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Greeny V. Valbuena

DE-SEGREGATING ATTIRE: HOW APPEARANCE HAS GUIDED HISTORY

*Greeny V. Valbuena**

I. INTRODUCTION

She walks up the courthouse steps. She takes a moment and then enters the courthouse exuding confidence, wearing a blue custom tailored three-piece suit with a teal bowtie and a matching polka-dot pocket-square. All she hears is the click-clack of her pink-laced brown oxford wingtip shoes echoing on the hardwood floors, but she is almost certain that most people staring at her are experiencing a shock to their paradigm; seeing a woman in men's attire. She knows the feeling all too well, yet she still has the conviction to proceed as if she did not notice that her favorite outfit would make people feel uncomfortable. What do people see? What thoughts come across their mind when she walks past them? "Is she gay?", "Is she transgender?", or is the first thought, "Wow! She is looking dapper!" She thinks to herself on her way inside the courtroom, "society sees a girl dressed as a boy and automatically assumes that she must want to be a man, or best-case scenario, they may think to themselves, does she feel like she needs to dress like a man to earn respect in here?"

Resolving the tension between societal expectations of gender non-conformity and the current interpretation of the law will be one of the biggest challenges this society will encounter, just like the desegregation of schools. This article discusses how the law itself has been used as a tool to discriminate against those who do not fit typical societal standards. While the law continues to aid in perpetuating socially constructed norms, there still exists a tension within humanity's need to explain and identify the world around it. The article will further examine the legal and social classifications placed on race and sex, essential to the physical appearance of the individual to determine whether they will be protected under Title VII of the Civil Rights Act of 1964.

Part II examines the history of cross-dressing dating back to Norse mythology during the pre-Christian era and further examine the gradual progression of society's view of how people are presumed to dress. Part II discusses the arrival of the Europeans and their curiosity and confusion after encountering a Two-Spirit individual who was accepted despite dressing in the clothes of the opposite gender. The criminalization of cross-dressing in the United States and how the laws are interpreted by the courts, although a step closer to change, are misguided by a person's physical appearance, showing how social norms have imparted from the legal rulings given in the United States Supreme Court.

Part III explores the complexities of gender non-conformity by taking a closer look at the *Price Waterhouse v. Hopkins*[1] case and the advancements and setbacks the U.S. Supreme Court created. Part III will then touch on courtroom decorum and legal etiquette and how those rules can affect the gender non-conforming individual. Part IV discusses the history of the Courts' treatment of race as a legal category, which is exceedingly helpful in analogously understanding the meaning of sex as a legal category. This analogy will show how society continues to be affected after the decision in *Brown v. Board of Education*[2]. Part IV concludes by delineating the two seminal cases: *Brown v. Board of Education* and *Price Waterhouse v. Hopkins.* The legal history and practice demonstrates how courts have mastered the ability to turn a blind-eye and continue to place human beings in a box to label them based on their appearance.

I. CROSS-DRESSING HISTORY

A person's inability to leave their home without clothes on can be analyzed in many different ways. However, today, society would not find a naked stranger walking down the street to be appealing. The only solution then is to have the ability to cover your body in public. The difficulty comes into play when you are

* Greeny V. Valbuena, Juris Doctor Candidate, May 2018, St. Thomas

[1] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[2] Brown v. Bd. of Ed., 347 U.S. 483 (1954) [hereinafter Brown I].

staring at your closet and have no idea what to wear or, if you are lucky enough, knowing exactly what you are going to wear. You pick out your favorite outfit, which happens to be an outfit you bought in the women's section because you find the clothes in the men's section are too baggy and the clothes in the women's section fit just right.. Despite your logic, society still has a hard time comprehending why someone who physically appears masculine would wear "women's clothing" and therefore assumes your sexuality as gay.

1. The Stereotype

Generally, society places every thought, idea, and human in a box to better understand what their eyes perceive and to be able to conform to the social norm created by those who interpret the law. Society has profoundly mixed views about cross-dressing. A woman who wears her husband's shirt to bed is considered attractive while a man who wears his wife's nightgown to bed may be considered transgressive. All this may result from an overall gender role rigidity for males, because of the prevalent gender dynamic in our binary society where men frequently encounter discrimination when deviating from masculine gender roles. Hence, when a male cross-dresser puts on his clothes, he transforms into the quasi-female and thereby becomes an embodiment of the conflicted gender dynamic.

Cross-dressing is the act of not dressing in conformity to your gender-role stereotype. Cross-dressing has been around for thousands of years.[3] Most of the time, people who cross-dressed were doing so to be able to do something that was prohibited to do based on their sex, to protect someone, or even to be able to be more adventurous in life.[4]

2. The Terminology

[3] *See* Julia Day, *A Brief History of Crossdressing*, ALL THAT IS INTERESTING (Oct. 29, 2014), http://all-that-is-interesting.com/crossdressing.

[4] *See Roland Altenburger, Is It Clothes that Make the Man? Cross-Dressing, Gender, and Sex in Pre-Twentieth-Century Zhu Yingtai Lore, 64 ASIAN FOLKLORE STUD. 2, (2005).*

While many mistakenly confuse identifying concepts, cross-dressers and transgender individuals are two distinctive and independent concepts. Transgender deals with gender *identity*, while cross-dressing deals with gender *expression*. The term "transgender"[5] is used as an umbrella term to encompass the sex/gender variant. Cross-dressers, like the one described above, are those who do not conform to gender-role stereotypes about appropriate dress for a particular sex.[6] This can be understood to mean many different things. In this article, I will be using the term "gender non-conforming individual" to encompass all terms used to define transgender individuals.

In the earliest of times, gender non-conforming individuals were thought to possess such wisdom that gender-conforming individuals did not have.[7] Gender non-conforming people were admired and appreciated; however, as civilization evolved from matrilineal and communal societies to a patriarchal society, a solid class division was created, reducing the status of women.[8] As this time-period evolved, men felt threatened by the belief that the

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[5] *See* Audrey C. Stirnitzke, Note, *Transsexuality, Marriage, and the Myth of True Sex*, 53 ARIZ. L. REV. 285 (2011) (explaining that "Transgender" is a term which encompasses the sex/gender variant such as: "crossdresser," generally a heterosexual individual who temporarily acts like the opposite gender in order to express their opposite-gender side, usually not connected to sexuality; "transvestites" usually are men who dress as women as part of their sexuality.); *see also* Mary Ann C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence,* 105 YALE L.J. 1, 11 (1995) (explaining that "sex" refers to the anatomical and physiological distinctions between men and women; "gender," is used to refer to the cultural overlay on those anatomical and physiological distinctions. "While it is a sex distinction that men can grow beards and women typically cannot, it is a gender distinction that women wear dresses in this society and men typically do not.").

[6] *Note: The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence*, 78 N.Y.U. L. REV. 2177 (2003).

[7] *See* Mercedes Allen, *Transgender History: Trans Expression in Ancient Times,* THE BILERICO PROJECT (Feb. 12, 2008), http://www.bilerico.com/2008/02/transgender_history_trans_expression_in.php#oyq3acwckcu63glk.99.

[8] *Id*.

blurred gender lines gave gender non-conformists a greater insight, so they sought out to destroy gender non-conformity.[9]

3. The Incognito

Gender disguise is a prominent form of cross-dressing behavior that appears throughout history in areas ranging from theatre and the performing arts, to military service.[10] For women in particular, gender disguise served as a means to make accessible that which would otherwise have been inaccessible under traditional notions of femininity.[11] Conversely, some men have cross-dressed to avoid mandatory military service or as a facade to assist in political or social protest, such as in the Rebecca Riots.[12] Under current social norms, being gender non-conforming is generally frowned upon, but this taboo was not always in place. Some of the most powerful individuals of societies were gender non-conforming.

A. Early Civilization

Transgendered depictions of The Great Mother and Her priestesses are found in ancient artifacts dating back to the earliest civilizations in Mesopotamia, Assyria, Babylonia and Akkad.[13] Evidenced by these artifacts, transgender priestesses were either recognized as something sacred or portrayed as undergoing castration in order to subvert matrilineal rule and bereave religious direction from the control of women.[14] Records of trans priestesses date back "to the late Paleolithic (if not earlier) era,"[15] suggesting

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[9] *Id*.
[10] *See* DUTHEL, *infra* note 59, at 103.
[11] *Id*.
[12] *See The Rebecca Riots*, THE NAT'L ARCHIVES (March 5, 2017) http://www.nationalarchives.gov.uk/education/resources/rebecca-riots (explaining the Rebecca Riots were a series of protests initiated by farmers and agricultural workers after being subjected to an alleged unfair taxation).
[13] Allen, *supra* note 7.
[14] *Id*.
[15] *Id*.

that the manifestation of transgender priestesses was not a later reaction to feminine leadership and reverence.[16] Some regions, particularly the oldest European customs, appear to have considered gender transgression one's religious duty.[17] In the ancient Middle Eastern religions, the mother goddess was the great symbol of the earth's fertility.[18] She was worshiped under many names and attributes.[19] She was represented as the creative force in all nature; the mother of all things.[20] This later involved the worship of a male deity,[21] whose death and resurrection symbolized the regenerative powers of the earth.[22] Early traditions, thrived longest in Greece, especially the mythological tales of cross-dressing[23] by Achilles, Heracles, Athena and Dionysus, as well as literal and metaphorical gender changes.[24]

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[16] *Id*.
[17] *Id*. (indicating that in Europe, transgender priestesses served as Artemis, Hecate and Diana).
[18] *See* E. O. James, *The Cult of the Mother Goddess*, 59 MAN 144 (August 1959).
[19] *Id*. (demonstrating she was also worshiped in Greece, Rome, and West Asia. In Phrygia and Lydia she was known as Cybele; among the Babylonians and Assyrians she was identified as Ishtar; in Syria and Palestine she appeared as Astarte; among the Egyptians she was called Isis; in Greece she had different names like Gaea, Hera, Rhea, Aphrodite, and Demeter; and in Rome she was worshiped as Maia, Ops, Tellus, and Ceres).
[20] *Id*.
[21] *Id*. (signifying her son, lover, or both (e.g., Adonis, Attis, and Osiris)).
[22] *Id*. (describing the many attributes of the Virgin Mary make her the Christian equivalent of the Great Mother, particularly in her great offerings, in her double image as mother and virgin, and in her son, who is seen as a god and who dies and is resurrected. The blind prophet Tiresias is often mentioned as a figure who had lived many years of his life in each different gender, and was said to have possessed acute wisdom for it).
[23] *Id*. (explaining a Greek mythology attempting to subvert earlier trans-oriented legends is the tale of a transgender male character, Kaineus [Caeneus], who was viewed as a "scorner and rival of the gods" and was driven into the earth by the Centaurs. Also, Cupid, the dual god[dess] of love, originally portrayed as intersex. Moreover, the child of Hermes and Aphrodite, one of Cupid's variant names provided the origin for the term, "hermaphrodite.").
[24] *Id*.

The Greeks were often in conflict with a group of warriors called the Amazons.[25] They were later mythologized and seem to have been thought of as transgender.[26] Pliny the Younger (a lawyer, author, and magistrate in Ancient Rome) referred to the Amazons as the Androgynae, or those "who combine the two sexes."[27] They carried double-edged axes which may have been symbols of intersexuality, as were those carried by the Amazons.[28] Now going across to Albania, the Klementi tribe would recognize a virgin woman to be a man if she swore before twelve witnesses that she would not marry.[29] Once recognized, she was able to carry weapons and herd flocks.[30]

Around 60 A.D., Emperor Nero reportedly had a young slave boy, Sporus, castrated and took him as a wife in a legal public ceremony.[31] From then on, Sporus was clothed as an Empress, and accompanied Nero as such. In 218 A.D., Elagabalus (or Heliogabalus) became emperor of Rome, and in 222 A.D., Nero was assassinated, mutilated, and dragged through the streets before being thrown into the Tiber River.[32] The justification for this brutal overthrow was for Nero's affinity for wearing women's clothing and makeup.[33] In the earliest civilizations, "The Great Mother" was looked upon by many different tribes throughout Europe, Asia, the Middle East, and Northern Africa.[34] In nearly all of these traditions, male-to-female ("MTF") priestesses (often

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[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id*. (denoting the South American tribe that inspired the naming of the Amazon River).
[29] *Id*.
[30] *Id*.
[31] Allen, *supra* note 7 (indicating that in early times, "eunuching" was believed to be the primary mechanism of gender change -- "eunuchs" ranged in form, from males whose testicles had been removed to those also given a total penectomy).
[32] *Id*.
[33] *Id*. (reporting that Emperor Nero prostituted himself and even offered a large sum of money to any physician who can give him female genitalia. He also declared one of his male lovers to be his husband).
[34] *Id*.

castrated) presided, and the cultures were primarily communal systems which held women in high esteem.[35] Matriarchal in nature, the cultures often espoused peace, but the realities of early civilization and tribal existence did not always allow for this.[36]

B. The Church: Patriarchal Corset

Beginning with the rise of Christianity, and being the first emperor to adhere to Christianity, Constantine I became the sole emperor in 342 A.D. The evolution of both gender expression and gender identity throughout history shaped the standard of the Roman Catholic Church. In this article, I will use the term "church" or "Roman Catholic Church" interchangeably. Constantine's fusion of religions and state strengthened anti-trans sentiment, bolstered slavery and set the stage for medieval witch-hunts.[37] Any evidence of early matriarchal and "transgender-venerating paganism"[38] was destroyed, which evolved into the Crusades and the Inquisition.[39] Repressive laws which aimed to decimate the gender and sexuality spectrum, evolved into part of the *Corpus juris civilis*.[40] This occurred because it was necessary to the land-owners[41] to break the spirit of the peons lobbying on their behalfin the interest of anticipating uprisings.[42] The idea of communalism was demonized and the Pagan tradition was reinvented as "witchcraft."[43]

1. The Queen of Kings

[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id*. (demonstrating the Roman body of law; the basis of many legal systems, including those of England and the United States).
[41] *Id*. (illustrating The Roman Catholic Church).
[42] *Id*.
[43] *Id*.

The church homogenized the early cross-dressing heroes based on the strong idolization by the peasantry.[44] Perhaps the most well-known manifestation of this homogenization is the story of Joan the Arc. In 1429, at the age of 16, Joan of Arc, with no military experience, shaved her head and dressed in male clothing, gathered several followers who believed in her confidence that god chose her to lead France to victory in the Hundred Years' War against England.[45] She went before the court of Prince Charles of Valois and requested an army to drive out the English.[46] Charles VII granted her request, but in the spring of 1430, Joan of Arc was captured by the Burgundian and turned over to the Inquisition.[47] She was charged with witchcraft, heresy, and dressing like a man.[48] Charles VII felt threatened by the influence she had over the peasantry so he left her to fend for herself.[49]

2. The Backstabber

Slowly, gender transgression began dematerializing by the regime gradually outlawing festivals, but the most recognizable and well-rooted matrilineal festival survived the extermination; All

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[44] *Id*. (illustrating those who were female-bodied but lived as males: Saints Pelagia, Margarita, Marinus (Marina), Athanasia (Alexandria), Eugenia, Appollinaria, Euphrosyne, Matrona, Theodora, Anastasia, Papula and Joseph (Hildegund), along with bearded women Galla, Paula and Wilgefortis (Uncumber). There are no known male-to-female equivalents of transfolk elevated to sainthood, so it is quite likely that MTFs suffered a zero-tolerance agenda).

[45] *See Joan of Arc*, HISTORY (Sept. 30, 2017), http://www.history.com/topics/saint-joan-of-arc; *see also Joan of Arc, Biography*, BIOGRAPHY (April 3, 2017), https://www.biography.com/people/joan-of-arc-9354756; Allen, *supra* note 7.

[46] Allen, *supra* note 7.

[47] *Joan of Arc supra* note 42 (finding that in May of 1429, she led the army to victory at Orleans; and on July 18, 1429, she enabled the coronation of King Charles VII).

[48] *Id*. (charging her with 70 counts).

[49] *Id*. (reporting that on May 30, 1431, she was burned at the stake).

Hallows' Eve.[50] But the Church's ambivalence will continue by its continuous use of floor-length gowns and jeweled adornments. It is interesting to point out that although the Roman Catholic Church forbade the castration of youth, the trans priestesses inspired the practice of recruiting castrati for church choirs.[51] Most of these boys came from poor families and experienced rigorous training in musical conservatories.[52] They were not allowed to marry because they could not procreate[53] so many found a career in priesthood.[54]

In early modern Spain, cross dressing was prevalent and happened to be the most popular form of entertainment for theater audiences.[55] However, this amiable attitude did not last, soon Spain began passing laws targeting female transvestites throughout the 1600s.[56] This is not to say that these traditions were only

[50] *Id*. (noting that Halloween was rooted in early matrilineal Celtic society drawn from celebrations surrounding Samhain. The Celtic Winter Solstice, which was Christianized as the "Feast of Fools," survived because it evolved into a "trans-inspired mocking of the Church.").
[51] *Id.*; *See also* John Gabriel, *The Castrati*, SDOPERA (June 6, 2017) http://www.sdopera.com/Content/Operapaedia/Operas/Ariodante/TheCastrati.htm (finding that Castrati was the name given to the male singers who were castrated before hitting puberty to preserve the high voice of a boy. A practice that ruled the music world for over two hundred years. Most church music was written for high voices; but biologically, boys voices change so it was quite contradictory when almost all of Europe used Castrati. Pope Clement VIII *preferred* Castrati and proclaimed: "the creation of castrati for church choirs was to be held *ad honorem Dei*" [Latin for "to the honor of God"]).
[52] *Supra* note 45.
[53] *Joan of Arc supra* note 45 (finding that some did marry but were excommunicated).
[54] *Id*.
[55] *Monarch Profile*, *supra* note 56 (noting that during this time there was an obsession with female cross dressers. The female cross dresser was in fact remarkably popular in the "Golden age Comedia.").
[56] *Id.* (showing still to this day, this form of entertainment remains the most popular form of theatrics and would not be the same without it).

practiced in Europe; they persevered in Japan[57] and even in the Polynesian Islands.[58]

There are several types of cross-dressers and several reasons why an individual might engage in cross-dressing behavior.[59] Some may cross-dress as a matter of comfort, style, or personal preference, while others may cross-dress to simply challenge the social norms.[60] Although it is a common misconception that cross-dressing is readily apparent, this is not always the case.[61]

C. North America: The Two-Spirit Identity

In North America, as late as the 1930s, Two-Spirit Natives were noted among tribal communities.[62] The North American indigenous tribes adopted the term "Two-Spirit"[63] as a blanket term to refer to individuals who neither identifies as a traditional

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[57] Allen, *supra* note 7 (finding that Noh dramas [the oldest surviving form of Japanese theater] found their root in the harvest folk dance, dengaku).

[58] Allen, *supra* note 7 (noting that communal and trans traditions are still very much alive in parts of Samoa, Tonga, and Tahiti); *see Monarch Profile: Queen Christina of Sweden*, THE MAD MONARCHIST (May 19, 2011), http://madmonarchist.blogspot.com/2011/05/monarch-profile-queen-christina-of.html [hereinafter *Monarch Profile*] (noting that Queen Christina of Sweden took on a male persona after her father ordered that she be raised as a boy. At the early age of six, after King Gustavus Adolphus of Sweden was killed at the battle of Lützen, she became Queen of Sweden. On June 5, 1654, Queen Christina abdicated in order to convert from Protestant to Catholic, a crime punishable by death. She methodically ensured a peaceful transition of power to her cousin, King Charles X Gustav. She disguised herself as a man and began her journey to Rome.).

[59] *See* HEINZ DUTHEL, KATHOEY LADYBOY THAILAND'S GOT TALENT 102 (2013).

[60] *Id.* at 103.

[61] *Id.*

[62] *See* Will Roscoe, *Sexual and Gender Diversity in Native America and The Pacific Islands*, NAT'L PARK FOUND. (2016), https://www.nps.gov/subjects/lgbtqheritage/upload/lgbtqtheme-nativeamerica.pdf.

[63] *Id.* (noting that Europeans took it as a moment to offend and ridicule them by calling them "berdache").

male nor traditional female.[64] Two-Spirits actually cover the full spectrum of gay, lesbian, bisexual and transgender.[65] What is more captivating is the four "agreed" upon genders: feminine women, masculine women, feminine men, and masculine men.[66] They had two spirits inhabiting the same body, and were given special kind of reverence.[67] Although male two-spirits were more common, there is documented evidence that both male and female two-spirits existed in more than 130 North American tribes.[68] Jesuit priest Jacques Marquette[69] noted that in the Illinois and Nadouessi tribes, nothing was decided without their advice.[70]As land was being conquered by the Europeans, the hatred towards Two-Spirits justified annihilation of the Native culture and religion.[71]

The emergence of class divisions and the actualization of wealth and power ultimately threatened the survival of female and transgender spiritual leaders.[72] Ownership of property was the best way to promulgate wealth, which made it the cornerstone of the patriarchal movement.[73] Patriarchal societies progressively amalgamated and later established the perception that females

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[64] *Id.*
[65] *Id.*
[66] *Id.* (noting feminine men and masculine women were termed "two-spirited" because of the ability to wear both male and female clothing and be ab`le to participate in both male and female activities).
[67] *Id.*
[68] *Id.*
[69] *Jacques Marquette Biography*, BIOGRAPHY (Feb. 12, 2016) http://www.biography.com/people/jacques-marquette-20984755 (noting that Jacques Marquette was born in Laon, France, on June 1, 1637. He joined the Society of Jesus at age 17 and became a Jesuit missionary. He founded missions in present-day Michigan and later joined explorer Louis Joliet on an expedition to discover and map the Mississippi River.).
[70] Roscoe, *supra* note 62.
[71] *Id.* (noting that in 1513, explorer Vasco Nunez de Balboa mauled forty Two-Spirits by feeding them to his dogs for the simple fact that they either cross-dressed or had same-sex partners. The Spaniards committed similar genocides in the Antilles and Louisiana. The areas where Two-Spirit traditions persevered were later over-powered by missionary teachings and residential schools).
[72] *Id.*
[73] *Id.*

should be subservient, but the perplexity of gender non-conforming persons created a fear of unconventionality.[74] This assisted in the evolution of patrilineal inheritance and the rise of misogyny.[75] With the manifestation of smallpox and homophobia, the admiration for Two-Spirits soon vanished and became associated with prostitution and immorality.[76]

D. American Laws: The Draconian Cross-Dressing Laws

Clothing is a form of communication.[77] It imparts thoughts and opinions; it radiates information.[78] If you are walking down the street, before you actually verbally communicate with someone, you already begin communicating the moment that person lays eyes on you.[79] Your clothing announces your sex, age, and class; even possibly your occupation, tastes, origin, opinions, and current mood.[80] No words have been spoken yet but you have both spoken in a ubiquitous language.[81]

Just like language, dress has its own grammar and semantics.[82] Consider blue for baby boys and pink for baby girls. Or that men should wear suits to court. Or opposite buttoning to mark gender. Even from the uniforms of blue worn by police officers to the orange jumpsuit worn by inmates to black robes worn by judges. Upon a glance, you infer their status, rank, values, beliefs, and grade; just enough to know who has more power in order to respond accordingly.[83]

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[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *See* Malcom Barnard, *Fashion as Communication*, TAYLOR & FRANCIS GRP. (1996), https://fashionascommunication.wordpress.com.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *See* I. Bennett Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMAN 1, 8 (2008).

This unconscious registration has a lot to do with how the law has policed this language. Initially, this law explicitly did so. However, today's laws concerning unconscious registration includes implicit law as well. By playing this powerful role, the law has been anything but impartial. By regulating clothes and appearance, the law is also communicating hierarchies of sex, class, race, and sexuality.[84]

Sumptuary laws "manifested an aspiration to construct an 'order of appearance' that allowed the relevant social facts, in particular about social and economic status, gender, and occupation to be 'read' from the visible sins disclosed by the clothes on the wearer."[85] Notably, however, many of these laws managed to instill and police social boundaries. Queen Elizabeth even proclaimed "none shall wear cloth of gold, silver tissued, silk of purple color . . . except . . . earls and above that rank and Knights of the Garter in their purple mantles."[86] A supplemental order addressed women stating, "none shall wear any cloth in silver in kirtles only . . . except knights' wives and all above that rank."[87]

This custom of regulating the language of dress nostalgically continued in colonial America. From a 1651 Massachusetts law prohibiting those with annual incomes of less than £200 from wearing gold, silver lace or buttons, silk hoods, or "great boots"[88], to South Carolina's slave code requiring slaves to wear only "negro cloth, duffelds, coarse kearsies, osnabrigs, blue linen, checked linen or coarse garlix or calicoes, checked cottongs, or scotch plaids, garlix or calico."[89]

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[84] *Id*.
[85] *Id*.
[86] *See* MARJORIE GARBER, VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY 213 (1992).
[87] *Id*.
[88] MASSACHUSETTS & WILLIAM HENRY WHITMORE, THE COLONIAL LAWS OF MASSACHUSETTS, REPRINTED FROM THE EDITION OF 1660 WITH THE SUPPLEMENTS TO 1672: CONTAINING ALSO THE BODY OF LIBERTIES OF 1641, 123 (Nabu Press 2012).
[89] THOMAS COOPER, M.D., L.L.D. THE STATUTES AT LARGE OF SOUTH CAROLINA 396 (1838).

Sumptuary laws[90] regulating dress in Europe and pre-Revolutionary America were created to "regulate dress in order to mark out as visible and above all legible distinctions of wealth and rank within a society undergoing changes that threatened to blur or even obliterate such distinctions."[91] These laws "manifested an aspiration to construct an 'order of appearance' that allowed the relevant social facts, in particular about social and economic status, gender and occupation to be 'read' from the visible signs disclosed by the clothes on the wearer."[92] These laws laid the groundwork for creating the view that women could never reach the status of men.

1. The Invasion

Since colonial times, laws barred people from wearing clothes signifying certain professions or social classes and barred people from attempting to present themselves as a different race.[93] Then came the politicians enacting anti-crossdressing laws.[94]

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[90] *Sumptuary Laws*, ENCYCLOPEDIA http://www.encyclopedia.com/social-sciences-and-law/law/law/sumptuary-laws (regulating clothing, ornamentation, food, drink, and other forms of luxury, imposing a hierarchy of consumption. These laws prohibited certain ranks of persons from wearing specified cloths, garments, or ornamentation) (last visited Oct. 10, 2017).

[91] *See* Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 597 (2005).

[92] *See* Hunt, *supra* note 85; *see* Capers, *supra* note 83, at 8.

[93] *See* Susan Stryker, TRANSGENDER HISTORY 31, 35 (2008); *see also* Michelle Migdal Gee, *Annotation, Validity of Law Criminalizing Wearing Dress of Opposite Sex*, 12 A.L.R. FED. 1249 (1982).

[94] *See Arresting Dress: A Timeline of Anti-Cross-Dressing Laws in the United States*, NEWS DESK (May 31, 2015) http://www.pbs.org/newshour/updates/arresting-dress-timeline-anti-cross-dressing-laws-u-s/ (noting that in the 19th century twenty-eight cities passed cross-dressing laws and in the 20th century an additional twelve cities. The most recent passed by Cincinnati in 1974) [hereinafter NEWS DESK]; *see* COLUMBUS, OHIO, COLUMBUS MUN. CODE §2343.04 (prohibiting person from appearing in public "in a dress not belonging to his or her sex"). *See also* People v. Simmons, 357 N.Y.S.2d 362, 365 (N.Y. Crim. Ct. 1974) ("Cross-dressing is proscribed by the laws of several states and

2. The Beginning of a Future Disaster

In 1848, in Columbus, Ohio, one of the earliest ordinances prohibited people "in a dress not belonging to his or her sex."[95] Cities passed cross-dressing laws to deal with the post-war stirrings of gay liberation.[96] In Chicago, the law was part of a broader legal effort to "urg[e] proper sex roles by proscribing dress, reading material, and behavior . . . as part of a general rule against public lewdness and indecency," that is, to regulate homosexuality.[97] There was a widespread perception among gay men and lesbians that they needed to avoid any sort of cross-dressing in order to steer clear of violating the law for wearing too few gender-appropriate garments.[98] One author writes that there was an "understanding among gay men and lesbians in the 1950s and 1960s that they were subject to arrest unless they had on three garments appropriate to their gender."[99] The cross-dressing laws, even when they were not borne out of the desire to enforce gender norms, functioned to keep gays and lesbians in fear of not conforming. The city's attorneys described the enforcement of gender norms as an effort "to prevent inherently antisocial conduct which is contrary to the accepted norms of our society."[100] This

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municipalities."); *see* Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 597 (2005).

[95] *See* NEWS DESK, *supra* note 96.

[96] WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 3, 27 (1999) (noting that in Chicago, they termed it "sexual deviance" and in California and New York they called it "illegal deception"); *See* Capers, *supra* note 83, at 8.

[97] *See* Eskridge, Jr., *supra*, note 98, at 28; *see, e.g.*, Chi., Ill., Chicago Mun. Code § 192-8 (prohibiting a person from wearing clothes that are of the opposite sex with the intent to conceal his or her sex); Columbus, Ohio, Columbus Mun. Code §2343.04 (prohibiting persons from appearing in public "in a dress not belonging to his or her sex"); *see also* People v. Simmons, 357 N.Y.S.2d 362, 365 (N.Y. Crim. Ct. 1974) ("Cross-dressing is proscribed by the laws of several states and municipalities").

[98] *See* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1551 n.85 (1993).

[99] *Id*.

[100] *Id*.

likely refers to the discouragement of homosexuality and demonstrates that, even before the emergence of an explicitly "LGBT" community, our opponents thought of us as one entity.[101]

In *State v. William*, Henrietta William was arrested when police officers saw her not only "with a basket of splinters and a bottle of kerosene oil", but most importantly and most "disturbing" to police officers, dressed in men's clothing.[102] After telling police officers that she was a man, they threatened to strip her. [103]

The implementation of these laws created a clear line on how a man and woman are supposed to act and what they are supposed to wear. This dichotomy reinforces the idea of a binary institution of male and female.[104] These ordinances were quickly struck down by courts because of their violation of the First Amendment, which requires laws to be written in a way that are not so vague that a reasonable person would not understand.[105]

Nan Hunter has posited that the purpose and goal of crossdressing laws were to prohibit fraud usually committed by women who dressed as men to gain economic or social advantage.[106], simply to be able to be treated equally for the work performed instead of the gender they were born with.[107] The fact that society can view a man as successful for the simple fact that he were born a man shows the hierarchal dichotomy in gender-roles prescribed by society.[108]

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[101] *See* Chicago v. Wilson, 389 N.E.2d 522, 532 (Ill. 1978); *see also* Doe v. McConn, 489 F. Supp. 76, 80 (S.D. Tex. 1980).
[102] State v. Williams, 71 S.E. 832 (S.C. 1911).
[103] *Id*.
[104] Look at all the government forms and government census all with two boxes to check off: male or female. U.S. DEP'T OF COM., C2010BR-03, AGE AND SEX COMPOSITION: 2010 (May 2011).
[105] *See* D.C. v. City of St. Louis, 795 F.2d 652 (8th Cir. 1986); *see also* City of Chicago v. Wilson, 389 N.E.2d 522 (Ill. 1978); *see also* City of Cincinnati v. Adams, 330 N.E.2d 463 (Ohio. Mun. 1974).
[106] *See* ESKRIDGE, JR., *supra*, note 98, at 27.
[107] *Id*.
[108] *Id*.

III. THE VALIDATION OF GENDER NON-CONFORMITY

"[G]ender" is to "sex" as "race" is to "color"[109]

One of the foundational premises in sexual equality jurisprudence is the notion that sex and gender are two distinct facets of human identity. As a result, sexual equality jurisprudence carelessly accepts the idea of biological sexual differences.[110] With sex being examined as a product of nature, and gender being explored as a function of culture, this creates an assumption that the identities of male and female are different than the masculine and feminine characteristics illustrated best as: nature vs. culture.[111]

Some people understand cross-dressing as a way of challenging socially-constructed gender norms. These are the same people who regulate and define transgender behavior by using modern sumptuary laws to enforce the bright-line rule of what gender *should* be, thereby perpetuating the gender dichotomy.[112] These laws were designed to "protect" the community from fraud or to insulate human identity and the confusion compelled by misinterpreting gender when someone disobeyed the well-established, historical gender role.[113] Because it is not common to them, they conflate gender and sex, thereby restricting the understanding that dress is subjective.[114]

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[109] *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE. L.J. 1, 4 (1995).

[110] *See, e.g.*, Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process,* 1 BERKELEY WOMEN'S L.J. 39, 42 n.22, 62 n.113 (1985).

[111] *Id*.

[112] Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995) (noting that these laws were designed to ensure social and sexual legibility by conflating sex and gender).

[113] *See* Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (showing that those who were found to not fall in the clear-cut, "black or white," category, were punished, which created a stereotypical distinction between the sexes).

[114] *See* Menkel-Meadow, *supra* note 114 (noting that although the "reasonable person" would find the word "stereotype" to include the social processes that construct and make comprehensible, the already profound binary, of male and female. Many of the opposition, use biology as an

Although equality jurisprudence classifies sex as a suspect class, especially women, because of the historical mistreatment, anti-sex discrimination laws are chartered on the idea that sex, is "more real" than gender. This "cousin" relationship between sex and gender has shown that sexual identity or sex discrimination can be predicated on gender-conforming societal rules and roles.[115] By accepting the notion that this is actually an *effect* of gender-conforming ideology, equality jurisprudence not only errs, in producing obvious illogicalities at the margin of gender identity, but also explains why it has been unsuccessful in abolishing this unnecessary complicated, incomprehensible, complex sex segregation.[116]

The idea that sex and gender are mutually exclusive is historically devastating. This belief must be abandoned for the sanctity of correctly preserving equality jurisprudence[117] by adopting a more behavioral concept of sex where sex should be understood to include all gender-role stereotypes irrespective of the imposition placed on men and women.[118] This approach

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excuse to hierarchize the social identity of a man and a woman. Essentially, biology empowers those with the authority to create laws to further their ideology and create a pretext of inferiority of women. Such authority creates "a profoundly powerful social function." The majority of the confusion comes from the interpretation the law places on the word "sex."; *see* Franke, *supra* note 117, at 3.

[115] *See* Franke, *supra* note 114, at 3.

[116] *Id*. at 7 ("The law has had a performative effect upon sexual identity, inscribing rather than describing what it means to be female and what it means to be male according to commonly accepted social norms, rather than biology or anatomy. . . . [I]n the wage-labor market, in shattering "glass ceilings" that obstruct women's entrance into the upper echelons of corporate management, and in increasing women's wages, which remain a fraction of those paid men.").

[117] *See* Franke, *supra* note 114, at 8 (recapitulating that "[p]rior to the Enlightenment, the difference between male and female was understood vertically, as a matter of degree between two points along the continuum of humanity . . . considered sex a mutable characteristic, whereas gender was an essential, immutable, and fixed trait.").

[118] *Id.* (noting that this performative concept of sex must be understood to include all gender-role stereotypes irrespective of the imposition placed on men or women in a particular workplace).

demonstrates that sex goes beyond the inflexible biological idea that has been applied in the legal and social realm, which places conditions on what is acceptable male and female behavior.[119]

Although courts recognize that sex stereotyping is a form of sex discrimination,[120] courts have come up short by failing to protect the effeminate man under Title VII because of the continued expectation that men must be masculine. This effectively amalgamates the effeminate man with the homosexual man.[121] This suggests that feminine behavior in men is a manifestation of homosexuality instead of realizing that a label is being placed on an individual who is expressing their gender non-conformity.[122]

Courts automatically conflate conduct with status when, for example, the conduct is that of a stereotypical gay man. Society assumes that if there is a biological man who is "feminine" that he must be gay and therefore, not protected under Title VII. The error occurs when courts do not realize that the employer is discriminating against this effeminate man because society has

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[119] *Id.* (noting where the law serves to limit the range of permissible sexual meanings, it becomes an instrument of discrimination itself).

[120] Colleen Keating, *Extending Title VII Protection to Non-Gender Conforming Men*, 4 MOD. AM. 82 (2008); *see also* Joel W. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins, 14* DUKE J. GENDER L. & POL'Y 205 (2007) (analyzing the Supreme Court's holding in Price Waterhouse v. Hopkins that gender stereotyping is impermissible sex discrimination).

[121] Hamm v. Weyauwega Milk Products, Inc.,199 F. Supp. 2d 878 (E.D. Wis. 2002) (holding that the fact that plaintiff was called a "Girl Scout" was unrelated to gender and thus not covered under Title VII because he was not a victim of sex discrimination, rather, he was harassed because of his perceived homosexuality); *see also* Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (finding that Smith's coworkers comments telling him that he was not acting masculine enough and being fired after informing his supervisor of his intentions to transition into living as a woman did not fall under Title VII).

[122] *Conduct*, *Merriam Webster Dictionary* (11th ed. 2017) (according to Merriam Webster, conduct is "the act, manner, or process of carrying on").

correlated effeminate men with being gay. Society's inability to not place labels is the true problem.[123]

When employers discriminate against cross-dressers, they are being discriminated against because the employer automatically assumes that the effeminate man is gay because he has feminine qualities that do not conform to society's norm. The idea that an individual *must* conform to a legal and social definition is the agency that generates discrimination. Females must wear women's clothing and males must wear men's clothing; no "flip-flopping" is allowed. Because there is a label for those who do not conform to the gender norms created by society, that label is used to determine whether you are protected under Title VII. So according to this logic, if you compare the dapper woman and the effeminate man, both labeled as cross dressers, only the dapper woman will be covered under Title VII.[124]

Why is it that a female dressed as a man isn't automatically thought of as a trans person but if it's a man dressed as a woman, it is unfathomable? It comes from an idea that a man would never want to be compared to a woman.[125] A man would never want to be "weak" like a woman, so why would he dress like one?

A. *Price Waterhouse v. Hopkins*: The Case

The U.S. Constitution demands that everyone is created equal; respectively, *Price Waterhouse v. Hopkins* occurred.[126] The U.S. Supreme Court's decision for its proclamation that gender need not conform to biological sex was ground breaking. It held

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[123] *See* Case, *supra* note 5, at 46-70 (contending that if masculine women were protected but effeminate men could be legally discriminated against, "this would send a strong message of subordination to women, because it would mean that feminine qualities, which women are disproportionately likely to display, may legitimately be devalued).

[124] *See* Price Waterhouse, *supra* note 1; *cf.* Hamm v. Weyauwega *supra* note 124; *see* Smith v. City of Salem *supra* note 124.

[125] *See* Franke, *supra* note 114, at 81 (noting that the notion that there are real, objective non-normative "differences between the class of people we call women and the class of people we call men"; a stereotype generalizing a class of people based on an archaic hierarchy mentality).

[126] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

that Title VII protects against discrimination on the basis of sex *stereotypes*. Ann Hopkins sued her employer, Price Waterhouse, under Title VII of the Civil Rights Act of 1964[127] for gender-based discrimination. Ms. Hopkins was showered with compliments by her employer when she obtained a $25 million contract Price Waterhouse told her that she executed it "'virtually at the partner level.'"[128] However, she was denied partnership in the accounting firm because she was not feminine enough.[129] The district court found that Ms. Hopkins was discriminated against based on her sex and that Price Waterhouse failed to prove, by clear and convincing evidence, that the same decision of denying Ms. Hopkins partnership would have occurred absent her gender.[130] The court of appeals affirmed, but the United States Supreme Court reversed the court of appeals decision finding that the district court erred in requiring Price Waterhouse to prove by clear and convincing evidence,[131] but insisted that "in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive or that she must not be, has acted on the basis of gender."[132]

Many courts are reluctant to relinquish the conventions that femininity belongs to women and that masculinity belongs to men. In fact, there is no real distinction between *Doe by Doe v. City of Belleville* [133] or *Oncale v. Sundowner Offshore Services, Inc.*[134]

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[127] 42 U.S.C. § 2000e *et seq* (1991).

[128] *See* Hopkins, 490 U.S. at 233.

[129] *Id*. (stating that partners in the firm made comments noting that she was "macho" and objected to her use of profanity and because her superiors thought that she should take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry").

[130] *Id*.

[131] *Id*. (noting the standard to be by a preponderance of the evidence).

[132] *Id*. at 250.

[133] Doe by Doe v. City of Belleville, 119 F.3d 563, 568 (7th Cir. 1997) (finding that "[i]f [the plaintiff] were a woman, no court would have any difficulty construing such abusive conduct as sexual harassment. And if the harassment were triggered by that woman's decision to wear overalls and a flannel shirt to work, for example – something her harassers might perceive to be masculine just as they apparently believed [the plaintiff's] decision to

from *Price Waterhouse*. Yet *Price Waterhouse* is not mentioned in any of the foul-mouthed women, transgender, or workplace-grooming Title VII cases decided after the Supreme Court issued this momentous decision.

B. The Courtroom

Rules of courtroom decorum are distinguishable from rules of *legal etiquette*. According to State Supreme Court rules, many judges are required to maintain order and decorum in proceedings before them. "Decorum" is derived from the Latin term "dec rum"[135] meaning "dignified propriety of behavior, speech, or dress."[136] The term legal etiquette began to be used in the United States in the late 1980s.[137] It refers to the British traditional codes of "civility" or "professionalism."[138]

The Supreme Court instructs visitors "inappropriate clothing may not be worn."[139] Some courts use some sort of "reasonable person" standard of attire. For example, all persons in one court must dress "in a manner that is not *offensive* or

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wear an earring to be feminine – the court would have all the confirmation that it needed that the harassment indeed amounted to discrimination on the basis of sex").

[134] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (writing for the Court, Justice Scalia stated "as some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. . . . But statutory provisions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our law rather than the principle concerns of our legislators by which we are governed").

[135] *Decorum*, *Merriam Webster Dictionary* (11th ed. 2017).

[136] *Id*.

[137] *See* Catherine Therese Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 954-55 (1991).

[138] *See*, *e.g.,* S. Tupper Bigelow, *Legal Etiquette and Courtroom Decorum,* ADD JOURNAL NAME, 28-29 (1995).

[139] *Visitor's Guide to Oral Argument at the Supreme Court of the United States,* US SUPREME COURT http://www.supremecourtus.gov/visiting/visitorsguidetooralargument.pdf (last visited Mar. 26, 2018)[hereinafter *Visitor's Guide*].

distracting to others of *usual* sensibilities."[140] Some courts will set forth a "minimum" attire standard requiring all persons attending court to wear a shirt (blouse, sweater, etc.), pants or skirt, and shoes.[141] Other courts are not lenient requiring "all lawyers and court attendants will be properly attired and will not dress in a manner to distract from proper order in the court."[142] Another court provides that no one is to enter or remain in the courtroom with clothing "in a condition so dirty, slovenly, bizarre, revealing, or immodest so as to distract from the orderliness and concentration of the trial."[143]

Some courts provide that "judicial discretion may be exercised otherwise in extreme conditions."[144] Rule 502 of the court also requires the wearing of a judicial robe while court is in session, subject to the same "extreme conditions" exception; the latter term is not defined.[145]

A concrete definition of "extreme" does not exist. Although it is left to judicial discretion, a multitude of local rules are meant to dictate legal etiquette. However, a man dressed as a woman can be professional. A man dressed as a "professional" woman can comply with the rules already established to regulate professionalism. Depending on how masculine or feminine a man would act in women's clothing can be the determining factor, but a line must be drawn. Further considerations includes what is considered a distraction to courtroom proceedings. Moreover, people may not be able to tell the difference if the man looks like a woman, but additional considerations should be analyzed if it is apparent that there is an attorney who identifies as a man but is dressed as a woman. Because cross dressing has been criminalized

[140] Loc. R. 2.8(a), Mono Cty. Sup. Ct. (Cal.).
[141] Loc. R. 10.9, Topeka Mun. Ct. (Kan.).
[142] Loc. R. 14(E), 8th Jud. Dist. (Tenn.).
[143] Loc. R. 4(c), Siskiyou Cty. Sup. Ct. (Cal.).
[144] Loc. R. 409, Grant Cty. Cir. Ct. (Wis.).
[145] *Id*.

for so long, society views such appearance to be "wrong" or "distracting" because it is not the "norm."[146]

This is not your *typical* gender discrimination or sexual orientation discrimination, but a "reverse-gender discrimination" based on the idea that men must be seen as masculine. The fact that society has created such a strong gender-conforming, stereotypical view of a man, affects the grand scheme of things. Essentially, this misogynistic patriarchal view has created a gender bias, not only for, but for men, requiring men to dress and act a certain way. Although women were criminalized for dressing like men, it was more of a taboo or more stigmatized for a man to be seen in women's clothing.

Looking at the differences between gender and sexual orientation, attitudes towards gender-roles is a continuing problem in today's society. The pervasiveness of gender discrimination in courtrooms is apparent when the court finds men dressed as professional women unprofessional and disobeying under courtroom decorum simply because humans are innately socially constructed to have gender-role bias.[147]

Society has evolved to realize that we cannot repeat history and the best correlation to be made is that of race, where a group of people is discriminated against for something that is uncontrollable—much like gender.. The same can be said with the desegregation of schools in the 1960's in *Brown v. Board of Education*.

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[146] *See* United States v. Guerrero, 31 M.J. 692 (N-M.C.M.R. 1990) (affirming the court martial of an officer who "wrongfully dressed in women's clothing" to the prejudice of good order and discipline).

[147] *See* Sandstrom v. State, 336 So. 2d 572 (Fla. 1976) (declining to hear appeal of a male attorney convicted of contempt for refusing to wear a tie in court); *see also* In re Decarlo, 357 A.2d 273 (N.J. Super. Ct. App. Div. 1976) (finding a female attorney wearing "wool gray slacks, a matching gray sweater, and a green shirt" in contempt for improper attire); *see* United States v. Davis, 26 M.J. 445 (C.M.A. 1988) (finding male officers wearing women's clothing "to the prejudice of good order and discipline); *See* Guerrero, 31 M.J. 692 (affirming the court martial of an officer who "wrongfully dressed in women's clothing" to the prejudice of good order and discipline).

For decades, society could not wrap their minds around children going to school with other races. It was seen as "wrong" or "bizarre". But as society has evolved and desegregation of schools was seen as imperative in our society. It seems like race and gender have been the two characteristics that have been discriminated on the most in our history. People form their own opinions based on what they see with their eyes. The first thing a person does when confronted with a complex idea is place a label in order to better understand the complexity; but placing a label on a subject is the foundation of discrimination.[148] By labeling, society is creating a box for each individual because once a meaning is bestowed upon a conduct or person, it becomes difficult to think "outside the box."[149] Once the label has been used for a long time, people do not realize that the process of labeling someone becomes so automatic that people have a hard time modifying these labels *even after* scientific proof. This automatic mental process is the same process used when labeling someone by their race.

IV. DESEGREGATING ATTIRE

Repeating history by choosing to ignore the obvious

[148] *See* Franke, *supra* note 114, at 13 (noting that "[c]learly the pervasiveness of discrimination against women can be attributed, in part, to the fact that women, like people of color, are an identifiable group").

[149] *See* Franke, *supra* note 114, at 29 n. 109 (stating that the notion of schema -the concept of innately deciding what one is interested in and how it is governed by a pattern-making tendency- allows us to create a consistent understanding of shifting impressions, which helps us recognize what objects to accept, reject, or modify. Recognition is followed by placing a label, and once named, the label becomes automatic the next time it is perceived and the more names we place on objects, the greater the pool of labels becomes, which gives those who fear change more confidence in preserving the existing labels); MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO 36 (1966); *cf.* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970) ("discussing changes in original rules or 'paradigm' in the context of scientific study").

The reasoning behind not desegregating schools is as flawed as the reasoning behind not protecting cross dressers under Title VII. Race became a way of classifying individuals as a social mechanism, creating a social hierarchy dominated by the Europeans. The Europeans felt empowered by conquering and enslaving people, creating such practice.[150] In colonial America, the African-Americans and Native Americans were classified as the inferior racial class, allowing the Europeans to dominate and maintain the practice of slavery. Race was determined by the different physical traits and became the characteristic in determining their status. What amplified the social hierarchy was the fact that only African-Americans were slaves; thus, creating a racial classification based on the color of one's skin. [151]

The first race-based statute was created in Virginia, almost one hundred years before the United States gained its independence from England.[152] Soon the social hierarchy dominated the New World and more laws were passed discriminating against individuals based on their race.

The history of classifying people based on appearance has been the ultimate defect in this country. The Court's attempt in

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[150] WILLIAM Q. LOWE, UNDERSTANDING RACE: THE EVOLUTION OF THE MEANING OF RACE IN AMERICAN LAW AND THE IMPACT OF DNA TECHNOLOGY ON ITS MEANING IN THE FUTURE 72, 1120 (2010); *Statement on "Race,"* AMERICAN ANTHROPOLOGICAL ASSOCIATION, http://www.aanet.org/stmts/racepp.htm (last visited Aug. 21, 2009); Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937, 950 (1993) (noting that before early statutes regulating slavery were in place, classification based on color "encouraged the economic exploitation of blacks").

[151] *See* Finkelman, *supra* note 157; Luther Wright, Jr., *NOTE: Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 520–21 (1995).

[152] *See* Wright, Jr., *supra* note 158; Carrie Lynn H. Okizaki, *Comment, "What Are You?": Hapa-Girl and Multiracial Identity*, 71 U. COLO. L. REV. 463, 473-74 (2000) (discussing 1662 Virginia Statute that dealt with the 'uncertain status' of mixed-race children. This led to the creation of the "one-drop rule," where "if a person is known to have one percent of African blood in his veins, he ceases to be a white man. The ninety-nine percent of Caucasian blood does not weigh by the side of the one-percent of African blood. . . . The person is a Negro every time").

defining race in *Hudgins v. Wrights*[153] is one of the earliest examples where the Court determined an individual's legal classification. Judge Tucker, writing for the majority, introduced the belief that legal classification must be based on appearance.[154] This rationale was the foreground[155] of legal reasoning, which reinforced the hierarchical structure of early American society, legitimizing the law's role in shaping social ideas that accepts the subordination of those who are not white.[156]

The Supreme Court's decision in *Plessy v. Ferguson* upheld the "separate but equal" doctrine.[157] This decision gave states authority to determine a person's race classification, either "white" or "colored,", as a necessity to the states' ability to racially segregate everyone within their jurisdiction.[158] However, soon society began to question the definition of race. "A liberal race theory developed that pictured race in terms of merely superficial physical differences, and that decidedly repudiated the claim that nature placed races in hierarchical relationship to each other."[159]

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[153] *See* Hudgins v. Wrights, 11 Va. 134 (1806) (finding that the three women appealing their status as slaves were free women after they contended that in their maternal line they were all descendants from a free Indian woman, but "their genealogy was very imperfectly stated" because they *appeared* more Indian or white than not black) (emphasis added).

[154] *See* LOWE, *supra* note 157; *see* Finkelman, *supra* note 157 (noting that Judge Tucker found the women to be free "because they *appeared* more Indian or white than black."); *see* Gregory v. Baugh, 25 Va. 611, 612 (1827) (reaffirming the establishment of using external physical characteristics as the legal standard in determining whether to free a biracial slave).

[155] Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1882 (1991) (showing "virtually all law takes place in the foreground." Winter explains that "legal reasoning typically transpires without the least awareness of the background assumptions that render it intelligible. This is not the product of ignorance, inattentiveness, or false consciousness. It is, rather, an ordinary matter of psychological and intellectual efficiency.").

[156] *See* Okizaki, *supra* note 159, at 465.

[157] *See* Plessy v. Ferguson, 163 U.S. 537, 548 (1896).

[158] *See* LOWE, *supra* note 157.

[159] *Id*. at 1126.

A. *Brown v. Board of Education*: The Case

By denouncing the "separate but equal" doctrine and the use of common sense, *Brown* I[160] clarified the unquestionable meaning of the *Plessy* doctrine – "separate educational facilities are inherently unequal."[161] The Supreme Court abolished the "separate but equal" doctrine, giving the Equal Protection Clause of the Fourteenth Amendment the proper meaning and authority it had all along.[162]

Brown I was a consolidation of cases where African-America children sought aid from their state courts to gain admission to public schools on a non-segregated basis. However, Brown and the children were denied admission to white-only public schools under laws that allowed race segregation. In 1951, Brown sued the Board of Education of Topeka, Kansas in federal district court. The district court found in favor of the Board of Education, citing *Plessy v. Ferguson* as guidance.[163]
With new proposed legislative solutions created to ease post-*Brown* ramifications, it further perpetuated the marginalization of African-Americans.[164] "Derrick Bell has remarked upon Brown's 'unassertive and finally implementation' because it did not boldly rebuke the likelihood that whites were only going to abide by desegregations [sic] remedies that converged with their interest, if at all."[165]

The Court, in *Brown* II, ordered states to desegregate schools "with all deliberate speed," finally acquiesced to the ongoing social hierarchy, and succumbed to white resistance to

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[160] *See* Brown v. Bd. of Ed., 347 U.S. 483 (1954); Brown v. Bd. of Educ., 349 U.S. 294 (1955) [hereinafter Brown II].
[161] *See* Brown I, 347 U.S. at 495.
[162] *See* LOWE, *supra* note 159 at 1114.
[163] *See* Brown I, 347 U.S. 483.
[164] Bryan L. Adamson, *A Thousand Humiliations: What Brown Could Not Do*, 9 SCHOLAR 187, 190 (2007).
[165] *See Id.* at 191; *see* DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES OF RACIAL REFORM 196 (2004).

desegregate. Those in opposition to desegregation "ensured that *Brown* would never be 'implemented as a social imperative.'"[166]

Although schools continued to elude the *Brown* II decision by requiring permission[167] from the school board to allow African-American students to transfer, school boards in Virginia, South Carolina, and Georgia, perpetuated the never-ending oppression and even threatened to close their school if they integrated.[168]

B. The Abolition of the Binary

In a perfect world, society would be able to carry-on about its day without the necessity of placing labels on human beings. It is seemingly impossible to eliminate this automatic connection the brain creates to understand what the eyes are soaking in. Although society is slowly realizing that equality jurisprudence is evolving, the reality of the binary of sex and race is that both legal classifications have been guided by ones' appearance. The progression of desegregating schools after *Brown* I can be analogized with the progression of protecting both men and women[169] under Title VII after the holding in *Price Waterhouse v. Hopkins*. As noted above, every excuse possible was created to keep schools segregated. From creating laws authorizing the separation of students by sex[170] to even closing down public

[166] CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 306 (2004); *See* Adamson, *supra* note 171.

[167] *See* Adamson, *supra* note 171 (noting that this was pervasive in the South to delay integration by implementing a "pupil placement plan" where African-American students were relentlessly found to be "unfit" to transfer); *See* ROBERT J. COTTROL ET. AL., BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION 190 (2003).

[168] *See*, CHIN ET AL., *supra* note 156; *The Brown Decision in Norfolk, Va.*, LITTLE JOHN EXPLORERS, http://www.littlejohn explorers.com/jeff/brown/resistance.htm (last visited Apr. 21, 2017) (stating that the school planned to close if African-Americans seek enrollment).

[169] Whether the individual is an effeminate man, a masculine man, a feminine woman, or a masculine woman.

[170] Daniel Sheridan, School Boycott Leader Vows to Continue, Natchez Democrat, Aug. 31, 1977 (on file with the Library of Congress, Records of

schools.[171] Post-*Brown*, the Court's outlook on racial segregation is best described as one of avoidance. Similarly, courts justify its denial of protection under Title VII with a myriad of excuses to deny protection from discrimination based on sex stereotypes by using a victim's nonconformity to a particular stereotype to define, for example, a cross dresser, and then finding that discrimination on the basis of that identity class not discrimination based on sex or sex stereotypes.[172] Courts are clearly avoiding having to protect those individuals who are "extreme" gender-nonconformists, even though Title VII protects against discrimination on the basis of sex stereotypes. "Discrimination occurs when false or stereotypical differences are mistaken for real differences, and thereby similar

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the National Association for the Advancement of Colored People, V: 2570, Folder: Branches – States – Mississippi: A-J Misc., 1956-81). The argument for sex separation was that keeping black and white students separate was as natural as separating male from female. It took the Supreme Court fifteen years before it ordered schools to expeditiously produce and implement plans designed to create complete integration of schools. Green v. New Kent Cnty. Sch. Bd., 391 U.S. 430, 440 (1968). The Fifth Circuit responded by establishing a standard to evaluate the legality of those counties implementing sex segregation. Courts were to examine whether the plans for sex segregation were motivated by racial discrimination or from a legitimate educational purpose. United States v. Hinds Cnty., 423 F.2d 1264 (5th Cir. Nov. 7, 1969).

[171] Prince Edward County closed public schools for four years rather than to desegregate. Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse,* 18 YALE J.L. & HUMAN. 187, 200 (2008).

[172] Sunish Gulati, *Note: The Use of Gender-Loaded Identities in Sex-Stereotyping Jurisprudence*, 78 N.Y.U. L. REV. 2177 (2003) (supporting that this is particularly noticeable in gender-nonconforming men. Although Courts have never suggested that Title VII be applied differently to men and women, the law continues to deny such protections disproportionately to men who are not masculine.). *See*, *e.g.,* Rathert v. Peotone, 903 F.2d 510, 516 (7th Cir. 1990) (finding that male police officers disciplined for wearing ear studs while off duty was rationally related to preventing loss of respect for police); Bedker v. Domino's Pizza, 491 N.W.2d 275, 277 (Mich. Ct. App. 1992) (upholding hair-length standards, stating that for the most part, protection under Title VII does not circumscribe characteristics not inherently immutable and that have no significant effect upon the employment opportunities afforded one sex in favor of the other).

cases are mistaken as dissimilar."[173] The history of racial classification statutes and the uncertainty over the actual meaning of "sex," and the idea that feminine qualities in women are easily identifiable is a highly normative fact; that is, the process by which our brain can better understand signs as unambiguously signifying "female" or "black" is exceedingly cultural, contingent, and value-laden.[174]

V. CONCLUSION

Once society understands gender non-conforming individuals, the more accepting people will become. Currently, eight states and eight cities and local governments have adopted laws forbidding work place discrimination based on gender identity/expression, and 193 major corporations have adopted gender identity/expression nondiscrimination policies.

She exits the courtroom still exuding confidence. All she hears is the click-click of her pink-laced brown oxford wingtip shoes echoing on the hardwood floors of the courthouse, but now most people staring at her are smiling after her big win. What do people see? What thoughts come across their mind when she walks past? Could their thoughts be progressive like, "I wonder where she bought that suit?" She thinks to herself on her way outside the courtroom, "society sees a girl dressed as a boy, and they automatically assume she either must want to be a man or something. Right before she exits the courthouse, she takes a moment, takes a deep breath, opens the doors, and the snapshots begin; recording her appearance for history. History is on her side.

[173] *See* Franke, *supra* note 114.
[174] *Id*. at 13.