . . . ." *Girls, Girls, Girls*, NEWSWEEK, Mar. 29, 1965, at 69.

130. *Age Discrimination in Employment: Hearing Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 90th Cong., 1st Sess. 202 (1967) [hereinafter *Age Discrimination*] (statement of Colleen Boland, president, Airlines Stewards and Stewardesses, Local 550, Transport Workers Union of America).

semipornographic literature.”<sup>131</sup> Naomi Wolf has labelled this complex of dress code and appearance standards for such female “display professions” the “Professional Beauty Qualification.”<sup>132</sup> She traces this trend to the 1960s when: “A commercially sexualized mystique of the airline stewardess, the model, and the executive secretary was promoted simultaneously.”<sup>133</sup>

Although receptionists, clerical, and professional workers may not have to be on their feet all day, they too are commonly required to wear unhealthful shoes. Footwear requirements in the airline industry are thus symptomatic of a widespread, physically injurious, but sexually discriminatory, employment practice. The flight attendants’ foot(wear) plight is especially ironic since one of their original tasks in the 1930s was to supply passengers with slippers so that they could rest their feet.<sup>134</sup> Flight attendants have periodically since the 1970s expressed their resentment at the imposition of high heels by staging “shoe-ins” in which flight attendants walked on to the job in comfortable flat shoes.<sup>135</sup>

Flight attendants are hardly a marginal or vanishing occupational group. In 1994 they crossed the 100,000 employee threshold, reaching 105,000.<sup>136</sup> This level represents a more than 20-fold increase since 1947, when airlines employed fewer than 5,000. The U.S. Bureau of Labor Statistics (BLS) projects that the growth in the number of flight attendants will continue to exceed the average of all occupations through the year 2005, when total employment will reach 128,000 to 141,000.<sup>137</sup> Approximately eighty percent of flight attendants are women.<sup>138</sup>

Yet another justification for focusing on flight attendants is the key link that they may have constituted in the socialization process making high heels occupationally acceptable: their high visibility to millions of passengers and visitors in airport con-

131. GEORGIA PANTER NIELSEN, FROM SKY GIRL TO FLIGHT ATTENDANT 1 (1982).

132. NAOMI WOLF, THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN 27 (1991).

133. *Id.* at 31.

134. McLAUGHLIN, *supra* note 108, at 12.

135. ARLIE HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING 126 (1983).

136. George Silvestri, *Occupational Employment to 2005*, MONTHLY LAB. REV., Nov. 1995, at 60, 70 tbl. 2.

137. U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, BULL. NO. 940, at 164-65 (1948); Silvestri, *supra* note 136, at 60, 70 tbl. 2. Other years for which the Department of Labor has published employment figures for flight attendants include: 1956: 7,500; 1962: 12,300; 1972: 39,800; 1980: 56,000; 1982: 54,000; 1983: 63,779; 1984: 68,432; 1985: 73,141; 1986: 79,377; 1987: 82,685; 1988: 88,555; 1989: 91,463; 1990: 99,779; 1991: 93,233; 1992: 92,775; 1993: 93,297. Sources: U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK: 1957 EDITION, BULL. NO. 1215, at 401 (1957); 1983-93 U.S. BUREAU OF LABOR STATISTICS, OFFICE OF EMPLOYMENT PROJECTIONS, “Wage and salary employment by occupation and industry, 1983-1993” (unpublished data furnished to author Jan. 23, 1996). These data have also been published every third June: U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT IN SELECTED NONMANUFACTURING INDUSTRIES, BULL. NO. 2289, at 25 tbl. 8 (1987); U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT IN SELECTED NONMANUFACTURING INDUSTRIES, BULL. NO. 2348, at 23 tbl. 7 (1990); 1962, 1972, 1980, 1982: U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK.

138. Unpublished data provided by U.S. Bureau of Labor Statistics (BLS), Division of Labor Force Statistics (Jan. 24, 1996). The BLS no longer collects data on the sex composition of the narrow category of flight attendants, which is now subsumed under the rubric “public transportation attendants.”

courses and terminals may, over the years, have exerted an influence on other, especially younger, women—already by 1965, U.S. airlines were interviewing a million young women a year for 10,000 stewardess jobs<sup>139</sup>—attitudinally preparing them to accept the pain of high heels for the greater good of the sophisticated “professional” image that employers assert as the *raison d’être* of a practice that lacks any substantive job-related justification. After all, a flight attendant without high heels would hardly generate the same skepticism as a welder without a face mask or an astronaut without a space suit.<sup>140</sup> Women’s magazines of the period helped foster the same fatalistic resignation by suggesting every imaginable palliative for stewardesses’ aching feet—which “causes frowns . . . that etch small lines in your face”—such as lotions, foot powder, and rubbing alcohol without ever mentioning that the employer-prescribed shoes may have been the chief source of the employees’ problems.<sup>141</sup>

## V. THE LEGAL BASIS OF THE STRUGGLE AGAINST HIGH HEELS

Why is a raised heel necessary at all? . . . The presumption is that in a structure so perfect as the foot no change of level in the sole at any part is desirable. The onus of proof . . . that heels are required rests with those who advocate them; it is not necessary to prove the negative.<sup>142</sup>

The Empire State Building . . . weighs 600,000,000 pounds—distributed, however, so evenly that “the weight on any given square inch is no greater than that normally borne by a French heel.”<sup>143</sup>

### A. The Business Necessity Defense

Title VII makes it “an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .”<sup>144</sup> Airlines’ shoe policies violate Title VII on the grounds that they either intentionally treat women differently because of their sex (disparate treatment) or constitute a facially neutral practice that has a disparate impact on women. Under the disparate treatment theory, airlines discriminate against women by permitting male employees to wear comfortable and “professional-looking” shoes while requiring female employees to wear unhealthful shoes, which sex-stereotype women as radiating sex appeal. Employers might defend against this claim by asserting as a legitimate nondiscriminatory reason<sup>145</sup> that they are merely subjecting

139. NIELSEN, *supra* note 131, at 82.

140. VALERIE STEELE, *Dressing for Work*, in MEN AND WOMEN: DRESSING THE PART 64, 66 (Claudia Kidwell & Valerie Steele eds., 1989).

141. *What Do They Have in Common?*, *supra* note 71, at 74, 117.

142. THOMAS ELLIS, THE HUMAN FOOT: ITS FORM AND STRUCTURE, FUNCTIONS AND CLOTHING 109-10 (1889). These sentences are plagiarized verbatim by JOHN MCALLISTER, THE HUMAN FOOT 32 (1933).

143. WILSON, *supra* note 26, at 292-93 (quoting from public relations material).

144. 42 U.S.C. § 2000e-2(a)(1) (1988).

145. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

men and women to dress codes reflective of the prevailing cultural standards of professionalism. Under the disparate impact approach, however, no plausible "business necessity" defense<sup>146</sup> could overcome a medical finding that the high-heeled shoes that airlines mandate for female employees result in a vastly disproportionate incidence of adverse health effects for women.

That the look of a female attendant's foot and leg is irrelevant to her tasks is obvious from the description in the *Dictionary of Occupational Titles*, which the U.S. Department of Labor has published for many decades to support the U.S. Employment Service's efforts to rationalize the labor market on behalf of employees and employers. According to this authoritative work, an airplane flight attendant:

Performs variety of personal services conducive to safety and comfort of airline passengers during flight. Greets passengers, verifies tickets, records destinations, and directs passengers to assigned seats. Assists passengers to store carry-on luggage in overhead, garment, or under seat storage. Explains use of safety equipment, such as seat belts, oxygen masks, and life jackets. Walks aisles of plane to verify that passengers have complied with federal regulations prior to take off. Serves previously prepared meals and beverages. Observes passengers to detect signs of discomfort, and issues palliatives to relieve passenger ailments, such as airsickness and insomnia. Administers first aid according to passenger distress when needed. Answers questions regarding performance of aircraft, stopovers, and flight schedules. Performs other personal services, such as distributing reading material and pointing out places of interest. Prepares reports showing place of departure and destination, passenger ticket numbers, meal and beverage inventories, palliatives issued, and lost and found articles. May collect money for meals and beverages.<sup>147</sup>

The Federal Aviation Administration (FAA), the agency charged with regulating the airline industry, has an even more austere view of the job description, making it unambiguously clear that high-heel shoes can only interfere with flight attendants' performance of their safety mission: "No person may serve as a flight attendant . . . unless that person has demonstrated to the pilot in command familiarity with the necessary functions to be performed in an emergency or a situation requiring emergency evacuation and is capable of using the emergency equipment installed on that airplane."<sup>148</sup> Moreover, in prescribing the number of attendants needed per seat, the FAA specifies that their mission on takeoff and landing is "to provide the most effective egress of passengers in the event of an emergency evacuation."<sup>149</sup> Finally, in 1994 the FAA issued a recommendation urging passengers to make their travel safer by wearing such "sensible clothing" as "low-heeled shoes or boots."<sup>150</sup> What is advisable for passen-

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146. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); 42 U.S.C. §2000e-2(k)(A)(1)(i) (1994).

147. 1 U.S. DEPARTMENT OF LABOR, *DICTIONARY OF OCCUPATIONAL TITLES* 255 (4th ed. rev. 1991).

148. 14 C.F.R. § 91.533(b) (1995).

149. *Id.* § 121.391(d).

150. See generally FAA, *Fly Smart: An Air Traffic Guide* (1994); see also Matthew Wald, *Shoe Policy May Be Changing for Airline Evacuation*, N.Y. TIMES, Nov. 14, 1996, at A12.

gers should a fortiori be mandatory for flight attendants, who are exposed to considerably greater risk.

A congressional oversight committee also underscored attendants' essential duties by recalling that "safety is the one and only reason flight attendants are necessary on passenger-carrying aircraft, not to be waiters and waitresses."<sup>151</sup> The crucial nature of their work is rooted in the fact that many, if not most, airplane crashes are survivable if attendants can evacuate the passengers quickly before they succumb to asphyxiation.<sup>152</sup> It was, therefore, not coincidental that "[o]riginally, all passenger-carrying airplane flights had registered nurses aboard."<sup>153</sup> Consequently, it is "ironic," as the chair of the House subcommittee investigating workplace safety in the industry observed, that the very employees "who are responsible for the safety of the flying public, may work under conditions in which their own safety is endangered."<sup>154</sup> Thus, if ministering to passengers' safety is flight attendants' principal function, then current airline policies regarding high heels directly interfere with that mission. As fashion photographer Helmut Newton, putatively speaking for millions, observed in *Vogue*: "When I see a woman, I always look immediately at her shoes—and hope they're high . . . because high heels make a woman look sexy and dangerous."<sup>155</sup> Presumably, however, a woman dangerously teetering on high heels is the last person even Mr. Newton would hope for to save his life by leading him out of a smoke-filled airplane.

No conceivable justification exists for requiring flight attendants performing a job that is "physically demanding . . . requiring speed, efficiency and long hours on duty"<sup>156</sup> to wear high-heeled or pointy-toed, narrow shoes, which generations of orthopaedic surgeons have censured.<sup>157</sup> Likewise, no imaginable business justification could support a mandatory dress code compelling female attendants to wear such shoes while walking through airport terminals. This practice is an all too obvious remnant of the *Coffee, Tea or Me?*<sup>158</sup> sexism that airlines infamously continue to cultivate and pander to even today when "the sexual connotations of the job" have allegedly "disappeared."<sup>159</sup>

This conclusion is hardened by the principal federal appellate court decision holding that it was a violation of the anti-sex discrimination prohibition of Title VII for airlines to refuse to hire male flight attendants.<sup>160</sup> The Fifth Circuit stated:

The primary function of an airline is to transport passengers safely from one point to another . . . . No one has suggested that having male stewards will

151. AIRCRAFT CABIN SAFETY STAFFING STANDARDS: SIXTEENTH REPORT BY THE COMMITTEE ON GOVERNMENT OPERATIONS, H.R. REP. NO. 97-394, at 3 (1981).

152. *Id.*

153. *Id.*

154. *FAA-OSHA*, *supra* note 120, at 2 (statement of Rep. Burton).

155. *High and Mighty*, *VOGUE*, Feb. 1995, at 214, 221.

156. *Age Discrimination*, *supra* note 130, at 202 (statement of Colleen Boland).

157. *See, e.g.*, EMIL HAUSER, *DISEASES OF THE FOOT* 41 (2d ed. 1950).

158. *See generally* TRUDY BAKER & RACHEL JONES, *COFFEE, TEA OR ME? THE UNINHIBITED MEMOIRS OF TWO AIRLINE STEWARDESSES* (1967); Lindsay Van Gelder, *Coffee, Tea or Fly Me*, *MS.*, Jan. 1973, at 86-105.

159. *McLAUGHLIN*, *supra* note 108, at 308.

160. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971).

so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another.<sup>161</sup>

Pan American had contended that female attendants "were superior in such non-mechanical aspects of the job as providing reassurance to anxious passengers, giving courteous personalized service and . . . making flights as pleasurable as possible," but the court found these alleged qualifications at best "tangential to the business."<sup>162</sup>

It was clear a quarter century ago, before the consolidation of the modern feminist movement and the dismantlement of many sexist institutions and attitudes, that "being a female is not a bona fide occupational qualification [BFOQ] for the job of flight cabin attendant" altogether.<sup>163</sup> A fortiori, it is unfathomable how current airline "business necessity" could lawfully dictate the sexually discriminatory enforcement of a rule requiring only female attendants to injure their feet in order to act as mobile human advertising billboards and project management's phantasmagorically "professional" image. After all:

In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past.<sup>164</sup>

Moreover, EEOC regulations expressly prohibit "stereotyped characterizations of the sexes . . . . The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group." If an employer's sex stereotyping of women as less capable of aggressive salesmanship is a prominent example of such impermissible discriminatory treatment,<sup>165</sup> then the policy that no female flight attendant can project a "professional image" while wearing healthful shoes must also be unlawful.

At a relatively early stage in the evolution of Title VII jurisprudence, some courts adopted the position that "in jobs where sex or vicarious sexual recreation is the primary service provided, e.g. a social escort or topless dancer, the job automatically calls for one sex exclusively; the employee's sex and the service provided are inseparable. Thus, being female has been deemed a BFOQ for the position of a Playboy Bunny, a job which calls for the employee forthrightly to titillate and entice male customers."<sup>166</sup> But once courts decided that an airline is "not a business where vicarious sex entertainment is the primary service provided," sex could not be "a BFOQ merely because an employ-

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161. *Id.* at 388.

162. *Id.* at 387.

163. *Id.* at 385.

164. *Sprogis v. United Airlines*, 444 F.2d 1194, 1198 (7th Cir. 1971).

165. 29 C.F.R. § 1604.2(a)(1)(ii) (1995). *See generally* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-52 (1989). Significantly, in this case the employer took adverse action against a candidate for partnership whom it had to advise to "dress more femininely. . . ." *Id.* at 235.

166. *See* *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 301, 302 (N.D. Tex. 1981).



er chooses to exploit female sexuality as a marketing tool, or to better insure profitability.”<sup>167</sup>

However, under Title VII, the only issue is employers’ equal treatment of men and women rather than some absolute standard of justice, fairness, respect, or autonomy. After all, according to the Supreme Court, the statute was “not intended to diminish traditional management prerogatives.”<sup>168</sup> It was, therefore, plausible for a district court to reason that “[r]ejecting a wider BFOQ for sex does not eliminate the commercial exploitation of sex appeal. It only requires . . . that employers exploit the attractiveness and allure of a sexually integrated workforce.”<sup>169</sup> Thus, if airlines insist on sexualizing their female flight attendants regardless of the health consequences, they can implement this enlightened employment practice without running afoul of Title VII only by evenhandedly exposing their male flight attendants to comparable moral degradation and physical injury.

If the courts agree that commercial air transportation is not a flying bordello and stewardesses are not *Sex Objects in the Sky*,<sup>170</sup> then a fortiori it must be unlawful under Title VII to require women to wear high heels and act “as sex objects” on the ground. Requiring female attendants to promenade in the concourses in high heels “provide[s] sexual interest by . . . emphasizing the contours of the leg . . . .”<sup>171</sup> That stereotyped image was graphically specified by one podiatrist who proclaimed “the high heel may well be the most potent aphrodisiac ever concocted. [T]he high heel sensuously alters the whole anatomy—foot, leg, thigh, hips, pelvis, buttocks, breasts, etc.”<sup>172</sup>

Studies have shown that women are subject to a double standard in shoes inasmuch as theirs are associated with “the realm of sexual attraction” whereas men’s shoes are associated with “status . . . in a career context.”<sup>173</sup> Only for women is it the case that items such as high heels, which “have already been appropriated as pornographic accessories,” also qualify as standard working clothes.<sup>174</sup> Although it may no longer be the

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167. *Id.* at 303.

168. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)).

169. *Wilson*, 517 F. Supp. at 304.

170. See generally PAULA KANE & CHRISTOPHER CHANDLER, *SEX OBJECTS IN THE SKY: A PERSONAL ACCOUNT OF THE STEWARDESS REBELLION* (1974).

171. Susan Kaiser et al., *Cultural Codes and Sex-Role Ideology: A Study of Shoes*, 5 AM. J. SEMIOTICS 13, 16 (1987). Catherine MacKinnon has noted that “provocative dress . . . primarily reassure[s] men of women’s sexual attractiveness to them.” CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 181 (1979).

172. William Rossi, *High Heels: The Agony and the Ecstasy*, 71 J. AM. PODIATRY ASS’N 698 (1981). For extended discourse along these lines, see WILLIAM ROSSI, *THE SEX LIFE OF THE FOOT AND SHOE* 119-48 (1993).

173. Kaiser et al., *supra* note 171, at 29.

174. WOLF, *supra* note 132, at 45. The origins of men’s and women’s office clothing in the United States were diametrically opposed. Whereas by the end of the 19th century “[m]ale business clothing had developed . . . into a kind of uniform that was also worn outside the office by middle-class men,” the uniform that women office workers finally developed by the 1920s was “the same as their leisure wear and implied—certainly to management—that women office workers were not wholly committed to their job. Elaborate hair styles, jewelry, perfume, light sandals, and dresses of soft, colorful fabrics . . . stressed differences between male and female, accenting femininity and sexuality and reinforcing the gender dichotomy.” ANGEL KWOLEK-FOLLAND, *ENGENDERING BUSINESS: MEN AND WOMEN IN THE CORPORATE OFFICE, 1870-1930* 174-

case, as it was for Susan B. Anthony in the mid-nineteenth century, that there is no occupation "in which woman in her present dress can possibly earn equal wages with man,"<sup>175</sup> women who must wear high heels for work are judged differently than their male colleagues. Because surveyed consumers evaluated high heels "as the most feminine, the most formal, the least comfortable, the sexiest, the most fashionable, and the most prestigious . . . [a]ttractiveness and discomfort tended to be perceived as compatible qualities in a desirable woman's shoe, and status seemed to be linked more to attractiveness than to a career." Men, in contrast, do not need to make such trade-offs<sup>176</sup>—nor, according to orthopaedic surgeons, should women: "normal walking is carried out best in a shoe which corresponds closely to the man's shoe."<sup>177</sup>

Employers' efforts to assert a legal privilege to construct only female employees' "professionalism" to coincide with stereotyped images of sexual attractiveness extends far beyond Playboy Clubs, which functioned as a standard joke during early EEOC discussions of the ban on sex discrimination. Years later the development of Title VII jurisprudence should have made it unnecessary to ask whether, if "[f]emale gender, physical beauty, and sexual attractiveness . . . were reasonably necessary to the performance of the job of a bunny, . . . were the same characteristics necessary for airline stewardesses, waitresses, receptionists, and secretaries?"<sup>178</sup>

If, in fact, the not-so-hidden agenda behind the high-heel policy is the creation of a sexual ambience for airlines,<sup>179</sup> then employers violate Title VII when they require *only* women "to wear sexually suggestive attire as a condition of employment."<sup>180</sup> A shoe designer confirms this inherently discriminatory aspect of workplace shoe rules when she concedes that high heels and pointed toes "are part of a fantasy life . . . where women are the toys and not the equals of men."<sup>181</sup> Even courts that in principle are prepared to acquiesce in employers' issuance of different personal appearance rules for male and female employees, "[s]o long as they find some justification in commonly accepted social norms and . . . business necessity," find a violation of Title VII where men are permitted to wear "normal business attire" and women are subject to "disparate" and "demeaning" treatment.<sup>182</sup> Such treatment is present where a woman is required to wear "sexually revealing" clothing, which actually "misrepresents [her] duties . . . by making [her] appear to be a sex object, making it more difficult for [her] to

75 (1994).

175. Letter from Susan B. Anthony to G. Smith (Dec. 25, 1855), GERRIT SMITH COLLECTION, SYRACUSE UNIVERSITY, *quoted in* Robert Riegel, *Women's Clothes and Women's Rights*, 15 AM. Q. 390, 391 (1963).

176. SUSAN KAISER, *THE SOCIAL PSYCHOLOGY OF CLOTHING: SYMBOLIC APPEARANCES IN CONTEXT* 88 (2d ed. 1990) (1985).

177. HAUSER, *supra* note 157, at 43.

178. PATRICIA ZELMAN, *WOMEN, WORK, AND NATIONAL POLICY: THE KENNEDY-JOHNSON YEARS* 96 (1982).

179. In Las Vegas casinos the unabashed point of making cocktail waitresses wear high heels is "to lift your legs and buttocks." Jeff Burbank, *MGM Boss Accused of Sexual Harassment*, LAS VEGAS REV. J., Nov. 6, 1993, at 1B (quoting cocktail waitress). "Walking in high heels makes the buttocks undulate about twice as much as walking in flat heels . . ." BEATRICE FAUST, *WOMEN, SEX, AND PORNOGRAPHY: A CONTROVERSIAL AND UNIQUE STUDY* 54 (1980).

180. *Priest v. Rotary*, 634 F. Supp. 571, 581 (N.D. Cal. 1986).

181. EUNICE WILSON, *A HISTORY OF SHOE FASHIONS* 279 (1969).

182. *Carroll v. Talmon Fed. Sav. & Loan Ass'n of Chicago*, 604 F.2d 1028, 1032-33 (7th Cir. 1979).

carry out [her] normal duties.”<sup>183</sup> Just as “it is ironic” that a lobby attendant charged with maintaining building security is required to wear a “skimpy costume,” so too for a flight attendant responsible for “insur[ing] the saf[e]ty of the [passengers] especially in cases of emergency,” who is forced to parade about in high heels.<sup>184</sup>

Because (nonequestrian) men generally stopped wearing high-heeled shoes long ago,<sup>185</sup> employers might seek to defend their sex-biased shoe rules on the ground that they fit within judge- and agency-created legal doctrine that allows employers to accommodate prevailing societal conventions concerning gendered clothing. In rejecting the Title VII claim of a male lawyer who resented being required to wear a tie in court, for example, a judge took notice of the socially constructed fact that:

virtually all male attorneys admitted to the bar wear neckties . . . when they appear in court or in a judge’s chambers, whereas only a distinct minority of female attorneys do so. And these differences in style of dress result not from mandates imposed upon the male and female attorneys by some coercive authority . . . but rather because this is the current fashion. Because contemporary fashions are different, a judge may permissibly conclude that a male attorney appearing in court without a necktie is lacking in proper decorum, whereas a female attorney not wearing a necktie is not subject to that criticism.<sup>186</sup>

A dress code may, according to EEOC regulations, require male employees to wear neckties and female employees to wear skirts or dresses. However, such policies comply with Title VII only if “the requirements are equivalent for men and women with respect to the standard or burden that they impose . . . .”<sup>187</sup>

Such a doctrine is, despite the imprimatur it bears, difficult to reconcile with the fundamental purpose of Title VII’s prohibition of sexually discriminatory employment practices. For even if the federal appellate judiciary has “concluded that the Act was never intended to interfere in the promulgation and enforcement of personal appearance

183. EEOC v. Sage Realty Corp., 507 F. Supp. 599, 606 (S.D.N.Y. 1981) (quoting plaintiff’s letter of complaint to employer).

184. *Id.*

185. Stewart Steele, *Footgear—Its History, Uses and Abuses*, 88 CLINICAL ORTHOPAEDICS 119, 126-27 (1972); VALERIE STEELE, FETISH: FASHION, SEX AND POWER 98 (1996). For a general history of shoes, see JUNE SWANN, SHOES (1982); LINDA O’KEEFE, SHOES: A CELEBRATION OF PUMPS, SANDELS, SLIPPERS AND MORE (1996); RUTH WILCOX, THE MODE IN FOOTWEAR (1948). For a discussion of the disadvantages of high heels on military boots, see James Dowie, *Observations on Boots and Shoes, with Reference to the Structure and Action of the Human Foot*, 26 EDINBURGH NEW PHIL. J. 401 (1838-39). Cowboy boots are a reminder of one of the alleged origins of heels—to grip stirrups. Because dude ranch cowboys must wear such boots during long workdays lasting 12 hours, their pointy toes and 1”-heels cause foot problems similar to those typically suffered by women. Telephone Interview with Randy Wilson, former dude ranch cowboy, Iowa City, Iowa (Mar. 3, 1996). It remains a great desideratum of historical shoe research to determine why men stopped wearing high heels when their original reasons for adopting them—elevating their height and accentuating their calves—were identical with women’s. For speculation that in the future androgynous men may wear high heels, see Holly Brubach, *The Athletic Esthetic*, N.Y. TIMES MAG., June 23, 1996, § 6, at 48.

186. Devine v. Lonschein, 621 F. Supp. 894, 897 (S.D.N.Y. 1985), *aff’d*, 800 F.2d 1127 (2d Cir. 1986). For an employment-related case in which a worker unsuccessfully sought to contest his employer’s power to force him to wear a tie, see Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977).

187. EEOC, COMPLIANCE MANUAL § 619.4(d), at 619-9 (Oct. 1981) [hereinafter COMPLIANCE MANUAL].

rules by private employers," the same courts recognize that Congress did mean to "discard outmoded stereotypes posing employment disadvantages for one sex."<sup>188</sup> A rule forbidding only female employees to wear pants, for example, must violate Title VII unless the employer can demonstrate "business necessity." Since it is impermissible "to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid,"<sup>189</sup> even a no-pants rule, which presumably infringes more on women's physical comfort (and their desire not to be leered at) than health, should be invalid under Title VII.

Even assuming the validity of the equivalent-burden doctrine: whatever subjective differences of opinion may prevail as to whether ties are as burdensome as skirts, there is no scientific-medical dispute that high-heel shoes are significantly more injurious and thus burdensome to women than the loafers or wingtips that airlines prescribe for male attendants. Consequently, even if one judge has ruled that "[t]he decision to project a certain image as one aspect of company policy is the employer's prerogative," and that "[a]n employer is simply not required to account for personal preferences with respect to dress and grooming standards,"<sup>190</sup> judicial vindication of an employer's power to prohibit women from wearing pants, as lamentably retrograde as it may be in denying women the same comfort as men, cannot legitimate an employer's cynically or recklessly implemented power to destroy its female employees' feet. On these grounds alone, then, the airlines' discriminatory shoe policies violate Title VII.

The fact that courts have upheld company rules prohibiting male employees from wearing long hair<sup>191</sup> might justify employers' rules prohibiting some benighted men from wearing high heels at work. However, an examination of the logic underlying the "long hair cases" reveals why they can offer no legal support to employers who compel all female employees in certain job descriptions to wear shoes that are harmful to the workers' health and that they do not want to wear. Even one of the leading cases upholding "an employer's right to exercise his informed judgment as to how best to run his shop" (by acquiescing in customers' distaste for long-haired men) was constrained to concede that an employer may not "have one . . . policy for men and another for women if the distinction is based on some fundamental right."<sup>192</sup> Thus, even if the U.S. Supreme Court has not yet been asked to hold that a worker's right not to have her body mangled is a fundamental right in the same category as the right to procreate or marry, surely a woman's right to the same degree of bodily integrity at work as men cannot be classified as "related more closely to the employer's choice of how to run his business than to equality of employment opportunity."<sup>193</sup> It would, therefore, be improbable and shocking to see a court apply the same cavalier standard to health-impair-

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188. *Knott v. Missouri Pac. R.R.*, 527 F.2d 1249, 1251-52 (8th Cir. 1975).

189. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388-89 (5th Cir. 1971).

190. *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979) (dealing with a prohibition on women wearing pants in lieu of a skirt).

191. *See, e.g., Dodge v. Giant Food, Inc.*, 488 F.2d 1333 (D.C. Cir. 1973). The EEOC took the position that such hair-length policies were discriminatory, but ceased contesting them once it became obvious that the courts unanimously disagreed. COMPLIANCE MANUAL, *supra* note 187, § 619.1.

192. *Willingham v. Macon Tele. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975).

193. *Id.*

ing high heels that it has created for depriving men of their right to express themselves by means of long hair: "If the employee objects to the grooming code he has a right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job."<sup>194</sup>

Consider the logic that underlies the airlines' sexually discriminatory shoe policies. What "legitimate business interest"<sup>195</sup> is served by instructing female flight attendants that "[d]ress shoes, with a minimum of a two inch heel . . . must be worn at all times while off the aircraft," while authorizing their male colleagues to wear penny loafers without any minimum heel height requirement on and off the airplane?<sup>196</sup> In what sense do female flight attendants "project a professional, conservative, business image"<sup>197</sup> walking through terminals in shoes that they, and many people observing them, know to be injurious to their health? For airline managers "a 'professional' flight attendant is one who has completely accepted the rules of standardization. The flight attendant who most nearly meets the appearance code ideal is therefore 'the most professional' . . . ."<sup>198</sup> This intentional sexualization of female flight attendants is underscored by the fact that airlines do not require female pilots to wear high heels.<sup>199</sup>

With the same type of customer preference justification airline management could issue the following regulations:

Based on focus group surveys that we have conducted at great expense it has become abundantly and irrefutably clear that our passengers overwhelmingly prefer and place much more confidence in female flight attendants who smoke cigarettes and male flight attendants who chew on toothpicks. Therefore, as of January 1, all female flight attendants must smoke cigarettes at all times while off the aircraft, while male flight attendants must conspicuously chew on toothpicks.

This kind of consumer-driven logic underlay Pan American's unlawful refusal to hire male attendants and prompted the federal appeals court to rule that "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome."<sup>200</sup>

Given the present state of medical enlightenment on the lethal consequences of tobacco, not even the so-called Tobacco Institute's lavishly financed, obfuscatory propaganda efforts could save this imagined policy.<sup>201</sup> It is unimaginable that any adjudica-

194. *Id.*

195. MARVIN HILL, JR. & ANTHONY SINICROPI, *MANAGEMENT RIGHTS: A LEGAL AND ARBITRAL ANALYSIS* 153 (1986) (discussing the standard for arbitrating dress code grievances under collective bargaining agreements).

196. U.S. AIR, *POLICIES AND PROCEDURES* §§ 10-30-18, 10-30-28 (Aug. 1, 1993).

197. CONTINENTAL AIRLINES, *POLICY & PROCEDURES* § 1, at app. 1 (Sept. 15, 1995) [hereinafter CONTINENTAL AIRLINES].

198. HOCHSCHILD, *supra* note 135, at 103.

199. Telephone Interview with Flight Dept., U.S. Air (Sept. 20, 1996).

200. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

201. Revealingly, at least one airline expressly informs its flight attendants that: "Smoking while walking or interacting with customers is not appropriate or professional." CONTINENTAL AIRLINES, *supra* note 197,

tor in the United States would permit such a physically injurious sexually discriminatory policy to pass muster under Title VII. Indeed, even if the employer imposed such a destructive rule nondiscriminatorily on both men and women, it is only marginally less certain that no adjudicator would uphold it under OSHA. Although the lethality of tobacco smoking exceeds that of wearing high heels, the principal reason why the sex-discriminatory heel rule does not immediately strike everyone as equally outrageous is the lack of widespread public appreciation of the crippling long-term impact of high-heeled shoes.

A potential objection to this analogy to compulsory smoking is that some women "think they want to wear high heels." Indeed, public acquiescence in or blindness toward employers' imposition of destructive shoe rules may in part be constructed on the social fact that millions of (and virtually only) women wear high heels outside of work. Yet, even apart from the fact that many people apparently also "want" to smoke, if employers are implicitly trading on this gendered difference in order to make their discriminatory shoe policies seem like second nature, such plausibility is forfeited when women resent such workplace rules and demand the right to wear comfortable shoes that resemble the shape of their feet all day long.

### *B. Recent Shoe Law Cases*

In spite of the fact that employers lack a legal basis for exercising their power to force female employees to wear unhealthful shoes there has, surprisingly, been virtually no litigation under Title VII over this issue. In 1992, the EEOC did file suit against an Atlantic City casino for maintaining a dress code for female cocktail servers that was not comparable to that for their male counterparts. Whereas the women were required to wear high heels, the men could wear comfortable dress shoes including sneakers.<sup>202</sup> Anna Grimes, the waitress on whose behalf the EEOC filed suit, stated that "her boss required her to wear three-inch heels, even though she had to have foot surgery and produced two doctors' notes saying that the heels were causing her back pain."<sup>203</sup> This particular employer might, for opportunistic litigation defense purposes, have wanted to agree with the complaining employees that the only reason that they are forced to wear "[h]eels so high they have kept many a podiatrist and chiropractor in business with ankle strains, hammer toes, knee problems and back pain" is "to sell sex."<sup>204</sup>

In this way the employer could seek to clothe itself with the authority of those court decisions that uphold the power of firms that purportedly sell sex to compel their female employees to submit to a "degrading" dress code<sup>205</sup> in order to secure an express ruling that their power extends to requiring women to deform their bodies for the greater profit of the owners of Sands Casino. The employer's cynicism is best summarized by the statement of its vice president and chief counsel that the lawsuit was "in-

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§ 1, at 1.

202. *EEOC v. Great Bay Hotel & Casino, Inc.*, No. 92-CV-2906(SSB) (D.N.J. filed July 2, 1992).

203. Pam Belluck, *Casino Waitresses Winning Right to Put It On*, SALT LAKE TRIB., Nov. 22, 1992, at A12.

204. *Id.*

205. *Harrah's Waitresses Let Their Hems Down*, LAS VEGAS REV. J., June 5, 1993, at 6B (quoting the EEOC and the American Civil Liberties Union of New Jersey).



describably silly and represents a wasteful use of scarce governmental resources."<sup>206</sup> Coming from a firm and an industry that channel scarce capital resources into one of humanity's most vital and noble missions, this criticism carries enhanced legitimacy.

Although the casino was unable to obtain any such ruling from the court, the case was settled without any resolution of the footwear issue. The workplace practice has reverted to that established by an earlier arbitration decision, which permitted female employees to wear heels no higher than 1½-inches and to wear more comfortable shoes if they could provide a doctor's note—conditions that are blatantly at odds with Title VII. At some unionized casinos in Atlantic City servers are permitted to, and do, wear flat shoes including sneakers.<sup>207</sup>

Despite this outcome, clear judicial support of a woman's right not to destroy her feet in the service of a cynical employer may yet be forthcoming. In a pending Title VII suit, cocktail waitresses at a nonunion casino in Las Vegas have sought to enjoin their employer from requiring them to wear shoes that disable them or exacerbate pre-existing foot, ankle, knee, leg, and/or back disabilities.<sup>208</sup>

Vindication of such a right would carry considerable precedential force for female workers in other industries in which employers impose shoe requirements that are even more irrational than those of the airlines. No matter how threadbare and vacuous the justifications that airline management might invent to bolster their high-heel policy, at least millions of passers-by in terminals and passengers on planes can in fact see those shoes. But can any rationality have underlain the requirement by the American Telephone & Telegraph Company, in effect as late as 1980, that telephone operators, whom customers never see, wear heels?<sup>209</sup> What possible "professionalism" pretext could banks—especially ones that take tellers' chairs away<sup>210</sup>—come up with for what can only be described as the sexist torture of forcing tellers to stand all day in unhealthy dress shoes that no one except a counter-vaulting robber would ever catch a glimpse of?<sup>211</sup> Today, much as in 1880, when *The Lancet* was urging Parliament to enact a

206. *Id.* (quoting Roberto Rivera-Soto).

207. Telephone Interview with Carol Leidy, Secretary-Treasurer Local 54, Hotel and Restaurant Employees Int'l Union (Jan. 16, 1996); Telephone Interview with Ted Lieverman, Attorney for intervening union (Jan. 17, 1996); Letter from Carol Leidy, Feb. 5, 1996 (on file with the author).

208. *Kwist v. Rio Hotel & Casino, Inc.*, CV-S-95-00229-DWH (RJJ) (D. Nev. filed Mar. 7, 1995); Eric Matusewitch, *Employers' Ability to Require Provocative Dress Is Curbed by Federal and State Civil Rights Laws*, 6 EMPLOYMENT DISCRIMINATION REP. 68, 69 (Jan. 17, 1996); John Smith, Tradition, *Changing Times Collide in Sex Harassment Case*, LAS VEGAS REV. J., July 29, 1993, at 1B.

209. Rimer, *supra* note 25; Telephone Interview with Rose Dimaggio Trela (June 5, 1996). Trela reports that the operators, who competitively spurred one another on to dress fashionably, furtively removed their heeled shoes when their feet hurt.

210. For many decades mercantile employers have sought to hide their disciplinary regimes behind customers' alleged tastes for permanently standing employees, whose sitting "might be misunderstood as indicating some laxity of attention to business." Margaret Irwin, *The Shop Seats Bill Movement*, 66 FORTNIGHTLY REV. 123, 125 (1899) (referring to firms in Scotland).

211. Telephone Interviews with personnel offices of all banks in Iowa City, Iowa (Jan. 10, 1996); Jim Hazlewood, International Representative, United Food and Commercial Workers, Financial Institution Employees of America, Local 1182, Seattle, Washington (Jan. 25, 1996); Virgene Cox, Teller, Seattle First National Bank, Walla Walla, Washington (Jan. 25, 1996). Even physicians in Nazi Germany characterized standing as a "crime against civilization." Hermann Matheis, *Bewußtes Gehen und Stehen: Die richtige Belastung*

seat law for shop assistants: "The answer is . . . that the retail shopkeeper would fain persuade himself, and have his customers believe, the ordinary business of a first-class establishment cannot be successfully conducted unless those working behind the counters . . . are kept standing with a show of occupation throughout the long hours during which the shop is kept open."<sup>212</sup>

This type of authoritarian employment practice is reminiscent of those of bygone years. Despite the fact, for example, that as early as 1917 a section of management understood that "employees should be encouraged to sit whenever the work may be done as efficiently sitting as standing,"<sup>213</sup> an early-twentieth-century federal government report on women workers found that in St. Louis:

A girl who uses the seat provided by law for her is frowned upon by those in charge and told that she is not being paid to sit down, even though there is no customer in sight. This is especially true of the 'show departments' of the store on the first floor, where a woman is likely to be severely criticized if she is not standing erect and alert every instant.<sup>214</sup>

## VI. OTHER LEGAL REMEDIES

Although it has been tried in some states, high heels cannot be legislated out of existence any more than bobbed hair, cosmetics, or liquor . . . Little will be accomplished by forbidding their general use, in spite of the fact that the far greater frequency of foot trouble in women (from five or ten to one in men . . . ) is directly due to their higher heels.<sup>215</sup>

Since workers' rights to bodily integrity are such a quintessentially occupational health and safety issue, the question arises as to why the circuitous route of anti-sex discrimination legislation has been proposed here as the main line of legal defense against employers' incursions. Workers' rights not to deform and destroy their feet are, in principle, anchored in the Occupational Safety and Health Act (OSHA), which requires every covered employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause . . . serious physical harm to his employees . . ."<sup>216</sup> Since orthopaedic foot surgeons have for years recognized and warned patients and the public about the epidemiologically and actuarially certain incidence of "serious physical harm" that will

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*des normalen Fußes*, 67 ZEITSCHRIFT FÜR ORTHOPÄDIE 135 (1938).

212. *Cruelty to Women*, LANCET, June 5, 1880, at 887. The remarkable longevity and proliferation of such managerial views is confirmed by the fact that even management at a natural food cooperative refused to consider providing chairs to its cashiers on the grounds that a sitting employee does not give the impression of working hard. Telephone Interviews with management of New Pioneer Co-Op Fresh Food Market, Iowa City, Iowa (May 1996).

213. NORRIS BRISCO, ECONOMICS OF EFFICIENCY 193 (1917).

214. 5 REPORT ON CONDITION OF WOMAN AND CHILD WAGE-EARNERS IN THE UNITED STATES: WAGE-EARNING WOMEN IN STORES AND FACTORIES, *supra* note 81, at 178.

215. MORTON, *supra* note 72, at 44.

216. 29 U.S.C. § 654(a)(1) (1988).

result from wearing precisely the kinds of shoes that airlines and other firms require female employees to wear, workers' statutory occupational health and safety rights trump employers' arbitrary and capricious wishes to pander to customers' alleged sexist images of the women who 'serve' them. Consequently, employers that impose injurious shoes on their female employees should not have an OSHA-leg to stand on.

Unfortunately, however, OSHA commits litigation exclusively to an agency (the Occupational Safety and Health Administration)<sup>217</sup> that has been so feckless and beleaguered that it avoids stepping on firms' toes for fear that Congress will massively reduce its funding and authority.<sup>218</sup> It is therefore politically unthinkable that this bureaucracy would launch such an unorthodox crusade against high heels. Moreover, a provision in OSHA has cast some doubt on whether the statute even applies to flight attendants.<sup>219</sup> Although the issue of whether the FAA's jurisdiction over airline employees' safety and health preempts OSHA's has not been definitively decided, the FAA has de facto preempted OSHA without ever having substantively exercised such jurisdiction itself. Thus, flight attendants have been deprived of the protections to which the vast majority of workers are entitled.<sup>220</sup>

One further source of legally enforceable but limited protection for some workers facing health-threatening shoe rules is the Americans with Disabilities Act (ADA). Under that federal regime, a "disability" means . . . a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."<sup>221</sup> Included among those impairments are ones under which employees are "significantly restricted as to the . . . duration" for which they can work vis-à-vis that of "the average person in the general population . . ."<sup>222</sup> Employers are prohibited under the ADA from discriminating against a "qualified person with a disability."<sup>223</sup> Discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business . . ."<sup>224</sup> The "undue hardship" referred to "means an action requiring significant difficulty or expense when considered in light of . . . the nature and cost of the accommodation," "the overall financial resources of," the number of em-

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217. *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 52 (1st Cir. 1991) ("[E]very court faced with the issue has held that OSHA creates no private right of action.").

218. Marc Linder, *I Gave My Employer a Chicken that Had No Bone: Joint Firm-State Responsibility for Line-Speed-Related Occupational Injuries*, 46 CASE W. RES. L. REV. 33, 116-34 (1995).

219. 29 U.S.C. § 653(b)(1) (1988) ("Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.").

220. *U.S. Air, Inc. v. Occupational Safety & Health Review Comm'n*, 689 F.2d 1191 (4th Cir. 1982). See generally H.R. REP. NO. 393, pt. I at 5 (1981); Matthew Finucane, *Jurisdiction of OSHA and FAA over Crew Health*, in INTERNATIONAL HEALTH CONFERENCE PROCEEDINGS: FLIGHT ATTENDANT OCCUPATIONAL HEALTH ISSUES 100-60 (1990).

221. 42 U.S.C. § 12102(2)(A) (1990).

222. 29 C.F.R. § 1630.2(j)(ii) (1995).

223. 42 U.S.C. § 12112(a) (1988).

224. *Id.*

ployees at, and the "impact" of the accommodation on the operation of, both the particular facility involved and the entire employing entity.<sup>225</sup>

Thus, if a physician certifies that a female worker who is otherwise qualified for her job has bunions or other foot deformations that make it impossible for her to wear the high heels or pumps that the employer requires, the employer would be required to accommodate her by permitting her to wear other shoes prescribed by the physician—unless the employer could show that such an accommodation would be an "undue hardship." The direct cost to the employer of permitting, for example, a saleswoman, to wear tennis shoes would presumably be zero. The employer's only escape from the duty to accommodate would consist in proving, for example, that the business would be disrupted because few customers would buy a refrigerator from a salesperson wearing comfortable footwear. That speculative evidentiary burden would be an extraordinarily heavy one, which no employer in a reported case has ever successfully borne.

This ADA approach, however, contains an important limitation. Unlike OSHA, the ADA is not a prophylactic occupational safety and health regime—it does not act prospectively to avert possible disabilities caused by workplace conditions. Thus, if an orthopaedic foot surgeon informed an employer that requiring a not-yet-disabled patient-employee to wear high heels would probably within a few years cause a disability, the ADA would not require the employer to make an accommodation to avoid that future disability.

By the same token, the successful "disabled" ADA litigant reveals a deep irrationality about employer practices. If, for example, an employer accommodated a disabled refrigerator saleswoman by permitting her to wear tennis shoes, it would presumably not require her to wear a sign stating something to this effect: "Because this employee suffers from hallux valgus, management has given her special temporary dispensation to wear these goofy shoes. We apologize for this deviation from our dress code and ask that you treat her as if she were the competent salesperson she is in high heels." The fact that the business sky did not fall on the heads of the healthily shod saleswoman, whose professionalism and ability to sell refrigerators continued unabated, would poignantly raise the question as to the justification for prohibiting the nondisabled employees from wearing healthful shoes.

## VII. CONCLUSION: LAISSEZ-FAIRE IN THE AIR AND ON THE GROUND

High-heeled shoes have been banned for women in Saudi Arabia after an edict by its grand mufti, Mohammed Ibn Baaz, who says: "They make women look taller, creating the type of misleading illusion forbidden under Islam. Women could lose balance, risking the unveiling of some 'private parts.' They cause health problems." It is expected that few women in Saudi Arabia will dare defy the edict, and a rush to buy flat shoes is expected.<sup>226</sup>

Undemocratically operated firms have required millions of women to wear unnaturally ill-fitting shoes as a condition of their employment. What makes this compulsory

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225. 42 U.S.C. §§ 12111(10)(A), (B) (1994).

226. *Mufti Illusion of High Heels*, EVENING STANDARD, Apr. 9, 1996, at 7.

wearing of high heels while working particularly ironic is that one of the historically monumental forces for democratization, the French Revolution, swept away high heels as a symbol of an oppressive and indolent aristocracy. When a new turn in fashion in the mid-nineteenth century brought them back into style, only for women, they were, once again, markers of idleness—this time of the wives of the economically active bourgeoisie who were excluded from public life and relegated to private familial and representational functions. Even a century ago the iconoclastic economist Thorstein Veblen pointed to high heels as evidence of “enforced leisure,” “demonstrating the wearer’s abstinence from productive employment.”<sup>227</sup> If such shoes had no adverse health consequences, this eternal return of fashion might, perhaps, be viewed as a merely comic instance of the cunning of history; but the fact that medical science has been warning against them for more than 250 years imparts a tragic component to this senseless imposition of pain, suffering, and, ultimately, disability.

Because the great preponderance of forefoot problems are a by-product of such inappropriate footwear, they are completely preventable. Workers and employers both must understand the predictable deleterious consequences of wearing shoes that are *contra naturam*. It is absurd that working women wear sneakers on the subway yet pumps in the office merely because male superordinates decree that the wearers of such comfortable shoes deserve as much respect as “mouseketeers.”<sup>228</sup> Rather, working women should be permitted, in fact strongly encouraged, to dress in comfortable shoes that resemble the shape of their feet all day long. It is also time for the EEOC, the FAA, the Occupational Safety and Health Administration, and the courts to recognize that women are entitled not only to whatever standards of comfort and healthfulness male workers enjoy, but to an absolute standard that prohibits employers from compelling any employee to choose between a livelihood and a lively step.

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227. THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS* 121 (1899).

228. Richard M. Goldstein, *A Sneaking Problem for Men*, N.Y. TIMES, Oct. 26, 1985, at 27. Significantly, even the strong and medically accurate feminist reply to this op-ed bemoaned that sneakers were not “professional-looking . . .” Paula Hirschhoff, *High-Heeled Instruments of Torture*, N.Y. TIMES, Nov. 5, 1985, at A30.