Journal of Civil Rights and Economic Development

Volume 34, Summer 2021, Issue 2 Article 5

Why Don't We All Just Wear Robes?

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WHY DON'T WE ALL JUST WEAR ROBES?

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INTRODUCTION

Lawyers and law professors select our professional outfits each day, often experiencing a mix of consternation and gratification. The dread springs from our failures: to know what constitutes the "right look;" to be able to achieve that "right look;" to anticipate what the day will bring; to have prepared by doing the laundry or other tasks. The joy resides in self-expression; we fashion ourselves as works of art, even within the constraints of professional attire.

It could have been different. We could have sacrificed the satisfaction of self-expression for the complacency of conformity; we could wear robes. Judges—at least when they are on the bench—are relieved from the obligation of selecting their attire as they are denied their individuality. But the history and current controversies of robes, for judges and others, is not so simple. Professional dress in classrooms and courtrooms shares the common ancestry of academic and legal robes, both of which are related to the dress of religious clerics. By the Tudor era, various regulations attended to the specific requirements of various ceremonial robes, while more generally graduate students and barristers were essentially equated with gentlemen and allowed to dress accordingly.[2] Fashions changed: black replaced more colorful garments during the mourning for monarchs; wigs substituted for hoods as head coverings.[3] Yet the main purposes are hierarchal: a person's individuality is subsumed by a costume that symbolized respect for the profession and the dignity of it.

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1 * Professor of Law & University Distinguished Professor, City University of New York School of Law. This article is adapted from RUTHANN ROBSON, DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES (Cambridge U. Press 2013).

2 Noel Cox, *Tudor Sumptuary Laws and Academical Dress: An Act against Wearing of Costly Apparel 1509 and an Act for Reformation of Excess in Apparel 1533*, 6 TRANSACTIONS BURGAN SOC'Y 15, 15-43 (2006).

3 *An English Judge's Dress*, 3 CANADIAN L. REV. 321-332 (1904).

It can sometimes seem to be a tempting solution to alleviate the discriminations, angst, and even cost of dressing professionally—especially for those whose appearance is gendered female or nonbinary—to argue for the adoption of robes in the legal and teaching professions. But, even if this were possible, it is not a tenable solution. Section I of this Article considers the cult of the judicial robe, examining judicial views on the metonymy of judges and their attire, as well as First Amendment and ethical issues regarding when and how judges can wear their robes. Part II shifts to lawyers in the courtroom, especially—but not only—women attorneys, and analyzes cases challenging judges who imposed dress codes on attorneys. Part III considers the possibility of dress in the courtroom as "disruptive" to "decorum" with an emphasis on our clients and others who appear in the courtroom but who can too often be forgotten. This section begins by discussing the historical precedent of William Penn, then the Chicago Eight trial, and then more recent controversies regarding the courtroom attire and expressions of spectators. Part IV returns to the issue of professional dress for teachers, who like attorneys once wore robes, and then interrogates the mandate of the graduation robe. The robe, like any other article of attire, can be deployed in an oppressive manner as well as a liberatory one.

I. THE CULT OF THE ROBE

While there is no specific dress mandate for federal judges, some states have rules of court that require a judge in open court to wear a judicial robe, or more specifically a "suitable black judicial robe," or even more specifically a black robe that "must extend in front and back from the collar and shoulders to below the knees" with "sleeves to the wrists."[4]

The early American controversies regarding how similar the dress of Article III judges would be to their British counterparts implicated style and nation-building, but also the symbolism of democracy and constitutionalism. The eventual compromise abandoned the British fashion for

[4] *See* Pennsylvania Rules Governing Standards of Conduct of Magisterial District Judges (judicial robes); Michigan Court Rules, Rule 8.115 (black robe); Alaska Rules of Administration, Rule 21 (a suitable black judicial robe); California Rules of Court, Rule 10.505 (the judicial robe must be black, extend in front and back from the collar and shoulders to below the knees, have sleeves to the wrists). While most state court judges wear black robes, the judges of Maryland's highest court, the Court of Appeals, wear scarlet robes with white collars. *See* Rudolf Lamy, *A Study of Scarlet: Red Robes and the Maryland Court of Appeals* (2006), available at https://mdcourts.gov/sites/default/files/import/lawlib/aboutus/history/judgesrobes.pdf.

various types of court wigs, but adopted British gowns that gradually eschewed scarlet and silk evolving to the stereotypical robe of black polyester.[5]

Even as customs settled, however, disagreements over judicial attire remained. Writing in 1945 while he was a respected Second Circuit Judge, the legal realist Jerome Frank argued to jettison the robe entirely.[6] Frank's essay, "The Cult of the Robe," contended that the "pretense that judicial reactions are uniform manifests itself in the demand that judges wear uniforms."[7] Moreover, Frank argued that the "judge's vestments are historically connected with the desire to thwart democracy by means of the courts."[8] He criticized the "atavistic robe" as analogous to an "esoteric judicial vocabulary" that conflicted with the "fundamental democratic principle" disfavoring secrecy."[9] In calling for abandonment of robe-ism, Frank invoked the ordinary citizen who would be unused to court-house ways and disquieted by the "strange garb of the judge."[10]

Frank's view has not prevailed, perhaps in part because the robe has become the metonym for the judge in contemporary popular culture as many a political cartoon illustrates. An argument in favor of this metonymic relationship is that robes not only obscure individualism, but that they foster the judicial independence so important to democratic constitutionalism. In this way, the judicial uniform in the United States—one that does not generally communicate rank—conveys an institutional message that each judge "belongs to the judiciary."[11]

This metonymic relationship, however, can raise constitutional issues. In general, the concern articulated in ethics opinions from various state committees is the misleading potential of a judicially-garbed candidate, but the effect is to maintain a hierarchy of judges. For example, in Nevada, the committee on judicial ethics and campaign practices has

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5 *See* John deP Wright, *Wigs*, 9 GREEN BAG 2D 395 (2006); S. James Clarkson, *The Judicial Robe*, 1980 SUPREME COURT HISTORICAL SOCIETY YEARBOOK 143-149 (1980); Charles M. Yablon, *Judicial Drag: As Essay on Wigs, Robes, and Legal Change*, WIS. L. REV. 1129-1153 (1995); Rob McQueen, *Of Wigs and Gowns: A Short History of Legal and Judicial Dress in Australia*, 16 LAW IN CONTEXT 31, 31-58 (1998).

6 *See* Jerome Frank, *The Cult of the Robe,* 28 SATURDAY REV. LITERATURE 41 (1945), reprinted in JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 254 (Princeton University Press, 1949).

7 FRANK, *supra* note 6, at 254.

8 *Id.* at 255.

9 *Id.* at 258.

10 *Id.* at 257.

11 James Zagel & Adam Winkler, *The Independence of Judges*, 46 MERCER L. REV. 795, 814-816 (1995).

opined that a person who has served as an "alternate municipal judge" or as an "unpaid part-time judge" or as a "full-time judicial master" may not wear a judicial robe in campaign literature; however, a person who is a "continuing part-time judge" may wear a judicial robe in campaign literature.[12] Prohibitions on being portrayed wearing robes in judicial elections may be susceptible to the same sort of First Amendment challenge as a prohibition of announcing views on disputed legal issues in judicial elections, a prohibition declared unconstitutional by the United States Supreme Court in *Republican Party of Minnesota v. White*.[13]

While the election context raises the most obvious clash between the ethical and constitutional considerations of judges donning robes, even a sitting judge may encounter such a conflict. In *Jenevein v. Willing*, the Fifth Circuit partially expunged the censure of a Texas judge by the state's commission on judicial ethics "to the extent it reached beyond" the judge's "use of the courtroom and his robe to send his message."[14] As part of contentious litigation in 2003 that spawned allegations of bribes, favors, and sexual misconduct, Judge Jenevein held a press conference in the courtroom—and importantly, wore his judicial robe—to announce his withdrawal from the case and his institution of grievance proceedings against the attorney who had made the allegations.[15] The attorney, however, filed a grievance against Judge Jenevein for holding the press conference, and the state commission issued a censure against the judge, without addressing the First Amendment defenses the judge had raised.[16] Judge Jenevein thereafter brought an action in federal court challenging the constitutionality of the censure.[17] The Fifth Circuit held that while the judge was indeed an employee, the First Amendment doctrine governing government employee speech emphasizing the divide between matters of public and private concern was inapposite.[18] Instead, the court applied strict scrutiny.[19] Considering whether judicial

12 *See* Opinion JE02-004, Standing Committee on Judicial Ethics and Election Practices (Nevada 2002); Opinion JE03-004, Standing Committee on Judicial Ethics and Election Practices (Nevada 2003); Opinion JE06-014, Standing Committee on Judicial Ethics and Election Practices (Nevada 2006); Opinion JE08-006, Standing Committee on Judicial Ethics and Election Practices (Nevada 2008).

13 Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

14 Jenevein v. Willing, 493 F.3d 551, 562 (5th Cir. 2007).

15 *Id* at 553.

16 *Id* 555.

17 *Id* at 556–57.

18 *Id.* at 561; *see, e.g.,* Pickering v. Bd. of Educ. of Township High Sch. Dist., 391 U.S. 563 (1968); Garcetti v. Ceballos, 547 U.S. 410 (2006).

19 *Jenevein*, at 558.

impartiality was a compelling governmental interest, the court held that it could not be, and said that the "state's interest in achieving a courtroom that at least on entry of its robed judge becomes a neutral and disinterested temple" was compelling.[20] The state's compelling interest extended to the "judicial use of the robe, which symbolically sets aside the judge's individuality and passions."[21] On the issue of whether the censure was narrowly tailored, the court had more difficulty separating the content of the judicial statements from their environment. The court found the judge's use of the "trappings of judicial office to boost his message," particularly "stepping out from behind the bench, while wearing his judicial robe, to address the cameras," could constitutionally support a censure.[22] In a limited victory for the state judge, however, the court ruled that the content of the statements could not be constitutionally censured. The Fifth Circuit emphasized that the judge was publicly addressing abuse of process, that the communication was between the judge and "his constituents," and it was on a matter of "judicial administration" rather than the merits of a case.[23]

Judges have become more administrative and less judicial, at least according to Justice Rehnquist in his own "The Cult of the Robe" essay published in 1976.[24] While Rehnquist did not even allude to matters of habiliment, he stressed the less attractive aspects of uniformity.[25] Perhaps not coincidentally, after Rehnquist assumed the status of Chief Justice of the United States, he adorned his robe with gold stripes, reportedly inspired by "a production of Gilbert and Sullivan's *Iolanthe*, in which the lord chancellor wore a similar robe."[26] Justice Ginsburg described the stripes as resembling those "of a master sergeant more than those of a British Lord," explaining that even though he was "a man not given to sartorial splendor," he said he "did not wish to be upstaged by the women."[27] Ginsburg added that Justice O'Connor, the first woman Supreme Court Justice, "has several attractive neck pieces, collars from

20 *Id.* at 559.

21 *Id.* at 560.

22 *Id.* at 560–61.

23 *Id.* The partial nature of Judge Jenevein's victory is apparent from the Fifth Circuit's refusal to grant the judge attorney's fees as a prevailing party, stating "the relief Jenevein received from the partial expungement of the commission's censure was de minimis." *Jenevein v. Willing,* 605 F.3d 268, 272 (5th Cir. 2010).

24 William Rehnquist, *The Cult of the Robe*, 15 JUDGES J. 74 (1976).

25 *Id.*

26 Henry J. Reske, *Showing His Stripes: Operetta Inspires Chief Justice to Alter his Robe*, 81 A.B.A. J. 35 (1995).

27 Ruth Bader Ginsburg, *In Memoriam: William H. Rehnquist,* 119 HARV. L. REV. 6, 6-10 (1995).

British gowns, and a frilly French foulard," while Ginsburg herself wore "British and French lace foulards too, and sometimes one of French Canadian design."[28] Yet for practicing attorneys, the solutions are not as elegant, or simple.

II. COURTROOM ATTIRE

For female attorneys in the United States, the choices of courtroom attire are more complicated than lace collars. The early American adoption, albeit partial, of British judicial attire did not extend to British customs regarding advocates. Until recently, the "court dress" in Great Britain featuring wigs and robes applied to both jurists and barristers, but not to solicitors, even when solicitor-advocates appeared in court.[29] In late 2011, the UK Supreme Court, established only a few years earlier, noted that its justices did not "wear legal dress themselves and have decided not to impose this obligation on advocates appearing before them."[30] The Supreme Court directed that "provided that all the advocates in any particular case agree, they may communicate to the Registrar their wish to dispense with part or all of court dress," the Court would "normally agree" to the advocates' preference with regard to legal dress.[31] Advocates' preferences, however, might well be to don the traditional garb that has long symbolized status, as well as its gradations. It is not mere coincidence that barristers who have been appointed to the rank of Queen's Counsel are called "silks" or that solicitors have argued that they be entitled to wear wigs.[32] Moreover, it might not be mere coincidence that at the very time the British legal profession is being diversified, the symbols of its status are being abandoned.

While rationales for maintaining formal court dress include hierarchy, as well as tradition, status quo, and "branding," another benefit is perceived gender equality.[33] A somewhat curmudgeonly call for the adoption of robed (if not wigged) attorneys in the United States, pointed to problems with women's apparel:

> Courtroom decorum is adversely affected as more and more

28 *Id.*

29 *See* Press Notice, *Revised Guidance on Court Dress at the UK Supreme Court*, SUP. CT. U.K. (Nov. 21, 2011), available at https://www.supremecourt.uk/docs/pr_1112.pdf.

30 *Id.*

31 *Id.*

32 *See* Asha Rangappa, *God Save the Wig*, LEGAL AFFS. 10 (May-June 2002).

33 *See* Yablon, *supra* note 5, at 1129–30.

> women appear at bar in a tremendous variety of color and design—pants, dresses, suits, blouses (with and without neckties). The necessary respect of the courtroom is absent when lawyers are higgledy-piggledy in attire. This is not to say that the woman who appears in gaucho pants is intentionally flouting the court's decorum, but rather that no discernible tradition or norm has developed in woman's dress in the court room. But were they robed, all lawyers would be dressed equally and have a great and conscious feeling of what they were about. Lawyers would immediately be inconspicuous and their causes would be foremost—which is as it should be."[34]

In the absence of standardized court dress, the professional attire of women attorneys in the United States has been subject to gendered and slovenly interpretations. Just as the wig and robe were once construed as exclusively male apparel, pants can be construed as exclusively male and thus inappropriate for women attorneys as courtroom attire.

As late as 1991, the New York City bar ethics committee was asked whether or not female lawyers could "wear appropriately tailored pant suits or other pant-based outfits in a court appearance."[35] The committee stated that it had been told "judges in this state have remarked negatively in open court on the attire of women lawyers appearing before them," and noted individual judges have "some degree of latitude to regulate the conduct of lawyers in their courtrooms."[36] Nevertheless, the committee stated that while the rules of dress are generally a matter of custom, pants could certainly qualify as respectful and dignified.[37] And as late as 1994, federal district courts in Oklahoma specifically provided by local rule that female attorneys must wear dresses or suits (with skirts).[38] The subject of dress codes, whether explicit or implicit, for women attorneys was included in the many "gender bias in the courts" reports that began in the state courts in the 1980s. By the time of the final report of the federal Ninth Circuit's task force published in 1994, the survey of 232 federal judges revealed only a small percentage of

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34 Lawrence W. Jordan, Jr., *Are Robes for Counsel the Only Dress for Courtroom Success?* 26 ADVOCATE 17, 17-18 (1983).

35 NYCLA Eth. Op. 688 (1991), available at 1991 WL 755944 (N.Y. Cty. Law. Assn. Comm. Prof. Eth.).

36 *Id.*

37 *Id.*

38 *See* Bethanne Walz McNamara, *All Dressed Up with No Place to Go: Gender Bias in Oklahoma Federal Court Dress Codes*, 30 TULSA L. J. 395-420 (1994-1995).

both male and female judges stating that they imposed a "no pantsuit" rule, although a similarly small percentage of judges (all male) stated they preferred not to have female counsel appearing when visibly pregnant.[39] Yet while the gender bias taskforces were instituted as a strategy to address gender inequality in the courts amongst advocates, litigants, and society, they also demonstrate the inadequacy of legal remedies. As the New York City ethics committee noted in its pantsuit opinion, "equality of attire in the courtroom" had a constitutional dimension, but as such it was beyond the committee's "jurisdiction."[40]

The constitutional issues regarding attorney dress can be difficult to litigate. For the most part, attorneys "dress for success," which means elevating their clients' interests above their own, especially in a courtroom context in which pleasing the judge (and jury) is important. In the absence of standardized dress codes, the general advice to women is to err on the side of conservatism, including skirts.[41] Yet there have been a few cases in which the attorney-judge relationship seemed to have devolved into a contempt proceeding, although, even then the constitutional issues can be obscured. For example, when Patricia DeCarlo, a legal services attorney in Camden New Jersey, wore slacks (gray wool), a sweater (gray), and a shirt (green) during a court appearance in January 1975, she was eventually held in contempt by the trial judge.[42] She appealed the contempt order, arguing in part that it constituted "unconstitutional discrimination against female attorneys."[43] The appellate court did not reach the constitutional issue, essentially holding that as a matter of law DeCarlo's dress was suitable.[44] The opinion noted that she was attired at oral argument in the appellate court in the same clothes she wore when the trial judge held her in contempt—a strategy that essentially invoked the judges' common sense.[45] Moreover, the trial judge's objection to DeCarlo's apparel eventually focused not on her

39 *See* John C. Coughenour et al., *The Effects of Gender in the Federal Courts; The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 852, 852-854 (1994).

40 *See* NYCLA Eth. Op., *supra* note 44.

41 *See* Maureen Howard, *Beyond a Reasonable Doubt: One Size Does Not Fit All When It Comes to Courtroom Attire for Women*, 45 GONZ. L. REV. 209, 209-224 (2009-2010) (discussing conservative advice, but also arguing for room for personal choice and comfort); *see also* Wendy Patrick, *Well Suited to the Courtroom: Women in Legal Advocacy*, 21 PRAC. LITIG. 7, 7-10 (2010) (assumes that the suit is skirted, stating it would be a problem if there was "a run in her nylons").

42 In re De Carlo, 141 N.J. Super. 42 (1976).

43 *Id.*

44 *Id.*

45 *Id* at 46.

pants, but on her sweater, or perhaps on her "open-collared blouse."[46] For the appellate court, the lack of "standards or traditions for female attorneys" worked in DeCarlo's favor, especially as contrasted to the established tradition of neckties for men.[47]

Rejecting a gender discrimination challenge to the requirement of a necktie (and jacket) for male attorneys, the Supreme Court of Alaska reasoned that court orders requiring "appropriate conservative business dress" applied equally to men and women: "Though women need not be required to wear a coat and tie, they are required to wear conservative business attire. Such a dress code would not discriminate since the general standard is the same."[48] The court likewise rejected the argument of attorney Martin Friedman that the tie requirement impaired his ability to represent his client zealously, by interfering with his ability to connect with jurors.[49] All ties, however, are not equal. An appellate court in New Mexico upheld a trial judge's interpretation of a local rule requiring male attorneys to wear "ties" as excluding a bandanna tied above the collar.[50] The attorney, Tom Cherryhomes, had "referred to a book on nineteenth century western wear and a dictionary" to argue that his neckwear satisfied the tie requirement.[51] The judge rejected the relevance of history, ordered Cherryhomes to wear a conventional tie, and then held him in contempt when he did not.[52] On appeal, the court circumvented the attorney's First Amendment argument, reasoning that the constitutional challenge was subsumed into the finding of contempt.[53] Cherryhomes should have complied with the order and then challenged its constitutionality. Yet the appellate court implied that such a challenge would not have been successful when it declared the trial judge's interpretation of the local rule as "reasonable."[54]

Cherryhomes, Friedman, DeCarlo, and other attorneys who have attempted to raise constitutional challenges to orders of attire issued by judges have faced the "cult of the robe" that accords authority to the judiciary, even if it may be mistaken. While the constitutional arguments of Cherryhomes, Friedman, and DeCarlo—at least as contained in the

46 *Id.* at 44.
47 *Id.* at 46.
48 Friedman v. District Court, 611 P.2d 77 (Ak. 1980).
49 *Id.* at 79.
50 *See* State v. Cherryhomes, 840 P.2d 1261 (N.M. Ct. App. 1992).
51 *Id.* at 1262.
52 *Id.*
53 *Id.* at 1268.
54 *Id.* at 1265.

appellate opinions—lack constitutional sophistication, each by implication argued for a standard that would require disruption of the courtroom proceedings. For example, as the court stated in *State v. Cherryhomes*:

> Cherryhomes contends that the issue before this court is whether his choice of neckwear disrupted the decorum of the court. He contends that his dress caused no disruption, that the judge required him to comply with a unique and personal interpretation of the local rule, and that the judge's ruling infringed his First Amendment right of free expression. We disagree with Cherryhomes's characterization of the issue.[55]

In *Friedman v. District Court*, the Alaska Supreme Court stated, "Friedman contends that the imposition of a dress code violates his rights to personal liberty and privacy under the Alaska Constitution," and "an attorney's style of dress, so long as it is not disruptive of judicial proceedings, is beyond the power of the courts to control."[56] And in *In the Matter of De Carlo*, the appellate court does not attribute the disruptive standard to the attorney, but to itself:

> Styles change and the promulgation of limits in dress is beyond precise articulation. Appellant was attired at oral argument in the clothes she wore in the trial court . . . [i]n our view, they were not of the kind that could be fairly labeled disruptive, distractive or depreciative of the solemnity of the judicial process so as to foreclose her courtroom appearance.[57]

This standard would require something more egregious than simply a lack of dignity, respect, and professionalism. For persons who are not dressing professionally, the ban on dressing disruptively, whether in courtrooms, schoolrooms, or in public is often at issue.

III. DISRUPTING COURTROOM DECORUM: CONCERN FOR OUR CLIENTS

The history of disruption of courtroom decorum is interwoven with the history of the nation, of the First Amendment, and with hats. When the members of the First Congress debated amending the Constitution to include what is now the First Amendment, Representative John Page

55 *Id.* at 1263.
56 Friedman v. District Court, 611 P.2d 77, 78 (Alaska 1980).
57 *In the Matter of De Carlo*,141 N.J. Super. 42, 47 (1976).

argued that whether a man has a right to wear his hat or not was far from trivial.[58] The clause being discussed did not refer to hats or other attire but to the freedom of assembly.[59] Page was responding to the previous remarks of Representative Theodore Sedgwick of Massachusetts, who had argued that the assembly clause was unnecessary: it was encompassed by the speech clause; it was self-evident; it would never be called into question; and it was derogatory to the dignity of the House of Representatives to descend into such minutiae.[60] In support of all his arguments, Sedgwick contended the amendment might just as well declare "a man should have a right to wear his hat if he pleased."[61] It proved not to be the best analogy, provoking a trenchant response by Representative John Page: just as "a man has been obliged to pull off his hat when he appeared before the face of authority," so too have people "been prevented from assembling together on their lawful occasions."[62]

As historian Irving Brant observed, Page's reference had tremendous resonance for the members of the First Congress who would have understood it as alluding to William Penn's famous trial.[63] A decade before Penn would receive the large land grant in America that would become the state of Pennsylvania, Penn and his co-defendant William Mead were prosecuted in England for "tumultuous assembly" and disturbing the peace.[64] They had preached outside a Quaker meeting house that had recently been closed by Restoration regulations limiting religious dissent from the recently reestablished Church of England.[65] Originally a pamphlet and purported trial transcript, *The Peoples Ancient and Just Liberties Asserted, In the Tryal of William Penn and William Mead at the Old Bailey, 22 Charles II 1670, written by themselves*, became an essential American document.[66] It portrayed Penn and Mead as heroes seeking their rights as Englishmen under the Magna Carta but stymied by arbitrary officials in the king's court.[67]

58 *See* NEIL H. COGAN, ED., THE COMPLETE BILLS OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 143-145 (Oxford University Press 1997).

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 *See* IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 55-56 (1965).

64 *Id.*

65 *Id.*

66 *The Peoples Ancient and Just Liberties Asserted, In the Tryal of William Penn and William Mead at the Old Bailey, 22 Charles II 1670, written by themselves*, *in* WILLIAM PENN, THE POLITICAL WRITINGS OF WILLIAM PENN (ed: Andrew R Murphy) 3-21 (2002).

67 *Id.* It appears as William Penn & William Mead, *The Trial of William Penn and William Mead,*

Their hats were central to this portrait. As Quakers, Penn and Mead denied so-called hat honor, the male practice of doffing one's cap to a superior including removing one's hat in court.[68] The refusal of hat honor, intended to challenge hierarchy, had become a well-known characteristic of the Quakers; a fair number of Quakers had been beaten, jailed, whipped, or fined because of their practice by the time of the Penn and Mead trial.[69] Thus, this colloquy was not surprising:

> RECORDER. Do you know where you are?
>
> PENN. Yes.
>
> RECORDER. Do you know it is the King's Court?
>
> PENN. I know it to be a Court, and I suppose it to be the King's Court.
>
> RECORDER. Do you not know there is respect due to the Court?
>
> PENN. Yes.
>
> RECORDER. Why do you not pay it then?
>
> PENN. I do so.
>
> RECORDER. Why do you not put off your hat then?
>
> PENN. Because I do not believe that to be any respect.
>
> RECORDER. Well, the Court sets forty marks a piece upon your heads as a fine for your contempt of the Court.[70]

at the Old Bailey, for Tumultuous Assembly: 22 Charles II. A.D. 1670, in 6 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 999, 1006–09 (1816). For discussions, *see* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 575-77 (2010); John S. Wilson, *The Importance of a Hat*, Paper CXVIII, (Chicago: Chicago Literary Club, 1999/2001), available at: http://www.chilit.org/PublishedPapers.htm; Andrew Murphy, *The Trial Transcript as Political Theory: Penn-Mead in Anglo-American Political Thought*, draft, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914723.

68 HOWELL, *supra* note 87, at 999.

69 *See* Krista J. Kesselring, *Gender, the Hat, and Quaker Universalism in the Wake of the English Revolution*, 26.2 THE SEVENTEENTH CENTURY 299-322 (2011). *See also* Maryland State Archives, Volume 53, Preface 44, p. xliv "In Kent a rule of court was adopted at the September 1658 sessions, doubtless as the result of a recent offence, 'That noe man presume excepte a member of the Court to Stand wth his hat on his head in the prsence of the Court . . . or use any unscivill Language' (Arch. Md. liv, 139). At the next session held in October, Henry Carline, a Quaker, was fined 30 pounds of tobacco for disobeying this order (Arch. Md. liv, 146)." Available at: http://www.msa.md.gov/megafile/msa/speccol/sc2900/sc2908/000001/000053/html/am53p—44.html.

70 HOWELL, *supra* note 87, at 956 .

However, shortly before this interchange, Penn and Mead had been waiting, hatless, for their case to be called.[71] When an official noticed their hats were off, he ordered an officer to "put on their hats again."[72] Seemingly, this command was merely for the purpose of immediately issuing the order to Penn to remove his hat, an order the court would have known as problematic for the Quaker William Penn. Immediately after the Recorder's fine, Penn and Mead both spoke:

> PENN. I desire it might be observed, that we came into the court with our hats off (that is, taken off,) and if they have been put on since, it was by order from the bench; and therefore not we, but the Bench should be fined.
>
> MEAD. I have a question to ask the Recorder: am I fined also?
>
> RECORDER. Yes.
>
> MEAD. I desire the Jury and all people to take notice of this injustice of the recorder. Who spake to me to pull off my hat? and yet hath he put a fine upon my head.[73]

The court's actions regarding the hats—provocative, arbitrary, and lacking the essentials of fairness—set the scene for the remaining injustices of the trial, the eventual jury acquittal, the prosecution of the jurors for that acquittal, and the imprisonment of Penn and Mead for contempt for failure to remove their hats.[74]

Thus, Representative Sedgwick's comparison of the right to wear or not wear a hat and the right to assembly as equally trivial rights was not likely to be accepted by those familiar with the Penn and Mead trial. Sedgwick's motion to strike "assembly" from the text of the First Amendment failed by a large margin.[75] But perhaps Sedgwick was correct. Recent constitutional doctrine tends to support the argument that assembly is mere surplusage and the right is encompassed by freedom

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71 *Id.* at 955.

72 *Id.* at 956.

73 *Id.*

74 *See id.* at 956, 961–69. The Penn and Mead trial is well-known for its aftermath regarding the right of jury nullification. *See Case of the Imprisonment of Edward Bushell, for alleged Misconduct as a Juryman: 22 CHARLES II. A.D. 1670*, *in* HOWELL, *supra* note 83, at 999, 1006–09; Simon Stern, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After* Bushell's Case, 111 YALE L.J. 1815, 1815–16 (2002). For a collection of scholarly writing on the concept of jury nullification, see Teresa L. Conaway, Carol L. Mutz, & Joann M. Ross, *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. UNIV. L. REV. 393 (2004).

75 *See* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 574–76 (2010).

of speech.[76]

Nevertheless, Penn's hat continues to have some constitutional plangency. Its most famous appearance is in *West Virginia State Board of Education v. Barnette*, albeit in a footnote.[77] The Court evoked William Penn's hat and the Quaker refusal to exhibit deference as an example of compelled speech.[78] Consistent with Penn's spirit, and reversing recent precedent, the Court held that "compelling the flag salute and pledge transcends constitutional limitations on [the local government's] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[79]

Yet wearing a hat in court persists as constitutionally prohibitable. Remarkably relying on an interpretation of the courtroom as a nonpublic forum, a federal district judge in 2009 concluded that requiring a litigant to remove his hat—a baseball cap—did not violate the litigant's asserted First and Fourteenth Amendment rights.[80] There was no issue of viewpoint discrimination, such as prohibiting only Yankees baseball caps.[81] Instead, the generally accepted etiquette of removing hats in a courtroom "out of respect" for the judicial process was reasonable: the litigant had no constitutional right to make a "fashion statement" by wearing clothes he "might have worn to a baseball game" rather than attire "suitable to the dignity of a courtroom."[82]

If a hat can disrupt courtroom dignity, then the prospect of criminal defendants donning judicial robes must certainly be disruptive. If those robes are adorned with symbols of oppression—for example, the yellow star used by the Nazis to badge Jews—the disruption is even more probable. And if the defendants removed the robes to reveal one of them was wearing the shirt of a police uniform, and if both defendants walked on the judicial robes they had removed, then there should be little doubt of disruption. All of this occurred near the end of the Chicago Conspiracy

76 *See id.* at 566–67.

77 *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 633 n.13 (1943). The footnote also includes a reference to William Tell. *Id.* ("The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one.")

78 *See id.* at 633.

79 *Id.* at 642. The Court reversed *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), decided only three years earlier.

80 Bank v. Katz, 08-CV-1033 (NGG)(RER), 2009 U.S. Dist. LEXIS 87929, at *5–10 (E.D.N.Y. Sept. 24, 2009) *aff'd*, 424 F. App'x 67 (2d Cir. 2011).

81 *Id.* at *7.

82 *Id.* at *6, *9. The original dress dispute occurred in state court with Todd Bank, an attorney appearing as a *pro se* litigant, wearing jeans as well as the baseball cap. *Id.*

Trial.[83]

The Chicago Conspiracy Trial, sometimes known as the Chicago Eight or Chicago Seven Trial, shared many features with the equally notorious Penn and Mead trial three centuries earlier. The Chicago Conspiracy Trial also arose from actions involving a tumultuous assembly; the original Chicago Eight defendants were charged under the then-recent federal Anti-Riot Act for their conduct at the 1968 Democratic National Convention in Chicago.[84] Like the Penn and Mead trial, there were possibilities of jury nullification, although the Chicago Conspiracy Trial jurors did return some guilty verdicts and were not imprisoned.[85] Both trials featured confrontations between judicial power and individual rights, including findings of criminal contempt based on the defendants' attire.[86]

The trial transcript of the robe incident does not capture the appearance of the robes or the defendants' actions, but does depict the character of the proceedings, including the relationship between the judge and defense counsel, William Kunstler:

> THE COURT: May the record show defendants Hoffman and Rubin came in at 1:28, with their-
>
> MR. RUBIN: The marshal just came and asked us to come in. We came as soon as we were asked.
>
> THE COURT: And also attired in what might be called collegiate robes.
>
> MR. RUBIN: Judge's robes, sir.
>
> A DEFENDANT: Death robes.
>
> THE COURT: Some might even consider them judicial robes.
>
> MR. RUBIN: Judicial robes.
>
> THE COURT: Your idea, Mr. Kunstler? Another one of your brilliant

83 The best description of the robe incident occurs in the contempt case on remand, *In re. Dellinger*, 370 F. Supp. 1304, 1315 (N.D. Ill. 1973), *aff'd* 502 F.2d 813 (7th Cir. 1974), *cert denied*, 420 U.S. 990 (1975). *See* Pnina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion*, 71 UNIV. COLO. L. REV. 1327, 1336 (2000) [hereinafter Lahav, *The Chicago Conspiracy Trial*]; Pnina Lahav, *Theater in the Courtroom: The Chicago Conspiracy Trial*, 16 LAW & LITERATURE 381, 430–35 (2004).

84 *See* Lahav, *The Chicago Conspiracy Trial*, *supra* note 101, at 1329–30; Anti-Riot Act, 18 U.S.C. § 2101 (2019).

85 *See Dellinger*, 370 F. Supp. at 1323–25.

86 *Id.* at 1347–48.

ideas?

MR. KUNSTLER: Your Honor, I can't take credit for this one.

THE COURT: That amazes me.[87]

Federal judge Julius Hoffman issued criminal contempt citations for a multitude of infractions by the defendants, as well as their attorneys.[88] The wearing of the judicial robes by defendants Abbie Hoffman and Jerry Rubin were only two of the specifications of contempt among more than 150 for the seven defendants and their two attorneys in the five-month trial the judge described as "marred by continual disruptive outbursts in direct defiance of judicial authority by defendants and defense counsel."[89]

After the Seventh Circuit remanded the cases to be tried before a judge other than the judge who had issued the criminal contempt citations, Judge Edward Gignoux of Maine, sitting by special designation, found that some of the contempt citations lacked merit, but did find Hoffman and Rubin guilty of contempt based upon the robe incident.[90] In his opinion, after describing the episode, he noted that the defendants had testified their "conduct was 'guerrilla theater' and 'symbolic communication' of their contempt for the judge and the judicial process, as well as their view that judicial robes were simply a cloak for police brutality."[91] This inchoate free expression claim remained implicit. Although Judge Gignoux conceded that "the record does not disclose that the conduct charged to these defendants in these specifications caused any substantial disruption of the proceedings," he found the defendants' actions "so flagrant, so outrageous, and so subversive of both respect for the court and the integrity of the judicial process as to rise to the level of an actual and material obstruction of the administration of justice."[92] Essentially, the judge concluded that the actions of Hoffman and Rubin achieved exactly what they intended: a subversion of the hierarchal order demanded by the judicial process.

Important to this hierarchal order is the notion of professionalization, including not only the attire of attorneys but also that attorneys represent, and generally speak for, the litigants. Bobby Seale, the eighth

87 *Id.* (appendix quoting transcript).
88 *Id.*
89 In re Dellinger, 461 F.3d 389, 391 (7th Cir. 1972) .
90 *Id.* at 402–465.
91 *Dellinger*, 370 F. Supp. at 1315.
92 *Id.* The judge directed that no sentence be imposed. *Id.* at 1321–22.

member of the Chicago Eight, sought to subvert this hierarchy by representing himself when his attorney of choice was hospitalized and Judge Hoffman refused to postpone the trial.[93] Seale vigorously asserted his right, including his right to represent himself, on numerous occasions, including statements addressing the judge thus:

> After you done walked over people's constitutional rights, after you done walked over people's constitutional rights, the Sixth Amendment, the Fifth Amendment, and the phoniness and the corruptness of this very trial, for people to have a right to speak out, freedom of speech, freedom of assembly, and et cetera. You have did everything you could with those jive lying witnesses up there presented by these pig agents of the Government to lie and say and condone some rotten racists, fascist crap by racist cops and pigs that beat people's heads—and I demand my constitutional rights—demand—demand . . . .[94]

For these and other statements, Judge Hoffman adjudged Bobby Seale in contempt of court and declared a mistrial solely for him, thus transforming the Chicago Eight Trial into the Chicago Seven Trial.[95] But first, Judge Hoffman ordered Bobby Seale shackled, bound to a chair, and gagged, a display that continued for several days.[96] The image of Bobby Seale—the only African American defendant—arrayed in muslin face coverings, chained, and tied was one many found shocking. The defendant was dressed in a disruptive manner, albeit not by his own choosing.

In reviewing Seale's appeal from the contempt citations, the Seventh Circuit cursorily approved the restraining attire, citing *Illinois v. Allen*, decided by the United States Supreme Court several months after Bobby Seale had been shackled, gagged, and tied at trial.[97] *Illinois v. Allen* involved the expulsion of a mentally ill defendant during his trial, but the Bobby Seale spectacle was obviously on the minds of the Justices.[98] Justice Black, who in his dissent in *Tinker v. Des Moines Independent Community School District* the year before had complained of young people

93 United States v. Seale, 461 F.2d 345, 379 (7th Cir. 1972).

94 *Id.*

95 *Id.* at 388–89.

96 As the Seventh Circuit explained, Seale was restrained, bound, and gagged on the afternoon of October 29, 1969; his restraints were removed on November 3. "On November 5, after six weeks of trial, the court *sua sponte* declared a mistrial as to Seale, and his trial was severed from that of his co-defendants." *Seale,* 461 F.2d at 350.

97 *Id.* citing Illinois v. Allen, 397 U.S. 337 (1970).

98 *See Allen,* 397 U.S. at 351–52.

and a "new revolutionary era of permissiveness in this country fostered by the judiciary,"[99] wrote for the Court that although it "is not pleasant to hold" that a defendant could be banished from the court for parts of his own trial, disruptive defendants must not be allowed to treat the courts, "palladiums of liberty as they are," with disrespect.[100] The opinion offered "three constitutionally permissible ways for a trial judge to handle an obstreperous defendant": bind and gag him, cite him for contempt, or remove him from the courtroom.[101] Yet the Court made clear that the first of these was the least acceptable.[102] Shackling and gagging was a "last resort" that could significantly affect a jury and constituted "something of an affront to the very dignity and decorum of the judicial proceedings."[103]

Writing separately, Justice Douglas made explicit the connection to "political trials" and extensively quoted from the Penn and Mead Trial.[104] Although not mentioning William Mead, or Penn's hat, Justice Douglas focused on Penn as a member of an "unpopular minority" who was asserting his rights to the consternation of the "sincere, law-and-order" panel of judges who wished something to be done to Penn "to stop his mouth."[105] For Douglas, political trials, presumably including the Chicago Conspiracy Trial, implicated the heart of constitutional democracy in which both majorities and minorities have an important stake.[106]

It is not only in overtly political trials that the constitutional rights of criminal defendants become enmeshed in matters of habiliment. The quintet of cases from the United States Supreme Court—*Illinois v. Allen* (1973), *Estelle v. Williams* (1976), *Holbrook v. Flynn* (1986), *Deck v. Missouri* (2005), and *Carey v. Musladin* (2006)—considered matters of attire in the context of criminal trials and did not involve the manifest challenges to democracy and hierarchy obvious in the Chicago

99 Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) (Black, J., dissenting).

100 *Allen*, 397 U.S. at 346.

101 *Id.* at 342.

102 *Id.* at 345.

103 *Id.*

104 *Id.* at 355 (Douglas, J., dissenting).

105 *Id.* at 353.

106 Justice Douglas did not use the word "democracy," but wrote of the "social compact": "Problems of political indictments and of political judges raise profound questions going to the heart of the social compact. For that compact is two-sided: majorities undertake to press their grievances within limits of the Constitution and in accord with its procedures; minorities agree to abide by constitutional procedures in resisting those claims." *Id.* at 356.

Conspiracy Trial or the Penn and Mead Trial.[107] Nevertheless, the Court's discussions of the relevance of clothes and appearance implicate issues of democracy, hierarchy, and constitutionalism.

Of central concern is whether the attire at issue brands the defendant with the mark of guilt. The Bill of Rights devotes the majority of its provisions to rights in the criminal context, although the presumption of innocence and the right to a fair trial are not specifically enumerated. Instead, the right to a fair trial inheres in the due process clauses of the Fifth and Fourteenth Amendments, although it could be said to flow from the Sixth Amendment as a whole or the provisions relating to a "public trial" or an "impartial jury."[108] Additionally, the Sixth Amendment right to assistance of counsel can be pertinent, not only because the defendant wishes to represent himself as in *Allen*, but because the defendant's attire might inhibit his ability to consult with counsel. As the Court in *Allen* noted, one reason to disfavor restraining a defendant is that the ability to communicate with counsel is "greatly reduced when the defendant is in a condition of total physical restraint."[109]

More important, however, the rights to a fair trial and to an impartial jury are compromised when a defendant wears shackles. Extending *Allen*, a divided Court in *Deck v. Missouri* found this was true even during the sentencing phase, when a jury was deciding whether or not to impose the death penalty on a defendant wearing leg irons, handcuffs, and a belly chain.[110] Although this convicted defendant no longer possessed the presumption of innocence, the right to effective counsel could be implicated given that shackles could "confuse and embarrass" a defendant.[111] Moreover, the wearing of shackles constituted an affront to the dignity of the courtroom that included "the respectful treatment of defendants."[112] While a trial judge could certainly take account of individualized security concerns, including the dangerousness of the

107 *See* Illinois v. Allen, 397 U.S. 337 (1970); Estelle v. Williams, 425 U.S. 501 (1976); Holbrook v. Flynn, 475 U.S. 560 (1986); Deck v. Missouri, 544 U.S. 622 (2005); Carey v. Musladin, 549 U.S. 70 (2006).

108 The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. AMEND. VI.

109 *Allen*, 397 U.S. at 344.

110 Deck v. Missouri, 544 U.S. 622 (2005).

111 *Id.* at 631.

112 *Id.*

defendant, the Court advised that the "symbolic yet concrete objectives" of courtroom decorum should generally not be disrupted by a defendant wearing shackles.[113]

Considerations of dangerousness also informed the Court's unanimous decision in *Holbrook v. Flynn* to uphold the appearance of several uniformed state troopers sitting behind the six defendants.[114] While this deviated from the general practice of extra security details wearing civilian clothes, a combination of factors made this impracticable.[115] The Court rejected the analogy to wearing shackles, noting that the uniformed guards did not necessarily communicate the defendants' dangerousness and could just as easily be interpreted by jurors as guarding against more general disruptions.[116] The Court noted that while it might be the better practice to have officers doff their uniforms when providing security, the Court's role in reviewing a constitutional challenge to a state-court practice was more limited.[117]

The limited role of the judicial review, especially given federalism concerns, governed the outcome in the two other cases of the quintet. In *Estelle v. Williams*, the Court unequivocally held that compelling a defendant to wear "prison garb" during the state court trial was a violation of the right to a fair trial inherent in the Fourteenth Amendment's Due Process Clause.[118] Unlike wearing shackles, there was no state interest possibly served by wearing "jail attire."[119] Further, there were equality concerns because the practice affected those who were unable to afford posting bail prior to trial.[120] However, the Court's majority did not extend relief to Harry Lee Williams, because although he had requested an officer at the jail to return his civilian clothes for court, his attorney did not object to Williams's prison attire.[121] While a state cannot compel a defendant to appear at trial in jail clothes, there must be an objection to preserve this right. The objection requirement not only serves federalism concerns but also preserves the possibility of a defense trial strategy of dressing the defendant in jail attire as a sympathy ploy.[122]

113 *Id*.
114 Holbrook v. Flynn, 475 U.S. 560 (1986).
115 *Id.* at 563.
116 *Id.* at 568–69.
117 *Id.* at 572.
118 Estelle v. Williams, 425 U.S. 501, 502 (1976).
119 *Id.* at 505.
120 *Id.*
121 *Id.* at 509-513.
122 *Id.*

Williams's emphasis on state compulsion foreshadows the problem of government control over a public trial. In *Carey v. Musladin*, the Court considered a constitutional challenge by a convicted defendant who argued that spectators wearing buttons with photos of the victim denied him a fair trial.[123] The Court's opinion was decisively procedural. Because the United States Supreme Court had never ruled on the potentially prejudicial effect of spectators, Musladin's claim was foreclosed by a federal statute limiting habeas corpus relief to constitutional violations that were contrary to clearly established Supreme Court precedent.[124] While the opinion was unanimous, Justice Souter's concurring opinion contended that trial judges had affirmative obligations to ensure a fair trial, including regulating the attire of spectators.[125]

One example of a trial judge taking such an obligation seriously occurred in a homicide trial in New York in which the judge banned the wearing of "obtrusive corsages of red and black ribbons of approximately five to six inches in length."[126] Applying the local courtroom decorum rules prohibiting disruptive conduct, the trial judge used his discretionary power to prohibit all expressive or symbolic clothing and accessories, including armbands, buttons, and flowers, as "disruptive of a courtroom environment, which environment must be scrupulously dedicated to the appearance as well as the reality of fairness and equal."[127] The judge criticized his own past practice in a non-jury trial permitting thirty-five spectators wearing bright yellow T-shirts bearing

123 Carey v. Musladin, 549 U.S. 70 (2006).

124 *Id.* The Antiterrorism and Effective Death Penalty Act, 28 U.S.C. S 2254, passed in 1996, provides, "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

125 *Musladin,* 549 U.S. at 81-83 (Souter, J., concurring).

126 People v. Pennisi*,* 563 N.Y.S.2d 612 (Sup. Ct. 1990). Other cases include Norris v. Risley*,* 918 F.2d 828 (9th Cir. 1990) (anti-rape buttons); State v. Franklin*,* 327 S.E.2d 449 (W. Va. 1985) (MAAD buttons); Woods v. Dugger*,* 923 F.2d 1454 (11th Cir. 1991) (spectators wearing prison guard uniforms in prosecution for murder of prison guard). Scholarship on this issue includes Sierra Elizabeth, *The Newest Spectator Sport: Why Extending Victims' Rights to the Spectators' Gallery Erodes the Presumption of Innocence*, 58 DUKE LAW JOURNAL 275–309 (2008); Jona Goldsschmidt, *"Order in the Court!": Constitutional Issues in the Law of Courtroom Decorum*, 31 HAMLINE LAW REVIEW 1 (2008); Scott Kitner, *The Need and Means to Restrict Spectators from Wearing Buttons at Criminal Trials*, 27 REVIEW OF LITIGATION 773 (2008); Meghan E. Lind, *Hearts on Their Sleeves: Symbolic Displays of Emotion by Spectators in Criminal Trials*, 98 J. CRIM. L. & CRIMINOLOGY 1147 (2008); Elizabeth Lyon, *A Picture Is Worth A Thousand Words: The Effect of Spectators' Display of Victim Photographs During A Criminal Jury Trial on A Criminal Defendant's Fair Trial Rights*, 36 HASTINGS CON. L. Q. 517 (2009).

127 *Pennisi*, 563 N.Y.S.2d at 616.

the blue legend "Justice for Jimmy," the victim.[128] While the vast majority of spectator attire that has been litigated seems to favor the victim and thus possibly prejudice the defendant's right to a fair trial, the judge also referenced the high profile "Central Park Jogger" criminal prosecution, in which the trial judge "barred a spectator-brother of one of defendants from wearing a black sweatshirt with the letters emblemized in white, 'My Brother Antron McCray Is Innocent.'"[129] Of course, she was correct.[130]

Any First Amendment rights of the spectators, even ones that would not prejudice a defendant, are blurred. Concurring in *Musladin*, Souter raised the possibility of the spectators' First Amendment right to wear buttons, although he stated he did not find such an interest "intuitively strong."[131] In the New York corsages case, the trial judge was dismissive: although free expression was at the "very core of our organized democratic society," it had no place in the courtroom, a "holy shrine of impartiality" that was clearly committed to special and defined purposes and not the "airing of general grievances."[132]

What if the button-wearer is not a spectator, but a state employee who would presumably possess First Amendment rights? Under *Garcetti v. Ceballos*, the state employee might have limited rights during the performance of the work as opposed to off-duty,[133] yet if the government allows the attire, the criminal defendant may not have a claim for unfairness. In *Sparks v. Davis*, Justice Sotomayor issued a statement "respecting the denial of certiorari" in an application for a stay of execution by Robert Sparks:

The allegations presented in this petition are disturbing.

> On the day the jury began punishment deliberations in petitioner Robert Sparks' capital murder trial, one of the bailiffs on duty in the courtroom wore a black tie embroidered with a white syringe—a tie that he admitted he wore to express his support for the death penalty.
>
> That an officer of the court conducted himself in such a manner

128 *Id.*

129 *Id.*

130 *See* Sofia Yarken, *Brett Kavanaugh vs. The Exonerated Central Park Five: Exposing the President's "Presumption of Innocence" Double Standard*, 33 J. CIV. RTS. & ECON. DEV. 101 (2019).

131 Carey v. Musladin, 549 U.S. 70, 83 (2006) (Souter, J., concurring).

132 *Pennisi*, 563 N.Y.S.2d at 614–15.

133 547 U.S. 410, 421 (2006) (holding that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities).

> is deeply troubling. Undoubtedly, such "distinctive, identifiable attire may affect a juror's judgment." [citing *Estelle v. Williams*]. The state habeas court, however, conducted an evidentiary hearing but did not find sufficient evidence to conclude that the jury saw the tie. I therefore do not disagree with the denial of certiorari. I nevertheless hope that presiding judges aware of this kind of behavior would see fit to intervene in future cases by completely removing the offending item or court officer from the jury's presence. Only this will ensure the "very dignity and decorum of judicial proceedings" they are entrusted to uphold. [citing *Illinois v. Allen*]. The stakes—life in this case, liberty in many others—are too high to allow anything less.[134]

The United States Supreme Court bans expressive dress at the United States Supreme Court building and its environs.[135] While the Court's guide for visitors to oral argument prohibits "display buttons and inappropriate clothing," federal statutes prohibit the display of any flag, banner, or "device" designed or adapted to "bring into public notice a party, organization, or movement" in the Supreme Court building or grounds.[136] In 1983 in *United States v. Grace*, the Court held that the prohibition could not constitutionally extend to the sidewalk, a traditional public forum.[137] Justice Thurgood Marshall contended that the entire statute should be unconstitutional, noting that it "would be ironic indeed if an exception to the Constitution were to be recognized for the very institution that has the chief responsibility for protecting constitutional rights."[138]

Yet Marshall's irony is the current state of the law. Interpretations of "devices that bring into public notice a party, organization, or movement" make clear that they extend to clothes. For example, a D.C. appellate court held that "costumes—the orange jumpsuit and the black hood—constituted 'devices,"' and another D.C. appellate likewise found the wearing of orange jumpsuits, with or without black hoods, and the wearing of orange T-shirts with the phrase "Shut Down Guantanamo" to be covered by the prohibition.[139] Such rulings have revealed two other

134 Sparks v. Davis, 140 S. Ct. 6, 6 (2019) (Sotomayor, J., concurring), *cert. denied*.

135 *See* SUP. CT. U.S., *Visitors Guide to Oral Argument*, available at https://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx.

136 *Id.*; 40 U.S.C. §13k; 40 U.S.C. §6135.

137 461 U.S. 171 (1983).

138 *Id.* at 185 (Marshall, J. dissenting).

139 *See* Potts v. United States, 919 A.2d 1127, 1130 (D.C.2007); Kinane v. United States, 12 A.3d

ironies. First, the prohibitions invert the usual hierarchy of protected speech classifications so that the most highly valued category of political speech becomes the least protected. Second, the prohibitions banish the central issue of disruption. Courts have reasoned that the statutory prohibition on "devices" was not directed at preventing disruption, but rather on preserving the "appearance of the Court as a body not swayed by external influence."[140] Thus, it does not matter that that the clothes themselves caused no actual disruption because they apparently disrupt the notion that the Court is not subject to democratic influences.

IV. EDUCATIONAL DRESS UNROBED

The "disruption" standard for students articulated by the Court in *Tinker v. Des Moines Independent Community School District*[141] is often applied to teachers. While teachers no longer wear robes except for special occasions such as graduation ceremonies, the necktie might be considered a modern vestige of the robe, or at least the ruff that often encircled the neck of a robe. In considering whether or not a dress code that mandates a tie can constitutionally be applied to public school teachers, courts have often acknowledged the government's interests in promoting respect, professionalism, a semblance of uniformity, and even dignity. Courts have differed, however, regarding the constitutionality of the means of achieving these interests. Such differences appear whether the challenge is based upon free expression or liberty or other constitutional arguments. They implicate not only individual constitutional rights but also local control of school boards and the judicial role. Ruling on a teacher's challenge to a dismissal based upon attire and facial hair, the future Justice Stevens, then a Seventh Circuit judge, wrote, "just as the individual has an interest in a choice among different styles of appearance and behavior, and a democratic society has an interest in fostering diverse choices, so also does society have a legitimate interest in placing limits on the exercise of that choice," and the federal courts should be hesitant to substitute their own judgment for that of the school board "on a question of manners."[142]

23 (D.C. 2011), *cert. denied*, 132 S. Ct. 574 (U.S. 2011).

140 *Id.* at 1129 (internal citation omitted).

141 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (holding that "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

142 Miller v. School Dist., 495 F.2d 658, 662 (7th Cir. 1974).

Extensive litigation beginning in the mid-1970s that challenged the mandatory (for male teachers) necktie policy of the Board of Education of East Hartford, Connecticut is illustrative.[143] The teacher objected to the necktie policy not only on the basis of his personal autonomy, but he also argued that the absence of a necktie actually enhanced his ability to teach by allowing him a "closer rapport" with his students.[144] The district judge dismissed the constitutional challenge to the policy, noting that a teacher's positive example in dress and grooming "enlarges the importance of the task of teaching, presents an image of dignity and encourages respect for authority."[145] The district judge proclaimed that such school policies are necessary to forestall the possibility of teachers "wearing 'Bermuda shorts' or similarly inappropriate forms of flamboyant dress."[146] A panel of the Second Circuit reversed the district judge, finding that the school board's asserted interests of establishing a professional image for teachers and maintaining respect within the classroom were not served by the tie requirement.[147] The panel opinion waxed on the expressive nature of attire—the robe of "priest and judge alike" has been a mark of authority—and favored the (American) liberty interest in dress over the unfortunate (Chinese and Russian) history of "oppression accomplished by body-tegument conformity."[148] In another reversal, the *en banc* Second Circuit credited the board's interest in "promoting respect for authority and traditional values, as well as discipline in the classroom, by requiring teachers to dress in a professional manner," and further applauded the school board's good faith in distinguishing between a "traditional English class" during which the teacher was required to wear a tie, and the "alternative" class in filmmaking, when he was not.[149] During an era when school busing cases dominated other circuits, the Second Circuit *en banc* stated that "it is not the federal courts, but local democratic processes, that are primarily responsible for the many routine decisions that are made in public school

143 E. Hartford Educ. Ass'n v. Bd. of Educ., 405 F. Supp. 94 (D. Conn. 1975) *rev'd*, 562 F.2d 838 (2d Cir. 1977), *rev'd* 562 F.2d 832,856 (rehearing *en banc* 1977). Similarly in Blanchet v. Vennilion Parish Sch. Bd., 220 So. 2d 534 (La. Ct. App. 1969), *writ denied*, 222 So. 2d 68 (1969) (rejecting the teacher's challenge to a mandatory necktie policy).

144 *E. Hartford Educ. Ass'n*,. 405 F. Supp at 95.

145 *Id.* at 98.

146 *Id.*

147 E. Hartford Educ. Ass'n v. Bd. of Educ., 562 F.2d 838 (2d. Cir. 1977).

148 *Id.* at 841-842.

149 E. Hartford Educ. Ass'n v. Bd. of Educ., 562 F.2d 838, 859, n.7 (2d. Cir. rehearing *en banc* 1977).

systems."[150] Judicial restraint was especially appropriate because the teacher's "interest in his neckwear" did not "weigh very heavily on the constitutional scales"; he could "remove his tie as soon as the school day ends."[151]

Compared to mandatory tie requirements, regulations of teachers' hairstyles have the potential to be more burdensome: the moment it takes to remove a necktie after work is obviously not sufficient to regrow a beard. Additionally, courts have discussed the relationship between beards (and other hair) and race, although just as in the Title VII cases involving black women's hair, the constitutional cases involving black male teachers and hair display a marked doctrinal incoherency. For example, one court rejected any possibility that "the wearing of a mustache had been so appropriated as cultural symbol by members of the Negro race as to make its suppression either an automatic badge of racial prejudice or a necessary abridgement of First Amendment rights."[152] On the other hand, a different court found that the teacher's goatee was "worn as 'an appropriate expression of his heritage, culture and racial pride as a black man.'"[153]

Yet the most important distinction in the cases regarding teachers' attire and hair is the level of the school at issue. Considering its hair regulation jurisprudence in 1982, the Fifth Circuit stated that there is a "bright line" between public colleges and public secondary or elementary schools.[154] The asserted needs for professionalism, respect, and discipline are simply not sufficient at the college level.[155] Interestingly, however, the court rejected an argument that the line should be between adults and adolescents: requiring all school employees, even bus drivers, to adhere to the dress code for students served the interests of the school in discipline and authority, as well as uniformity.[156] While many of the challenges to schools occurred during the "counter culture" era, provoking judicial hostility or sympathy, it is nevertheless remarkable that judges cite cases involving students and teachers interchangeably. While the rhetoric is that of respect, hierarchy, and professionalism, it is as if the teachers' status as adult employees and the students'

150 *Id.* at 856-57.
151 *Id.* at 861-62
152 Ramsey v. Hopkins, 320 F. Supp. 477, 480–81 (N.D. Ala. 1970).
153 Braxton v. Bd of Pub. Instruction. 303 F. Supp. 958, 959 (M.D. Fla.1969).
154 Domico v. Rapides Par. Sch. Bd., 675 F.2d 100 (5th Cir. 1982).
155 *Id.*
156 *Id.* at 101.

status as minors legally compelled to attend school are commensurate.

For students, their entry into adulthood might be said to be at high school graduation, a ceremony during which they traditionally wear robe-like attire. As one federal judge described it, the cap and gown is the "universal symbol of achievement and honor in the academic world."[157] The judge used this universality to defeat the First Amendment claim of a high school senior who wanted to wear his traditional Lakota clothing at graduation in *Bear v. Fleming*, decided in 2010.[158] The judge found that the student's expressive activity must yield to the school board's interests, including an interest in "demonstrating the unity of the class and celebrating academic achievement."[159] The judge noted that "not all of the audience members will be Lakota or will understand the significance of Mr. Dreaming Bear's traditional Lakota clothing," repeating that in contrast, the cap and gown "is a universally recognized symbol."[160] But as the court's opinion also noted, the graduating class consisted of ten seniors, nine of whom were Lakota.[161] Tellingly, the judge reasoned that the "graduation proceedings celebrate not only the students' achievements, but also the school's achievement as an institution of learning and the teachers' and administrators' achievements as educators."[162]

Thus, the judge presiding over the hearing on Dreaming Bear's request for preliminary relief, presumably attired in his own black judicial robe over his clothes, ruled to mandate Dreaming Bear conform to a "tradition" that elided Dreaming Bear's own tradition, culture, and individuality.

CONCLUSION

Even if we were able to start anew with a mandate that we all wear robes—lawyers, law professors, teachers, and perhaps even defendants, clients and spectators in courtrooms—such a prescription would undermine our rights of expression even as it attempted to establish a superficial equality. Our concerns for our professional dress are never simply

157 741 F. Supp. 2d 972 (W. Div. S.D. 2010).
158 *Id.*
159 *Id.* at 990.
160 *Id.*
161 *Id.* at 991.
162 *Id.* at 988. *See also Graduation Dress Dispute in South Dakota Ends*, THE NEWS COURIER (May 19, 2010), https://www.enewscourier.com/news/state_and_nation/graduation-dress-dispute-in-south-dakota-ends/article_2d6bace5-b935-5494-ab41-a2832feb1f26.html.

personal ones. We cannot return to the era of the robe, but we should be able to move forward with more understanding of balancing our roles and our humanity.