

## When Your Identity Is Inherently "Unprofessional": Navigating Rules of Professional Appearance Rooted in Cisheteronormative Whiteness as Black Women and Gender Non-Conforming Professionals

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# WHEN YOUR IDENTITY IS INHERENTLY “UNPROFESSIONAL”: NAVIGATING RULES OF PROFESSIONAL APPEARANCE ROOTED IN CISHETERONORMATIVE WHITENESS AS BLACK WOMEN AND GENDER NON-CONFORMING PROFESSIONALS

SHANNON CUMBERBATCH<sup>1</sup>

## INTRODUCTION

Several years ago, I attended my first large-scale career fair as a recruiter where I screened a mass of aspiring lawyers for staff attorney positions at my legal organization. During our brief break from marathon interviewing, my white colleagues shut down their tables to enjoy their downtime and as I prepared to do the same, I looked up to find a critical mass of Black<sup>2</sup> women excitedly converging upon my interview station. Forming a half circle around my table, they began exclaiming how enamored they were by my appearance and how it countered much of the counseling they had received on how to appear “professional” and “look like a lawyer.” They emphatically discussed the damage and financial expense they incurred to straighten and subdue their naturally coiled, gravity defying hair to appear “polished” and “professional” for their interviews. They shared how they spent several hours in several

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<sup>2</sup> I capitalize “Black” when referring to Black people, because as explained by Kimberlé Crenshaw, “Black [people], like Asian [people], Latin[x/e], and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.’ . . . I do not capitalize ‘white,’ which is not a proper noun, since [neither white people nor ‘people of color’ refers to] a specific cultural group.” Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1244 n.6 (1991). In this context, Black is both a racial category that encompasses many cultures and ethnicities of African descendants, and a specific culture borne out of collective resistance to anti-Black oppression and preservation of ancestral practices.

stores seeking a skirt suit that would complement their figure, but not emphasize or unveil their curves, and were ultimately forced to splurge on a tailor to appear feminine and physically appealing without being hypersexualized, since the average suit is not designed to fit their body type. They were told to wear these skirt suits with “flesh toned” stockings and “nude” makeup for a “polished” but “professional” look, and reflected upon their frustration running up and down retail aisles seeking “flesh tones” and “nude” colors that actually matched their complexion, since the “darkest” shade of most products still only reflect the darkest tone of white or light skin. They looked at me, a visibly Black woman with brown skin, wearing bold gold earrings, a large naturally curly afro, bright colored fitted pant suit, and bare-face except for a bright red lip, and questioned whether it might be possible to enter the legal profession without having to leave elements of their Black womanhood behind. They wondered if contrary to what they had been conditioned to believe, it is in fact possible to be successful in law, and to also be yourself, when your being does not fit the prototype prescribed by cishet<sup>3</sup> white male patriarchy.

Neither the hardships nor musings they shared were new to me; each experience was painfully familiar. I too had been conditioned by counselors and mentors, including well-intentioned ones of color, to contort my coils, curves and complexion to fit into spaces historically designed to exclude people like me, and even now, only occasionally allows admission on the condition that we distance ourselves from our own cultures and conform to theirs. Worse than my own firsthand experience, I’ve many times observed the trauma of Black women whose bodies were thicker than mine, skin was darker than mine, hair more tightly coiled than mine, cultural garb more distinct and style more flamboyant than mine be forced to contract—make themselves small—to fit into spaces too limited and restrictive to hold their greatness. What was revelatory in this conversation was that I had unintentionally become for some Black women what I too always tried to find in a sea of white faces in professional places—someone who looks like me, and who, based on how they present themselves, are communicating that it is okay to bring all parts of my Black womanhood with me as I enter this space. I realized that I was now the person being sought instead of the seeker, and

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<sup>3</sup> The term cishet is short for cisheterosexual and refers to someone who both identifies as their sex assigned at birth, and as heterosexual. See Sian Ferguson, *Cisgender and Straight Don't Mean the Same Thing - Here's Why*, HEALTHLINE, (Sept. 23, 2019), <https://www.healthline.com/health/cisgender-vs-straight#straight-defined>.

that I have a responsibility to prepare new professionals from marginalized backgrounds to navigate and challenge the often arbitrary and sometimes unspoken rules of professionalism that will likely be imposed upon them in the legal profession. More importantly, instead of conditioning marginalized people to conform, I have an obligation to use my access and positional privilege to disrupt the dominant culture that demands conformity to a status quo steeped in an ideology of white cis-heteronormativity<sup>4</sup>—this part is paramount and this piece is part of that effort.

In Part One, I will unearth the racist roots and oppressive ideologies that underlie the foundation upon which legal institutions and the standards of professionalism borne out of them were formed. In Part Two, I will explore the traditional standards of professional appearance in law—what the standards require of people in the profession, and how these standards are codified, communicated, and inequitably enforced. In Part Three, I will reexamine professional appearance norms through an anti-oppressive and intersectional lens, with particular emphasis on the challenges gender non-conforming people<sup>5</sup> and Black women encounter while navigating white cis-heteronormative standards of professional appearance.<sup>6</sup> In Part Four, I will acknowledge the challenges and offer some recommendations for beginning the process of creating an anti-oppressive culture and developing more equitable expectations of professional appearance in the legal profession that embrace instead of exclude people of marginalized identities and experiences.

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<sup>4</sup> Cis-heteronormative as used here is the fusion of two distinct concepts - cisgender, and heteronormative. Cisgender refers to people who identify with the sex they were assigned at birth, and heteronormative refers to ideologies and practices predicated on heterosexuality as the norm, pushing people who do not identify as heterosexual further to the margins of society. *See id.* *See also* Sophie Stone, 6 *WAYS HETERO/CIS-NORMATIVITY IS ENGRAINED IN OUR SOCIETY*, TEARAWAY, (Aug. 19, 2016), <https://tearaway.co.nz/cisheteronormativity/>. Together, cis-heteronormative is intended to refer to ideologies and practices that further marginalize transgender, gender non-conforming and queer people. *See id.*

<sup>5</sup> Gender non-conforming refers to people who do not fit the stereotypes associated with the sex they were assigned at birth. *See Fact Sheet: Transgender & Gender Nonconforming Youth in School*, SYLVIA RIVERA LAW PROJECT, <https://srlp.org/resources/fact-sheet-transgender-gender-nonconforming-youth-school/>.

<sup>6</sup> Although the experiences of gender non-conforming people and Black women are discussed in separate sections here, it is important to note that these are not inconsistent identities, and that many Black gender non-conforming people experience oppression at the intersection of transphobia, homophobia and anti-Blackness, producing a unique and often compounded experience of marginalization. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1991). *See also*, *What is intersectionality, and what does it have to do with me?*, YW BOSTON, (Mar. 29, 2017) <https://www.ywboston.org/2017/03/what-is-intersectionality-and-what-does-it-have-to-do-with-me/>.

## I. THE FOUNDATION AND FUNCTION OF LEGAL TRADITION

*“[A]s Crenshaw has pointed out, one of the central problems with race and legal education is the implicit assertion of ‘perspectivelessness’ in the teaching of a fundamentally racialized body of law . . . . The law, as an institution, functions the same way. A seemingly (and often asserted) neutral method for organizing economic, political, and social interactions, the law actually serves to protect the economic interests of the ruling class—elite white men.”*

— Wendy Leo Moore<sup>7</sup>

While legal education and the pomp and circumstance of the profession would have us believe that the law and all traditions borne out of it are to be uncritically adopted and revered as neutral practices rooted in justice, this could not be further from the truth.<sup>8</sup> Many in the profession now acknowledge that interpretation and application of the law are influenced by the racism, anti-Blackness, sexism, classism, ableism, homophobia, transphobia, xenophobia, islamophobia, etc. that plagues society, often resulting in unjust rulings, but fewer acknowledge that the law itself, as written and intended, is often designed to oppress and exclude certain demographics of people, laying the foundation for those same toxic -isms and “phobias” in larger society.<sup>9</sup> The law is an incredibly powerful tool of socialization—it shapes our perceptions of right or wrong, deserving and undeserving, and how we engage with one another.<sup>10</sup> Even the practice of personifying the law itself, rather than acknowledging the identities, interests, and true intentions of those crafting it, allows lawyers and laypeople alike to treat the law as some omniscient voice of reason whose objective operation is infallible to human error. In reality, the law is simply a set of glorified rules created and codified by imperfect human beings who may have limited or biased

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<sup>7</sup> WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS AND RACIAL INEQUALITY 17 (2008) (internal citation omitted).

<sup>8</sup> *See id.*

<sup>9</sup> *See id.* at 29. “. . . the post-civil rights legal reasoning that supports white racial group interests influences all institutions in the United States. But, with regard to law schools in particular, the force of these laws is heightened because the law also serves as the main source of authority in the legal curriculum. As such, it carries both the authority of an educational knowledge source, as well as the legal and political force of the state. Thus, the law represents one of the deepest racialized normative structures functioning to enforce and reproduce white institutional space.” *Id.*

<sup>10</sup> *See id.*

perspectives and personal interests to protect.<sup>11</sup> Since the inception of this country, wealthy white, cis-gender, heterosexual Christian slave owners and capitalists have wielded the law as their weapon of war—figuratively and literally—against people who are not white American or of European descent, and those who do not conform to heteronormative gender binaries or observe traditional European faiths.<sup>12</sup> Though sometimes used as a tool to challenge systemic injustice, the law itself is often the source of injustice that needs to be challenged.<sup>13</sup>

Through the law, wealthy white cis-gender, heterosexual men defined racial Blackness and whiteness<sup>14</sup> in direct contrast to one another to communicate and enforce social hierarchies along which rights and resources were to be stratified, with whiteness reigning supreme and Blackness branded as inherently inferior.<sup>15</sup> Lawmakers deemed whiteness a vested property interest and legally enforceable social status,<sup>16</sup> while Blackness was defined *as* property, to be policed, brutalized, disenfranchised and enslaved from birth, primarily by white people.<sup>17</sup> They used the law to stigmatize and marginalize people in poverty<sup>18</sup> and

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<sup>11</sup> See *id.* at 29. “. . .none of the studies examining legal education, whether in terms of race, class, or gender, has situated this voice within its analysis, revealing that this, too, is part of the hidden curriculum in legal education. Case law is presented to students as the voice of authority, as though handed down by God.” *Id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *id.* at 22.

<sup>14</sup> See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1736-37 (1993). “Many theorists have traditionally conceptualized property to include the exclusive rights of use, disposition, and possession, with possession embracing the absolute right to exclude. The right to exclude was the central principle, too, of whiteness as identity, for mainly whiteness has been characterized, not by an inherent unifying characteristic, but by the exclusion of others deemed to be ‘not white.’ The possessors of whiteness were granted the legal right to exclude others from the privileges inhering in whiteness; whiteness became an exclusive club whose membership was closely and grudgingly guarded. The courts played an active role in enforcing this right to exclude - determining who was or was not white enough to enjoy the privileges accompanying whiteness. In that sense, the courts protected whiteness as any other form of property.” *Id.*

<sup>15</sup> See Moore, *supra* note 7, at 15. “Beginning with the construction of a constitution that recognized and politically protected racialized slavery, white supremacy was deeply embedded in the U.S. legal structure. . . . Race and the law were fundamentally interconnected, and sociolegal constructions of race were at all moments connected to the preservation of white economic and political power.” *Id.* at 15.

<sup>16</sup> Harris, *supra* note 14 at 1725 “According whiteness actual legal status converted an aspect of identity into an external object of property, moving whiteness from privileged identity to a vested interest. The law’s construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and, of property (what legal entitlements arise from that status). Whiteness at various times signifies and is deployed as identity, status, and property, sometimes singularly, sometimes in tandem.”

<sup>17</sup> See Act XII of 2 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 170 (William Waller Hening ed., 1823). The Act proclaimed that “all children borne in this country shalbe [sic] held bond or free only according to the condition of the mother.” *Id.*

<sup>18</sup> See William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U.

those with disabilities;<sup>19</sup> to enforce gender binaries and heteronormativity;<sup>20</sup> and to systematically exclude non-Europeans from outside of the United States to maintain white cis het Christian hegemony and homogeneity in America while practicing imperialism in other countries.<sup>21</sup> So why would we assume that an institution so deeply rooted in inequity and reliant on deference to precedent in decision-making is certain to produce purely objective and just practices? Why do we uncritically replicate practices conceived at a time where the common conscience actively embraced enslavement, eugenics, internment camps and mass immigration exclusion on the basis of sexual orientation, disability and skin color without considering the extent to which our current legal traditions may be infected by these oppressive ideologies?<sup>22</sup> How can we reasonably believe that standards created when Black, Brown, and Indigenous peoples were legally excluded from legal institutions are likely to embrace our distinct identities and experiences in the profession?<sup>23</sup> Understanding that most norms in the legal profession were created in a time where the law itself explicitly encouraged active hostility toward marginalized people based on their racial, ethnic, sex, gender and religious identities, we must constantly reevaluate the standards and traditions borne out of legal institutions through an intersectional and anti-oppressive lens.<sup>24</sup>

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RICH. L. REV. 111, 130 (1997) (stating that in New Jersey, “vagrants” could be legally beaten, fined, jailed and banished for being poor).

<sup>19</sup> See KIM NIELSON, *A DISABILITY HISTORY OF THE UNITED STATES* 146 (2012).

<sup>20</sup> See *id.* at 153. “As historian Margot Canaday has shown, immigration officials also used the ‘poor physique’ category to reject individuals suspected of sexual perversion (homosexuality), having bodies with ambiguous sexual organs, or simply being undiscernibly distinctly male or female.” *Id.*

<sup>21</sup> See Naturalization Act of 1790, ch. 3, 1 Stat. 103 (stating that only free white persons of good character qualify for naturalization in the United States); *United States v. Bhagat Singh Thind*, 261 U.S. 204, 214-15 (1923) (holding that Hindu people do not qualify as white, and therefore do not qualify for naturalization, despite technically qualifying as Caucasian).

<sup>22</sup> It is worth noting that all these oppressive ideologies and practices still exist—they have simply evolved to be less explicit at times but are no less harmful.

<sup>23</sup> See MOORE, *supra* note 7, at 27 (“The white institutional space of elite law schools has as its foundation a history and legacy of white racist exclusion of people of color. Not only did this result in the white accumulation of economic and political power reaped from these institutions, but it also permitted an exclusively white construction of the norms, values, and ideological frameworks that organize these institutions.”)

<sup>24</sup> See MOORE, *supra* note 7, at 17 (“Symbolic violence, according to Bourdieu, is perpetrated by ‘every power which manages to impose meanings and to impose them as legitimate by concealing the power relations which are the basis of its force . . . gets presented as neutral, yet it imposes meanings and symbols that are associated with dominant culture, thus reproducing and ideological frame that rationalizes and reproduces structures of inequality.’”)

## II. TRADITIONAL STANDARDS OF PROFESSIONAL APPEARANCE IN LAW

*"Appearances matter in the legal industry. The way you dress can help you command respect, inspire trust, and convey a polished, professional image. Your wardrobe is a tool you can use to win the trust of supervisors, clients, opposing counsel, and judges."*

— *Sally A. Kane*<sup>25</sup>

The heavy emphasis placed upon professional appearance permeates every part of the legal profession, from the classroom to the courtroom, from the initial interview at a law office through the path to promotion. People in the legal profession are constantly being assessed on their appearance, whether explicitly indicated or not.<sup>26</sup> Conventional standards of professional presentation in law tend to be more conservative, more exacting, more expensive and more consequential than in most other industries, yet not more equitable nor clear.<sup>27</sup> Most guidance on professional appearance in law involves some conclusory yet amorphous terms and subjective standards, like "polished," "well-groomed," "respect[ful]," "conservative," "appropriate," and while shamelessly defining the word with the word, "professional," leaving many subject to evaluation under unclear expectations.<sup>28</sup> Even where professional appearance policies provide more precise details, the standards are not consistently applicable across all offices or courtrooms in every jurisdiction, and certainly are not always equitably enforced across identity.<sup>29</sup> Susan Scafidi, founder and director of the Fashion Law Institute and a law professor at Fordham University attests to the variance in professional dress standards throughout the profession, stating that

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<sup>25</sup> Sally Kane, *Law Firm Dress Code for Women: The Good, the Bad, and the Ugly*, BALANCE CAREERS, (accessed Aug. 13, 2019), <https://www.thebalancecareers.com/law-firm-dress-code-for-women-2164255>. The text of Kane's article has since been updated; all references in this paper are to the article as originally published, and accessed most recently in August 2019.

<sup>26</sup> See Adrian Furnham et al., *What to wear? The influence of attire on the perceived professionalism of dentists and lawyers*, 43 J. APPLIED SOC. PSYCH. 1838, 1843-45 (2013) (this study demonstrates that individuals thought attorneys with formal dress were more capable in respect to their profession than those in casual or smart attires).

<sup>27</sup> See Liane Jackson, *Lawyer Fashion Evolves to Reflect Personality and Tradition*, A.B.A.J. (Feb. 1 2018, 12:30 AM), [http://www.abajournal.com/magazine/article/lawyer\\_fashion\\_reflects\\_personality\\_tradition/P1](http://www.abajournal.com/magazine/article/lawyer_fashion_reflects_personality_tradition/P1)

<sup>28</sup> See Kane, *supra* note 24.

<sup>29</sup> See Jackson, *supra* note 26.

[T]he rules vary from court to court, jurisdiction to jurisdiction. In family court, you dress differently than you would in criminal court or appellate court . . . . With that being said, it is still true that the courtroom is the last bastion of formality in America. We've stopped dressing up for the theater, for church, but when it comes to court, there are still rules.<sup>30</sup>

The lack of consistency in professional standards across offices and jurisdictions is also reflected in the research conducted by MM.LaFleur, a styling company for professional women.<sup>31</sup> MM.LaFleur conducted a focus group with women attorneys to assess current fashion trends, and their stylists were shocked by the differences in professional dress norms in various jurisdictions, noting that “in certain counties, women had to wear skirts to court and could not wear pants . . . . Women in New York said wearing anything cropped made them look less serious. Color was very important in court—stick to neutrals—black, navy, charcoal. Others came in and said, [w]hen I'm in the office, I can wear anything.”<sup>32</sup>

The Virginia Board of Bar Examiners, however, rejects any allowances other spaces make for casual attire, and even imposes a mandatory dress code upon aspiring lawyers taking the bar exam.<sup>33</sup> Their policy states that “law firms . . . have ‘dress down’ policies of varying descriptions. There is no ‘dress down’ or ‘casual dress’ policy at the Virginia Bar Exam.”<sup>34</sup> As recently as 2017, the policy stated that test takers were “expected to dress in proper attire. For men, proper attire [was] coat and tie. For women, proper attire [was] traditional business attire.”<sup>35</sup>

This version of the policy provided no specific guidance at all for anyone who does not identify as a man or express their gender through masculine presentation; it assumed that everyone operated on a gender binary—identifying as either man or woman, and that all women have a clear, consistent, shared understanding of what constitutes “traditional

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<sup>30</sup> *Id.* (internal quotation marks omitted).

<sup>31</sup> *See id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See Mandatory Dress Code*, VA. BD. BAR EXAM'RS, <https://barexam.virginia.gov/bar/barmdc.html> (last visited Sept. 19, 2020).

<sup>34</sup> *Mandatory Dress Code*, VA. BD. BAR EXAM'RS, <https://barexam.virginia.gov/bar/barmdc.html> (last visited Nov. 20, 2017), [<https://web.archive.org/web/20171120175030/https://barexam.virginia.gov/bar/barmdc.html>].

<sup>35</sup> *Id.* The policy was recently revised in 2020 to remove the gendered language and replaced “professional attire” with “court attire” and included more specific examples. See current policy at <https://barexam.virginia.gov/bar/barmdc.html> (last visited Sept. 19, 2020).

business attire.”<sup>36</sup> Beyond the exclusion of non-binary people and lack of clarity for women, the original policy did not contemplate the existence of those who wear traditional attire consistent with their culture or religion.<sup>37</sup> The policy was updated in 2020 to remove the gendered language, replace “proper attire” and “traditional business attire” with “court appropriate attire” and provide a more specific definition that includes “a dress, skirt and jacket or pantsuit” in addition to a jacket with a tie.<sup>38</sup> Instead of offering examples, the new policy presents specific definitions of “court appropriate attire,” which though more expansive than before, still leaves little room for certain cultural or religious garb, for example.<sup>39</sup> Nevertheless, as it pertains to dress policies generally, it is certainly an improvement to no longer require that examinees dress along a gender binary nor that women somehow infer specific guidance from vague, conclusory language to determine appropriate attire.<sup>40</sup> Unfortunately, the original Virginia Board of Bar Examiners policy is not an outlier in the legal community, as many other dress codes have failed to revise their policies, still lending themselves to ambiguity and complete erasure of identities that do not currently dominate positions of power in the profession.<sup>41</sup> For example, the standards for professional dress in the United States Bankruptcy Court of The Western District of Texas reads:<sup>42</sup>

Courtroom attire should be restrained and appropriate to the dignity of the United States Bankruptcy Court. For all lawyers, experts, and witnesses appearing in the capacity of an officer or other business representative, this means professional attire. Professional attire for men is a suit or blazer/jacket and tie. Professional attire for women is a suit, blazer/jacket, conservative dress, or comparable professional attire.<sup>43</sup>

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<sup>36</sup> See Michael Smith, *Bar Exam Dress Codes*, MICHAEL SMITH'S LAW BLOG (Jul. 31, 2014) <https://smithblawg.blogspot.com/2014/07/bar-exam-dress-codes.html> (providing the text from the policy in place at the time this note was written). See also *Mandatory Dress Code*, *supra* note 32 (providing the policy currently enforced by the Virginia Board of Bar Examiners).

<sup>37</sup> See *id.*

<sup>38</sup> See *supra* notes 33-34.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

<sup>41</sup> See *e.g.*, United States Bankruptcy Court of the Western District of Texas, *Courtroom Attire*, <https://www.txwb.uscourts.gov/courtroom-attire> (last visited Mar. 29, 2020).

<sup>42</sup> See *id.* (providing explicit instructions for only those who identify as either a man or a woman).

<sup>43</sup> *Id.*

While providing some greater detail for women, this policy provides no guidance for people who are gender non-conforming, do not identify along gender binaries, or who express their culture or religion through distinct garb.<sup>44</sup> It also draws an unnecessary correlation between respecting the dignity of the court and adhering to very specific “restrained” and “conservative” attire standards without regard for the degree to which the dignity of the individual is eroded by such strict limitations on self and cultural expression.<sup>45</sup>

Like those above, many professional dress guidelines are gendered, crafted along the lines of conventional man/woman binaries, and are arguably unnecessarily restrictive if not completely ambiguous. When more expansive detail is provided, it is often with greatest emphasis on what is or is not appropriate for women in particular.<sup>46</sup> For example, in an article detailing standards for business presentation in law, Sally Kane, attorney, legal content marketing director, writer and consultant with Law Box Communications advises:

A neat, well-groomed hairstyle is a must. Long and short styles are both appropriate for women, as long as the style is neat and professional. Classic hairdos such as a low ponytail or bun look polished and professional for longer hair. Avoid wild, untamed or overly teased styles, and never dye your hair in unnatural colors such as pink or blue. . . . Jewelry and accessories should be tasteful and limited. Hosiery should be sheer, tan, nude, or another light color.<sup>47</sup>

Though containing some of the usual vague and conclusory language, Kane elaborately provides more specific examples of conventional thought on how women in the legal profession should groom and accessorize themselves for work.<sup>48</sup> In my experience, Kane’s advice echoes the standard guidance given to women across the country as they prepare to enter traditional professions like the law. I will later discuss how these standards are not equitably applied among women with various backgrounds and identities, but for now it is worth noting the level of scrutiny every aspect of a woman’s appearance is subjected to in common standards of professional appearance.

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *See e.g.* Kane, *supra* note 24 (describing what a woman should and should not wear).

<sup>47</sup> *Id.*

<sup>48</sup> *See id.*

Understanding the emphasis placed on appearance in the legal profession, many law schools are also offering career counseling to help students navigate conventional norms of professional dress in law, much of which echoes the advice of Kane and continues to place the most meticulous emphasis on the appearance of women.<sup>49</sup> Priya Alika-Ellias shares the guidance she received from her law school, stating:

They told us that big hoop earrings were unprofessional; that open-toe shoes were not preferred; that we should test skirt lengths by kneeling and seeing if the skirt hit the floor. Blouses, they said, could dip three fingers' length below the collarbone (not further). No ostentatious jewelry or accessories. . . . When the big firms came calling for interviews, we were advised to wear foundation, blush, a suitably demure lipstick shade, and suitably demure nails. (None of us could agree on what “demure nails” meant: only that any color called ‘Vamp Scarlet’ was probably off the table.)<sup>50</sup>

The advice given to this student, like that of Kane, includes ambiguous terms and implicitly but with greater detail guides women to appear “restrained” and “conservative”<sup>51</sup> from head to toe while also subtly conforming to certain standards of feminine beauty and chastity—a standard not similarly imposed upon men when told how to appear professionally.

Much like this advice to law students, many grooming policies in the profession have moved away from a limited list of what is acceptable and toward a list of what is *not* acceptable, leaving the range of acceptable options open to interpretation and exploration.<sup>52</sup> For example, the State of New York actually has no explicit guidelines for appropriate courtroom attire, yet individual judges may still have specific expectations of attorneys and clients appearing in their courtrooms, whether stated explicitly or not.<sup>53</sup> The U.S. District Court for the Eastern District

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<sup>49</sup> See Staci Zaretsky, *A Message from Career Services: Ladies, Please Learn How to Dress Yourself*, ABOVE THE LAW, (Nov. 21, 2011, 1:21 PM), <https://abovethelaw.com/2011/11/a-message-from-career-services-ladies-please-learn-how-to-dress-yourself/>.

<sup>50</sup> Priya-Alika Elias, *What Does Dressing ‘Professionally’ Mean for Women of Color?*, VOX (Mar. 8, 2018, 1:00 PM), <https://www.vox.com/2018/3/8/17096202/>.

<sup>51</sup> The details of this guidance imply the requirement explicitly imposed by the Virginia State Board of Bar Examiners. See *Mandatory Dress Code*, *supra* note 32.

<sup>52</sup> See e.g., Jeanette Coleman, *The Dos and Don'ts of Workplace Dress Codes*, AX CET HR SOLUTIONS (July 2, 2019), <https://blog.axcethr.com/the-dos-and-donts-of-workplace-dress-codes>.

<sup>53</sup> See United States District Court Southern District of New York, *Is there a Dress Code?*, (April 19, 2018) <https://nysd.uscourts.gov/node/175>; Gordon Exall, *Does What You Wear Matter?*

of New York for instance states that “Proper court attire is mandatory. No jeans, shorts, tank tops, sweats or other very casual attire is permitted.”<sup>54</sup> Like many modern professional dress policies, the court here simply states that “proper” court attire is mandatory, without explaining what is considered proper court attire.<sup>55</sup> Instead of providing guidance on what is acceptable, the court provides a few examples of what is not.<sup>56</sup> Ideally, a specific list of unacceptable attire would suggest that the universe of acceptable options is vast and varied, leaving plenty of room for individual expression. And while some may feel that they have more options with less specific guidelines for professional dress, others may feel this ambiguity leaves them vulnerable to inequitable application of implicit standards, and that in practice, many marginalized people do not have any options at all that would have their appearance deemed professional by those in positions of power in law.<sup>57</sup>

### III. RE-EXAMINING PROFESSIONAL APPEARANCE NORMS IN THE LAW THROUGH AN INTERSECTIONAL AND ANTI-OPPRESSIVE LENS

*“Judgments about aesthetics do not exist apart from judgments about the social, political, and economic order of a society. They are an essential part of that order. Aesthetic values determine who and what is valued, beautiful, and entitled to control. Thus established, the structure of society at other levels also is justified.”*

— Paulette Caldwell <sup>58</sup>

#### A. Gendered Norms in Professional Appearance Standards for Women in Law

Women were historically systematically excluded from the legal profession.<sup>59</sup> The courts stated that women had no legal identity

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*Guidance for Advocates and Litigants*, CIV. LITIG. BRIEF (Nov. 20, 2018), <https://www.civillitigation-brief.com/2018/11/20/does-what-you-wear-matter-guidance-for-advocates-and-litigants/>.

<sup>54</sup> United States District Court Eastern District of New York, *Is There a Dress Code for Jurors?*, <https://www.nyed.uscourts.gov/court-info/faq?page=12> (last visited Mar. 29, 2020).

<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> *See Elias, supra* note 49.

<sup>58</sup> Paulette M. Caldwell, *A Hair Piece: Perspectives On The Intersection Of Race And Gender*, 41 DUKE L. J. 365, 393 (1991) (discussing the court’s decision in *Rogers v. American Airlines*).

<sup>59</sup> *See Audrey W. Latourette, Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859, 859-61 (2005).

independent of men,<sup>60</sup> and this ideology is reflected in early iterations and some current expectations of professional dress for women, such as the two piece business suit derivative of men's business wear.<sup>61</sup> Professional appearance norms have subtly shifted over time for women, moving from the pantsuit to the skirt suit, to the sheath dress and jacket, to the variety of suits and separates, depending on jurisdiction.<sup>62</sup> Some celebrate this shift as a sign of women emerging from the shadows of men in professional spaces.<sup>63</sup> In an American Bar Association (ABA) article about shifting norms in professional dress, Tasha Brown stated, "[W]hat I don't believe is that you have to dress like a man version of something to be professional, a respected lawyer and appropriate."<sup>64</sup> Brown acknowledges that women need not emulate men to be professional or thrive in law and can express their own professional identities distinct from that of men.<sup>65</sup> Danielle J. Schivek takes this sentiment a step further to say that women *must* reject masculine norms of professional attire and just *be* women, as if masculine presentation is inherently inconsistent with womanhood.<sup>66</sup> In her article the *Rewritten Rules of Power Dressing*, she says, "While the 'Power Suit' was the uniform of choice for a generation of independent, career-minded women who fought for a 'seat at the table,' the modern woman must cast off the chains of patriarchal fashion and embrace the styles sported by her contemporaries. Assuming a masculine facade is an antiquated expectation of the modern woman."<sup>67</sup> While I am excited to see women expressing their personalities through professional appearance independent of men, there is a line between women having the freedom to express themselves how

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<sup>60</sup> See SUSAN E. MARTIN & NANCY C. JURIK, *DOING JUSTICE, DOING GENDER: WOMEN IN LEGAL AND CRIMINAL JUSTICE OCCUPATIONS* 108-09 (2006).

<sup>61</sup> See Erica Euse, *The Revolutionary History of the Pantsuit*, VICE (Mar. 21, 2016, 12:00 AM), [https://www.vice.com/en\\_us/article/wd7vey/the-history-of-the-pantsuit-456](https://www.vice.com/en_us/article/wd7vey/the-history-of-the-pantsuit-456) ("[Wearing a pantsuit] was the expectation at the time if you were to be taken seriously as a business woman, but women were still criticized for trying to emulate men, because it was a derivative of menswear," says Shira Tarrant, professor and author of *Fashion Talks: Undressing the Power of Style*.)

<sup>62</sup> See Áine Cain, *THEN AND NOW: The progression of work fashion from the 1950s to today*, BUS. INSIDER (Aug. 3, 2018, 2:55 PM), <https://www.businessinsider.com/work-clothes-history-2018-6>. See also Elizabeth Segran, *The outrageous, deeply sexist history of the pantsuit*, FAST CO. (Oct. 15, 2019), <https://www.fastcompany.com/90393935/the-outrageous-deeply-sexist-history-of-the-pantsuit>.

<sup>63</sup> See Segran, *supra* note 57.

<sup>64</sup> See Jackson, *supra* note 26.

<sup>65</sup> See *id.*

<sup>66</sup> See Danielle J. Schivek, *The Rewritten Rules of Power Dressing*, N.Y. L.J. (Sept. 20, 2017, 12:00 AM), [law.com/newyorklawjournal/sites/newyorklawjournal/2017/09/20/the-rewritten-rules-of-power-dressing/?slreturn=20200013021453](http://law.com/newyorklawjournal/sites/newyorklawjournal/2017/09/20/the-rewritten-rules-of-power-dressing/?slreturn=20200013021453).

<sup>67</sup> *Id.*

they please and imposing institutional expectations based on binary definitions of womanhood rooted in traditional femininity. The latter fails to successfully decenter men in women's clothing choices and may be oppressive instead of liberating for women whose gender identities or expression directly conflicts with traditional conceptions of femininity.<sup>68</sup>

It is also important to note that this institutional shift is partly in response to white cishet male desires that women exude femininity, even in professional spaces, a requirement which further centers men and reinforces gender binaries through expectations of women's appearance.<sup>69</sup> The demand for traditional femininity performance for women is also seen in expectations that women wear makeup as part of their professional presentation.<sup>70</sup> Many professional appearance guidelines for women seem designed to make them physically appealing yet non-threatening to white cishet male authority.<sup>71</sup> For example, as mentioned above, skirt suits or dresses with blazers are often preferred to implicitly command power without men feeling undermined by a woman's masculine presentation.<sup>72</sup> Women are told that clothing should accentuate their figure but not be "too tight", "too baggy" nor "too revealing," and makeup should be worn but subtly so, likely so that the wearer is just attractive enough to appease the white cishet male gaze without appearing too liberated in their self-expression.<sup>73</sup> For what other purpose would women in particular be expected to wear makeup in order to appear "polished" beyond appeasing aesthetic demands rooted in

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<sup>68</sup> See Amy Billing, *Feminine Dress: Oppression or Self-Expression*, MEDIUM (Apr. 20, 2018), <https://medium.com/@amybilling/feminine-dress-oppression-or-self-expression-b590e1b4fca7>.

<sup>69</sup> See e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (discussing a woman who was denied partnership at an accounting firm after failing to act more feminine).

<sup>70</sup> See Catherine S. Louis, *Up the Career Ladder, Lipstick In Hand*, N.Y. TIMES (Oct. 12, 2011), <https://www.nytimes.com/2011/10/13/fashion/makeup-makes-women-appear-more-competent-study.html>.

<sup>71</sup> See *Hopkins*, 490 U.S. at 235 (noting how Hopkins was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.") (internal quotation marks omitted).

<sup>72</sup> See Jackson, *supra* note 26 ("Women lawyers I meet . . . want to look beautiful but not provocative. Even seven years ago, women were dressing to fit in, to challenge men—and that was their way to compete with their colleagues. Now, it's stronger and more to their benefit to just be women."); see also Euse, *supra* note 61. "In most business offices, the pantsuit is often a failure outfit. . . [sic] If you have to deal with men, even as subordinates, you are putting on trouble. . . [sic] If you want to be a liberated woman, burn your polyester pantsuit, not your bra. The polyester pantsuit will keep you in corporate serfdom, while your bra can help you up as well as hold you up." *Id.* (internal quotation marks omitted).

<sup>73</sup> See Alli Kirkham, *How Society Polices Women's Clothing (No Matter What We Wear)*, EVERYDAY FEMINISM (Apr. 16, 2015), <https://everydayfeminism.com/2015/04/policing-womens-clothing/>. See also Louis, *supra* note 70.

feminine desirability? I do believe that women, regardless of sexual orientation, can independently decide to—and feel empowered in—expressing their femininity through professional appearance without centering men. I proudly do so myself. My commentary is on the context in which such guidelines are created, not the choices of people whose own presentation preferences align with them.<sup>74</sup> When it becomes less of a choice and more of an expectation imposed through appearance standards in a profession where white cishet male authority sets the standards, we must interrogate the foundation and function of the practice imposed and who it is designed to serve, control or exclude.

*B. Navigating Gendered Norms as Gender Non-Conforming People*

At best, professional dress standards delineated by gender fail to account for gender non-conforming people and provide no guidance to those who do not identify as a man or a woman, or express their gender on such a binary.<sup>75</sup> At worst, such policies are deliberately designed to reinforce gender binaries, implicitly communicating that the beings and bodies of people who fail to conform do not belong in professional environments.<sup>76</sup> While many policies may have just been written at a time where gender non-conforming and non-binary people were pushed so far to the margins of society that people in positions of power overlooked their existence when establishing standards, the law has also explicitly validated employer’s interests in reinforcing gender binaries through attire and grooming policies.<sup>77</sup> In *Willingham v. Macon Tel*

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<sup>74</sup> As with all things, we should note the extent to which our preferences are informed by institutional conditioning, the ways in which we are rewarded for complying, and how this reward system informs our sense of self-worth. For example, without any external expectations, one may not prefer a business suit, but upon being treated poorly when not wearing a suit and being treated favorably when wearing a suit, one may begin to feel disempowered without a suit and empowered with a suit in professional spaces, which is no longer just a result of one’s own individual preference, but a reflection of how they are treated when one makes either choice. It is also possible that in participating in the norms imposed, one finds that it suits them well and decides to deliberately participate in the practice, even when no longer imposed.

<sup>75</sup> See Jennifer L. Levi, *The Interplay Between Disability and Sexuality: Clothes Don’t Make the Man (or Woman), But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 90-104 (2006).

<sup>76</sup> See Doreen Pierre, *The Problematic Politics Of Style And Gender Identity In The Workplace*, HUFFPOST (Sept. 12, 2019, 5:45 AM), [https://www.huffpost.com/entry/style-gender-identity-workplace\\_1\\_5d711924e4b09bbc9efab37c](https://www.huffpost.com/entry/style-gender-identity-workplace_1_5d711924e4b09bbc9efab37c) (explaining that dress policies reinforcing the repression of gender identities outside of heteronormative standards make individuals believe one’s gender identity is not respected in the workplace).

<sup>77</sup> See Robert J. Tracy and Maja Szumarska, *Are Dress Codes and Grooming Policies a Source of Potential Liability for Employers?*, N.Y. L.J. (Aug. 23, 2019, 2:00 PM), <https://www.law.com/newyorklawjournal/2019/08/23/are-dress-codes-and-grooming-policies-a-source-of-potential-liability-for-employers/> (explaining that employers should review their established dress and grooming policies in light of recent state and local laws protecting employees

*Publ'g Co*, the district court for the Middle District of Georgia decided in favor of an employer that prohibited men but not women from wearing long hair, stating:

[I]f it be mandated that men must be allowed to wear shoulder length hair despite employer disfavor, because the employer allows women to wear hair that length, then it must logically follow that men, if they choose, could not be prevented by the employer from wearing dresses to work if the employer permitted women to wear dresses. While dresses on men would be a greater departure from the norm than is long hair, if plaintiff be correct, it cannot be gainsaid that to prevent men from wearing dresses while allowing women to do so would discriminate against the rights of men, and such discrimination would be present in the same manner as it would be present when men are prohibited by employers from wearing long hair. Continuing the logical development of plaintiff's proposition, it would not be at all illogical to include lipstick, eyeshadow, earrings, and other items of typical female attire among the items which an employer would be powerless to restrict to female attire and bedeckment. It would be patently ridiculous to presume that Congress ever intended such result . . . .<sup>78</sup>

The court's position is unsurprising, not just given the time period, but given that the law itself has a history and present practice of violently enforcing gender norms through policing,<sup>79</sup> criminal law,<sup>80</sup> and

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from discrimination based on gender identity or expression in the workplace). *See also* Dana Wilkie, *When Do Dress Codes That Perpetuate Gender Stereotypes Cross the Line?*, SOC'Y OF HUM. RESOURCES (Mar. 18, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/gender-discrimination-in-dress-codes.aspx> (stating that gender-based dress policy may pass legal muster if the company reimbursed female employees for the clothing they were required to wear).

<sup>78</sup> *See* *Willingham v. Macon Tel. Publ'g Co.*, 352 F. Supp. 1018, 1020 (M.D. Ga. 1972), *rev'd*, 482 F.2d 535 (5th Cir. 1973). Note that such gendered grooming policies, particularly as it relates to hair length, may be discriminatory against Black and Native men in particular, who may wear longer styles as part of cultural expression. *See* Carolyn D. Richmond et al., *Workplace Hairstyle Policies May Be Discriminatory, NYC Warns*, FOX ROTHSCHILD LLP (Feb. 22, 2019), <https://www.fox-rothschild.com/publications/workplace-hairstyle-policies-may-be-discriminatory-nyc-warns/> (explaining that workplace grooming policies that disparately discriminate against Black people and Native based on hairstyles violate the law).

<sup>79</sup> *See* *When enforcing gender norms turns violent*, PBS NEWSHOUR (May 31, 2015, 11:30 AM), <https://www.pbs.org/newshour/nation/enforcing-gender-destroys-individual-identity-todays-youth> (explaining that individuals were subject to gender policing through laws allowing police to arrest individuals for not wearing gender-appropriate clothing decades ago and are still victims of gender policing in modern times).

<sup>80</sup> *See* *Body Politics: A Primer on Criminalization of Sexuality and Reproduction*, AMNESTY INT'L

immigration law,<sup>81</sup> among others. The legal tradition of stigmatizing, marginalizing, and excluding gender non-conforming people both influences and reflects societal disdain for this demographic.<sup>82</sup> Like the law, gender binary appearance policies project, reflect and protect the profession's expectations of gender performance.<sup>83</sup> Policies that exclude or do not contemplate the existence of gender non-conforming people implicitly communicate that they do not belong in professional spaces.<sup>84</sup> The fact that someone's gender identity or expression seems to be in violation of a professional policy may also be used as justification for their maltreatment.<sup>85</sup> For example, this can manifest in unfair evaluations of their overall “professionalism” for failure to meet gendered standards, but can also result in people feeling justified in ostracizing them based on their gender identity or expression.<sup>86</sup>

I recall that one professional peer who identifies as a woman, but does not express her gender through traditionally feminine presentation and may be described as more masculine presenting, was referred to as “he-she” by an officer in open court while advocating for clients in criminal proceedings. In the same jurisdiction, a client who identifies as a Black

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at 17 (2018), <https://www.amnesty.org/download/Documents/POL4077632018ENGLISH.PDF> (stating that laws that criminalize sexuality are often applied disproportionately against gender non-conforming people).

<sup>81</sup> See, e.g., *Gendered Paths to Legal Status: The Case of Latin American Immigrants in Phoenix, Arizona*, IMMIGR. POL'Y CTR. (May 2013), <https://www.americanimmigrationcouncil.org/sites/default/files/research/genderedpaths052813.pdf> (stating that immigration law is in fact not gender neutral, but rather contains biases for women trying to gain legalization through the current immigration system).

<sup>82</sup> See generally Amanda Babine et al., *Dismantling Stigma in the Transgender and Gender Non-Conforming Community*, N.Y. TRANSGENDER ADVOC. GROUP (Mar. 2019), [https://static1.squarespace.com/static/5b05b943697a98664e663ab4/t/5d162f60b5eba8000164797b/1561735009693/NYTAGDismantlingStigma\\_Final.pdf](https://static1.squarespace.com/static/5b05b943697a98664e663ab4/t/5d162f60b5eba8000164797b/1561735009693/NYTAGDismantlingStigma_Final.pdf) (explaining that lack of legal protections on the part of legal institutions creates a hostile environment for gender-nonconforming people and, as a result of not fitting into the gender binary, members of the gender non-conforming community are rejected by mainstream society).

<sup>83</sup> See Ilaria Boncori and Saoirse O'Shea, *Half of transgender and non-binary people hide their identity at work in fear of discrimination – here's how you can help*, CONVERSATION (May 30, 2019, 5:40 AM), <http://theconversation.com/half-of-transgender-and-non-binary-people-hide-their-identity-at-work-in-fear-of-discrimination-heres-how-you-can-help-115523> (stating that professional dress codes can be unnecessarily gendered and marginalize non-binary people in the workplace).

<sup>84</sup> See *id.* (explaining that companies need to change their existing policies and implement changes to be inclusive of gender non-binary people in the professional environment).

<sup>85</sup> See SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 147–48* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (showing thirty percent of respondents reported experiencing some form of mistreatment in the workplace in the previous year related to their gender identity or expression, including experiencing harassment, being fired, and/or denied a promotion).

<sup>86</sup> See Pierre, *supra* note 76 (detailing the author's personal experience trying to dress like a “professional”).

woman but was dressed in traditionally masculine attire was told, “if you want to look like a man, I’ll treat you like one,” while being violently shoved out of the courtroom. Both instances were acts of violence designed to erode the dignity of gender non-conforming people, and both incidents are in keeping with the legal tradition of violently enforcing gender norms. Gender-binary dress codes and grooming policies in the legal profession are not necessarily the source of such violence against gender non-conforming people, but they are originally borne out of the same exclusionary and oppressive ideologies that lay the foundation for the active and passive violence they experience on a daily basis.<sup>87</sup> Aside from undermining a gender non-conforming person’s sense of belonging in the profession, gender binary policies require that gender non-conforming people struggle to navigate professional norms with no instruction, while their being itself is considered an abnormality.<sup>88</sup>

### C. Navigating Norms at the Intersection of Race and Gender

*“A history of racist exclusion meant that this frame was generally formed without any input from racially excluded groups. Yet, because most people in these institutions, as well as most social scientists who study institutions, fail to make the connection between historical racist exclusion and contemporary institutional norms, much of the white frame remains tacit, thereby reifying whiteness within the space without the need for intentional action to do so.”*

– Wendy Leo Moore <sup>89</sup>

Regardless of sexual orientation, gender identity or expression, Black, Brown, Indigenous peoples and marginalized religions in the United States are seen as aberrations in legal practice.<sup>90</sup> This is especially the case for Black attorneys, as the law has already communicated through

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<sup>87</sup> See Serena, *How Dress Codes Reinforce Systemic Violence*, ANTI-VIOLENCE PROJECT (Jan. 24, 2018), <https://www.antiviolenceproject.org/2018/01/how-dress-codes-reinforce-systemic-violence/#fn-5942-3> (“We must also recognize that when institutions talk about ‘acceptability,’ ‘professionalism,’ and ‘discomfort,’ they are talking about white able-bodied cis-masculine centered [sic] standards. They are referencing a history of colonialism, racism, and patriarchy. They are upholding the notion that a gender binary is real and should be enforced. Dress codes, in short, have too often been a tool of a dominant culture and a way to police *certain kinds* of bodies.”)

<sup>88</sup> See *Non-Binary Gender Inclusion in the Workplace*, QUEERNESS (Nov. 1, 2015, 11:00 PM), <https://thequeerness.com/2015/11/01/non-binary-gender-inclusion-in-the-workplace/>.

<sup>89</sup> MOORE, *supra* note 7, at 28 (emphasis in original omitted).

<sup>90</sup> See *generally* JAMES LEIPOLD, NAT’L ASSOC. FOR LAW PLACEMENT, 2019 REPORT ON DIVERSITY IN U.S. LAW FIRMS (2019), [https://www.nalp.org/uploads/2019\\_DiversityReport.pdf](https://www.nalp.org/uploads/2019_DiversityReport.pdf).

policing, policies and precedent that Black people were intended to be enslaved, and then criminalized under the law, which creates cognitive dissonance and sometimes harmful consequences when people encounter Black advocates in legal spaces.<sup>91</sup> The consequences may range from being constantly mistaken for a criminal court client (or non-lawyer support staff when the person is feeling benevolent enough to presume we are here for employment instead of incarceration) to being threatened with police violence by judges and court officers to remind us of “our place” in the courtroom.<sup>92</sup> To the extent this issue has been assessed at the intersection of race and gender, most conversations have focused on the experiences of Black men.<sup>93</sup> However, in the context of professional appearance policies informed by standards of feminine beauty, and a profession from which both women and Black people have historically been excluded, the intersectional experience of Black women is a notable one.<sup>94</sup>

i. Beauty, Femininity & Desirability: Viewing Black Women Through White Racial Frames

*Black women bear the brunt of racist intimidation resulting from western standards of physical beauty. This intimidation begins early in the lives of black female children, continues throughout adulthood, and causes immeasurable psychological injury and dignitary harm. Such intimidation also is a crucial instrument to limit the economic and social position of black women.*

- Paulette Caldwell<sup>95</sup>

<sup>91</sup> See Margaret M. Russell, *Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Strait-jacket of Legal Practice*, 95 MICH. L. REV. 766, 766–70, 784–85 (1997).

<sup>92</sup> See, e.g., Sarah Meehan, *‘Lawyering while black’: Maryland Legal Aid Attorney Says Harford Officer Mistook Him for Suspect, Detained Him*, BALT. SUN (Mar. 26, 2019, 5:30 PM), <https://www.baltimoresun.com/maryland/harford/aegis/bs-md-ci-20190326-story.html> (describing a situation where an African-American lawyer representing his client was detained by a sheriff in a courtroom because the sheriff “suspect[ed] he was his client impersonating an attorney . . . .”)

<sup>93</sup> See, e.g., Russell, *supra* note 91, at 773 (using the example of two Black men attorneys on opposing sides of the O.J. Simpson trial as representative of stereotyped roles all Black attorneys must navigate); see also TSEDALE M. MELAKU, *YOU DON’T LOOK LIKE A LAWYER: BLACK WOMEN AND SYSTEMIC GENDERED RACISM* 73 (2019) (“All the Women are White, All the Blacks are Men”).

<sup>94</sup> See generally Crenshaw, *supra* note 6. See also LEIPOLD, *supra* note 90, at 2 (“[W]omen of color remain the most underrepresented of all [in law firms], with Asian women making up just 1.46% of law firm partners, Latinx women making up just 0.80% of law firm partners, and Black or African-American women making up just 0.75% of law firm partners.”)

<sup>95</sup> Caldwell, *supra* note 57, at 383.

Standards of professional appearance are inextricably intertwined with traditional perceptions of beauty, femininity and desirability.<sup>96</sup> The metric for these standards, like most other mainstream standards in the United States, was created by and for white people to maintain an ideology of white supremacy, placing whiteness at the pinnacle of all things positive, and Blackness at the opposite end of the spectrum, encompassing all things negative.<sup>97</sup> In most contexts, this racial stratification has been codified and enforced through law.<sup>98</sup> Conventional perceptions of beauty, femininity and desirability all complement and influence one another, and are assessed through a white racial frame, with Eurocentric beauty as the goalpost by default and proximity to whiteness as the metric, making them essentially unachievable for those in closer proximity to visible Blackness.<sup>99</sup> John M. Kang stated the following:

Whiteness still assumes a lofty position of aesthetics that is somehow universal, objective, acontextual, and natural. *Whiteness became the paradigm of beauty itself*, not simply the highest level in an aesthetic hierarchy. This necessarily meant that the racial features of people of color were seen as not only ugly—but subjective and deviant. The beauty of any other race had to be measured against this paradigm of White aesthetics. The closer the racial group’s physical features resembled those of White people, the more attractive that group’s features actually appeared.<sup>100</sup>

While many gender-conforming white women seem to be celebrating the shift to professional appearance standards that allow for greater expression of beauty and femininity,<sup>101</sup> many visibly Black women cannot

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<sup>96</sup> See MELAKU, *supra* note 93, at 3, 23.

<sup>97</sup> See John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 313 (1997).

<sup>98</sup> See Harris, *supra* note 14, at 1736. In discussing tort law that allows white people to bring defamation claims for being mistaken as Black, but does not allow Black people to bring suit for being mistaken as white, Harris writes:

Being regarded as white, or the reputation of whiteness, represents a blending of the concepts of reputation as honor – that which is claimed by virtue of status – and reputation as property – that which has value in the market. Whiteness was honorific in that it was conferred and not earned, based on the inherent unequal status of dominant and subordinate groups. Thus, it might be seen as outside conceptions of reputation as property. . . . Indeed, being Black – or being propertied of whiteness – is something that causes harm capable of pecuniary measurement.

*Id.* at 1735 n.121 (citation omitted).

<sup>99</sup> See MELAKU, *supra* note 93, at 23.

<sup>100</sup> Kang, *supra* note 97, at 306.

<sup>101</sup> See Jackson, *supra* note 26 (“[T]imes have changed—the palette has expanded, allowing [women] lawyers more license to inject fun elements into their wardrobes.”)

exhale the same sigh of relief, as many visibly Black women's bodies and beings are deemed inherently gender non-conforming and in direct contrast to conventional feminine beauty as assessed through a white racial frame.<sup>102</sup> Traditional standards of beauty and femininity honor lighter skin, looser hair texture, smaller facial features and thinner, more narrow body frames, effectively excluding many phenotypes associated with Black female aesthetics.<sup>103</sup> Whether explicitly stated in professional appearance policies or not, visibly Black women are held to impossible aesthetic standards for which white women are the prototype.<sup>104</sup>

In an ABA Journal article discussing how professional appearance standards in law are shifting to reflect the personalities of people in the profession, Susan Scafidi notes the following:

Michelle Obama gave us both arms and legs . . . The first controversy was her eschewing stockings, then the much louder controversy over her showing her fabulous biceps. In her official portrait, she wore a sleeveless dress. She made it safer for American women to show their arms in a more formal setting. You might wear a jacket to court, but we don't have to wear one all the time to show our strength—the arms will do it for us.<sup>105</sup>

While some obviously feel more liberated and safer in self-expression by former first-lady Michelle Obama's fashion choices, others may have interpreted the backlash experienced by first-lady Obama as a warning that such liberties are not afforded to everyone, and that it is not safe for women of color, and particularly Black women, to deviate from the most

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<sup>102</sup> See Kang, *supra* note 97, at 286, 314, 353.

<sup>103</sup> See *id.* at 310 ("[F]or Black women, lighter skin and other [w]hite features were usually necessary to achieve a sense of acceptable femininity. This is because, as stated earlier, [w]hite people, from as early as the sixteenth century, explicitly equated [w]hitenedness with feminine beauty.") See also Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 52 (2008) ("[I]f we look more closely at colorism, it becomes apparent that color is itself shorthand for a complex interplay of perceived physiognomy, behavior, and culturally-transmitted expectations and assumptions. Psychologists studying colorism find that skin tone is not the sole index of color identifications. Facial features, such as shape of one's nose, eyes, and lips, also contribute to perceptions of a person's color, as does the texture and style of one's hair.")

<sup>104</sup> See Priyanka Kalra, "The ugly refugee" – brown skin and white beauty standards, FRIKTION (Sept. 9, 2017), <https://frikzionmagasin.dk/the-ugly-refugee-brown-skin-and-white-beauty-standards-38d0246ec2bd> ("For a woman of colour, not only are the Western beauty standards completely unattainable, they also come with a set of imposed ideas of who she is, where she comes from and what she is deserving of.")

<sup>105</sup> See Jackson, *supra* note 26 (internal quotation marks omitted).

covered and conservative clothing.<sup>106</sup> In reality, professional standards were not shifted to reflect the fashion choices of Michelle Obama; she was harshly criticized for being in violation of said professional standards, despite the fact that such standards were neither consistently nor strictly enforced before a Black family took office.<sup>107</sup> Michelle Obama's look for her first official photo as first lady was fairly conservative and classic by any standards—she wore a solid black floor-length gown with pearls, but the fact that her gown was sleeveless spurred mass criticism and accusations that her attire undermined the seriousness of and distracted from the purpose of the occasion.<sup>108</sup> While sleeveless attire was supposedly distracting on Obama, being sleeveless in the White House was neither a novel nor rouge look at this point—former first lady Jackie Kennedy consistently wore even less “conservative” sleeveless patterned dresses to White House ceremonies, and even Hillary Clinton's social secretary agreed that sleeveless attire was appropriate for the occasion.<sup>109</sup> So while imbuing safety for some, the slanted and disproportionate criticism faced by former first-lady Obama may have been intimidating to others, particularly to other women of color and especially Black women who are not already in such secure positions of power, and whose professional security may not survive the scrutiny she faced. Given that the scrutiny faced by former first-lady Obama was so deeply rooted in anti-Blackness, it's neither surprising nor unreasonable that white or light women whose skin color is considered the epitome of feminine beauty might feel “safe” taking greater risks in their professional

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<sup>106</sup> See Delisia Mathews et al., *The Michelle Obama Influence: An Exploration of the First Lady's Fashion, Style, and Impact on Women*, 2 FASHION & TEXTILES 6 (2015); Anagha Srikanth, *Michelle Obama opens up about accepting her body despite criticism from men*, HILL (Feb. 13, 2020), <https://thehill.com/changing-america/well-being/mental-health/482971-michelle-obama-opens-up-about-enormous-pressure-and> (indicating that Obama has been the subject of racist comments regarding her looks, which might make other women of color feel the need to dress more conservatively).

<sup>107</sup> See Bonnie Fuller, *Michelle Obama's Sleevegate: Why Can't America Handle Her Bare Arms?*, HUFFPOST, [https://www.huffpost.com/entry/michelle-obamas-sleevegat\\_b\\_171172](https://www.huffpost.com/entry/michelle-obamas-sleevegat_b_171172) (last updated Dec. 6, 2017) (explaining that the criticism of Michelle Obama's wardrobe is misguided because other first-ladies wore similar clothing and first-lady Jacqueline Kennedy wore sleeveless attire in most photographs).

<sup>108</sup> See Imaeyen Ibang, *Obama's Choice to Bare Arms Causes Uproar*, ABC NEWS (Mar. 2, 2009, 9:48 PM), <https://abcnews.go.com/GMA/story?id=6986019&page=1>. Chicago Tribune style reporter Wendy Donahue indicated the paper's site received hundreds of online responses about Obama's outfit. See *id.* “Most of the complaints centered on the dress conveying a sense of informality on a serious occasion . . . She's kind of faced some criticism for that in the past where people have said maybe [her clothing is] distracting from the central point, from what is going on.” *Id.* It is also worth noting that some commented that it was appropriate for her but would not be if her arms were “flabby,” demonstrating the fatphobia that contributes to how different standards are applied to different body types. See Fuller, *supra* note 107.

<sup>109</sup> See Fuller, *supra* note 107.

appearance while others may not.<sup>110</sup> Former first-lady Obama, on the other hand, was repeatedly referred to as “an ape in heels,”<sup>111</sup> “gorilla face”<sup>112</sup> and a “poor [g]orilla . . . [who] needs to focus on getting a total makeover . . .”<sup>113</sup> The constant comparison to large monkeys is an all too familiar, specifically anti-Black racial epithet designed to dehumanize descendants of African people who were branded beastly animals to justify our enslavement and systematic exclusion.<sup>114</sup> When weaponized against a Black woman and coupled with “heels,” “face” and “makeover”—traditional indicators of femininity—it is designed to send a very clear message that Black women could never meet their standards of feminine beauty, and could therefore never have a rightful place in “their” society.<sup>115</sup> Using less explicitly racist but still very familiar coded language designed to undermine her femininity and sense of belonging, commentators insisted that former first-lady Obama is “not classy enough,” “doesn’t look like a first lady” and “is strikingly ungracious.”<sup>116</sup> So while many women, including Black women, may feel empowered and motivated by Michelle Obama’s courage to challenge conventional norms through her attire and entire existence in the White House, most of us are familiar enough with the anti-Black backlash to know that it is all but *safe* to do so.<sup>117</sup>

<sup>110</sup> See Elias, *supra* note 49.

<sup>111</sup> See Jenée Desmond-Harris, *The West Virginia nonprofit official who called Michelle Obama an “ape in heels” has been fired*, VOX (Dec. 28, 2016, 2:40 PM), <https://www.vox.com/identities/2016/12/28/14100862/west-virginia-nonprofit-official-michelle-obama-ape-in-heels-fired> (attributing quote specifically to Pamela Ramsey Taylor, director of Clay County Development Corp., Clay, West Virginia).

<sup>112</sup> *Id.* (attributing quote specifically to Patrick Rushing, mayor of Airway Heights, Washington.)

<sup>113</sup> Walter Einkenkel, *Georgia educator fired for calling Michelle Obama a ‘poor gorilla’*, DAILY KOS (Oct. 4, 2016), <https://www.dailykos.com/stories/2016/10/4/1577796/-Georgia-educator-fired-for-calling-Michelle-Obama-a-poor-gorilla>.

<sup>114</sup> See Siji Jabbar, *Enough with Stereotyping black people as monkeys!*, THIS IS AFR. (Mar. 26, 2014), <https://thisisafrika.me/politics-and-society/enough-stereotyping-black-people-monkeys/>.

<sup>115</sup> See Mikki Kendall, *22 times Michelle Obama endured rude, racist, sexist or plain ridiculous attacks*, WASH. POST (Nov. 16, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/11/16/22-times-michelle-obama-endured-rude-racist-sexist-or-plain-dumb-attacks/> (providing links to articles that discuss a few—of many—situations when/where someone used racist language to characterize Michelle Obama and her attire).

<sup>116</sup> See *id.*; Cleve R. Wootson Jr., *She was a historic first lady, but Michelle Obama says some never saw past ‘my skin color’*, WASH. POST (July 26, 2017, 3:40 PM), <https://www.washingtonpost.com/news/reliable-source/wp/2017/07/26/she-was-a-historic-first-lady-but-michelle-obama-says-some-never-saw-past-my-skin-color/>.

<sup>117</sup> See Wootson Jr., *supra* note 116 (detailing the public nature of the racist comments toward first-lady Obama and how those comments impacted her).

ii. Navigating the White Racial Frame of Professional Appearance as a Visibly Black Woman

Let's revisit Sally Kane's grooming advice for women in the law through the experience of a Black woman with deeper or darker complexion and more tightly coiled hair in Afro-centric styles:

**A neat, well-groomed hairstyle is a must.** Long and short styles are both appropriate for women, as long as the style is neat and professional. Classic hairdos such as a low ponytail or bun look polished and professional for longer hair.

**Avoid wild, untamed or overly teased styles,** and never dye your hair in unnatural colors such as pink or blue . . . Jewelry and accessories should be tasteful and limited. **Hosiery should be sheer, tan, nude, or another light color.**<sup>118</sup>

Whether these standards are explicitly written into policies or not, they do reflect common expectations around professional appearance in practice.<sup>119</sup> Let's focus on the two aspects that might most obviously present a challenge for certain visibly Black women with darker or deeper skin tones and more tightly coiled tresses, beginning with hosiery, then hair.

*Acceptable Shades of Professional Appearance: "tan," "nude," "light"*

While some offices and jurisdictions do not expect women to wear hosiery at all anymore, there are still some that do.<sup>120</sup> In my experience, the color cluster Kane describes is consistent with common expectations for those that do—expectations that obviously do not account for the existence of darker or deeper skin tones. Many Black women with deeper skin tones are neither "light" nor "tan," nor able to easily locate a shade of nude that reflects the color of their bare body, or a sheer stocking consistent with their complexion.<sup>121</sup> I recall from a very young

<sup>118</sup> Kane, *supra* note 24 (emphasis added).

<sup>119</sup> *See id.*

<sup>120</sup> *See* Admin, *What to Wear: The Great Panty Hose Debate*, DIAMOND REPORTING (Oct. 4, 2014), <http://www.diamondreporting.com/blog/wear-great-panty-hose-debate/> (discussing the debate around if women should or should not wear hosiery in a professional setting).

<sup>121</sup> *See* Rachel Lubitz, *Nubian Skin, the pioneers of inclusive nude lingerie, on what the industry is still missing*, MIC (Apr. 19, 2018), <https://www.mic.com/articles/188966/nubian-skin-the-pioneers-of-inclusive-nude-lingerie-on-what-the-industry-is-still-missing> ("[Ade Hassan] was working in the corporate world in London, in roles in which pantyhose and neat button-down shirts were essential parts of the necessary wardrobe. But because of her skin tone, she was having a

age scouring clothing stores, grocery stores and pharmacies with my mother to find hosiery that matched our skin tones as closely as possible. After sifting through every shade of sheer and nude stocking, I realized that companies were not considering my bare body when creating their "nude" products, and once of greater age and consciousness, I realized that this is just one of the many ways that whiteness is treated as default, and skin of deeper or darker tones are treated as aberrations. What was particularly notable about this realization, is that whiteness was centered even when whiteness was not explicitly mentioned; it was simply implied and affirmed that a nude body is a light or white body, because those are the bodies considered consistent with femininity and worthy of marketing.

My understanding of whiteness as default in the beauty industry was further affirmed when I went to browse drugstore brands of "demure" lip colors and foundation with a white colleague on a court break. After I failed to find a "nude" lipstick that was pigmented enough to match the darker lining of my natural lip, my colleague showed me to her favorite brands of foundation, but was shocked to realize that the "darkest skin tone" of most foundations was closer to the complexion of her white skin than the brown color of my Black skin. Several of the makeup lines simply did not bother accounting for the existence of visibly Black or brown skin when creating their shade spectrums.<sup>122</sup> Skin was synonymous with white or light skin, which literally went without saying—"dark" tones meant the color of tanned white or light skin, as anything deeper or darker falls outside the scope of beauty altogether and was not worth accommodating.

*Acceptable Hair in Professional Appearance: "neat," "not wild," "not untamed"*

Black people's hair comes in a vast variety of textures, lengths, thicknesses, colors and styles, but the hair type most phenotypically associated in closest proximity with visible Blackness is thick, tightly coiled, gravity defying, afro-like tresses when worn loosely, as well as braided, twisted and loc'd Afrocentric styles.<sup>123</sup> Black women's hair has been

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much more difficult time sticking to that uniform than her lighter-skinned counterparts.").

<sup>122</sup> See Brianna Moné, *4 times beauty brands were dragged for having a 'limited' range of foundation*, INSIDER (July 30, 2018, 4:27 PM), <https://www.insider.com/beauty-brands-called-out-for-not-enough-foundation-shades-2018-7> (describing how it is hard for darker skinned women to find the right foundation to match their skin).

<sup>123</sup> See Harris, *supra* note 103 at 54 n.8 ("[W]e have all been taught to recognize the combination of generous lips, a broad nose, and large hips and derriere as 'African' and skinny lips, a narrow

hotly debated and litigated in the context of grooming policies and anti-discrimination law, as it has often been referred to as not “neat,” and too “wild,” “untamed” and outright “unprofessional” by employers.<sup>124</sup> Many have explicitly alleged that Black women’s hair, as it grows out of our heads or in styles reflective of Black culture, could never meet any professional appearance expectations.<sup>125</sup> Visibly Black women with more tightly textured hair are encouraged to chemically process and straighten their hair with damaging tools, or cover their natural tresses with straight-haired wigs (but not Afrocentric head wraps)<sup>126</sup> for important professional occasions, such as interviews or court proceedings.<sup>127</sup> While courts have held that grooming policies explicitly precluding afros can be found discriminatory,<sup>128</sup> as afros may be considered a biological marker of Blackness by courts, the same legal “protection” is not extended to other Afrocentric styles, such as braids or locs, as they are considered purely voluntary artifices not actually borne out of Black culture (tragically and ironically citing white women’s cultural appropriation of stigmatized Afrocentric braided styles as evidence).<sup>129</sup> In deciding Title VII cases related to racial

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nose and hips, and a flat posterior as ‘European.’ In fact skin color and body shapes vary across the African continent and in Europe as well. The association of a very particular physiognomy with ‘the African,’ and the conflation of ‘African’ with ‘Negro’ or ‘black,’ is the product of modern race science, which began in the seventeenth century, reached its pinnacle (or nadir) in the nineteenth century, and still lingers in contemporary folk understandings of ‘race.’) See also Kimika Hudson, *The Missing Education on Black Hair*, HUFFPOST, [https://www.huffpost.com/entry/the-missing-education-on-black-hair\\_b\\_5540407](https://www.huffpost.com/entry/the-missing-education-on-black-hair_b_5540407) (last updated Dec. 8, 2017).

<sup>124</sup> See Imani Gandy, *Black Hair Discrimination Is Real – But Is It Against the Law?*, REWIRE (Apr. 17, 2017, 4:58 PM), <https://rewire.news/ablc/2017/04/17/black-hair-discrimination-real-but-is-it-against-law/>.

<sup>125</sup> See, e.g., Caldwell, *supra* note 57, at 384 n.58 (“Job counsellors at traditionally black colleges often advise students to avoid African-influenced styles when seeking employment.”).

<sup>126</sup> See Kuli Roberts, *Being African: What does hair have to do with it?*, BBC NEWS (July 22, 2015), <https://www.bbc.com/news/world-africa-33525254>.

<sup>127</sup> See Caldwell, *supra* note 57, at 384 n.58; See Keydra Manns, *Texas Reporter Goes Viral After Wearing Natural Bun Hairstyle On-air*, THE GRIO (Oct. 27, 2020), <https://thegrio.com/2020/10/27/texas-reporter-goes-viral-for-natural-bun-hairstyle/> (discussing several Black women in news who were called unprofessional for or discouraged from wearing their natural hairstyles.)

<sup>128</sup> See *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 167 (7th Cir. 1976) (holding that a supervisor denying an employee a promotion based on her afro was racially discriminatory).

<sup>129</sup> See *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (“Plaintiff may be correct that an employer’s policy prohibiting the ‘Afro/bush’ style might offend Title VII and section 1981. But if so, this chiefly would be because banning a natural hairstyle would implicate the policies underlying the prohibition of discrimination on the basis of immutable characteristics. *But cf.* [Smith v. Delta Air Lines, 486 F.2d 512 (5th Cir. 1973)], (upholding no-mustache, short-sideburn policy despite showing that black males had more difficulty complying due to nature of hair growth). In any event, an all-braided hairstyle is a different matter. It is not the product of natural hair growth but of artifice. An all-braided hair style is an ‘easily changed characteristic,’ and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.”); Caldwell, *supra* note 57,

discrimination, especially those that pertain to hair, courts have distinguished between “immutable” and “involuntary” expressions of racial or cultural identity, and those that are “mutable” and “voluntary.”<sup>130</sup> In deciding to only afford legal rights to expressions of identity that are “involuntary” and “immutable”, the court is clearly communicating that if one can in any way shed or “mute” their own racial or cultural identity to assimilate into the dominant Eurocentric culture, they should, and because many jurists are invested in imposing an ideology of white supremacy, cultural homogeneity and hegemony through law, they have not extended protections to those who challenge the dominant culture by *voluntarily* maintaining their own cultural identity.

Of course, plenty of people of color, and Black women in particular proudly express their racial and cultural identities whether they are afforded legal protections or not, but not always without consequence.<sup>131</sup> Research shows that in corporate environments, Black women who wear their hair in Afrocentric styles are penalized economically, even if not actually in violation of any written policy.<sup>132</sup> Black women with Afrocentric styles are less likely to be hired, promoted, perceived as professional and are presumed to be more dominant,<sup>133</sup> and therefore an

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at 379 (“In support of its view that the plaintiff had failed to establish a factual basis for her claim that American’s policy had a disparate impact on black women, thus destroying any basis for the purported neutral application of the policy, the court pointed to American’s assertion that the plaintiff had adopted the prohibited hairstyle only shortly after it had been ‘popularized’ by Bo Derek, a white actress, in the film ‘10.’ Notwithstanding the factual inaccuracy of American’s claim, and notwithstanding the implication that there is no relationship between braided hair and the culture of black women, the court assumed that black and white women are equally motivated (i.e., by the movies) to adopt braided hairstyles. Wherever they exist in the world, black women braid their hair. They have done so in the United States for more than four centuries. African in origin, the practice of braiding is as American—[B]lack American— as sweet potato pie. A braided hairstyle was first worn in a nationally-televised media event in the United States—and in that sense ‘popularized’—by a black actress, Cicely Tyson, nearly a decade before the movie ‘10.’ More importantly, Cicely Tyson’s choice to popularize (i.e., to ‘go public’ with) braids, like her choice of acting roles, was a political act made on her own behalf and on behalf of all black women.”)

<sup>130</sup> See *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980) (“Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. . . . But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer’s choice of how to run his business than to equality of employment opportunity.”) (quoting *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975)) (internal quotation marks omitted).

<sup>131</sup> See Ashleigh Williams, *The Connection Between Hair and Identity in Black Culture*, C+R RES., <https://www.crresearch.com/blog/connection-between-hair-and-identity-black-culture> (last visited Mar. 26, 2020) (“Even today, in certain places, industries, or workplaces, traditionally Black hairstyles, such as dreadlocks, are restricted and can be a cause for termination. An 11th circuit court of appeals recently ruled that banning employees for wearing their hair in ‘locs’ does not qualify as racial discrimination.”)

<sup>132</sup> See MELAKU, *supra* note 93, at 25.

<sup>133</sup> *Id.*

affront to white male authority while failing to fit the white racial frame of femininity.

One of my professional peers in public service law—a Black woman who we will call Shayla—explained that as recently as 2019, while practicing in New York City, arguably one of the more “liberal” jurisdictions, a judge consistently would not allow her to speak on the record in advocacy of her clients while wearing an afro. The judge literally cut her off mid-sentence and told her to sit down, reminding her of her “place” in the courtroom—likely in response to interpreting her afro as an act of resistance to white cultural dominance in a court of law. Shayla’s clients even noticed how differently the judges treated Shayla when she was wearing an afro versus when her hair was slicked back into a bun and began to worry about how it would impact their case. It is important to note that Shayla was not actually in violation of any professional appearance policy. As mentioned earlier, New York courts have no explicit guidelines for what constitutes appropriate court appearance, but those who exercise power in the courts still penalize those who violate the unspoken rules of professionalism rooted in an ideology of white supremacy.<sup>134</sup> Despite the fact that afros have been considered immutable characteristics of Blackness by courts, some would maintain that it was Shayla’s responsibility to mute her Blackness and conform to the Eurocentric demands of the courtroom, not only for her own professional advancement, but for the legal interests of her clients.<sup>135</sup> While this is an indignity and sacrifice many Black attorneys often make in the moment of advocacy, the long term impact of consistently demanding individual conformity instead of institutional transformation is that anti-Blackness becomes further cemented in our conceptions of professionalism and legal practice, which will continue harming clients and counsel who do not fit the white racial frame.<sup>136</sup> Given that the same institutionalized anti-Blackness underlying our ideas of professionalism also permeate every other aspect of life and the law, from policing to sentencing, failing to challenge these oppressive practices will be far more harmful to

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<sup>134</sup> Aysa Gray, *The Bias of ‘Professionalism’ Standards*, STAN. SOC. INNOVATION REV. (June 4, 2019), [https://ssir.org/articles/entry/the\\_bias\\_of\\_professionalism\\_standards](https://ssir.org/articles/entry/the_bias_of_professionalism_standards) (“Professionalism has become coded language for white favoritism in workplace practices that more often than not privilege the values of white and Western employees and leave behind people of color.”).

<sup>135</sup> See Carla D. Pratt, *Sisters in Law: Black Women Lawyers’ Struggle for Advancement*, 2012 MICH. ST. L. REV. 1777, 1783-84 (2012).

<sup>136</sup> See generally Lynette Parker, *Schools and the No-Prison Phenomenon: Anti-Blackness and Secondary Policing in the Black Lives Matter Era*, 12 J. EDUC. CONTROVERSY 1, 6 (2017); see also Gray, *supra* note 134.

clients than an individual attorney’s decision to challenge them by maintaining her cultural expression.<sup>137</sup>

Unfortunately, none of the circumstances are unique. Anti-Black hair discrimination is incredibly pervasive and pernicious, beginning in childhood and continuing throughout adulthood.<sup>138</sup> Federal protections are so sparse that in 2019 the states of California and then New York passed legislation to prohibit discrimination on the basis of hair.<sup>139</sup> The California “Crown Act” (acronym for Create a Respectful and Open Workplace for Natural Hair) explicitly acknowledges the history of anti-Black hair discrimination in professionalism standards, stating, “Professionalism was, and still is, closely linked to European features and mannerisms, which entails that those who do not naturally fall into Eurocentric norms must alter their appearances, sometimes drastically and permanently, to be deemed professional.”<sup>140</sup>

#### IV. CHANGING THE OPPRESSIVE CULTURE AROUND PROFESSIONAL APPEARANCE IN LAW: RECOMMENDATIONS AND CHALLENGES

To challenge oppressive practices in the profession, we must first acknowledge that nothing, including and especially the law, is neutral.<sup>141</sup> We must consciously acknowledge the oppressive roots of the law, and through an intersectional and anti-oppressive lens, reexamine all of its fruits—the practices, precedent, traditions and criteria—everything.<sup>142</sup> With each element of legal institutions—and quite frankly, of life—we must at minimum question what purpose does this serve? Who does this serve? Who does this harm or exclude? What is the historical

<sup>137</sup> See Gray, *supra* note 134; Parker, *supra* note 136, at 19 (describing that the media and policing contribute to the portrayal of young Black males as criminals).

<sup>138</sup> Janelle Griffith, *New York is second state to ban discrimination based on natural hairstyles*, NBC NEWS (July 15, 2019), <https://www.nbcnews.com/news/nbcblk/new-york-second-state-ban-discrimination-based-natural-hairstyles-n1029931> (“No one should face discrimination at school or in the workplace, but too often we see people of color, particularly women, who are told their hair is unprofessional or not appropriate in public settings . . . These discriminatory policies sideline people of color — keeping children out of their classrooms and diminishing who they are.”) (internal quotation marks omitted).

<sup>139</sup> Liam Stack, *California Is First State to Ban Discrimination Based on Natural Hair*, N.Y. TIMES, (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/natural-hair-discrimination-ban.html>; see also Griffith, *supra* note 138.

<sup>140</sup> See *id.*

<sup>141</sup> Leslie Green & Thomas Adams, *Legal Positivism*, STAN. ENCYCLOPEDIA PHILOSOPHY (2019), <https://plato.stanford.edu/entries/legal-positivism>.

<sup>142</sup> See generally Amanda Carlin, *The Courtroom as White Space: Racial Performance as Non-credibility*, 63 UCLA L. REV. 450, 459 (2016) (discussing how the courtroom historically was populated exclusively by whites, which created a judicial system that directly and indirectly benefits whites).

context and present implications? How can we create something that serves a righteous purpose—something that benefits, and centers marginalized people? What can we do better when what we believed to be our best efforts produce imperfect results?

I do not intend to provide a perfect solution here—in fact, I’m not sure that one exists—but any good effort would require the collective investment and input of various actors within and outside of the profession, not just my perspective. Challenging oppression in the profession will require greater sacrifice, listening, unlearning, re-learning, and labor from those who have been historically centered, and greater insight and influence from those who have been pushed to the margins. As such, I will not propose a specific route, but will offer some considerations and suggestions to get us started in the right direction.

A. *Crafting Policies That Are Clear, Culturally Conscious and Anti-Oppressive*

i. Determining the Purpose of the Policy

To the extent that legal institutions have written policies for professional appearance, they should revisit them to examine the historical context and present impact, determine the true purpose, whether the importance of the purpose outweighs the imposition of the policy, and whether the policy as written even serves that purpose in practice. Even for something as seemingly simple and supposedly neutral as requiring a blazer or a suit jacket, we must question: what actual work-related purpose does this serve, other than upholding pompous tradition, and is the benefit of this purpose worth the imposition? Let’s unpack some of the common rationales offered for conservative professional dress policies:

*Maintaining uniformity:* If the purpose is to maintain uniformity, I would encourage questioning why uniformity is so important to one’s professional practice, upon what foundation the standard for uniformity is built, what identities or appearances it centers, and whether uniformity can be accomplished without imposing a cishet white racial frame to the detriment of those it was never intended to serve. What does uniformity look like when it does not require marginalized people to conform, shed or conceal critical aspects of their identity expression? We must remember that uniformity is not equality, equality is not equity and forced assimilation is not true inclusion, it is oppression. Therefore,

an anti-oppressive policy requires interrogating and potentially eliminating demands for uniformity and instead embracing the vast variety of identities and cultures expressed through professional appearance.<sup>143</sup>

*Avoiding distraction:* It is often asserted that deviating from more “restrained” professional norms will be “distracting” to professional peers and decision-makers in the workplace or courthouse. However, the reality is that the mere presence of people the law was designed to disenfranchise will always be a distraction to those who were not expecting to or interested in seeing us as professionals in legal spaces. Requiring that marginalized demographics mute key aspects of their identity expression serves to further maintain the novelty of, instead of normalizing, their whole existence, ensuring that they continue to be considered a distraction and subject to demands of assimilation or exclusion. We also must reckon with the reality that if people in the legal profession entrusted with the lives and liberty of vulnerable people can be so easily and fatally distracted from their incredibly important tasks by patterned fabric, bright colors, bare-arms, “untamed” hair, and various racial, cultural and gender expressions, then perhaps they should not be trusted with such a heavy responsibility. Either way, the responsibility to maintain focus should fall upon the people in the position of power who are so easily distracted by identity expression in aesthetics, not those whose identity expression is considered distracting due to the history of exclusion making them an aberration in the profession.<sup>144</sup>

*Demonstrate respect for the “dignity” of the court:* There is no true correlation between how tamed, restrained, conservative, demure, assimilating or gender conforming one is in the courts, and their respect for the “dignity” of the proceeding. Moreover, it is quite ironic how frequently the profession demands that marginalized people suffer

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<sup>143</sup> See generally Alfie Kohn, *Uniform National Standards Are Not Equal*, N.Y. TIMES (July 29, 2010), <https://www.nytimes.com/roomfordebate/2010/07/21/who-will-benefit-from-national-education-standards/uniform-national-standards-are-not-equal> (explaining uniformity in standardized tests does not promote equity). See also Blair Mann, *Equity and Equality Are Not Equal*, EDUC. TR. (Mar. 12, 2014), <https://edtrust.org/the-equity-line/equity-and-equality-are-not-equal/> (“[Equity and Equality] are similar, but the difference between them is crucial.”).

<sup>144</sup> See generally SOC’Y OF AM. LAW TEACHERS, RACIAL DISCRIMINATION IN THE LEGAL PROFESSION 5 (2014), <http://www.saltlaw.org/wp-content/uploads/2014/07/June-30-SALT-FINAL-to-CERD-2.pdf> (“The serious under-representation of racial minorities in the legal profession arises from a significant negative national legacy of slavery and apartheid coupled with continuing adverse developments on education prior to legal education, legal education and entrance into the legal profession, and experiences of racial minority lawyers.”). Obviously, there are behaviors and cultural practices that might not be appropriate for certain settings, but there are likely few that realistically fall within the scope of professional appearance policies.

indignities to demonstrate respect for the dignity of the law—the very institution that laid the foundation for and perpetuates their dehumanization and disrespect.<sup>145</sup> Regardless of the rationale one might conjure for connecting conformity to particular aesthetics with respect for the dignity of the courts, I recommend prioritizing the dignity of human beings and particularly that of marginalized people over glorified institutions as a starting place for an anti-oppressive approach.

*Demonstrate respect for clients and the formality of the proceeding:* I do think it is reasonable and important to communicate to the people we represent in legal proceedings that we are invested in representing them well. However, I think the difficulty is determining what does and does not convey that sentiment through our professional appearance.<sup>146</sup> Different people, offices, courtrooms, and jurisdictions will have different ideas about this, but in making the determination, I encourage decision-makers to interrogate their instincts for bias against, ignorance and erasure of identities and experiences outside of their own or their general preference for those that fit a cishet white racial frame. I suggest starting from a place of reevaluating one's understanding of what it means to be professional and how, if at all, that must be expressed through physical appearance. Whatever final policy is developed should be informed by a variety of marginalized perspectives that have historically been excluded from shaping professional norms.

## ii. Crafting the Policy

Crafting a professional appearance policy that impacts so many different people with varying backgrounds, identities and experiences should be a collective endeavor involving influence and insight from a diversity of people, especially those historically harmed by traditional policies. The policy should be designed to serve a distinct purpose central to the nature of the work, that rationale should be communicated to those expected to comply, and the final guidelines should be tethered to the decided purpose to avoid gratuitously limiting identity expression, which always disproportionately imposes indignities upon

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<sup>145</sup> See *id.* (describing how the legal system and the U.S. government historically supported the dehumanization of Black people most blatantly through slavery and a legal system of apartheid in 16 U.S. states).

<sup>146</sup> *What to Wear for Legal Professionals: Office Dress Code*, DIAMOND REPORTING (Sept. 26, 2014), <http://www.diamondreporting.com/blog/wear-legal-professionals-office-dress-codes/> (describing the multitude of choices/opinions on how a person should dress in specific situations).

marginalized people.<sup>147</sup> Finally, the policy should be a living document open to routine review and revision as society and your own institutional consciousness continues to evolve, as opposed to stubbornly defaulting to tradition, precedent, or “how it has always been done.” Here is a non-exhaustive list of variables to consider when crafting an anti-oppressive appearance policy:

*Are these guidelines borne out of a white racial frame or other oppressive ideologies and practices?*

It is important to avoid defaulting to traditional norms and ideologies when forming policies, as it is quite likely if not certain that these practices have been tainted by or are steeped in ideologies of white supremacy, anti-Blackness, racism, classism, sexism, homophobia, transphobia, ableism, fatphobia, xenophobia, islamophobia and the list goes on.<sup>148</sup> Given the law’s role in creating, enforcing, normalizing and convincing us of the neutrality of such practices,<sup>149</sup> it is particularly imperative for members of the legal profession to educate ourselves on the historical context and present manifestations so that we may recognize them in all their forms. This might sound quite onerous, but it is a continuous process that is much easier to navigate with an earnest eagerness to unlearn and relearn, and the humility to fail and try again. And fortunately, one does not have to and should not do this alone—it is a collective lift that best benefits from various perspectives.

*Are these guidelines applicable and accessible to various demographics of marginalized people?*

A good place to start is questioning whether this policy assumes that the “normal” or “average” person to whom it applies is white, middle-upper class, gender-conforming, heterosexual, cisgender, not disabled, thin, of European ancestry and faiths. Now, it is likely that the “average” person in a professional space actually does have most if not all of the aforementioned privileges, but that is also likely because policies have consistently centered the “average” privileged person, continuously

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<sup>147</sup> See Gray, *supra* note 134 (“In the workplace, white supremacy culture explicitly and implicitly privileges whiteness and discriminates against non-Western and non-white professionalism standards related to dress code, speech, work style, and timeliness.”).

<sup>148</sup> See *id.*

<sup>149</sup> See Patricia A. L. Ehrensall, *Fraser and the Cheerleader: Values and the Boundaries of Student Speech*, 22 J. SCH. LEADERSHIP 309, 311 (2012).

relegating less-privileged, historically excluded people to the margins.<sup>150</sup> An anti-oppressive policy, however, is not based upon the experiences of the “average” privileged person, but instead accounts for and is designed to disrupt the systemic factors that have contributed to the exclusion of less privileged people.<sup>151</sup>

*Can these guidelines be equitably applied, or is there an invisible tax on marginalized people?*

Because many marginalized people may conform to the demands of the dominant culture at all costs, it can be easy for others to overlook the difficulty with which they do so.<sup>152</sup> However, historically excluded groups often perform a great deal of invisible labor and pay a hefty inclusion tax to participate in mainstream professional spaces.<sup>153</sup> For Black women for example, the invisible labor involved with meeting expectations of professional appearance may include, but is not limited to, the additional time, money and energy we invest, along with the emotional indignity we suffer when forced to contort our tightly coiled tresses into “sleeker” styles considered more “professional” based on the white racial frame.<sup>154</sup> For gender non-conforming people, invisible tax may involve the potential trauma of expressing their gender along a binary in ways that will make them least likely to be met with violence and hostility in the courtroom, but also least likely to feel at home in their own bodies.<sup>155</sup> For more curvaceous people and those considered fat, this may involve the exorbitant financial cost of having the required clothing customized to conform to the contours of their bodies to avoid being characterized as “too revealing” or “sloppy.”<sup>156</sup> For people with far fewer financial resources, the costs may mean choosing between basic necessities such as food and utilities in order to purchase the clothing and accessories necessary to meet expectations of professional

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<sup>150</sup> See Gray, *supra* note 134.

<sup>151</sup> *Id.* (“Creating a fair and equitable workplace begins by accepting and appreciating the diversity of employees’ cultures, experiences, and knowledge.”).

<sup>152</sup> See Willie Garrett, *Marginalized Populations*, MINN. PSYCHOL. ASS’N, (Apr. 1, 2016), [https://www.mnpsych.org/index.php?option=com\\_dailyplanetblog&view=entry&category=division%20news&id=71:marginalized-populations](https://www.mnpsych.org/index.php?option=com_dailyplanetblog&view=entry&category=division%20news&id=71:marginalized-populations) (“[Marginalized people] are all around us but virtually invisible...unless they cause problems or disrupt the lifestyles of mainstream persons.”)

<sup>153</sup> MELAKU, *supra* note 93, at 21.

<sup>154</sup> *Id.* at 23-25.

<sup>155</sup> See Ruth Carter, *Non-Binary Lawyering: What’s Courtroom Attire?*, ATT’Y WORK (Aug. 9, 2018), <https://www.attorneyatwork.com/non-binary-lawyering-ruth/> (describing what life is like as a non-binary attorney).

<sup>156</sup> Elias, *supra* note 49.

appearance, which ironically requires people without money to spend money in order to appear as if they have money, so that they can access opportunities to earn money.<sup>157</sup> Each type of inclusion tax is compounded for those who exist at the intersection of multiple marginalized identities. For example, anti-Blackness, homophobia, transphobia, fatphobia and classism converge to create a uniquely excessive inclusion expense for those who are visibly Black, gender non-conforming or non-binary, queer, considered fat, *and* have limited financial resources—all in the same being, at the same time. Often, the inclusion tax of conformity makes it far too expensive for marginalized people to enter the legal profession, especially for those with multiple oppressed identities. Policies that impose an inclusion tax upon those with marginalized identities should be avoided at all costs. Where policies are not inherently oppressive, are deemed necessary and could be equitably applied were it not for the financial burden, the institution enforcing the policy should increase equitable access by covering the financial cost.

*Does this policy clearly communicate your intent and expectations?*

As previously mentioned, I suggest disclosing the purpose of a policy to participants as it helps to clarify your intent while providing insight into your expectations and keeps you accountable in ensuring that your guidelines actually reflect the purported purpose.

One of the most important aspects of implementing a clear, conscious, anti-oppressive policy is *how* it is communicated. If your purpose and expectations are conveyed in vague, conclusory, coded and loaded language like “professionalism,” “business-like,” “polished,” and “appropriate,” it will: 1) run the risk of being rooted in oppressive norms; 2) lend itself to inconsistent or overbroad interpretation; 3) provide little guidance to those less familiar with established norms in professional spaces because they are not part of the dominant culture or social class; and 4) likely be weaponized against those whose beings and bodies are considered inherently unprofessional.<sup>158</sup> Priya-Alika Elias speaks to the disproportionate scrutiny women of color face under amorphous professional appearance standards as she expounds upon the instruction she received from her law school:

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<sup>157</sup> See Katherine Randolph, *Disparity In Clothing Access In D.C. Can Make It Hard to Dress For Success*, GEO. VOICE (Nov. 22, 2019), <https://georgetownvoice.com/2019/11/22/disparity-in-clothing-access-in-d-c-can-make-it-hard-to-dress-for-success>.

<sup>158</sup> See Alaina Leary, *Who Decides What Professional Clothing Is?*, RACKED (July 13, 2017, 9:32 AM), <https://www.racked.com/2017/7/13/15900900/professional-dress-office-code>.

[G]enerally, they avoided specific rules. “Be discreet,” they said. “Dress professionally, like the older lawyers do. Blend in.”

When you’re a woman of color, that’s almost impossible. You learn quickly that your body is hypervisible, because it is probably the only one of its kind in the courtroom. You are constantly among men, white men, who notice how different you look from the usual faces they see. And because you’re hypervisible, you are subject to the harshest, most unforgiving scrutiny. *Does that girl belong here? What is she doing here?* they wonder. And when they wonder, they seize upon the easiest thing to criticize, the first thing anybody would notice: the way you’re dressed . . . When you don’t have a clear set of rules to follow, you’re open to the judgment of a subjective authority — often a white male authority. In the eye of that authority, your very presence is a violation.<sup>159</sup>

#### B. *Challenging Conditioning and Complicity: Internalized and Institutional Oppression*

It is worth noting that, unfortunately, just as white men do not have to be present at all for their patriarchal standards to be enforced, white people need not be present at all for ideologies rooted in white supremacy to prevail.<sup>160</sup> One of the most successful strategies of the oppressor is to condition the oppressed to be complicit in their own oppression and that of others; the system of white supremacy is a well-oiled machine that can, at this point, operate with little active effort from white people at all.<sup>161</sup> We have all, to some extent, been conditioned by the ideology of white supremacy, and dismantling it requires actively unlearning problematic values we previously accepted as objective truths.<sup>162</sup> When new professionals are unclear how to navigate the ambiguous expectations of the profession, they will likely rely upon the

<sup>159</sup> Elias, *supra* note 49.

<sup>160</sup> Donna K. Bivens, *What Is Internalized Racism*, in *FLIPPING THE SCRIPT: WHITE PRIVILEGE AND COMMUNITY BUILDING* 43, 44 (Maggie Potapchuk & Sally Leiderman eds. 2005) (emphasizing that people of color internalize racism and develop “ideas, beliefs, actions, and behaviors that support or collude with racism.”).

<sup>161</sup> *Id.* (“[J]ust as there is a system in place that reinforces the power and expands the privilege of white people, there is a system in place that actively discourages and undermines the power of people and communities of color and mires us in our own oppression.”).

<sup>162</sup> MELAKU, *supra* note 93, at 25 (“[N]o demographic is immune to the dominant racial ideology that maintains the status quo—including negative perceptions of [B]lack resistance to Eurocentric standards . . .”).

advice of mentors of the same or similar background, if they have access to any at all.<sup>163</sup> And unfortunately, it is often from our mentors with whom we share marginalized identities that we first learn to make ourselves small and suppress aspects of our identities to fit the cishet white racial frame.<sup>164</sup> Sometimes this advice reflects the actual beliefs of marginalized mentors who have unconsciously bought into the system of white supremacy and are not yet far along in the process of unlearning that we all need to undergo.<sup>165</sup> However most times, it is also an effort to prepare us for and protect us from the far harsher criticism we will experience under the white gaze if we fail to conform. Yet when said advice is framed in a way that validates and imposes oppressive ideologies, the intention becomes irrelevant and the impact is just as harmful.<sup>166</sup> Again, the cumulative impact of consistently encouraging conformity is further cementing the dominant culture that demands our conformity while continuously chipping away at our own individual and collective sense of cultural identity.<sup>167</sup> The sad reality is that each of us have likely at some point made ourselves small or sacrificed parts of our identity to survive in spaces that were hostile to our existence. Instead of just preparing others to do the same, we should be working to dismantle the systems that require us to do so, so that others who come after us do not have to in order to thrive. When we have access to power, it is incumbent upon us to interrupt this cycle instead of being complicit in perpetuating it.

While it is important to prepare new professionals from marginalized backgrounds for the hostility that awaits them and equip them with the necessary information to make an informed decision on how to navigate

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<sup>163</sup> See Catherine A. Hansman, *Diversity and Power in Mentoring Relationships*, in *CRITICAL PERSPECTIVES ON MENTORING: TRENDS AND ISSUES* 44, 47 (Catherine a. Hansman et al. eds., 2002), <https://www.govinfo.gov/content/pkg/ERIC-ED465045/pdf/ERIC-ED465045.pdf>.

<sup>164</sup> See Torie Weiston-Serdan & Arash Daneshzadeh, *Critiquing the Anti-Blackness in Mentoring*, *DIVERSE ISSUES IN HIGHER EDUC.* (Aug. 11, 2016), <https://diverseeducation.com/article/86008> (discussing President Obama's "My Brother's Keeper" initiative, a mentoring program for boys and young men of color, and the anti-Black rhetoric that pervades mentoring programs).

<sup>165</sup> See Bryant G. Garth & Joyce S. Sterling, *Diversity, Hierarchy, and Fit in Legal Careers: Insights from Fifteen Years of Qualitative Interviews*, 31 *GEO. J. LEGAL ETHICS* 123, 129 (2018) ("A supervisor's conscious and unconscious behavior can have negative impacts in the workplace . . .").

<sup>166</sup> See Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and A Contemporary Indictment of Rogers v. American Airlines*, 7 *CARDOZO WOMEN'S L.J.* 115, 139 (2001) ("When a person's appearance is viewed by others and themselves as inappropriate, illegitimate or even 'ugly,' it is much easier to relegate their status to the bottom of the barrel economically and socially, which justifies a system of political oppression.") (internal footnotes omitted).

<sup>167</sup> See *id.* ("Grooming policies based on a limited interpretation impact which looks and, consequently which people are valued and perceived as legitimate. The result of which allows appearance discrimination to be 'a form of race discrimination that is as pervasive as it is painful.'") (internal footnotes omitted).

a profession designed to exclude them, it is also important to tell them the truth—that no matter how much they conform, they will never truly “fit in.” Regardless of what clothes and accessories they wear, their non-white and/or gender non-conforming bodies and beings will still be considered the antithesis of “professional” under the cis-heteronormative white racial frame that dominates professional spaces.<sup>168</sup> So while they may be able to lessen their hardship by embracing or emulating white cishet conceptions of professionalism, a suit is not a sufficient shield against the hostility and harm they will encounter when the attacks are targeting what is underneath.

This was evident during my years of courtroom practice. While I was not consciously striving to conform to standards of professionalism through white racial frames, I sometimes did, whether through conditioning, coincidence or personal preference. At the time, I often did enjoy the versatility of wearing fairly conservative feminine suits (a stark contrast to my colorful, eccentric casualwear), and the versatility of sometimes wearing my hair straight or in tight buns (a stark contrast to my usual large “curly-fro”). I was also very thin at the time, told I was “articulate,” and “attractive” (often by the court staff who interrupted my legal advocacy to offer their unsolicited satisfaction with my physical appearance). And yet, wearing my hair in a slicked-back bun, covering my thin, feminine-presenting body in a conservative suit, and speaking in professionally preferred English still did not protect me from being perceived the way the law intended: as a criminalized Black body instead of a practicing professional. When I entered the same criminal courthouse for years, wearing my conventionally “professional” attire and showing my official attorney identification, I was still regularly re-routed to the line for people who had cases in criminal court. When I entered the courtroom in which I had been practicing law for several years and sat in the front row among my non-Black professional peers, I was singled out and told to sit in the back and wait for my lawyer, as the first row is reserved for attorneys. As I appeared before the same judge for the second day in a row, wearing a suit, a slicked-back bun and carrying my case files, I stated on the record that I was an attorney representing the client standing next to me, and the judge still looked up at my non-Black co-counsel and asked if he was the attorney representing “both clients” today—referring to *me* and my client. And after

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<sup>168</sup> See *id.* at 140 (explaining that when minorities attempt to “fit” into white dominated culture they are merely “masking” themselves, which leads to self-loathing).

navigating this exhausting obstacle course of anti-Black oppression, I would return to the office and might encounter a colleague (sometimes even a non-Black colleague of color) who made the same mistaken assumption that I must be in a law office seeking representation, not offering it.<sup>169</sup>

The unfortunate reality is that the average person's perception of "professional" has little to do with what we wear on our bodies, and more to do with our bodies themselves; no matter what I do or wear as a visibly Black woman, the law has cemented my position as "criminal" instead of "professional" in the social order for those peering through a white racial frame. Though brown-skinned and visibly Black with a tightly curled afro, my overall physical appearance and, therefore, experience, is in many ways more privileged than that of my darker, thicker peers with even more Afrocentric phenotypes who suffer similar and additional harms to an even more extreme degree. It is important to acknowledge that embracing and expressing all parts of our identities is not the problem, the problem is the institutions and practices that stigmatize and marginalize our identities, and strides will only be made by changing the oppressive institutions, not the individuals they exclude.

i. Challenges in Changing Courtroom Culture: Professional Presentation and Client Representation

One concern that may arise in challenging conventional standards of professionalism is that clients may maintain the same traditional expectations of professional appearance and assume that attorneys who fail to present that way are not competent counsel. Former assistant public defender Shelley Duff speaks to the importance of prioritizing client perceptions in our presentation as she says:

I want clients to have confidence in me and not to look disheveled. If you come in dressed sharply, it gets attention. People feel good and have confidence in you, and I definitely think that's important. We have people looking at jail time or facing serious consequences. When someone meets me for the first time, you

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<sup>169</sup> The problem here is not that my peers in the legal profession placed me on the same plane with Black people navigating the criminal system or believed that I could have been one of them—I very well could be—as many of my dearest loved ones are. But the reason I could so easily be ensnared in these systems is the same reason so many other Black people are, and the same reason that I am presumed to need a lawyer instead of being a lawyer—because almost instinctively, people see Blackness as inherently "unprofessional", if not outright "criminal".

do have to fit that stereotype of what a lawyer's going to look like.<sup>170</sup>

Duff's point is a valid one. It is important to demonstrate to our clients that we have invested careful effort into every aspect of their representation; we should invest the same effort we would if our own liberty were at stake. Crafting anti-oppressive policies for professional appearance does not mean that we stop encouraging attorneys to exercise thoughtfulness in their overall presentation when appearing on behalf of others in serious legal proceedings. The charge is to think more critically about what informs our expectations of "professional" appearance—what purpose the expectations serve, who they center, and who they exclude, erase, or oppress. To that end, and to Duff's assertion that we must "fit [the] stereotype of what a lawyer's going to look like,"<sup>171</sup> we must acknowledge that this simply will not be possible for people of certain identities regardless of what we wear.

As previously mentioned, because perceptions of professionalism are more about our bodies and beings than what we wear over them, many clients may already question the competence of any lawyer who is not a cishet white male, since that is a popular perception of who holds power in the profession.<sup>172</sup> Many clients instinctively respect casually dressed senior white men who appear less polished, so again, what it looks like to be a lawyer or "professional" is loaded and not limited to attire.<sup>173</sup> I think when being responsive to the potential preferences of clients, it is important to consider to what extent those preferences are informed by harmful biases, and to what extent we should or should not buttress those biases through our practices when we have a stated commitment to creating anti-oppressive policy. Of course, I think this is a more complicated question when representing clients who do not have the resources to choose their lawyer and should not be denied representation, versus paid clients with whom boundaries can be enforced a bit more easily by declining their business if they expect their personal biases to dictate the identity expression of their attorney. However, clients, paid or not, ultimately just want to be respected and represented well, and

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<sup>170</sup> Jackson, *supra* note 26.

<sup>171</sup> *Id.*

<sup>172</sup> See Kang, *supra* note 97, at 313.

<sup>173</sup> See Elizabeth B. Cooper, *The Appearance of Professionalism*, 71 FLA. L. REV. 1, 18 (2019) (explaining studies that indicate people perceived as physically appealing are more likely to be seen as "smart, likeable, and good," while those who are not conventionally attractive may find themselves excluded from opportunities).

take their cues of what quality courtroom representation looks like from decision-makers in the court.<sup>174</sup>

When considering what a “good” lawyer looks like, clients are considering how the court perceives this lawyer, and how those particular perceptions impact their case.<sup>175</sup> As illustrated in the example of Shayla’s client noting the judge’s distaste for Shayla’s afro, clients make this determination based on how judges and other lawyers treat people who present a certain way—it communicates who does and does not have power in the courtroom. For example, I have had clients initially express candid concern about having a Black woman lawyer, or even a public defender, but those concerns were assuaged once they had the opportunity to observe my effective advocacy. Conversely, I have had Black clients who were excited about having a lawyer of shared identity, but then expressed concern when seeing me unfairly berated by the judge, reasonably believing that the judge sees me the same as them—having little credibility in court as a Black person; in either instance, clients’ assumptions about my skills were informed by what people in positions of power have communicated mainstream about people with my identities.

ii. Challenges in Changing Courtroom Culture: Professional Appearance in Trial Litigation and Impressions on Jurors

In addition to the perceptions of clients, those who appear before juries in trial litigation may be worried about how prospective jurors will perceive litigants who do not conform to traditional standards of professional appearance in court, and the impact that may have on the verdicts they can achieve for clients. However, jurors, like clients, come to the process with their own biases about all parties in the legal process, and these biases often have more to do with the identity of the litigator than their attire and adornments. Attempting to conform to certain standards of professional appearance rooted in cishet whiteness will not save gender non-conforming, people of color, and especially visibly Black people from being subjected to discrimination based upon their identities. While conforming to certain appearance standards will not

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<sup>174</sup> See Robert J. Aalberts et al., *Public Defender’s Conundrum: Signaling Professionalism and Quality in the Absence of Price*, 39 SAN DIEGO L. REV. 525, 545-46 (2002) (describing how a criminal defendant’s perception of a public defender can be negatively affected when the defendant perceives a judge giving private attorneys subliminal advantages or preference).

<sup>175</sup> See *id.*

protect against one's competence and credibility being questioned based on their identity, it is clear that people do make judgements about the attire and overall appearance choices others make, and often punish those who fail to conform—consciously or not. However, jurors, again like clients, take their cues of what a credible lawyer “looks like” from the profession and the court in which they are appearing. The people in positions of greatest power in the profession have always had the ability to define and redefine all impressions of the profession for the public. So as legal institutions engage in an anti-oppressive culture change, the public will follow.

All participants in the profession must work to uproot the deeply ingrained ideologies of white supremacy, anti-Blackness and cisheteronormativity that permeate the creation, application, and practice of law. This requires educating and urging all participants in the profession—academics, admins, attorneys, advocates, court staff, judges, juries and beyond—to be cognizant of, continue unlearning and challenging oppressive ideologies and practices while replacing them with ones rooted in liberation.

Judges in particular have a unique opportunity to enforce anti-oppressive policies and effect culture change in their courtrooms by at minimum:

- 1) publicly acknowledging the oppressive origins of traditional professional appearance norms and urging all other judges, litigants, staff, clients and jurors to challenge the biases that inform our expectations of what an attorney “should look like”
- 2) publicly acknowledging and reinforcing the reality that there is no true correlation between one's competency and credibility as an advocate, and their decision to maintain their identity expression through their professional appearance, instead of assimilating into existing, exclusionary norms
- 3) being mindful of how their treatment of people who do not conform to standards of professionalism rooted in white cishet identity expression influences the extent to which others perceive and treat them as professionals
- 4) explicitly encouraging and embracing cultural, religious and gender identity expression through professional appearance and prohibiting discrimination on that basis through courtroom codes of

conduct, jury instructions and consequences for discrimination

- 5) publicizing purposeful, clear, culturally conscious, anti-oppressive professional appearance expectations—to the extent they are deemed necessary at all. If a judge decides not to codify and circulate guidelines for professional appearance, they must be vigilant in constantly questioning whether their judgements or those of others in the courtroom are informed by implicit expectations of professional appearance and penalizing marginalized people for not conforming to norms designed to exclude them. There should be a means for marginalized people to report when they are being penalized for not conforming to implicit expectations, they should be believed, and these biases should be addressed.

If we change the culture of the profession and courts from which clients, juries and the general public take cues, we can change overall perceptions of professionalism to promote more anti-oppressive policies and allow for more equitable standards and expectations of professional appearance to emerge. We must usher in this conscious change with the same force, persistence, and pervasiveness with which the oppressive practices were originally ingrained.