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MODEL DRESS CODE: PROMOTING GENDERLESS ATTIRE RULES TO FOSTER AN INCLUSIVE LEGAL PROFESSION

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A MEMORABLE CONVERSATION

I knew that my likelihood of being able to wear a dress to court was pretty slim. I wasn't *that* naïve. At the same time, I resented the notion that at no time in my future legal career would I be able to acknowledge, honor, or share the full complexity of my identity—that, by choosing law, I was relinquishing the right to ever be fully myself in my professional career.

I came out as transgender at age eighteen. Shortly thereafter, I began to transition socially and medically. I quickly realized how much of my "self" I had been unable to acknowledge in my yearning to be recognized as anything other than what I knew I was not—a girl. Early in my transition, this manifested as a desperate need to be recognized as male. Later, though, as I began to "pass,"[2] feel comfortable in my own skin, and

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2 "Passing refers to a transgender person's ability to be correctly perceived as the gender they identify as and beyond that, to *not* be perceived as transgender." Jae Alexis Lee, *What Does "Passing" Mean within the Transgender Community?*, HUFFPOST (June 10, 2017, 11:13 AM), https://www.huffpost.com/entry/what-does-passing-mean-within-the-transgender-community_b_593b85e9e4b014ae8c69e099?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAHaahKHyajyLT5RMSHVYItf42Aberl94r53ZVSJRZei0fYrCOnr3oUvY7BnOmfPyYg1jSyaN8ed4sfiOzO9tiYMTvVdcbXR-_A3hNYqm3tTFNPXRSryxiBZsmmEejKhP0ImwSjsl11ATvzGAxOHl6XtAibFSmBYjR0LF1VNdJKI

recognize the face looking back at me in the mirror, I also found myself exploring what I had long ignored: my femininity.

Exploring my femininity was a radical act. Transitioning provided me with the comfort and courage to disregard my fears—the fear that painting nail polish on my toes would give those around me an excuse to misgender me; the fear that donning a dress would undermine my identity as "not a girl"; and the fear that wearing makeup might somehow make me "less trans." And, my newfound freedom led to another development: in addition to "he/him/his," I embraced "they/them/theirs" as pronouns. I had realized that I do not fit squarely within the gender binary,[3] and I had begun to embrace myself in full.

After a few years of living with this unparalleled authenticity, the idea of "going back into the closet" was an entirely unwelcome one for me. During law school orientation, I donned my suit for the class photograph and wondered if the credibility and reputation I hoped to establish with my peers would have been destroyed before they even knew my name if I had worn a dress to the event instead. I wondered how the judges addressing the first-year law students during that week of welcome would react if they noticed my nail polish and earrings in their courtroom. Somehow, despite my generally masculine gender expression, I was completely preoccupied by the concern that I might never be seen as a credible, reputable, and successful lawyer if I acknowledged this facet of my identity.

Within the first few weeks of law school classes, I sought advice from the first professional connection I had made in the legal world: my legal research and writing professor, Rebekah Hanley. I picked nervously at my fingernails as I waited for her office hours to begin. I was overwhelmed, shy, and incredibly nervous about the response my questions might receive.

Professor Hanley will pick up the story from here.

If students are anxious when they visit my office, they generally manage to hide it fairly well. Not Malcolm. He had come looking for professional advice from the most familiar, accessible law faculty member available. Though I do not recall seeing him pick at his nails, I do recall noticing that his hands were shaking. So was his voice.

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[3] For the basics on the gender binary and gender variance, see *Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT'L CTR. FOR TRANSGENDER EQUALITY (Oct. 5, 2018), https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive.

"Based on your experience working with students, and in law firms, what do you think happens if I show up for my summer clerkship interviews in a suit, but I wake up one day in July and want to wear a skirt suit or dress to the office? I mean, I haven't been a boy that long. I'm still . . . figuring it all out. But is it completely out of the question?"

I have fielded a wide range of student questions during my seventeen years as a member of the law school faculty, including four years leading the school's career center as an Assistant Dean. But Malcolm's question was new, and it caught me off-guard. We sat in silence while I worked through a response in my head.

I knew what I wanted the answer to be, for Malcolm and others. When I teach or present at a conference, I ordinarily wear a dress. I gravitated to the same kinds of clothing when I clerked for the federal courts and practiced at a large law firm. Around that default, I have built a professional wardrobe that reflects my identity, personality, budget, style, and comfort. I do own a few pairs of slacks and a couple of pantsuits, though, and no one at work is shocked when, due to convenience, weather, or whim, I appear in one. Indeed—they do not seem to notice at all. I want Malcolm to enjoy similar freedom in his professional life.

But my responsibility is to prepare Malcolm for the world he will enter—not the one I envision. "That feels like a risk," I said. "Maybe less so in Portland, Oregon, than in some other parts of the country. Still, it's hard to know how your supervising attorneys would react. I hope they'd be respectful. I hope they'd look at the strength of your work ethic and the quality of your work product and not the cut of your clothes. But I can't promise that will be the case."

Preparing students like Malcolm is not my only responsibility; I also have a duty to improve the profession that Malcolm will enter. I have been fortunate to benefit from the tireless efforts of female lawyers, senior to me, who were sidelined again and again due to their gender—under-estimated and overlooked by hiring partners; excluded from business lunches at all-male clubs; and excused from the partnership track due to a pregnancy. They fought for opportunity, respect, and inclusion—for themselves and for the future. Now I *am* the senior lawyer; I have an obligation to engage in similar efforts for the lawyers who follow me.

Based on that obligation, and inspired by Malcolm's bravery and authenticity, we propose and explain the value of an ungendered model dress code, a resource that any legal employer might draw upon to craft

a customized office policy honoring the employer's commitment to promoting diversity and inclusion in the legal profession.

THE LAW SHOULD CATCH UP WITH CULTURAL PROGRESS: AN ARGUMENT FOR GENDERLESS DRESS CODES

I. ARGUMENT SUMMARY

This essay does not challenge the notion that legal employers have an interest in establishing a professional dress code and a right to do so. Rather, that is its point of departure. Employers and employees alike benefit from clearly articulated standards that specify employer expectations consistent with office culture, seasonal climate, and regional norms.[4] Employees deserve to know, rather than be forced to guess, whether or when they should wear business suits to work; which days, if any, they can appropriately don more casual outfits; and what kinds of attire are acceptable as business casual in their workplace. Workplace dress codes might address a range of topics, including garment length, coverage, condition, and cleanliness; fabric quality and type; and absence of large logos or graphic images.

However, legal employers should avoid sex-based—or, more accurately, gender-based[5]—distinctions in crafting guidelines for professional attire.[6] Even though the law permits dress codes differentiated by gender, those policies are antiquated in light of evolving conceptions of gender identity and expression; are contrary to the language and purpose of Title VII;[7] and contribute to judgment and discrimination by

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[4] *See* Karen Thornton, *Parsing the Visual Rhetoric of Office Dress Codes: A Two-Step Process to Increase Inclusivity and Professionalism in Legal-Workplace Fashion*, 12 LEGAL COMM. & RHETORIC: JALWD 173, 174 (2015).

[5] Gender may or may not align with sex. "Sex is a biological trait that is determined by the specific sex chromosomes inherited from one's parents. . . . Gender, on the other hand, is socially, culturally and personally defined. It includes how individuals see themselves (gender identity), how others perceive them and expect them to behave (gender norms), and the interactions (gender relations) that they have with others." Krista Conger, *Of mice, men and women*, STANFORD MEDICINE, https://stanmed.stanford.edu/2017spring/how-sex-and-gender-which-are-not-the-same-thing-influence-our-health.html (last accessed Dec. 30, 2019); *see also* Denise Grady, *Anatomy Does Not Determine Gender, Experts Say*, N. Y. TIMES (Oct. 22, 2018), https://www.nytimes.com/2018/10/22/health/transgender-trump-biology.html; *see also* Cydney Adams, *The gender identity terms you need to know*, CBS NEWS (Mar. 24, 2017), https://www.cbsnews.com/news/transgender-gender-identity-terms-glossary/.

[6] *See generally* Sally Kane, *Law Firm Dress Code for Men and Women*, BALANCE CAREERS, https://www.thebalancecareers.com/sample-law-firm-dress-code-2164257 (last updated Sept. 16, 2019).

[7] *See* 42 U.S.C. § 2000e (1964).

forcing gender non-conforming individuals to perform an inauthentic identity.[8] Legal employers with a stated interest in—and business need for—fostering a diverse, welcoming, and affirming environment should craft a genderless dress code consistent with their inclusivity aspirations.

II. BEYOND THE BINARY: SOCIETAL RECOGNITION OF GENDER FLUIDITY ALONG A SPECTRUM IS EXPANDING, THOUGH STUBBORN MALE-FEMALE DISTINCTIONS ENDURE

The ongoing paradigm shift in societal conceptions of gender provides the backdrop for this essay and is worth examining. Just as the "gender revolution"[9] is changing societal norms, it is also changing the relatively conservative and risk-averse legal profession—albeit slowly. This essay calls upon the profession to accelerate that change in the interest of inclusion.

First, women are decreasingly expected to dress or act "femininely."[10] Lawyers who present as female, for example, now generally have the option of wearing pantsuits as opposed to skirts.[11] The judges and other authorities who perpetuated the tradition of women avoiding pantsuits are, one way or another, yielding to more progressive voices that encourage women to show up in any professional attire in which they can comfortably focus on completing their work.[12]

More importantly, gender is decreasingly viewed as given or fixed.[13] In growing numbers, people no longer expect biological sex assigned at birth to correlate with lifelong gender identity and expression—in part because they know, or have at least heard about, people transitioning.[14]

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8 *See generally* Mirande Valbrune, *Gender-Based Dress Codes: Human Resources, Diversity And Legal Impact*, FORBES (Sept. 28, 2018, 8:00 am), https://www.forbes.com/sites/forbeshumanresourcescouncil/2018/09/28/gender-based-dress-codes-human-resources-diversity-and-legal-impact/#8d83d904f535.

9 *See generally* Susan Goldberg, *We Are in the Midst of a Gender Revolution*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.com/pdf/gender-revolution-guide.pdf (last visited Dec. 2, 2019).

10 *See, e.g.,* Elizabeth Kiefer, *Have Millennials Killed The Dress Code?*, BUSTLE (Aug. 21, 2018), https://www.bustle.com/p/have-millennials-killed-the-dress-code-10104742.

11 *See* Sally Kane, *Law Firm Dress Code for Women: The Good, the Bad, and the Ugly*, BALANCE CAREERS, https://www.thebalancecareers.com/law-firm-dress-code-for-women-2164255 (Aug. 13, 2019) .

12 *Id.*

13 *See generally* Grady, *supra* note 5.

14 *See generally* Diana Tourjée, *The Girl's Guide to Changing Your Gender*, VICE (Oct. 17, 2018, 3:20 PM), https://www.vice.com/en_us/article/43e899/male-to-female-transition-guide.

Some of those people who have transitioned are lawyers who have entered the profession identifying as one gender and transitioned to a different gender while practicing law.[15]

Further, gender is no longer regarded as a simplistic binary—either culturally or legally.[16] Some stores now refuse gender-based differentiation of children's toys, clothing, or shoe sections.[17] Companies have created new products to fit these trends, including, for example, Mattel's introduction of the "world's first gender-neutral doll."[18] In 2019, the Merriam-Webster Dictionary officially changed its definition of the pronoun "they" to encompass its use in reference "to a single person whose gender identity is nonbinary."[19] Governments are following these private-sector leaders; critically, in 2017, Oregon became the first state to allow residents to legally identify as non-binary on a driver's license or identification card.[20] Just two years later, New Hampshire became the thirteenth state to do so.[21]

Widely publicized controversies have also heightened public awareness of the challenges faced by individuals who do not fit neatly into male and female categories. For instance, legislation requiring that people choose which public bathrooms to use according to the sex noted on their birth certificate, not their gender identity, sparked backlash and

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15 *See, e.g.*, Ellen Krug, *About Me*, ELLIE KRUG, https://elliekrug.com/about/ (last visited Aug. 13, 2019).

16 Mainstream society's growing recognition of gender as more than a "simplistic binary" is not a new or novel perspective; "[o]n nearly every continent, and for all of recorded history, thriving cultures have recognized, revered, and integrated more than two genders. Terms such as 'transgender' and 'gay' are strictly new constructs that assume three things: that there are only two sexes (male/female), as many as two sexualities (gay/straight), and only two genders (man/woman). Yet, hundreds of distinct societies around the globe have their own long-established traditions for third, fourth, fifth, or more genders. . . . Most Western societies have no direct correlation for . . . the many [] communities without strict either/or conceptions of sex, sexuality, and gender. Worldwide, the sheer variety of gender expression is almost limitless." *See A Map of Gender-Diverse Cultures*, PBS (Aug. 11, 2015), http://www.pbs.org/independentlens/content/two-spirits_map-html/.

17 *See, What's in Store: Moving Away from Gender-based Signs*, TARGET (Aug. 7, 2015), https://corporate.target.com/article/2015/08/gender-based-signs-corporate.

18 *See* Eliana Dockterman, *'A Doll For Everyone': Meet Mattel's Gender-Neutral Doll*, TIME (Sept. 25, 2019), https://time.com/5684822/mattel-gender-neutral-doll/.

19 *See* Kendall Trammell, *Merriam-Webster Adds the Nonbinary Pronoun 'they' to its Dictionary*, CNN, https://www.cnn.com/2019/09/17/us/merriam-webster-nonbinary-pronoun-they-trnd/index.html (last updated Sept. 18, 2019, 6:27 AM).

20 *See* Casey Parks, *Oregon Becomes First State to Allow Nonbinary on Drivers License*, OREGONIAN, https://www.oregonlive.com/portland/2017/06/oregon_becomes_first_state_to.html (last updated June 15, 2017).

21 *See* Jordyn Haime, *N.H. Becomes 13th State to Add Non-Binary Gender Option on Drivers Licenses*, N.H. PUB. RADIO (July 11, 2019), https://www.nhpr.org/post/nh-becomes-13th-state-add-non-binary-gender-option-drivers-licenses#stream/0.

legal challenges.[22] In the wake of that controversy, gender-neutral bathrooms are becoming more common.[23]

Competitive athletics, which are as binarized as bathrooms, have provided another source of awareness-raising controversy. When a would-be competitor cannot satisfy the standards used to sort participants into male and female categories—the only two categories available—the consequences prompt concerns about fairness and privacy, along with questions regarding potential redefinition: how should organizers define male and female eligibility now that gender is known to be a spectrum and neither sex nor gender is fixed?[24] While people will disagree about the best strategy for including a particular athlete in competition, the mere existence of that disagreement may itself be proof of some consensus that gender is not a simple binary.

Notwithstanding the emerging understanding of gender as a spectrum and the growing acceptance of gender fluidity, both written and unwritten binary professional attire expectations persist. These enduring, outdated expectations perpetuate judgment of and discrimination against those who will not—or cannot—comply.[25] Gender-differentiated dress codes and norms (like public restrooms, sports, and so many other aspects of mainstream society) are premised on the basic assumption that gender is binary.[26] That basic assumption is false. Employers should not perpetuate routines that rely on a false premise. Anything built upon a crumbling foundation will not stand.

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22 *See* Merrit Kennedy, *North Carolina Reaches Settlement in Long Battle Over Bathrooms and Gender Identity*, NPR (July 23, 2019), https://www.npr.org/2019/07/23/744488752/north-carolina-reaches-settlement-in-long-battle-over-bathrooms-and-gender-ident.

23 *See, e.g.*, Allison Needles, *Here's What Those New Signs on Some Public Restrooms in Tacoma Mean*, NEWS TRIBUNE, https://www.thenewstribune.com/news/local/article231663373.html (last updated June 18, 2019, 3:55 PM); *see also* Allison Kite, *New KCI Terminal Will Offer All-Gender Bathrooms, Other Inclusive Features*, KANSAS CITY STAR, https://www.kansascity.com/news/local/article238272348.html (updated Dec. 11, 2019, 4:18 PM).

24 *See, e.g.*, Paul MacInnes, *Caster Semenya blocked from competing at world championships*, THE GUARDIAN (July 30, 2019, 2:31 PM), https://www.theguardian.com/sport/2019/jul/30/caster-semenya-blocked-defending-800-metres-title-athletics-world-championships; *see also* Geneva Abdul, *This Intersex Runner Had Surgery to Compete. It Has Not Gone Well.*, N.Y. TIMES, https://www.nytimes.com/2019/12/16/sports/intersex-runner-surgery-track-and-field.html (last updated Dec. 17, 2019); *see also* Brad Townsend, *Flashback: Transgender wrestler Mack Beggs finishes high school career with another UIL state title amid boos, criticism and questions*, THE DALLAS MORNING NEWS (June 12, 2018), https://www.dallasnews.com/high-school-sports/2018/06/13/flashback-transgender-wrestler-mack-beggs-finishes-high-school-career-with-another-uil-state-title-amid-boos-criticism-and-questions/.

25 *See generally* Arthur Langer, *Is Your Dress Code Discriminatory?*, TLNT (May 31, 2019), https://www.tlnt.com/is-your-dress-code-discriminatory/.

26 *See id.*

To reduce judgment and discrimination in the workplace and the resulting harm to non-binary and gender non-conforming individuals, legal employers should promulgate and enforce dress codes without reference to gender. Just as gender is not binary, employer-promulgated and -enforced dress codes likewise should not be binary. Unfortunately, although the law *could* be read to ensure that employers take this step, so far judicial interpretation has avoided that result.

III. THE TITLE VII BLIND SPOT:[27] THE CONFOUNDING LEGALITY OF GENDER-DIFFERENTIATED[28] DRESS CODES—AND THE HARMS THEY CAUSE

A. Judicial Interpretation of Title VII Permits Gender-Differentiated Dress Codes

Title VII of the Civil Rights Act of 1964 prohibits employment practices that discriminate on the basis of race, color, religion, sex, or national origin:

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise *to discriminate against any individual with respect to his* compensation, terms, *conditions*, or privileges *of employment, because of such individual's* race, color, religion, *sex*, or national origin; or
>
> (2) to limit, segregate, or *classify his employees* or applicants for

[27] *See* Jennifer L. Levi, *Misapplying Equality Theories: Dress Codes at Work*, 19 YALE J. L. & FEMINISM 353, 353 (2008).

[28] Dress code jurisprudence and scholarship often refer to gendered dress codes as "sex-differentiated." This is consistent with the language of Title VII, which prohibits discrimination on the basis of sex—not gender or gender identity. However, as discussed above, *supra* note 5, an employer that prohibits or discourages a male employee from wearing skirts or dresses to the office—or that penalizes him for doing so—makes that decision based not on the employee's XY sex chromosomes but rather on the employee's expressed and perceived male gender. Therefore, in an effort to be precise and consistent, this essay uses the word gender, even though that word may—unfortunately—undermine the strength of a legal claim that an employer's professional attire standards amount to unlawful discrimination. For further discussion of this issue, *see* Weinberg, *supra* note 4 at 1–2, writing: "U[sing the words sex], gender, sexual orientation, and gender identity interchangeably may seem innocuous, but the disaggregation and conflation of these different categories has permitted courts to either extend or give a more preclusive effect to sex discrimination under [Title VII]. . . . Although sex is often the term used in federal civil rights statutes, such as in Title VII, society's understanding of gender and sexuality is much different now than it was when many such laws were passed. . . . Because gender refers to the physical appearance and mannerisms of an individual, many scholars agree that this should be the focal point of inquiry in cases involving 'sex.'"

> employment *in any way which would* deprive or tend to deprive any individual of employment opportunities or otherwise *adversely affect his status as an employee, because of such individual's* race, color, religion, *sex*, or national origin.[29]

Employer dress code and grooming policies have been interpreted as conditions of employment and, therefore, must comply with Title VII requirements.[30] A question regarding Title VII compliance is whether a challenged dress and grooming policy has a "legitimate business purpose."[31] However, a policy with a legitimate business purpose may nevertheless violate Title VII if it (1) places an unequal burden on the plaintiff's sex or (2) is "motivated by sex stereotyping."[32]

In *Price Waterhouse v. Hopkins*, the Supreme Court identified certain forms of sex stereotyping as impermissible under Title VII.[33] Plaintiff Ann Hopkins had alleged that her employer, Price Waterhouse, discriminated against her on the basis of sex when it rejected her for partnership.[34] Partners in Hopkins's office had recommended her candidacy for partnership, citing her strong work efforts in securing a $25 million contract for Price Waterhouse; had called her performance "outstanding" and "virtually at the partner level"; and had described her as "an outstanding professional" with "strong character, independence, and integrity."[35] But both supporters and opponents of Hopkins's candidacy for partnership expressed that Hopkins was "sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff."[36]

In addition, Hopkins's colleagues described her as "macho," suggested that she "overcompensated for being a woman," said she should "take a course at charm school," and criticized her use of profanity, with one partner acknowledging that those objections were to "a lady using foul language."[37] Further, when Hopkins learned that Price Waterhouse was deferring her reconsideration for partnership until the following year,

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29 42 U.S.C. § 2000e-2 (1964) (emphasis added).

30 *See generally* Ashlee Johnson, *From Jespersen to Jenner: Exploring Grooming Policy Standards in The Age of Gender Nonconformity*, 7 WAKE FOREST J. OF L. & POL'Y 607, 611–12 (2017).

31 *See* Michelle Y. DiMaria, *The Fine Line Employers Walk: Is It a Justified Business Practice, or Discrimination?*, 6 LAB.& EMP. L. F. 1, 2 (2016).

32 *See Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1106 (2006) (en banc).

33 *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 258 (1989).

34 *See id.* at 231–32.

35 *See id.* at 233–34.

36 *See id.* at 235 (internal quotation marks omitted).

37 *Id.*

she was told that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to improve her chances.[38]

The Court held that Price Waterhouse's employment actions constituted impermissible sex stereotyping under Title VII.[39] Specifically, the Court held that employers cannot consider an individual's failure to conform to sex-based stereotypes when making employment decisions.[40] Writing for the plurality, Justice Brennan warned that actions that draw upon and perpetuate sex stereotypes violate Title VII's broad prohibition of sex discrimination:

> In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. . . . [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[41]

Despite Justice Brennan's expansive condemnation of employers' insistence on conformity to sex stereotypes, gender-differentiated dress codes—which are by definition an employer's insistence on conformity to sex stereotypes—have been consistently upheld by lower courts as legal and constitutional.[42]

Specifically, lower courts have repeatedly held that gender-differentiated dress or grooming standards alone are insufficient to establish a prima facie case of sex discrimination under Title VII.[43] Rather, to prevail, a plaintiff must establish that the policy either (1) places "unequal burdens" on the plaintiff because of her gender or (2) was motivated by

38 *Id.*

39 *See id.* at 251.

40 *See id.* at 251–52.

41 *See id.* at 250–51.

42 *See, e.g.*, *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1386 (11th Cir. 1998) (dismissing challenge to policy prohibiting men from having long hair); *see also Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907 (2d Cir. 1996) (upholding policy requiring that male employees have short hair); *see also Jespersen*, 444 F.3d at 1104.

43 *See, e.g.*, *Jespersen*, 444 F.3d at 1104; *see also Frank v. United Airlines, Inc.*, 216 F.3d 845, 854–55 (9th Cir. 2000).

impermissible sex stereotyping.[44] Both routes have proven difficult for plaintiffs.

For example, in *Jespersen v. Harrah's Operating Co.*, the Ninth Circuit stated that the courts "have long recognized that companies may differentiate between men and women in appearance and grooming policies."[45] In *Jespersen*, a casino's gender-differentiated "Personal Best" grooming policy required that female employees wear their hair "teased, curled, or styled," wear stockings and colored nail polish,[46] and apply specific makeup types as directed by casino-hired "image consultants."[47] The plaintiff, Darlene Jespersen, experienced extreme discomfort wearing makeup and claimed that being required to do so negatively affected her job performance.[48]

Yet the court held that Jespersen did not have a cognizable claim under Title VII.[49] The court reaffirmed its previous holding that, to establish a prima facie case of sex discrimination under Title VII, a plaintiff must prove that the challenged policy either "creates an 'unequal burden' for the plaintiff's gender"[50] or was motivated by sex stereotyping.[51] Based on that rule, the court held that Jespersen had not established a prima facie claim under either theory.[52]

First, the court concluded that the casino's grooming policies were similarly burdensome for both male and female employees.[53] The court reasoned that both male and female employees were required to keep trimmed nails and to wear similar uniforms, and that men were prohibited from wearing makeup, applying nail polish, or having long hair, while women were required to do all those things.[54] The court further reasoned that Jespersen had not provided sufficient evidence that "it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the

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44 *See* Mary A. Case, *Legal Protections For The "Personal Best" Of Each Employee: Title VII's Prohibition On Sex Discrimination, The Legacy Of Price Waterhouse v. Hopkins, And The Prospect Of ENDA*, 66 STAN. L. REV. 1333, 1346-47 (2014).

45 *Jespersen*, 444 F.3d at 1110.

46 *See id.* at 1107.

47 *See id.* at 1114.

48 *See id.* at 1108.

49 *See id.* at 1112.

50 *See id. at* 1110.

51 *See id.* at 1111.

52 *See id.* at 1106.

53 *See id.* at 1109.

54 *See id.* at 1107.

requirement that he keep his hair short."[55] Therefore, refusing to take judicial notice of facts Jespersen had failed to introduce into evidence, the court concluded that Jespersen had not established that the casino's policy imposed an unequal burden on female employees.[56]

Second, in the court's view, Jespersen had not proven that the casino had partaken in impermissible sex stereotyping.[57] The court distinguished Jespersen's case from Hopkins's in several ways.[58] It reasoned that Price Waterhouse's stereotyping placed Hopkins in a "double bind," discouraging her from acting masculine even though acting that way had contributed to her success; in contrast, the casino's stereotyping did not "objectively inhibit [Jespersen's] ability to do the job"—in part because Jespersen's subjective, individual experience was insufficient proof.[59] Further, the court observed that where Price Waterhouse had asked Hopkins to hide traits that were considered praiseworthy in men, the casino did not "single out Jespersen"; rather, it applied its "Personal Best" policy "to all of the bartenders, male and female."[60] Finally, the court reasoned that, unlike in *Price Waterhouse*, no evidence in Jespersen's case indicated "that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear."[61]

The Ninth Circuit went on to distinguish Jespersen's case from other sex stereotyping cases, reasoning that the casino's policy was not "intended to be sexually provocative," the policy did not "intend to stereotype women as sex objects,"[62] and Jespersen had not sued for sexual harassment.[63] Ultimately, the court reaffirmed[64] that while a Title VII

55 *See id. at* 1110.

56 *See id.* at 1110–11.

57 *See id.* at 1111–12.

58 *See generally*, Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII & (and) an Argument for Inclusion*, 24 BERKELEY J. OF GENDER, L. & JUST. 166, 183 (2009).

59 *See id.*

60 *See Jespersen,* 444 F.3d at 1111–12.

61 *See id.* at 1112; *contra* Katie Reineck, *Running from the Gender Police: Reconceptualizing Gender to Ensure Protection for Non-Binary People*, 24 MICH. J. GENDER & L. 265, 278–79 (2017) (arguing that the *Jespersen* court "failed to recognize that stereotyping can be based on implicit biases and does not require the employer to realize that it is asking women employees to adhere to a gendered stereotype when it determines, for example, that they must wear makeup to look professional.")

62 *See Jespersen*, 444 F.3d at 1112.

63 *See id.* at 1111–13 (contrasting against *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068–69 (9th Cir. 2002) (en banc); *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001)).

64 *See* Case, *supra* note 44, at 1358 ("The Ninth Circuit claimed it 'took this sex discrimination

challenge to a dress or grooming policy *could* be successful using a sex-stereotyping theory, Jespersen had failed to establish such a case.[65]

B. Critiques of Gender-Differentiated Dress Code Jurisprudence

The unequal burden and sex stereotyping standards reaffirmed in *Jespersen* have been criticized by scholars and legal practitioners on several grounds. First, critics argue that dress code jurisprudence—known colloquially as the "Title VII blind spot"[66]—violates the plain language and early interpretations of Title VII.[67] Even though courts generally analyze Title VII claims "with the understanding that every employee or prospective employee must be treated without regard to protected traits, such as race, sex, religion, or disability," when analyzing dress or grooming policies, courts allow employees to be treated differently with regard to their sex (or gender).[68] In fact, early rulings by the Equal Employment Opportunity Commission (EEOC) stated that "[t]o maintain one employment standard for females and another for males discriminates because of sex . . . and is unlawful unless the employer demonstrates the applicability of the narrow [bona fide occupational qualification] [69] exception."[70] The EEOC eventually "admitted defeat" after courts consistently held that gender-differentiated dress and grooming

case en banc in order to reaffirm our circuit law concerning appearance and grooming standards, and to clarify our evolving law of sex stereotyping claims.'" (quoting *Jespersen*, 444 F.3d at 1105)).

65 *See Jespersen*, 444 F.3d at 1113.

66 *See* Jennifer L. Levi, *Misapplying Equality Theories: Dress Codes at Work*, 19 YALE J. L. & FEMINISM 353, 356 (2008) ("I call this anomalous jurisprudence—the collection of cases upholding different standards of dress for men and women in the workplace—the 'Title VII blind spot.'")

67 *See* Case, *supra* note 44, at 1354; *see also* Case, *supra* note 5, at 48–49 ("[O]ne need not go beyond the plain language of [Title VII] to find explicit protection for [the] 'male employee who routinely appeared for work in skirts and dresses . . . .'"); *see also* Peter B. Bayer, *Mutable Characteristics and the Definition of Discrimination under Title VII*, 20 U.C. DAVIS L. REV. 769, 771 (1987) ("[T]he courts have yet to fulfill [Title VII]'s mandate. In apparent contradiction of the statute's plain language, the courts have defined certain policies as nondiscriminatory despite the fact that the policies make blatant distinctions on the basis of sex, race, and national origin . . . ."); *see also* Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 97 (2006) (writing that in *Jespersen* the Ninth Circuit turned Title VII on its head and departed from well-established law when it interpreted Title VII's precedent to mean that Jespersen could not prevail unless her case demonstrated that *all* women are burdened, not just those who, like her, are offended and harmed by having to wear makeup.)

68 *See* Johnson, *supra* note 30, at 614.

69 The bona fide occupational exception allows an employer to discriminate against an individual on the basis of certain protected characteristics "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *See* 42 U.S.C. § 2000e-2(e).

70 *See* Case, *supra* note 44, at 1354.

policies are, alone, insufficient to sustain a claim under Title VII.[71] But its original stance was consistent with the plain language of Title VII.[72]

Second, critics argue that in addition to violating Title VII's plain language, dress code jurisprudence subverts Title VII's purpose[73]—and the purpose of anti-discrimination law generally.[74] The reasoning employed by courts in permitting gender-differentiated dress and grooming policies limits the ability of marginalized groups to achieve equal opportunity[75]—a result antithetical to the purpose of anti-discrimination laws.[76] Indeed, by condoning "even-handed" discrimination,[77] dress code jurisprudence perpetuates the kind of discrimination that Title VII was implemented to prevent.[78]

Third, critics argue that *Jespersen* and other decisions like it directly betray *Price Waterhouse*'s holding and reasoning.[79] Though

71 *See id.* at 1355. Though the EEOC "admitted defeat," it "held to its longstanding view that 'absent a showing of a business necessity, different grooming standards for men and women constitute sex discrimination under Title VII'" *Id.*

72 *See id.* at 1361.

73 *See* Bayer, *supra* note 67, at 772–73 (arguing that "all employment decisions, criteria, terms, conditions, and opportunities that are premised on or implicate race, color, religion, sex or national origin are discriminatory" in light of Title VII's "overall goal": "evaluating individuals based on their qualifications rather than upon group stereotypes.").

74 *See* Clements, *supra* note 58, at 171, 198 (arguing that the stigmatization arising from the "trait discrimination"—discrimination on the basis of "mutable traits" rather than *im*mutable traits or traits "tied to a fundamental right"—condoned in dress code jurisprudence "frustrates the goal of antidiscrimination law: to achieve social equality for historically disenfranchised groups").

75 *See id.* at 179.

76 *See id.* at 171, 198.

77 *See* Bayer, *supra* note 67, at 862 (discussing *Gerdom v. Continental Airlines, Inc.,* 692 F.2d 602 (9th Cir. 1982) (en banc), *cert. dismissed*, 460 U.S. (1983) (reasoning that "grooming rules . . . which do not significantly deprive either sex of employment opportunities[] and which are *even-handedly applied* to employees of both sexes" are permissible) (emphasis added)); *see also Jespersen*, 444 F.3d at 1110 ("where, as here, such [grooming and appearance] policies are reasonable and are imposed *in an evenhanded manner* on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities.") (emphasis added) (internal quotations omitted) (quoting *Knott v. Mo. Pac. Ra. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975)).

78 *See* Case, *supra* note 5, at 46, 81 (writing that "under a disparate impact analysis, requiring such gendered characteristics (even if evenhandedly from both sexes) in the absence of business necessity is [] a violation of Title VII . . ." and that "if courts knock out objective standards on disparate impact analysis but preclude employees from challenging subjective ones, far from eliminating discrimination, the courts have rather expanded even further the scope of covert discrimination under the hypocritical face of neutral standards"); *see cf.* Bayer, *supra* note 67, at 862–63 (arguing that "a male-only hair length rule is not 'evenhanded' [because i]t places a stereotypical requisite on men . . . that is not imposed on women").

79 *See* Case, *supra* note 44, at 1357–58 (explaining that the *Jespersen* holding did not align with the *Hopkins* holding of "interpreting a clear statutory text prohibiting employer-mandated distinctions between the sexes" even though *Jespersen* had stark factual similarities to *Hopkins*); *see also* Case, *supra* note 5, at 49 (explaining that notwithstanding *Hopkins*'s finding of impermissible sex discrimination by employers against women based on appearance, "discrimination against male job applicants who appear 'effeminate' is generally lawful, as is employment against cross-

disagreement exists as to the "clear" or "main" holding of *Price Waterhouse*,[80] some critics remain adamant that its holding and reasoning were unmistakable.[81] Specifically, they argue that *Price Waterhouse*'s holding "that it constitutes impermissible sex stereotyping to suggest to a female employee that she 'dress more femininely, wear makeup, have her hair styled, and wear jewelry' should make clear that sex-specific grooming standards violate Title VII."[82] If *Price Waterhouse* "stand[s] for the proposition that any sex stereotyping in the workplace is impermissible and violative of Title VII,"[83] dress code jurisprudence—which allows employers to force employees to conform to sex-based stereotypes regarding attire—clearly betrays *Price Waterhouse*.

Finally, the logic employed by courts in upholding gender-differentiated dress and grooming policies essentially renders this form of discrimination immune from challenge, except under extreme circumstances.[84] Courts adopting an interpretation of *Price Waterhouse* that deems sex stereotyping impermissible "only insofar as it has a pernicious effect on the advancement of women in the workplace"[85] will

dressers").

80 *See* Clements, *supra* note 58, at 179 (referencing other commentators' observation that "it is not clear that the Court's holding established that sex stereotyping *per se* violates Title VII," and noting that "the Court's discussion of sex stereotyping was not central to the key holding of the case, which was to resolve how a plaintiff must prove a 'mixed-motive' discrimination case. . . .") (emphasis added); *see also* Amy McCrea, Note, *UNDER THE TRANSGENDER UMBRELLA: IMPROVING ENDA'S PROTECTIONS*, 15 GEO. J. GENDER & L. 543, 551 (writing that "[a]rguably, a natural implication of the Supreme Court's prohibition on sex stereotyping in *Price Waterhouse* would be that employers may not have dress or grooming standards requiring male and female employees to dress or groom themselves in a particular and different ways" but that "federal courts may not share this interpretation").

81 *See* Case, *supra* note 44, at 1357 (calling *Price Waterhouse* "a clear holding interpreting a clear statutory text prohibiting employer-mandated distinctions between the sexes.").

82 Mary A. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L. J. 1, 49 (1995).

83 Levi, *supra* note 66, at 378 (acknowledging two main interpretations of *Price Waterhouse*: (1) "that any sex stereotyping in the workplace is impermissible," and (2) "that sex stereotyping is impermissible only insofar as it has a pernicious effect on the advancement of women in the workplace.").

84 *See id.* at 389 (writing that "[a]s long as courts rely exclusively on group-based equality claims rooted in second generation anti-subordination analysis, [...] dress code challenges will likely fail."); *see also* Clements, *supra* note 58 at 179 (describing existing scholarship's argument that "the assimilationist themes running through [dress code jurisprudence and courts' reasoning] severely limits the ability of subordinated groups to achieve equal opportunity in the workplace"); *see also* McCrea, *supra* note 80, at 552 (arguing that the *Jespersen* court's blanket statement that "Harrah's grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender[,]" particularly without any further explanation, "provided little guidance to plaintiffs attacking a dress or grooming policy . . .").

85 Levi, *supra* note 66, at 378.

require "not simply a showing of sex stereotyping (or differentiation between men and women) but *subordination as well*."[86] And, "[b]ecause most women are gender conforming, such a showing is difficult, at best, to make."[87]

Jespersen illustrates another type of hurdle that dress code challengers have faced: failing to prove what should be self-evident. The *Jespersen* court's observation that the plaintiff had not introduced sufficient evidence "that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypic image of what women should wear" falls flat because the policy plainly did precisely that: by forcing female bartenders to apply particular makeup, wear colored nail polish, and tease, curl, or style their hair, the "Personal Best" policy forced women employees to perform their gender in a stereotypical way—and penalized them when they deviated from a gender stereotype.[88] Thus, the plaintiff lost because she failed to prove something obvious—a logical corollary of what she did prove.[89]

Relatedly, the *Jespersen* court's statement that no evidence showed that female bartenders must invest more time and money than male bartenders to comply with the policy has been criticized, including in one *Jespersen* dissent:

> Every [Harrah's] requirement that forces men to spend time or money on their appearance has a corresponding requirement that is as, or more, burdensome for women: short hair v. "teased, curled, or styled" hair; clean trimmed nails v. nail length and color requirements. . . . The requirement that women spend more time and money applying full facial makeup has no corresponding requirement for men, making the "overall policy" more burdensome for the former than the latter. . . .
>
> It is true that Jespersen failed to present evidence about what it costs to buy makeup and how long it takes to apply it. But is

86 *Id.* at 378–79.

87 *Id.* at 379.

88 *See Jespersen*, 444 F.3d at 1112; *id.* at 1114 (Pregerson, J., dissenting) ("I believe that the 'Personal Best' program was part of a policy motivated by sex stereotyping and that Jespersen's termination for failing to comply with the program's requirements was 'because of' her sex.").

89 *See* Reineck, *supra* note 61, at 296 (referring to the *Jespersen* court's reasoning as an "unwillingness to use common sense"); *see also* McCrea, *supra* note 80, at 551 (writing that "[i]t seems obvious that a policy requiring women to wear makeup and forbidding men to do the same is rooted in sex stereotypes.").

> there any doubt that putting on makeup costs money and takes time? . . .
>
> Women's faces, just like those of men, can be perfectly presentable without makeup. . . . I see no justification for forcing them to conform to Harrah's quaint notion of what a "real woman" looks like.[90]

One final, foundational critique is also worth raising: contrary to the reasoning within dress code jurisprudence, gender-differentiated dress codes—particularly in the legal profession—do not serve a legitimate business purpose. Legitimate business purposes for dress or grooming policies include safety or hygiene considerations; customer preference, "so long as catering to this preference does not have a discriminatory impact;"[91] and the need to operate efficiently and productively, or profitably.[92] Legal employers, like all employers, have an interest in promulgating and enforcing dress and grooming policies to ensure hygiene, cater to non-discriminatory client preference, and foster a professional atmosphere.[93] However, no legitimate business purpose justifies making these policies gendered.[94] To be blunt, if a firm finds a well-pressed, knee-length, tailored dress on a female employee to be acceptable, it should find a similar dress on *any* employee to be acceptable. Reflexively replicating antiquated gender stereotypes is not a legitimate business purpose.

Though the policies challenged in *Jespersen* and similar cases may lack legitimate justification, they do have an explanation: gender discrimination. They also have harmful effects.

C. The Damaging Effects of Dress Code Jurisprudence[95]

Dress code jurisprudence's greatest flaw may be its continued

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90 *See Jespersen*, 444 F.3d at 1117–18 (Kozinksi, J., dissenting).

91 *See* HR SERIES POLICIES AND PRACTICES (Jan. 2020).

92 *See id;* Mark R. Bandsuch, *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 CAP. U. L. REV. 965, 1087 (2009).

93 *See* Bandsuch, *supra* note 92, at 1087.

94 *See generally id.* at 1082–83.

95 This essay explores the harms that dress code jurisprudence inflicts upon non-binary and gender non-conforming individuals. But dress code jurisprudence—and dress codes generally—also perpetuate judgment and discrimination against other minority groups. Though race is not the focus of this essay, complex intersectionality issues should, at a minimum, be acknowledged in any discussion of dress codes and the harms they create. *See* Janet Ainsworth, *What's Wrong with Pink Pearls and Cornrow Braids?: Employee Dress Codes and the Semiotic Performance of Race and*

insistence that plaintiffs show group-based harm to sustain a claim under Title VII.[96] As one critic has pointed out, "[t]he harm caused by . . . dress codes is perceived exclusively as an individualized harm not shared by other members of the affected class."[97] "However, Title VII, the law that serves as the doctrinal basis of these claims does not require a showing of group harm."[98] By requiring proof of group, not individual, harm under the unequal burdens analysis,[99] dress code jurisprudence has become a disingenuous attempt to address discrimination: "[i]t has permitted employers to impose sex-based workplace policies that have a pernicious effect on people whose gender identity does not fit within traditional norms."[100] Thus, by declining to remedy—or often, even recognize—the individual harms caused by gender-differentiated dress codes, courts have allowed those policies and harms to persist.

Gender-differentiated dress codes effectively force gender non-conforming individuals to perform an inauthentic identity.[101] Gender identity is central to a person's core—"perva[sive in] one's entire concept of one's place in life."[102] In several cases challenging dress codes, transgender plaintiffs "have successfully demonstrated the [individual harm] of having to express a gender inconsistent with their internalized sense of who they are as male or female," neither, or both.[103] The inauthenticity required of gender non-conforming individuals forced to comply with sex-differentiated dress codes "creates a culture of coerced assimilation."[104] And, by requiring a showing of a group subordinating effect, courts have failed to "recognize that 'sometimes assimilation is not an escape from discrimination, but precisely its effect.'"[105]

Gender in the Workplace, *in* LAW, CULTURE AND VISUAL STUDIES (Anne Wagner & Richard K. Sherwin, eds., 2014).

96 *See* Levi, *supra* note 66, at 356. For example, the "unequal burdens" analysis requires a plaintiff to show an "unequal burden on the plaintiff's [gender]"—not just an unequal burden on the plaintiff *because of* her sex. *Jespersen*, 444 F.3d at 1106. This creates a required showing of group (not just individual) harm. *See id.* at 1109.

97 *See* Levi, *supra* note 66, at 357.

98 *See id.*

99 *See* Johnson, *supra* note 30, at 624 ("[W]hile courts have expanded the *Price Waterhouse* sex stereotyping standard, the unequal burdens standard has barely evolved, and challenges under that standard are unlikely to succeed where the majority of employees suffer no burden in complying with sex-specific grooming policies based on gender norms.").

100 *See* Levi, *supra* note 66, at 364.

101 *See id.* at 367.

102 *See id.* at 365 (quoting *M.T. v. J.T.*, A.2d 204, 205 (N.J. Super. Ct. App. Div., 1976).

103 *See id.* at 366.

104 Bandsuch, *supra* note 92, at 983.

105 *See id.* (quoting Ritu Mahajan, *The Naked Truth: Appearance Discrimination, Employment*

The "coerced assimilation" effected by dress code jurisprudence and gender-differentiated dress codes interferes with personal autonomy, privacy, and identity.[106] It reinforces stigmatization and subordination.[107] And it prevents gender non-conforming individuals from achieving truly equal opportunity in the workplace[108]. This causes concrete economic harm.[109] In effect, dress code jurisprudence's interpretation of Title VII is itself "a source of discriminatory injury to the very groups it was created to protect."[110]

IV. PROMULGATING AND ENFORCING DRESS CODES WITHOUT REFERENCE TO GENDER: A STRATEGIC CHOICE CONSISTENT WITH ETHICAL DUTIES, CULTURAL EVOLUTION, AND MARKET FORCES

On a practical level, the "Title VII blind spot" eliminates one possible route to reform in the legal profession: legal employers will not create genderless dress standards because marginalized employees bravely raise their voices, file discrimination claims, and secure court orders. Rather, legal employers will create genderless standards, and enforce them in a gender-neutral manner, only when those employers realize that doing so is consistent with their ethical obligations and advances their business interests.

Although gendered dress codes may be legal, they may nevertheless be unethical. In 2016, the ABA passed a new model rule of professional responsibility that, if adopted by a state, would subject a lawyer to discipline for harassing or discriminatory conduct:

> It is professional misconduct for a lawyer to: . . .
> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, *sex*, religion, national origin, ethnicity, disability, age, sexual orientation, *gender identity*, marital status or socioeconomic status in conduct related to the practice of law.[111]

The resolution to create the rule was co-sponsored by a number of

and the Law, 14 ASIAN AM. L.J. 165, 181 (2007).

106 *See* Bandsuch, *supra* note 92, at 983.

107 *See id.* at 983–84.

108 *See* Clements, *supra* note 58, at 179.

109 *See* Levi, *supra* note 66, at 366.

110 Bandsuch, *supra* note 92, at 983.

111 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016) (emphasis added).

ABA committees, sections, and commissions, including the Diversity & Inclusion 360 Commission and the Commission on Sexual Orientation and Gender Identity.[112] The first to speak in favor of the resolution was Chair of the ABA Commission on Sexual Orientation and Gender Identity, who shared that, years prior, he had been passed over by a law firm hiring committee because he is gay.[113] This recent amendment to the professional conduct rules suggests that, even absent a civil remedy for those who experience discrimination due to a gendered dress code, lawyers may begin to distance themselves from gendered attire norms based on their ethical duty to foster an inclusive profession.

As of June 2019, just two states—Vermont and Maine—had adopted versions of the new ABA model rule, though about half the states have some anti-discrimination rule that predates the ABA's model rule.[114] Professional discipline for engaging in discrimination by virtue of promulgating or enforcing gendered appearance standards seems highly unlikely.[115] Thus, economic forces are more likely than ethical rules to reshape lawyer behavior.[116]

Historically, the practice of law has been a male endeavor—and a straight, white male endeavor at that—though women and other underrepresented groups have diversified the profession, breaking down barriers in growing numbers over recent decades.[117] Institutional changes have facilitated some of this transformation. For example, law

112 *See* Lorelei Laird, *Discrimination and Harassment will be Legal Ethics Violations Under ABA Model Rule*, ABA J. (Aug. 8, 2016, 6:36 PM), http://www.abajournal.com/news/article/house_of_delegates_strongly_agrees_to_rule_making_discrimination_and_harass.

113 *See id.*

114 *See* Debra Cassens Weiss*, Second State Adopts ABA Model Rule Barring Discrimination and Harassment by Lawyers*, ABA J. (June 13, 2019, 11:39 AM), http://www.abajournal.com/news/article/second-state-adopts-aba-model-rule-barring-discrimination-by-lawyers.

115 *See generally* Alison J. Hartwell*, Makeup for Success: Why Jespersen v. Harrah's Stifles Diversity by Promoting Stereotypes in Employment*, 13 CARDOZO J. L. & GENDER 407, 408 (2007) ("Courts have not been impressed with employees' interests in determining their own appearance, and have repeatedly legitimated employers' regulation of employee appearance.").

116 *See* John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 72 (2013) ("[F]ew will deny that the economics of law practice significantly influence lawyer behavior.").

117 *See* Jennifer Cheeseman Day, *Number of Women Lawyers At Record High But Men Still Highest Earners*, U. S. CENSUS BUREAU (May 08, 2018), https://www.census.gov/library/stories/2018/05/women-lawyers.html; *see also* Debra Cassens Weiss, *Law Firm Diversity is 'good news/bad news story,' Says NALP Executive Director*, ABA J. (Jan. 9, 2019), http://www.abajournal.com/news/article/law-firm-diversity-is-bad-news-good-news-story-nalp-executive-director-says ("The overall percentage of minority associates continues to increase at law firms, both year over year and since 2009."). In 1960, just four percent of lawyers were women, but by 1993, twenty-five percent of lawyers were women; as of 2018, the percentage of women lawyers has increased to thirty-eight percent. Day, *supra* note.

firms have become more generous with respect to parental leave.[118] They have introduced part-time and flex-time options,[119] in addition to emergency or on-site daycare, to support parents of young children.[120] With the help of technological advances, they have enhanced flexibility by permitting more telecommuting.[121] These innovations have all facilitated shifts in demographics in the legal profession by signaling to women and other parents that they belong and by creating a path to continued advancement in the face of family transitions.

But true inclusivity has proven evasive.[122] Through retention and promotion, legal employers have stayed close to their original demographic.[123] Junior attorneys who do not feel welcomed or supported pursue other professional opportunities.[124] Thus, while "non-traditional" lawyers enter the profession in increasing numbers, they do not remain or advance at the same rate as their straight, white, male peers.[125] Additional, intentional, meaningful change designed to boost

118 *See, e.g.*, Staci Zaretsky, *The Top 10 Law Firms For Gender Equity & Family-Friendly Policies (2019)*, ABOVE THE LAW (Apr. 16, 2019), https://abovethelaw.com/2019/04/the-top-10-law-firms-for-gender-equity-family-friendly-policies-2019/.

119 *See id.*

120 *See* Angela Morris, *Big Law Onsite Day Care: The Trend That Wasn't*, THE AMERICAN LAWYER (Jan. 13, 2017), https://www.law.com/americanlawyer/almID/1202776873511/.

121 *See* Staci Zaretsky, *More Biglaw Firms Join The Future of Law Practice By Offering Telecommuting Programs*, ABOVE THE LAW (Mar. 20, 2017, 1:42 P.M.), https://abovethelaw.com/2017/03/more-biglaw-firms-join-the-future-of-law-practice-by-offering-telecommuting-programs/.

122 *See, e.g.*, Kim Elsesser, *Female Lawyers Face Widespread Gender Bias, According to New Study*, FORBES (Oct. 1, 2018), https://www.forbes.com/sites/kimelsesser/2018/10/01/female-lawyers-face-widespread-gender-bias-according-to-new-study/#11944d724b55 (explaining a recent survey that indicated female lawyers, and especially women of color, are more likely than their male counterparts to be interrupted, to be mistaken for non-lawyers, to do more office housework, and to have less access to prime job assignments); *see also* Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, AM. BAR ASS'N (May 2, 2018), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/ ("Despite the increased emphasis on diversity and inclusion within the legal

field over the past decade or so, the legal profession remains one of the least diverse of any profession.").

123 *See, e.g.*, Veronica Root, *Retaining Color*, 47 U. MICH. J. L. REFORM 575, 575 (2014) (explaining that large law firms have notable problems retaining minority attorneys).

124 *See* Janee T. Prince, *"Can I Touch Your Hair?" Exploring Double Binds and the Black Tax in Law School*, 20 U. PA. J. L. & SOC. CHANGE 29, 41 (2017) ("Aside from not feeling valued, women of color leave law firms because they do not feel supported (twenty-two percent 22%), and they lack the ability to establish meaningful relationships (twenty-one percent 21%).").

125 *See, e.g.*, Anusia Gillespie, *The Horrible Conflict Between Biology and Women Attorneys*, AM. BAR ASS'N, https://www.americanbar.org/careercenter/blog/the-horrible-conflict-between-biology-and-women-attorneys/ (last visited Dec. 30, 2019) ("[W]omen have comprised around 47% of graduating law school classes since 2000, and yet women represent only about 18% of equity partners nationwide.").

inclusivity is necessary if institutions are to improve the retention and advancement of non-traditional lawyers.[126]

Finding ways to boost retention is particularly important because the population of the United States is becoming increasingly diverse,[127] and clients expect lawyers and firms to keep pace.[128] Clients want access to lawyers they trust and relate to.[129] Clients also want to partner with organizations that truly champion diversity and inclusion values, not those that merely advertise those concepts, so some clients will hire outside counsel only at firms that are able to demonstrate a commitment to enhancing diversity in the legal profession.[130]

As a result, law firms that want to remain competitive must adapt—like employers across all disciplines—to meet the changing expectations of job applicants and employees.[131] The cultural shift that has reshaped client expectations has also affected the legal talent that employers attract and retain.[132] Generation Z, roughly comprised of those born between 1997 and 2012,[133] is just beginning to enter the legal workforce.[134] The New York Times has highlighted Generation Z's progressive perspective on identity, noting the generation's acceptance of gender-neutral pronouns.[135] The most diverse generation to date,[136] Generation Z highly values diversity and inclusion; indeed, seventy-seven percent of Generation Z poll respondents reported that an

126 *See generally* discussion *supra* notes 124 and 125.

127 *See* Hansi Lo Wang, *Generation Z Is The Most Racially And Ethnically Diverse Yet*, NPR (Nov. 15, 2018. 10:11 A.M.), https://www.npr.org/2018/11/15/668106376/generation-z-is-the-most-racially-and-ethnically-diverse-yet.

128 *See* Daniel S. Wittenberg, *Corporate Clients Demand More Diversity from Law Firms*, A.B.A. (June 20, 2017), https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/corporate-clients-demand-more-diversity-law-firms/.

129 *See* Matt Lalande, *What Potential Clients Look For When They Visit Your Legal Site*, LAW TECH. TODAY, (Feb. 14, 2019), https://www.lawtechnologytoday.org/2019/02/this-is-what-potential-clients-are-looking-for-when-they-visit-your-legal-site/.

130 *See* Ben Seal, *The 2018 Diversity Scorecard: The Rankings*, AM. LAW. (May 29, 2018), https://www.law.com/americanlawyer/2018/05/29/the-2018-diversity-scorecard/.

131 *See* The Law Society, *Horizon Scanning: Forward Thinking*, (June 2018), www.lawsociety.org.uk.

132 *See* Katie Miserany, *Trying to recruit Gen Z? Focus on D&I*, SURVEYMONKEY, https://www.surveymonkey.com/curiosity/trying-to-recruit-gen-z-focus-on-di/ (last accessed Dec. 30, 2019).

133 *See* Michael Dimock, *Defining generations: Where Millennials End and Generation Z Degins*, PEW RES. CTR. (Jan. 17, 2019), https://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins/.

134 *See* Tyler Paige, *Gen Z Is Coming to Your Office. Get Ready to Adapt.*, AALL STREET J. (Sept. 6, 2018), https://www.wsj.com/graphics/genz-is-coming-to-your-office/.

135 *See* Dan Levin, *Generation Z: Who They Are, in Their Own Words*, N.Y. TIMES (Mar. 28, 2019), https://www.nytimes.com/2019/03/28/us/gen-z-in-their-words.html.

136 *See* Wang, *supra* note 127.

employer's diversity will affect their decision about whether to accept an employment offer.[137]

In short, progressive action is an investment that will yield desired—and elusive—dividends for legal employers in the form of employee longevity and loyalty.[138] The leaky pipeline of diverse talent creates employer costs and should be a concern.[139] In light of new perspectives on gender and identity, genderless dress codes may be the next step legal employers should pursue to reduce the judgment and discrimination that impair non-binary employees' ability to contribute and advance in the workplace.

Legal employers do face risk in adopting a genderless dress code and enforcing that code in a gender-neutral way. Welcoming professionals to wear work-appropriate attire consistent with the employees' authentic selves may alienate traditional clients, prospective clients, judges, or other economically important audiences, a risk that is more pronounced in conservative communities than in progressive ones.[140] And, in certain instances, attire that does not conform with the expectations of a decision-maker presents a risk of prejudicing client interests.[141]

Still, to attract, support, and retain a diverse community of professionals, employers should invite lawyers to wear any professional attire in which they can comfortably, capably, competently, and confidently perform their duties. This invitation will reduce the distracting and damaging pressure, experienced acutely by gender-non-binary lawyers, to evade workplace discrimination by performing an inauthentic identity.[142] By embracing genderless attire standards, confronting their

137 *See* Benjamin Ho & Caroline Pham, *INSIGHT: Generation Z—What Employers Can Expect Within the Next Generation of Workers*, BLOOMBERG LAW (Aug. 8, 2019, 4:01 AM), https://news.bloomberglaw.com/daily-labor-report/insight-generation-z-what-employers-can-expect-with-the-next-generation-of-workers; *see also* Miserany, *supra* note 132. Millennials, individuals in the generation immediately preceding Generation Z, born approximately 1981 through 1996, similarly value diversity. *See also Ryan* Jenkins, *How Generation Z Will Transform the Future Workplace*, INC. (Jan. 15, 2019), https://www.inc.com/ryan-jenkins/the-2019-workplace-7-ways-generation-z-will-shape-it.html ("69 percent of Millennials employed at a diverse organization said they would stay with their employer beyond five years, compared with 27 percent not employed at a diverse organization.").

138 *See* Jenkins, *supra* note 137.

139 *See generally id.*

140 The overall percentage of LGBTQ lawyers is 3.8 percent among associates and 2.11 percent among partners. There are widespread geographic differences, however. About 55 percent of the reported LGBTQ lawyers are accounted for by just four cities: Los Angeles; New York City; San Francisco and Washington, D.C." Weiss, *supra* note 117.

141 *See* Bea Bischoff, *I Dress 'Straight' to Protect My Clients*, RACKED (July 5, 2017), https://www.racked.com/2017/7/5/15874342/queer-lawyer-straightness-performance.

142 *See* Leslie Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. 577, 579 (2018),

biases, and suppressing their risk aversion in the interest of expanding inclusivity, lawyers can serve as leaders within and beyond the profession.

CONCLUSION

Drafting a dress code—any dress code—is a useful first step; it helps ensure that no employee suffers for deviating from a set of unwritten rules that are second-nature to some new hires yet entirely unknown by others.[143] But making that dress code genderless is also important.

A genderless dress code confirms that all employees, no matter their gender, are held to the same standards and equally permitted to professionally express their identity in their workplace. Such an inclusive communication would signal that what the employer values in its employees is work ethic, work quality, and professionalism—not conformity with a particular gender performance.

The need to move forward in this manner is particularly pronounced for legal employers, which have an ethical obligation to avoid discrimination as well as a business interest in fostering an inclusive work environment.

In short, gender, a social construct, is not binary. Professional attire rules for lawyers should not be binary either.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036768 ("People in the legal profession from traditionally marginalized groups—termed 'outsiders'—sometimes feel pressure to perform strategies to communicate their identity in a predominantly white, heterosexual, male profession. Building upon outsider strategies to combat prejudice or assimilate, which legal scholarship describes in terms such as covering and passing, the diversity crisis in the legal profession signals the need for a deeper understanding of identity communication and strategies.").

143 *See* Kim Durant, *What Are the Benefits of Setting a Dress Code in the Workplace*, CHRON, https://smallbusiness.chron.com/benefits-setting-dress-code-workplace-22655.html

APPENDIX: MODEL DRESS CODE[144]

A. What to Wear

i. *Formal is sometimes required.* For court appearances and any formal, in-person interactions with clients, prospective clients, witnesses, opposing counsel, or court personnel, wear formal business attire.
   a. Business suit with jacket or an equivalently formal outfit intended for a professional workplace, wit
   b. Leather (or faux leather) loafers, lace-up loafers, pumps, flats, or boots, and
   c. Complementary accessories, like a belt, necktie, scarf, dark socks, hosiery, or jewelry

ii. *But business casual is the general norm.* At all other times, casual professional clothing, like the following, is acceptable:
   a. Slacks, khaki pants, skirts, and dresses
   b. Button-down shirts and blouses
   c. Fitted sweaters, vests, and blazers

iii. *Some items are too casual for business hours.* The following items are not acceptable in the office at *any* time, Monday through Friday:
   a. Denim
   b. Stretch pants, leggings, and athletic tights
   c. Shorts
   d. Tank tops, halter tops, midriff-revealing tops, and scoop- or v-neck tops that are cut low in the front or back
   e. Athletic shoes, water shoes, and flip flops

144 This model ungendered, professional dress code was drafted in an effort to avoid perpetuating harmful stereotypes based on the gender-binary fiction. Each law office can tailor this code to address office atmosphere along with the region's seasonal and cultural climates. The authors take no position as to whether the level of formality captured by this model code is appropriate or necessary; rather, we provide this template as an example of an effort to create and clearly communicate a set of expectations that do not default to outdated gender norms.

B. Other Considerations

i. *Fit*. The width and length of all clothing components, like pant legs and sleeves, should fit. Clothing that is excessively tight/loose or short/long may be unacceptable. A tailor may be able to advise and assist with any necessary adjustments: [list local tailor names].

ii. *Quality.* While professional attire tends to be fashioned from elevated fabrics (e.g., not jersey knit, or t-shirt, fabric), clothing need not be from any particular store or designer; need not be purchased new; and need not be expensive.

iii. *Condition*. Clothing should be clean; pressed and/or free of wrinkles; and free of holes and/or frayed edges.

iv. *Logos*. Small (up to the size of a quarter, roughly) brand logos are acceptable; large graphic images are not.