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Bethanne Walz McNamara

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ALL DRESSED UP WITH NO PLACE TO GO: GENDER BIAS IN OKLAHOMA FEDERAL COURT DRESS CODES

Skirt and pants stand juxtaposed as the Western world's symbolic Great Divide.

- Susan Brownmiller¹

As long as the male-dominant power paradigm of law remains unchallenged, the basic social hierarchy will not change. The struggle for sexual equality can be successful only if it challenges, rather than reifies, the male paradigm of law.

- Janet Rifkin²

I. INTRODUCTION

Dress codes may seem trivial and unmeritorious of federal court time and serious analysis, but "objectification, in fact and in consequence, is never trivial."³ Attire conveys stature, wealth, education, respect, and social status. All of which are attributes that women have historically been unable to attain in their own right, and have only occasionally attained through vicarious association with their fathers and husbands.⁴ For this reason, it is necessary that a woman be allowed to enter the work place dressed in a manner that reveals "professionalism" regardless of whether it also portrays "femininity."

1. SUSAN BROWNMILLER, *FEMININITY* 82 (Ballantine Books 1985) (1984).

2. Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83, 95 (1980).

3. Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73 (1982) (quoting ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 115 (1981)).

4. SIMONE DE BEAUVOIR, *THE SECOND SEX* 588-89 (Vintage Books 1974) (1949). See also, GLORIA STEINEM, *OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS* 116-17 (1983).

The pain of looking back at wasted, imitative years is enormous. Trying to write like men. Valuing myself and other women according to the degree of our acceptance by men - socially, in politics, and in our professions. It's as painful as it is now to hear two grown-up female human beings competing with each other on the basis of their husband's status, like servants whose identity rests on the wealth or accomplishments of their employers. And this lack of esteem that makes us put each other down is still the major enemy of sisterhood. Women who are conforming to society's expectations view the nonconformists with justifiable alarm. Those noisy, unfeminine, women, they say to themselves. They will only make trouble for us all. Women who are quietly nonconforming, hoping nobody will notice, are even more alarmed because they have more to

Women who are obligated to dress in a manner that accentuates their "femininity" instead of their "professionalism" are revisited by negative stereotypes and pigeonholed in the very category that, in the pursuit of a successful career, it is crucial they leave.⁵ Ultimately, feminizing a woman's appearance through dress codes reinforces a woman's subordinate status in society and inhibits her from engendering the confidence and respect she deserves from peers, clients, and employers.⁶

The Ninth Circuit Gender Bias Task Force reported, "[A]lthough 'dress codes' may be regarded simply as a matter of routine business policy . . . gender specific dress codes are perceived by some women as a way of setting them apart from their male colleagues."⁷ It went on to say, "[V]iewed independently, dress codes that prohibit women from wearing pants . . . may appear to be an unlikely subject for policy debate. But viewed as one aspect of a professional environment that a sizeable fraction of . . . female practitioners view as hostile . . . gender-specific dress codes may need to be accorded greater significance."⁸ Indeed, a woman's attire is significant, and should not be underestimated when it is crucial to her economic and social welfare that she be regarded as a credible professional. Unfortunately, many task forces have concluded that women have been "'denied credibility' in courts and faced 'a judiciary underinformed about matters integral to many women's welfare'."⁹

Specifically, this comment deals with the dress codes in each of the three Oklahoma Federal District Courts.¹⁰ While each dress code is different, all three treat women patronizingly and place them in an

lose. And that makes sense, too. The status quo protects itself by punishing all challengers, especially women whose rebellion strikes at the most fundamental social organization: the sex roles that convince half the population that its identity depends on being first in work or in war, and the other half that it must serve as docile, unpaid, or underpaid labor.

Id.

5. See Whisner, *supra* note 3, at 73-78. See also JOHN T. MOLLOY, *THE WOMAN'S DRESS FOR SUCCESS BOOK 21* (1977) (providing that "[d]espite the rhetoric of the feminist movement, many women, including businesswomen, continue to view themselves as sex objects. Sexuality is certainly an important part of our lives. But when sexuality is a factor in choosing business wear, it harms a woman's career").

6. *Id.* See also Laura Mansnerus, *Why Women are Leaving the Law*, *WORKING WOMAN*, Apr. 1993, at 64.

7. *The Final Report of the Ninth Circuit Gender Bias Task Force: The Effects of Gender in the Federal Courts*, 67 S. CAL. L. REV. 727, 852 (1994).

8. *Id.* at 852.

9. *Id.* at 733-34.

10. Specifically, the three Oklahoma Federal District Courts include the Northern District Federal Court, the Western District Federal Court, and the Eastern District Federal Court.

inferior context and position.¹¹ In this sense, the federal judiciary is lending its legitimacy to women's subordinate position in society by characterizing them, literally dressing them, as "females" first and "professionals" second. This indicates women are "second best" in a male dominated profession.¹²

II. A HISTORICAL PERSPECTIVE

Law, in mythology, culture, and philosophy, is the ultimate symbol of masculine authority and patriarchal society.¹³ Until recently, women have been excluded from the courts and the legal system, as the law was viewed to be the exclusive dominion of men.¹⁴ The adversarial system, upon which the American system is based, is characteristically associated with the male attributes of being battle-hardened, shrewd, authoritative, and tough-minded.¹⁵ Women, on the other hand, have historically been viewed as compassionate, selfless, gentle, moral, and pure.¹⁶

In 1875, the Wisconsin Supreme Court stated that the law was unfit for the female character.¹⁷ To expose women to the brutal, repulsive, and obscene events of courtroom life would shock man's reverence for womanhood and relax the public's sense of decency.¹⁸ That same sentiment was shared by the famous litigator Clarence Darrow,

11. See discussion *infra* part V.

12. If men are dominant in the law, and women inferior, then to be dressed "womanly" is to be distinguished as second best. See Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, And The Federal Courts, 66 N.Y.U. L. REV. 1682 (1991).

From 1982 until 1990, these task forces on gender bias in the courts were exclusively the domain of state courts. The federal courts (either acting circuit by circuit or as a whole by action of the Judicial Conference of the United States) neither took the lead nor followed suit in forming committees to ask questions about the interaction between gender and the federal court system. The question of what role, if any, the federal courts as an institution might take in considering the effects of gender has come to the fore recently because of actions by Congress and by the federal judiciary.

In 1988, Congress created a specially chartered committee, empowered to provide a comprehensive overview of the federal judicial system. That group, the Federal Courts Study Committee (FCSC), with fifteen members appointed by the Chief Justice, included several federal judges; its charge was to think about the future of the federal courts. Many individuals and organizations saw the FCSC as having the potential to make recommendations about how gender affects decisionmaking, employment, and work in the federal courts. The FCSC thus heard and received testimony-including many requests that the federal courts, like the state courts, convene gender bias task forces and begin other programs on gender bias.

Id. at 1685-86.

13. Rifkin, *supra* note 2, at 92.

14. Rifkin, *supra* note 2, at 83-84.

15. Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1547 (1991).

16. *Id.*

17. *Id.*

18. *Id.*

who stated to a group of women lawyers, "You can't be shining lights at the bar because you are too kind. You can never be corporation lawyers because you are not cold-blooded. You have not a high grade of intellect. I doubt you can ever make a living."¹⁹ Indeed, when Myra Bradwell,²⁰ who has been dubbed "America's first woman lawyer,"²¹ asked the Supreme Court for permission to practice law, Justice Bradley declined, stating, "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."²²

In spite of the ratification of the Bill of Rights in 1791, women's rights and status were left virtually unchanged.²³ The strictures of the Bill of Rights were limited to the federal government, and the states were still free to pass legislation that was primarily drawn from the English common law. Thus, women gained few property or contractual rights from the ratification.²⁴ Change was slow even with the passage of the Fourteenth Amendment.²⁵ In fact, for over 100 years, the Supreme Court turned away equal protection challenges to unequal treatment of women and men.²⁶ Only in 1971, seven years after the Civil Rights Act of 1964 and the passage of Title VII,²⁷ did the Court decide that such treatment was constitutionally suspect.²⁸

19. *Id.* at 1548. See also GERMAINE GREER, *THE FEMALE EUNUCH* 111-12 (Bantam Books 1972) (1970).

It is true that women often refuse to argue logically. In many cases they simply do not know how to, and men may dazzle them with a little pompous sophistry. In some cases they are intimidated and upset before rationalization begins. But it is also true that in most situations logic is simply rationalization of an infralogical aim. Women know this; even the best educated of them know that arguments with their menfolk are disguised realpolitik. It is not a contest of mental agility with the right as the victor's spoils, but a contest of wills. The rules of logical discourse are no more relevant than the Marquess of Queensberry's are to a pub brawl. Female hardheadedness rejects the misguided masculine notion that men are rational animals. Male logic can only deal with simple issues: women, because they are passive and condemned to observe and react rather than initiate, are more aware of complexity. Men have been forced to suppress their receptivity, in the interests of domination.

Id.

20. Myra Bradwell (1831-1894).

21. JANE M. FRIEDMAN, *AMERICA'S FIRST WOMAN LAWYER, THE BIOGRAPHY OF MYRA BRADWELL* 1 (1993).

22. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

23. O'Connor, *supra* note 15, at 1549.

24. O'Connor, *supra* note 15, at 1549.

25. Catherine A. MacKinnon, *Toward A Redefinition of Sexual Equality*, 95 HARV. L. REV. 487, 488 (1981).

26. *Id.*

27. Title VII of the Civil Rights Act of 1964 was meant to prohibit employment discrimination on the basis of race, color, religion, sex or national origin. 42 U.S.C. §§ 2000e to e-15 (1988).

28. MacKinnon, *supra* note 25, at 488.

Reed v. Reed,²⁹ the landmark case which rejected the automatic male preference for estate administrators, paved the way for future gender neutral legislation.³⁰ Sandra Day O'Connor, the first female Supreme Court Justice,³¹ stated that the *Reed* decision "signaled a dramatic change in the Court's approach to the myth of the 'True Woman.'"³² The "true woman" perception was based upon the historical stereotypical view as to the proper role and experience for a woman. In Justice O'Connor's opinion, woman's current progress is due "in large part to the explosion of the myth of the 'True Woman' through efforts of real women and the insights of real men. Released from these prejudices, women have proved they can do a 'man's' job."³³

Certainly, this progress can be exemplified by the efforts of real people like Supreme Court Justice Ruth Bader Ginsburg, the first director of the Women's Rights Project of the ACLU,³⁴ and Melvin Wulf, a former director of the ACLU.³⁵ Together, Justice Ginsburg and Wulf wrote the *Reed* brief that resulted in an unanimous Supreme

29. 404 U.S. 71 (1971).

30. See generally *id.* *Reed* was the first case that found a state law that discriminated against women to be unconstitutional, and hence, illegal.

31. Sandra Day O'Connor was appointed to the United States Supreme Court in 1981.

32. O'Connor, *supra* note 15, at 1551.

33. O'Connor, *supra* note 15, at 1549. Many women have rebelled against the status quo in clothing. See BROWNMILLER, *supra* note 1, at 91-92.

History is enlivened by a number of women of ambition and talent who chose to masquerade in men's clothes, or who wore some essential part of the forbidden costume in order to work in comfort. Whether it was to take up arms and fight for her country, like Joan of Arc, to lead escaped slaves through Southern swamps to freedom, like Harriet Tubman, or to carouse at night in raffish cafes for research and adventure, like George Sand, a bonnet and a skirt would have imposed a ridiculous bar. They are a fixed bunch, these purposeful cross-dressers, these illustrious women in serious drag, having little in common besides a profound need for self-realization and unstoppable courage. The list includes Rosa Bonheur, who received official permission from the Paris police to dress in Men's clothes when she went to sketch horses at the slaughterhouse, Calamity Jane, who drove a stage coach in the American West, and the eminent landscape designer Gertrude Jekyll, who wore army boots and a workman's apron to supervise the planting on England's great estates.

BROWNMILLER, *supra* note 1, at 91-92.

34. MONA HARRINGTON, *WOMEN LAWYERS REWRITING THE RULES* 182 (1994). I had the honor of meeting Justice Ginsburg this summer in Cambridge, England, where she was teaching a two week class on gender discrimination with the assistance of Professor Rosalie Levinson of Valparaiso University Law School. Despite the demanding schedule of a Supreme Court Justice, Justice Ginsburg was kind enough to take the time to read this comment, and send me information on additional material for research. I would like to thank both Justice Ginsburg and Professor Levinson for their help with this paper. I would also like to thank Cynthia Harrison, Chief Historian of the Federal Judicial Office, Patsy Engelhard, Director of the Commission on Women in the Profession of the ABA, Marena McPherson, Commission on Women in the Profession of the ABA, Professor Lundy Langston, University of Tulsa College of Law, and Professor Linda Lacey, University of Tulsa College of Law.

35. *Id.* at 209.

Court decision for Sally Reed³⁶ and began a carefully choreographed succession of cases that dealt with sex discrimination and gender equality.³⁷ "Ruth Bader Ginsburg and her cohorts . . . argued that equality under the law should mean gender neutrality Their fear has been that if employers could make any distinction at all between the sexes, the distinctions would inevitably turn against women."³⁸ In the end, it is thought that "defining women as a sex-based class for any purpose invites . . . invidious stereotyping and discrimination."³⁹

One year after the *Reed* decision, another landmark case for gender equality passed through the hands of the Supreme Court.⁴⁰ In *Frontiero v. Richardson*,⁴¹ the Court rejected a federal statute which made it difficult for women to claim their husbands as dependents, but not for men to claim their wives.⁴² Justice Brennan wrote, "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."⁴³ Over the years this cage has changed form, but the substance and the oppression has remained the same.

III. WOMEN IN TODAY'S WORKPLACE

The "long and unfortunate history of sex discrimination" is not over. Gender bias concerning the capabilities of women and the appropriate images women should project has not halted at the Federal Court door.⁴⁴ As women litigated about their rights in the 1960s and

36. *Id.* at 208. Sally Reed, the mother of a deceased child, challenged Idaho state law that automatically favored the father of a deceased child as the administrator of the estate.

37. *Id.*

38. *Id.* at 215.

39. *Id.* at 183.

40. *Frontiero v. Richardson*, 411 U.S. 677 (1973). Ruth Bader Ginsburg and Melvin Wulf, arguing as *amicus curiae* for the American Civil Liberties Union, urged reversal. *Id.* at 678.

41. *Id.*

42. *Id.*

43. *Id.* at 684. See also LOIS GUNDEN CLEMENS, *WOMAN LIBERATED* 20 (1971).

And so society has been conditioned to believe that women are something less than men. They are considered to be human beings, but beings of a lower sort, having less wisdom and intelligence than the male, and lacking in most of his endowed abilities and capacities. In most parts of the world women have traditionally not had equal opportunities with men to develop their capacities and to become persons of worth in their own right. They have been prejudged as a class rather than fairly judged as persons. These myths about women which have been accepted as truth throughout history have been disproved by the findings of modern science.

Id.

44. See Resnik, *supra* note 12, at 1684-85.

1970s, "they found that some of the pain of discrimination came from the very places to which they brought claims - courts."⁴⁵ In fact, as late as 1981, a former Wisconsin judge stated that, "women are sex objects whether they like it or not."⁴⁶

A. *Impact of Gender Differences on the Legal System*

A report conducted by the Federal Courts Study Committee found that education was the answer to extinguishing and preventing gender bias in the courts.⁴⁷ The 1990 report stated:

Studies in many state systems reflect the presence of bias - particularly gender bias - in state judicial proceedings. Although we have confidence that the quality of the federal bench and the nature of the federal law keep such problems to a minimum, it is unlikely that the federal judiciary is totally exempt from instances of this general social problem.⁴⁸

A 1993 article titled *Why Women are Leaving the Law*,⁴⁹ specifically addressed the problems women face in the "gender gulf" between men and women in the law. The dichotomy of the sexes ultimately results in many women abandoning legal careers in search of a more "gender friendly" occupation. Several studies indicate a disturbingly high dissatisfaction level among women in legal occupations.⁵⁰ In commenting on the male dominance of the profession, one attorney was quoted as saying, "the legal profession, more than any other profession I know, runs on testosterone."⁵¹

A study conducted in 1986 polled women law graduates from 1975 and 1976, approximately ten years after they had graduated from law school.⁵² The findings were similar. The feelings of exclusion due

45. Resnick, *supra* note 12, at 1684.

46. Whisner, *supra* note 3, at 119. Archie Simonson made the statement after losing his recall election. Simonson had been removed from office after saying that an assault, that took place on a sixteen year old girl, was a result of "influencing environmental factors," including the woman's clothing. Simonson said that the boy was just reacting normally to the school's sexual permissiveness. *Simonson v. United Press Int'l*, 654 F.2d 478, 481 (7th Cir. 1981). "Simonson then sentenced the delinquent fifteen-year-old to one year at a state reformatory, suspended the sentence, and directed that the youth participate in a home community treatment program." *Id.*

47. Resnik, *supra* note 12, at 1686.

48. Resnik, *supra* note 12, at 1686.

49. Mansnerus, *supra* note 6, at 64.

50. Mansnerus, *supra* note 6, at 66.

51. Mansnerus, *supra* note 6, at 64.

52. Stacy Caplow & Shira A. Scheindlin, *Portrait Of A Lady: the Woman Lawyer in the 1980s*, 35 N.Y.L. Sch. L. Rev. 391, 395 (1990).

to gender differentiation are pervasive in female attorneys, and psychologically debilitating.⁵³ The feeling of exclusion applies to women's relationships with clients as well as colleagues.⁵⁴ Respondents of the survey stated, "The clients are men. The clients just don't hire women."⁵⁵ "It was hard to be taken seriously by clients and partners. I didn't fit in with all of the . . . masculine stuff."⁵⁶ "The energy spent struggling with sexism is a major diversion."⁵⁷

B. *Women as Decorative Objects*

Certainly, a gender neutral dress code is not the panacea for the complex and varied reasons women are disenchanted and disillusioned with the law.⁵⁸ However, a dress code that purposely reaffirms a woman's femininity cannot help but reinforce the sociological and cultural "differences" of the genders, which results in women feeling additionally alienated, separated, frustrated, and ultimately inferior.⁵⁹

Sociologists have described women having to dress "femininely" and "professionally" as a "deliberately manipulated catch-22 in the workplace."⁶⁰ Sociologist Deborah L. Sheppard stated, "Women perceive themselves and other women to be confronting constantly the

53. *Id.* at 417-25.

54. *Id.* at 424.

55. *Id.*

56. *Id.*

57. *Id.*

58. *See supra* note 45 and accompanying text.

59. Mansnerus, *supra* note 6, at 64. *See also* Caplow & Scheindlin, *supra* note 52. *See also* Mary F. Radford, *Sex Stereotyping and The Promotion of Women to Positions of Power*, 41 *HASTINGS L.J.* 471, 504 (1990).

Despite the strength of criticisms leveled against stereotypical notions of men and women, the salient point is that these notions are entrenched in the workforce and have both an internal and an external effect on the achievement and promotion of women. The task of uprooting and dispelling these stereotypes falls to legislators, employers, employees, parents, teachers, philosophers, artists, sociologists, lawyers, anthropologists, and psychologists alike. Feminist legal theorists already have made substantial contributions toward this project by engaging in a restructuring of legal approaches on both a practical and theoretical level. While it would be idealistic and naive to assume that the legal system is the only, or even the most effective, tool available to eradicate this dangerous form of sexism, there are a variety of incremental ways in which the legal system can aid in the process of relieving sex stereotypes of their power.

Id.

60. NAOMI WOLF, *THE BEAUTY MYTH* 42 (1992).

A fifty-four-year-old American woman, quoted in *The Sexuality of Organization*, said her boss replaced her one day without warning. He had told her that he wanted to look at a younger woman so his spirits could be lifted. She said that her age . . . had never bothered her before he mentioned it to her.

Id. (internal quotation omitted). Is it any surprise that, two decades into the legal evolution of the professional beauty qualification, working women are tense to the point of insanity about their appearance?

dualistic experience of being 'feminine' and 'businesslike' at the same time, while they do not perceive men experiencing the same contradiction."⁶¹ This contradiction has become publicly obvious in the O.J. Simpson trial concerning the attire of Deputy District Attorney Marcia Clark.⁶² Clark, who hasn't lost a case in five years,⁶³ was "softened" in response to a focus group in Phoenix that "convicted Ms. Clark of the unwomanly crime of abrasiveness."⁶⁴ Beyond prosecuting O.J. Simpson, Clark must "see if she can hew the fine line between strong and tough, warm and weak, woman and D.A." These additional demands upon her have not gone unnoticed. "In the wake of this, some women are offended that Clark went 'soft.' Others are appalled that she had to."⁶⁵ However, Superior Court Judge Lance Ito has failed to take the attire issue that Clark faces seriously.⁶⁶ When a prospective juror told Clark that her skirts were too short, the other attorneys in the courtroom began laughing.⁶⁷ Ito, instead of controlling the courtroom heckling, prompted more laughs when he stated, "I wondered when someone was going to mention that."⁶⁸ But that was not the end of it for Clark. Ito raised the attire issue yet again as the court broke for lunch saying, "I'm glad we finally got the skirt issue out in the open."⁶⁹ Clark responded, "Speak for yourself."⁷⁰

Ito may be speaking for himself, but his jovial attitude speaks for the lack of respect that is given to women in many United States courtrooms.⁷¹

61. *Id.*

62. Associated Press, *Questions Turn to Skirts*, News-leader, Springfield, Mo., Oct. 29, 1994, at A7.

63. Ellen Goodman, *So, What's a Poor Girl to Wear*, The Tulsa World, Oct. 21, 1994, at N13.

64. *Id.*

65. *Id.*

66. Associated Press, *supra* note 62, at A7.

67. Associated Press, *supra* note 62, at A7.

68. Associated Press, *supra* note 62, at A7.

69. Associated Press, *supra* note 62, at A7.

70. Associated Press, *supra* note 62, at A7. "But if you want to know how differently the style issue plays out for male and female professionals, consider what would have happened if Marcia Clark had posed for People magazine the way defense attorney Robert Shapiro did. Without a shirt on." Associated Press, *supra* note 62, at A7.

71. The Judicial Conference of the United States Courts has adopted Commentary to Canon 3(A)(3) of the ABA MODEL CODE OF JUDICIAL CONDUCT (1990) (of which California has adopted). That commentary states, "[T]he duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias towards another on the basis of personal characteristics like . . . sex . . ." *The Final Report of the Ninth Circuit Gender Bias Task Force*, *supra* note 7, at 1043 (quoting the Judicial Conference of the United States, VOL. II, GUIDE TO JUDICIARY POLICIES AND PROCEDURES, CODE OF CONDUCT FOR THE UNITED STATES JUDGES (adopted Sept. 1992)).

[E]vidence suggests that the courthouse is a site of particular tension over female sexuality. Many state court systems, in the late eighties, published extensive self-studies of gender bias operating in the courts, including the subjection of women lawyers to sexually charged attention from male judges, lawyers and court officials. The 1989 Massachusetts Gender Bias Study, for example, reported the 64 percent of the women lawyers surveyed had observed male lawyers, in court, making remarks or jokes that demean women, 43 percent had heard inappropriate comments of a sexual or suggestive nature, and virtually everyone had heard remarks about the clothing or physical appearance of women lawyers⁷²

The Ninth Circuit Gender Bias Task Force found that "Women in the courts, including lawyers and clients, are sometimes subjected to demeaning forms of address, comments on their physical appearance and clothing, sexist remarks and 'jokes'"⁷³ This denial of credibility is "not found by their male counterparts."⁷⁴ Most importantly, for women and their clients "[t]his is a cause for concern because credibility is directly related to one's ability to influence others."⁷⁵ The objectification of a woman attorney in the courtroom directly undermines her effectiveness as an advocate by calling into question her credibility, while maintaining the credibility of her male counterpart. Thus, the discrimination affects not only women and their clients, but the administration of justice, which is the foundation of the law itself. In *The Beauty Myth*, author Naomi Wolfe adroitly summarized the obvious: "If, at work, women were under no more pressure to be decorative than are their well-groomed male peers in lawyer's pinstripe or banker's gabardine, the pleasure of the workplace might narrow; but so would a well-tilled field of discrimination."⁷⁶

The justification for regulation of women's appearance rests on two faulty assumptions: (1) women inherently enjoy being decorative and objectified; and (2) women do not possess the intelligence and discretion necessary to choose proper business attire.⁷⁷ Thus, proper attire must be determined for women by their male superiors.⁷⁸ The belief that women enjoy being decorative objects is deeply embedded in the history of women in general and is rooted in the ownership of

72. MONA HARRINGTON, *WOMEN LAWYERS REWRITING THE RULES* 103 (1994).

73. *The Final Report of the Ninth Circuit Gender Bias Task Force*, *supra* note 7, at 733.

74. *The Final Report of the Ninth Circuit Gender Bias Task Force*, *supra* note 7, at 733.

75. *The Final Report of the Ninth Circuit Gender Bias Task Force*, *supra* note 7, at 733.

76. WOLF, *supra* note 60, at 45.

77. See *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1033 (7th Cir. 1979).

78. See *id.* at 1033 n.17.

women as property.⁷⁹ "The notion of women as male property is . . . at the heart of cultural-social order."⁸⁰ In this sense, attire serves a dual purpose: "it is intended to indicate the social standing of the woman . . . , but at the same time it puts feminine narcissism in concrete form; it is a uniform and an adornment; by means of it the woman who is deprived of *doing* anything feels that she expresses what she *is*."⁸¹ The sentiment involved is her feeling that she is an object for ownership and exchange by men.

Social custom furthers this tendency to identify herself with her appearance. A man's clothes, like his body, should indicate his transcendence and not attract attention; for him neither elegance nor good looks call for his setting himself up as object; moreover, he does not normally consider his appearance as a reflection of his ego. Woman, on the contrary, is even required by society to make herself an erotic object. The purpose of the fashions to which she is enslaved is not to reveal her as an independent individual, but rather to cut her off from her transcendence in order to offer her as prey to male desires; thus society is not seeking to further her projects but to thwart them.⁸²

The concept of women as decorative objects has persisted even though women are no longer regarded as the legal property of men.⁸³

For example, a court employee told of a supervisor who forbade female staff from wearing pants to work, even on days when they would not be in court and when their judges were not in chambers; and who told females that they needed to 'dress up' more. The same supervisor was described as making derogatory comments about women generally. Another court employee said she disliked working with a certain male judge because he paid 'too much attention' to what she was wearing - commenting on color, style, and the

79. Rifkin, *supra* note 2, at 90-91.

80. Rifkin, *supra* note 2, at 90.

The nature and meaning of patriarchal social order and of patriarchal culture has recently become the subject of intense scholarly questioning. Historians, literary scholars, political theorists, economists, anthropologists, sociologists, psychologists, and law teachers have been attempting through their respective disciplines, to understand the origin of patriarchy and the perpetuation of a patriarchal social order. By patriarchy, I mean any kind of group organization in which males hold dominant power and determine what part females shall and shall not play, and in which capabilities assigned to women are relegated generally to the mystical and aesthetic and excluded from the practical and political realms, these realms being regarded as separate and mutually exclusive.

Rifkin, *supra* note 2, at 83 (citations omitted).

81. DE BEAUVOIR, *supra* note 4, at 589.

82. DE BEAUVOIR, *supra* note 4, at 589-90.

83. Whisner, *supra* note 3, at 76-77.

like - and he refused to work with female employees unless they were wearing dresses.⁸⁴

It is argued that objectification is self-imposed by women themselves. Society and the fashion industry have exploited this belief, but as women are becoming more independent, they are rejecting this association.⁸⁵

That so-called feminine ardor for clothes shopping had been flagging for some time. Between 1980 and 1986, at the same time that women were buying more houses, cars, restaurant dinners, and health care services, they were buying fewer pieces of clothing - from dresses to underwear. The shaky economy played a role, but mostly women just didn't seem to enjoy clothes shopping as much anymore. In one poll, more than 80 percent said they hated it, double from a decade earlier.⁸⁶

In one of the largest studies of women's fashion shopping habits in the early '80s, Wells Rich Greene found that "the more confident and independent that women became, the less they cared . . . about their clothes. The agency could find only three groups of women who were loyal followers of fashion: the very young, the very social, and the very anxious."⁸⁷ Yet even Slim Keith,⁸⁸ who was referred to in 1946 as the "Best Dressed Woman in the World," called her title about as empty as "Miss Butterfat Week' in Wisconsin."⁸⁹

C. *Employer Restrictions on Choice of Attire*

In spite of the questionable premise that women enjoy being decorative objects, many employers have restricted women's individuality

84. *The Final Report of the Ninth Circuit Gender Bias Task Force, supra* note 7, at 853.

85. SUSAN FAULDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 170 (1991).

86. *Id.*

[M]aybe I'm sick of the masquerade. I'm sick of pretending eternal youth. I'm sick of belying my own intelligence, my own will, my own sex. I'm sick of peering at the world through false eyelashes, so everything I see is mixed with the shadow of bought hairs; I'm sick of weighting my head with a dead mane, unable to move my neck freely, terrified of rain, of wind, of dancing too vigorously in case I sweat into my lacquered curls. I'm sick of the Powder Room. I'm sick of pretending that some fatuous male's self-important pronouncements are the objects of my undivided attention, I'm sick of going to films and plays when someone else wants to, and sick of having no opinions of my own about either. I'm sick of being a transvestite. I refuse to be a female impersonator. I am a woman, not a castrate.

GREER, *supra* note 19, at 58.

87. FAULDI, *supra* note 85, at 174.

88. Slim Keith was at the zenith of society for more than half the twentieth century. She socialized with the Hearsts, the Paleys, as well as Cary Grant, Gary Cooper, Ernest Hemingway and Truman Capote. SLIM KEITH AND ANNETTE TAPERT, *SLIM* 124 (1990).

89. *Id.*

and choice of business attire due to the perceived notion that women prefer to be viewed sexually instead of professionally.⁹⁰ In *Carroll v. Talman Federal Savings & Loan Ass'n*,⁹¹ the plaintiff Mary Carroll, was required to wear a "career ensemble" as a condition of her employment. The ensemble was to be worn every business day except for the "glamour days"⁹² which were the last Tuesday of every month and two weeks out of the year.⁹³ The dress code for the male employees, however, merely required "proper business attire." The Court dismissed Talman's defense that the dress code was reasonably necessary to the operation of its business since other acceptable alternatives of dressing in business attire were not available. The court held that the imposition of the dress code was unlawful discrimination.⁹⁴

Talman attempted to justify its dress code by arguing "that women cannot be expected to exercise good judgment in choosing business apparel, whereas men can."⁹⁵

Sexual objectification can be seen in Talman's perception that the women's sexuality must be muted by uniforms and that the women's business judgment could not be relied upon to control their desire to adorn themselves in a sexual way.⁹⁶

Talman also stated the purpose of the dress code was to avoid the "dress competition among women," which otherwise only existed on "glamour days."⁹⁷ At oral argument, counsel for Talman stated that, "the selection of attire, of clothing on the part of women is not a matter of business judgment."⁹⁸ He castigated the otherwise intelligent employees as women "who have excellent business judgment [but] somehow follow the . . . slit skirt fashion . . . and they don't seem to equate that with a matter of business judgment."⁹⁹ Ironically, however, the personnel manager for Talman admitted that when women were allowed to dress in "appropriate business attire" on "glamour days" that they never wore "improper attire."¹⁰⁰

The discrepancy between the assertions of Talman's counsel and those of the personnel manager can be explained by the ambiguity

90. See *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1033 (7th Cir. 1979).

91. *Id.*

92. *Id.* at 1033 n.16.

93. *Id.* at 1030.

94. *Id.* at 1033.

95. *Id.* at 1033 n.17.

96. Whisner, *supra* note 3, at 88.

97. *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1033 (7th Cir. 1979).

98. *Id.*

99. *Id.*

100. *Id.*

that is found in women's clothes. "[A] woman's . . . behavior is noticed and labelled sexual even if it is not intended as such."¹⁰¹ Men interpret messages in woman's clothing that are non-existent, and thus leave women vulnerable to harassment and discrimination regardless of intent.¹⁰² Ironically, even without such intent, women feel guilty for possibly provoking the negative treatment through their choice of attire. Conversely, women are unable to point to the harassment as credible, because they are unable to see themselves as credible.¹⁰³

Gender differentiation sustains and preserves patriarchy, the social structure characterized by systemic power disparities based on gender.¹⁰⁴ The New York Task Force on Women in the Courts concluded:

[G]ender bias against women . . . is a pervasive problem with grave consequences Cultural stereotypes of women's role in marriage and in society daily distort courts' application of substantive law. Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condensation, indifference and hostility.¹⁰⁵

Courts that fail to appreciate the significance of these issues and accept the regulation of women's appearance, to control men's behavior, thereby legitimate sexual objectification.¹⁰⁶ Forcing or inducing a woman to conform to dress standards that are not her own and which purposefully feminize her appearance serve only to subvert her professionalism and cripple her emancipation from the chains of objectification.

101. WOLF, *supra* note 60, at 43 (citing five studies from *THE SEXUALITY OF ORGANIZATION 1* (JEFF HEARN ET AL EDS., 1989)).

102. WOLF, *supra* note 60, at 43.

Beauty provokes harassment, the law says, but it looks through men's eyes when deciding what provokes it. A woman employer may find a well-cut European herringbone twill, wantonly draped over a tautly muscled masculine flank, madly provocative, especially since it suggests male power and status, which our culture eroticizes. But the law is unlikely to see good Saville Row tailoring her way if she tells its possessor he must service her sexually or lose his job.

WOLF, *supra* note 60, at 45.

103. WOLF, *supra* note 60, at 45.

104. Whisner, *supra* note 3, at 119.

105. *The Final Report of the Ninth Circuit Gender Bias Task Force*, *supra* note 7, at 732.

106. *The Final Report of the Ninth Circuit Gender Bias Task Force*, *supra* note 7, at 732.

IV. APPEARANCE REGULATION AND THE LAW

Title VII of the Civil Rights Act prohibits employers from engaging in practices which discriminate upon the basis of race, color, religion, sex or national origin.¹⁰⁷ Section 703(a) of the Civil Rights Act of 1964 provides:

It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or discharge any individual, or to otherwise 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 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.¹⁰⁸

Title VII was created to give previous victims of employment discrimination equal opportunity in the workplace. The inclusion of gender was accomplished just one day prior to the passage of Title VII by a floor amendment in the House of Representatives by Howard Smith of Virginia who was, ironically, a strong opponent of the entire Civil Rights Act.¹⁰⁹ Originally intended only to affect race and ethnic discrimination, the last minute inclusion of "sex" allowed Congress little time for debate or broad consideration of its scope.¹¹⁰ In fact, some members of the House feared that the inclusion of "sex" was an attempt to delay or defeat the bill.¹¹¹ The lack of clear Congressional intent regarding "sex" has been a nemesis of Title VII's application and has left the courts struggling with its proper interpretation and scope.¹¹² Consequently, while the inclusion of gender has undoubtedly helped women overcome discrimination, the potential impact was unfortunately weakened, if not by a premature birth, then at least by lack of parental planning.¹¹³

Employer-imposed grooming regulations and dress code policies are one type of discrimination that has been challenged under Title

107. 42 U.S.C. §§ 2000e to e-15 (1988).

108. 42 U.S.C. § 2000e-2(a) (1988).

109. Peter F. Ziegler, Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. CAL. L. REV. 965, 968 (1973) (citing Robert S. Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877 (1967)).

110. *Id.*

111. *Id.*

112. *See generally id.*

113. If there had been strong legislative history and intent behind the inclusion of "sex" in Title VII, its application could have been less ambiguous, and the overall impact greater.

VII with only moderate success. *Fagan v. National Cash Register Co.*¹¹⁴ was one of the first cases challenging employer appearance standards.¹¹⁵ The plaintiff, who refused to wear his hair above his collar was suspended from his job. He sued under Title VII for sex discrimination. The United States Court of Appeals for the District of Columbia Circuit upheld the regulation. Referring to a California decision the Court stated:

Making some sense as to claimed discrimination "because of sex" the court referred to the meager legislative history of the "sex" amendment. Then the opinion explained the real purpose of the language. Congress sought to establish equal occupational opportunities, an equal right to available employment, equal pay for equal work and working conditions. It was not planned that the Act was [to] be used to interfere in the promulgation and enforcement of the general rules of employment, deemed essential by an employer, where the direct economic effect upon the employee was nominal or non-existent.¹¹⁶

In assessing a claim of unlawful sex discrimination courts have generally applied a two-part test: (1) Is the behavior complained of unlawful sex discrimination under Title VII,¹¹⁷ and, if so, (2) does it qualify as a bona fide occupational qualification (BFOQ).¹¹⁸

In his dissenting opinion, Judge Wright criticized the decision of the court in *Fagan* because National Cash Register's admittedly discriminatory hair policy was never subject to the 703(e) BFOQ analysis.¹¹⁹ He wrote, "By passing Section 703(a), Congress intended to prevent employers from refusing to hire an individual based on stereotyped characterizations of the sexes [The] exception to the prohibition . . . against sex discrimination in employment is applicable only to job situations that require specific physical characteristics necessarily possessed by only one sex."¹²⁰

However, later that year the court reaffirmed *Fagan* in *Dodge v. Giant Foods, Inc.*¹²¹ *Dodge* represented another challenge to discriminatory appearance standards based on hair length. The court stated

114. 481 F.2d 1115 (D.C. Cir. 1973).

115. *See id.*

116. *Id.* at 1123 (citing *Baker v. California Land Title Co.*, 349 F. Supp. 235, 237-38 (C.D. Cal. 1972)).

117. Whisner, *supra* note 3, at 81 (citing 42 U.S.C. § 2000e-2(a) (1988)).

118. Whisner, *supra* note 3, at 81 (citing 42 U.S.C. § 2000e-2(e) (1988)).

119. *Fagan v. National Cash Register Co.*, 481 F.2d 1115, 1126-27 (D.C. Cir. 1973) (Wright, J., dissenting).

120. *Id.* at 1126-27 (internal citations omitted).

121. 488 F.2d 1333, 1336 (D.C. Cir. 1973).

that the appearance regulation did not fall within Title VII because the provision was not allocating employment opportunities unequally.¹²² The court wrote, "We conclude that Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities."¹²³

Five other districts have followed *Fagan* and *Dodge*, but not always without ambiguity.¹²⁴ In 1971, the Fifth Circuit rejected a hiring policy that excluded men based on customer preference.¹²⁵ The employer was unable to prove that being a female flight attendant qualified as a lawful BFOQ.¹²⁶ However, several years later, when faced with an employer hair cut requirement, the same court upheld it as valid based upon "standards customarily accepted in the business community."¹²⁷

In *Carroll v. Talman Federal Savings & Loan Ass'n*,¹²⁸ the Seventh Circuit rejected a dress code which required a uniform for women, but only appropriate business attire for men. The court characterized the requirement as "demeaning to women"¹²⁹ and unlawful discrimination. Nevertheless, the court gave validity to employer-sanctioned dress codes that conform to commonly accepted social norms: "So long as they find some justification in commonly accepted social norms and are reasonably related to the employer's business needs, such regulations are not necessarily violations of Title VII even though the standards prescribed differ somewhat for men and women."¹³⁰

Yet, while approving of "social norms," the court stated that stereotypical assumptions about gender are "anathema to the maturing state of Title VII."¹³¹ The district court did not explain, however,

122. *Id.* at 1336-37.

123. *Id.*

124. Susan Hillary Loeb, Note, *Disparate Dress Codes as Sex Discrimination in Violation of Title VII*, 56 CHI.-KENT L. REV. 1249, 1259 (1980).

125. *Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971).

126. *Id.* at 387-88.

127. *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084, 1087 (5th Cir. 1975).

128. 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

129. *Id.* at 1033.

130. *Id.* at 1032.

131. *Id.* at 1033 (citing *In re Consolidated Pretrial Proceedings in the Airlines Cases*, 582 F.2d 1142 (7th Cir. 1978)). See also Mary Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 479 (1990) (providing that "'female' or 'feminine' roles and traits are usually the antithesis of the traits thought related to success and effectiveness. Consequently, feminists have extended the discourse on equality to encompass the notion that true equality is not currently available for women because male-defined reality renders women unequal.").

when a dress code is lawfully based on "social norms," and when the social norms, themselves, are based on stereotypes.

In *La Von Lanigan v. Bartlett*,¹³² a female employee was discharged for wearing pantsuits in violation of the employer's dress code.¹³³ The district court stated that the plaintiff did not establish a prima facie case of illegal gender discrimination under Title VII, and thus the employer was not obligated to justify its dress code.¹³⁴

The court in *EEOC v. Sage Realty Corp.*¹³⁵ reached a different conclusion by applying a three-part test. After plaintiff Mary Hasselman was laid off for refusing to wear sexually provocative uniforms to work, the EEOC brought suit claiming a Title VII violation. The Court found the dress code constituted unlawful discrimination because Sage knew the revealing nature of the uniform would cause the plaintiff to endure sexual harassment.¹³⁶ The Court found that Hasselman had established a prima facie case of sex discrimination by showing "first, that as a condition of her employment [she] was required to wear the . . . uniform; second, that Sage . . . imposed this condition; and, third, that but for her womanhood [she] would not have been . . . subjected . . . to sexual harassment."¹³⁷ Under this analysis, it would seem plausible that any dress code that heightens a woman's potential to be sexually harassed by objectifying her womanhood would create a prima facie case of sex discrimination. "[W]omen tend to be economically valued according to men's perceptions of their potential to be sexually harassed."¹³⁸

Sage was a harassment case that involved attire that was overtly sexual, but the harassment does not always have to be blatant to be present. "Harassment expresses the conviction that women's basic identity is in their bodies."¹³⁹ Thus, to end harassment in the workplace, a woman must claim credibility outside gender distinctions and classifications. But to assert this credibility "is to challenge male power in all spheres of life. It is to challenge male control of Congress, of the military, of corporate management, of education, and of

132. 446 F. Supp. 1388 (W.D. Mo. 1979).

133. *Id.* at 1390.

134. *Id.* at 1391.

135. 507 F. Supp. 599 (S.D.N.Y. 1981).

136. *Id.* at 609.

137. *Id.* at 607-08.

138. Whisner, *supra* note 3, at 93 (quoting CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 23 (1979)).

139. HARRINGTON, *supra* note 72, at 119.

all the professions. It is to challenge male control of women's bodies. It is to challenge male control of the law."¹⁴⁰

V. OKLAHOMA FEDERAL COURT DRESS CODES

"Oklahoma is slow to recognize gender issues."¹⁴¹ In 1920, the 19th amendment to the United States Constitution gave women the right to vote.¹⁴² However, the proposal to amend Oklahoma's Constitution was not introduced until 1923.¹⁴³ Oklahoma women were not given the right to serve on all juries until 1952,¹⁴⁴ and Oklahoma was the last state in the United States to grant women the right to hold major political office.¹⁴⁵

The 10th Circuit, in which Oklahoma sits, is one of a minority of circuits that have not created a task force to investigate gender bias in the courts.¹⁴⁶ Nor has Oklahoma as a state "undertaken an official effort to sensitize judges and attorneys to gender bias and the serious effects of what was once acceptable behavior in the courtroom and professional environment."¹⁴⁷ The Ninth Circuit Gender Bias Task Force concluded:

Comments on physical appearance are demeaning and put people at a disadvantage by drawing attention to their gender rather than the reason for their presence in court. Comments appropriate in a social setting often are inappropriate in a professional setting. For example, complimenting a female attorney on her appearance¹⁴⁸

140. HARRINGTON, *supra* note 72, at 120.

141. LEAGUE OF WOMEN VOTERS OF OKLAHOMA, A RESOURCE GUIDE TO OKLAHOMA COURTS 163 (1994).

142. U.S. CONST. amend. XIX.

143. LEAGUE OF WOMEN VOTERS, *supra* note 141, at 163.

144. LEAGUE OF WOMEN VOTERS, *supra* note 141, at 163.

145. LEAGUE OF WOMEN VOTERS, *supra* note 141, at 163. From 1928 to 1942, the amendment to allow women the right to hold major political office in Oklahoma was pursued. The amendment was twice rejected; once in 1935 and once in 1940. The amendment was eventually passed by a 2 to 1 vote in 1942. LEAGUE OF WOMEN VOTERS, *supra* note 141, at 163.

146. Letter from Cynthia Harrison, Chief, United States Judicial History Office, to Beth McNamara, Comment Author, *Tulsa Law Journal* (Nov. 10, 1994) (on file with the *Tulsa Law Journal*).

147. LEAGUE OF WOMEN VOTERS, *supra* note 141, at 159.

In August, 1988, the Conference of Chief Justices and the Conference of State Court Administrators called for the creation of task forces in every state to assess and address gender bias, ethnic, and cultural concerns. Statewide task forces began to assess the existence of gender bias and its effects on court decisions. By May, 1992, thirty-three states, the District of Columbia and Puerto Rico, had formed gender bias task forces or exploration committees to examine the issue.

LEAGUE OF WOMEN VOTERS, *supra* note 141, at 160-61.

148. *The Final Report of the Ninth Circuit Gender Bias Task Force*, *supra* note 7, at 1050.

In light of the aforementioned, it is not surprising that the Oklahoma Federal District Courts are the only federal district courts in the United States with gender biased dress codes.¹⁴⁹

The dress requirements in the local court rules vary from district to district. The judges in each district are responsible for developing the local rules of their district, and are allowed additional discretion in their presiding courtrooms. Oklahoma federal courts are divided into three districts: Northern, Western and Eastern.¹⁵⁰ Each of these three districts has its own local court rules. Occasionally within the local rules, the courts develop a personnel manual that further elaborates on the rules or addresses issues not previously covered.

This comment contains information gathered from a survey of the twenty judges and magistrate judges in Oklahoma federal courts¹⁵¹ concerning their district's dress code, and their own personal opinions on what constitutes an appropriate dress code.¹⁵² The opinions were as varied as the dress codes themselves.¹⁵³

A. *The Northern District*

The author's experience in the Northern District Federal Court was the inspiration for this paper.¹⁵⁴ The Local Rules of the Northern District regarding dress state: "Counsel should always be attired in a proper and dignified manner and should abstain from any apparel or ornament calculated to attract attention to themselves."¹⁵⁵ The rule in the personnel manual concerning general attire states, "Female personnel shall wear dresses, skirts, pants suits, or dress slacks."¹⁵⁶ However, the rule concerning courtroom attire states, "Female personnel

149. See discussion *infra* part V.

150. These courts are located in Tulsa, Oklahoma City, and Muskogee, respectively.

151. Judges responding to the survey include: Judge Alley, Judge Bohanon, Judge Brett, Judge Cauthron, Judge Cook, Judge Daughtery, Judge Ellison, Judge Leonard, Judge Russell, Judge Seay, Judge Thompson, Judge West, Magistrate Judge Argo, Magistrate Judge Blasdel, Magistrate Judge Howland, Magistrate Judge Irwin, Magistrate Judge Payne, Magistrate Judge Purcell, Magistrate Judge Wagner, and Magistrate Judge Wolfe.

152. See appendix 1.

153. I would like to thank the judges who responded to my survey.

154. The inspiration for this comment came from statements made to me about my attire (when I was wearing pants), and comments from other personnel lamenting the fact that they had to keep a dress or skirt on hand at all times in case they were called into court. When one of my superiors suggested that I should not wear pants in the courtroom, I asked the magistrate for whom I worked what constituted appropriate courtroom attire. He assured me that pants were acceptable attire in his courtroom.

155. NORTHERN DISTRICT LOCAL RULES 83.2(B)(16).

156. UNITED STATES DISTRICT COURT - THE NORTHERN DISTRICT OF OKLAHOMA, PERSONNEL MANUAL, 10-1 (1993).

attending Court sessions must wear a dress, skirt and blouse, or other similar business attire."¹⁵⁷

Hence, the women personnel employed by the Northern District Federal Court are required to wear a skirt or a dress as a condition to work in the courtroom, even if the rule does not necessarily apply to female attorneys working in the courtroom. The rule requiring women personnel to wear dresses or skirts in the courtroom is disturbing for three reasons. First, not allowing female personnel to wear slacks in the courtroom because of their gender subjects women to additional burdens and hazards due to their "sex." Second, purposefully requiring women personnel to feminize their professional appearance objectifies them, and perpetuates stereotypes concerning women's abilities, competence, and credibility.¹⁵⁸ Third, the requirement that female courtroom personnel feminize their personal appearance places unnecessary pressure on female attorneys to conform to the patriarchal standards of women's attire.¹⁵⁹

The three-pronged test used in *Sage* to establish a prima facie case of discrimination¹⁶⁰ can be applied to the female courtroom employees. If a courtroom employee must wear a dress to perform her duties as an employee, then the first two prongs are satisfied. If, by way of the third requirement, she can prove heightened harassment by being objectified in "feminine" professional attire she may satisfy a prima facie burden. In its defense, the court would have to show a legitimate nondiscriminatory reason for requiring female personnel to wear skirts and dresses in the courtroom.¹⁶¹ If the legitimate reason involves respect for the formality of the court,¹⁶² then it is clear that women may achieve that respect through "professional attire" that is not necessarily "feminine attire." Ultimately, the gender question should not hinge on demonstrating harassment, but on gender differentiation that results in inequitable treatment. Restricting women from wearing pants into a courtroom is inequitable treatment and is exactly the treatment Title VII¹⁶³ was meant to prohibit. A Title VII

157. *Id.*

158. See Rifkin, *supra* note 2, at 84-85.

159. See DE BEAUVOIR, *supra* note 4, at 588-95.

160. EEOC v. Sage Realty Corp., 507 F. Supp. 599, 607-08 (S.D.N.Y. 1981).

161. See *id.* at 608 (holding that "once plaintiffs present evidence sufficient to make their prima facie showing, the burden of production shifts to defendants to rebut the prima facie case by articulating a legitimate, nondiscriminatory reason for their actions.>").

162. Some survey respondents cited "respect for the formality of the court," as the inspiration, if not justification, for the dress code. Results from Oklahoma Dress Code Survey (on file with author).

163. 42 U.S.C. § 2000e-2(a) (1988).

application would not require a showing of harassment, but would require a showing that the court's dress code intentionally discriminates between men and women regarding "a term or condition of employment."¹⁶⁴ Not allowing women to wear pants into the courtroom is a "term or condition of employment." A court would have to find that a women can only adequately perform courtroom duties attired in a dress or skirt for the dress code to be justified by a BFOQ.¹⁶⁵ If the dress code cannot be sustained by a valid BFOQ, then it is illegal.¹⁶⁶

B. *The Western District*

The Western District's local rules do not address or acknowledge women. The rule regarding appropriate courtroom attire states: "All male lawyers and male court personnel must wear both coats and ties."¹⁶⁷ There is no mention of women, and that in itself is puzzling. If women are feeling alienated and excluded in the law, it may result from rules that discount an entire gender and reinforce and perpetuate feelings of inferiority and exclusion.

The purposeful exclusion of women in the dress code can be explained in either of two ways: it is unnecessary because women are free to dress any way they judge to be professional; or in a profession dominated by men, women are not worth mentioning. In addressing the first explanation, it is logical to inquire about the range of women's apparel worn in the Western District Federal Court. In telephone conversations to court personnel in the Western District, the answer was unanimous: women only wear dresses.¹⁶⁸ Specifically, one employee, who had worked in the Western District Court for nineteen years, reported that he "never once saw a woman wear slacks in court."¹⁶⁹ I asked if a woman had ever attempted to wear pants to federal court, and he replied, "they just don't do it or I don't remember them doing it, in my memory I have never seen it."¹⁷⁰

It is evident that there is a dress code maintained in the Western District even though it is not explicitly written. The fact that it is not

164. *Id.*

165. 42 U.S.C. § 2000e-2(e) (1988).

166. *Id.*

167. WESTERN DISTRICT LOCAL COURT RULE 30(B)(18)(g).

168. Telephone interview with the Operations Manager, Western District Federal Court.

169. *Id.*

170. *Id.*

express, however, makes it no less discriminatory. The silent, unspoken discrimination is often the most invidious. Women who are compelled to dress femininely without the explicit dress code are more likely to blame themselves for the harassment and sexism because while their sexuality is expected, its manifestation cannot be concretely pinpointed to a source other than themselves.¹⁷¹ A dress code that acknowledges men, and not women, but nevertheless obligates women to conform to an unspoken stereotype, confirms their insignificance, subordination, and questions their legitimacy in a patriarchal profession.¹⁷²

C. *The Eastern District*

Of the three federal districts, the Eastern District has the most explicit and discriminating dress code regulation.¹⁷³ The rule, in part, states: "All female lawyers and female court personnel must wear dresses or suits."¹⁷⁴ In telephone conversations with personnel at the Eastern District Federal Court it was clarified that the word "suit" did not include "pantsuit." Further, the dress code applies to the courtroom, as well as the workplace in general. In other words, women are never allowed to wear pants.

Regarding the Eastern District, an analysis such as the one applied in *Sage* could be used to show a prima facie case of discrimination.¹⁷⁵ The Eastern District would then have the burden of presenting "legitimate, nondiscriminatory reasons" for the dress regulation.¹⁷⁶ In essence, the court would have to prove that women cannot exhibit respect for the formality of the court without feminizing their professional appearance, and reaffirming their sexuality.¹⁷⁷ A successful Title VII challenge could only be avoided by proving that the feminization of a woman's appearance is a valid BFOQ and is a "term or condition of her employment."¹⁷⁸ This is an insurmountable obstacle, and as in the Northern District, a Title VII application

171. See WOLF, *supra* note 60, at 43.

172. See *supra* note 2 and accompanying text.

173. The Eastern District Dress Code prohibits women from wearing pants in the courtroom. EASTERN DISTRICT LOCAL RULE 30(g).

174. EASTERN DISTRICT LOCAL RULE 30(g) (stating "[a]ll male lawyers and male court personnel must wear both coat and ties. Leisure suits are not permissible. All female lawyers and court personnel must wear dresses or suits"). The Eastern District has proposed an amendment to Rule 30(g). See *infra* note 204 and accompanying text.

175. EEOC v. Sage Realty Corp., 507 F. Supp. 599, 607-08 (S.D.N.Y. 1981).

176. *Id.* at 608.

177. WOLF, *supra* note 60, at 45.

178. 42 U.S.C. § 2000e-2(a) (1988).

would result in the dress code being found illegal. Justice Jeanne Coyne, a state Supreme Court Justice, was asked if women judges decide cases differently by virtue of being women?¹⁷⁹ She responded that, "a wise old man and a wise old woman reach the same conclusion."¹⁸⁰ Which is to say, that a professional is a professional, regardless of gender identification—regardless of what she wears.

D. *The Results*

All of the judges who responded to the survey in the Northern District agreed that women should be allowed to wear pants in the courtroom.¹⁸¹ One judge suggested a gender neutral dress standard that puts the burden on counsel, without reference to the specifics. The following is an example of such a dress code, "All lawyers and court personnel must wear appropriate courtroom attire."¹⁸² The importance was not gender differentiation, but that attorneys treat the formality of the courtroom with the respect that it is due.¹⁸³

The majority of the responses were from the Western District. However, of those responding only half offered their opinion as to whether women should be allowed to wear pants in the courtroom. Ironically, the only female judge to respond to the survey did not offer an opinion. However, she did write that she was instigating a project to make the local rules "briefer and more meaningfully organized, and also to make them gender neutral."¹⁸⁴ All of the judges in the Western District who did answer the survey, however, believed that women should be allowed to wear pants in the courtroom.¹⁸⁵ The Eastern District, which had the most restrictive attire regulation, did not offer a response or an opinion.¹⁸⁶

179. O'Connor, *supra* note 15, at 1558.

180. O'Connor, *supra* note 15, at 1558.

181. All of the judges stated that they would allow women to wear pants in their courtroom, although one judge specifically excluded jeans. Results from Oklahoma Dress Code Survey (on file with author).

182. NORTHERN DISTRICT LOCAL RULE 30B(19)(h) (superseded on 12/1/93). See UNITED STATES DISTRICT COURT - THE NORTHERN DISTRICT OF OKLAHOMA PERSONNEL MANUAL 10-1.

183. Retaining respect for the court was a major concern for the judges when considering an appropriate dress code. Results from Oklahoma Dress Code Survey (on file with author).

184. *Id.*

185. *Id.*

186. *Id.*

VI. CONCLUSION

Susan Brownmiller wrote, "Who said that clothes make a statement? What an understatement that was. Clothes never shut up. They gabble on endlessly, making their intentional and unintentional points."¹⁸⁷ The law is still a profession steeped in patriarchy.¹⁸⁸ In order to compete successfully in the law, a woman must be perceived to be as competent and as professional as a man. Attire that reflects both a woman's sexuality and professionalism is a contradiction that leaves women and men uncertain of a woman's legitimacy. "A skirt, any skirt, has a feminizing mission One is perpetually reminded to be circumspect when sitting or bending down Feminine clothing has never been designed to be functional, for that would be a contradiction in terms. Functional clothing is a masculine privilege To become truly feminine is to accept the . . . restriction and come to adore it."¹⁸⁹ But many women never come to adore it.

[W]hy do I persist in not wearing skirts? Because I don't like this artificial gender distinction. Because I don't wish to start shaving my legs again. Because I don't want to return to the expense and aggravation of nylons. Because I will not reacquaint myself with the discomfort of feminine shoes. Because I am at peace with the freedom and comfort of trousers. Because it costs a lot less to wear nothing but pants. Because I remember how cold I used to feel in the winter wearing a short skirt and sheer stockings. Because I can still call to mind the ugly look of splattered rain water on the back of my exposed legs. Because I can still recall the anguish of an unraveled hem. Because I remember resenting the enormous amount of thinking time I used to pour into superficial upkeep concerns, and because the nature of feminine dress is superficial in essence—even my objections seem superficial as I write them down. But that is the point. To care about feminine fashion, and do it well, is to be obsessively involved in inconsequential details on a serious basis. There is no relief.¹⁹⁰

187. BROWN MILLER, *supra* note 1, at 81.

188. Rifkin, *supra* note 2, at 95.

189. BROWN MILLER, *supra* note 1, at 85-86.

190. BROWN MILLER, *supra* note 1, at 81.

Some women have worn men's clothes to accomplish their work. Some women have worn men's clothes to indicate their temporary or permanent sexual attraction to other women. Some women have worn men's clothes to experience the power and freedom of being a man. Some woman have worn men's clothes because they hated their female bodies. Some women have worn men's clothes because they looked so adorable in them. Some women have worn men's clothes because they sought an alternative to the confining clothes they were expected to wear, and expected to delight in, as women.

BROWN MILLER, *supra* note 1, at 93-94.

The intent of this comment is to promote a gender neutral dress code in the Oklahoma Federal Courts which would allow women (courtroom employees as well as attorneys) to wear pants into all three federal district courts; a dress code that mandates "professionalism" without "sexism." As the Committee on Professional Ethics of the New York County Lawyers' Association concluded, "We find it difficult to see how an appropriately tailored pants outfit could diminish the order and decorum of the tribunal, affect the rights of the parties or witnesses, or impair the administration of justice."¹⁹¹

In the end, gender based dress codes that draw attention to the "femininess" of a female are not helping women blur the lines of sexuality that are already emblazoned in the male dominated legal profession.¹⁹² Legitimizing the "feminization" of women through judicially sanctioned implicit and explicit appearance regulations demeans and reduces women to their historical status as incompetent and unprofessional "objects," and obscures the path to true equality for everyone.¹⁹³ As Chief Judge J. Clifford Wallace stated as he introduced the Ninth Circuit Gender Bias Task Force Preliminary Report, "My strong conviction is that we in the justice system cannot be content until we have rooted out, as best we can, the effects of bias and prejudice based on gender"¹⁹⁴

In the process of researching this paper, I contacted the American Bar Association's national headquarters in Chicago.¹⁹⁵ After discussing each of the three local rules with a representative from the ABA's Women's Commission, the representative stated that she had "no idea" gender bias dress codes like the ones in Oklahoma Federal

191. *The Final Report of the Ninth Circuit Gender Bias Task Force*, *supra* note 7, at 852.

192. *See generally* Mansnerus, *supra* note 6.

193. *See* Whisner, *supra* note 3, at 77. *See also* JOHN MOLLOY, *THE WOMAN'S DRESS FOR SUCCESS* BOOK 21-22 (1977).

In past centuries and throughout much of this century, women were indeed primarily considered sex objects. That was partly because men subjugated them and partly because they let themselves be subjugated. But woman are no longer the cardboard characters that appeared in the early novels of Enlightenment England. They have depth and personality. They have career goals that they are determined to reach. Nevertheless, many women still cling to the conscious or subconscious belief that the only feminine way of competing is to compete as a sex object and that following fashion trends is one of the best ways to win. It's not.

Id.

194. *The Final Report of the Ninth Circuit Gender Bias Task Force*, *supra* note 7, at 963.

195. Telephone interview with representative from the American Bar Association's commission on women (April 12, 1994).

Court "still existed."¹⁹⁶ Indeed, they don't exist anywhere else.¹⁹⁷ Only four other federal districts in the entire United States have local rules that address courtroom attire.¹⁹⁸ Regarding these four, one specifically requires judges to wear judicial robes in court,¹⁹⁹ and the other three were gender neutral.²⁰⁰ It is no surprise that the ABA representative's response to Oklahoma's federal court dress codes was summarized in one word, "shocking."²⁰¹

In July, 1994, after delivering a copy of this comment to Supreme Court Justice Ruth Bader Ginsburg, a letter was also received from her chambers stating that Justice Ginsburg was glad to have the information regarding this comment before her attendance at the Tenth Circuit's Judicial Conference.²⁰² A subsequent letter was received from Justice Ginsburg in December, as this Comment was near publication, summarizing the results of the Tenth Circuit's Judicial Conference.²⁰³ After attending the conference, Justice Ginsburg indicated that the United States District Court for the Eastern District of Oklahoma has proposed an amendment to Local Rule 30(g) concerning courtroom attire.²⁰⁴ The amendment, signed by Chief Justice

196. *Id.*

197. The dress codes in the Oklahoma Federal District Courts are the most gender biased in the country. None of the other districts in the 10th Circuit have a dress code in their local rules (Wyoming, New Mexico, Colorado, Utah). Perhaps an explicit dress code is not necessary, and the court should trust the individual to properly attire himself/herself in dignified and professional clothes. It is arguable that the Northern, Western and Eastern districts should omit a dress code from their respective local rules.

198. The following courts have rules which discuss attire: the United States District Court for North Dakota, the United States District Court for Montana, the United States District Court for the Northern District of Texas, and the United States District Court for the Southern District of Texas.

199. The District Court for Montana requires that judges wear judicial robes in court. DISTRICT COURT FOR MONTANA LOCAL RULE 1002b.

200. The District Court for North Dakota requires, "Persons shall be fully dressed in an attire to maintain the dignity of the court." DISTRICT COURT FOR NORTH DAKOTA RULE 3B4. The District Court for the Southern District of Texas requires, "Dress with dignity." DISTRICT COURT FOR SOUTHERN DISTRICT OF TEXAS RULE 21, Appendix C. The District Court for the Northern District of Texas requires, "All persons . . . shall dress . . . in a manner demonstrating respect for the Court. Each Judge has the discretion to require particular aspects of dress or conduct that may be appropriate under this rule." DISTRICT COURT FOR NORTHERN DISTRICT OF TEXAS RULE 14.1.

201. Telephone interview with representative from the American Bar Association's commission on women (April 12, 1994).

202. Letter from Linda C. O'Donnell, Secretary to Justice Ginsburg, Supreme Court of the United States, to Beth McNamara, Comment Author, *Tulsa Law Journal* (July 29, 1994) (on file with the *Tulsa Law Journal*).

203. Letter from Justice Ruth Bader Ginsburg, Supreme Court Justice of the United States, to Beth McNamara, Comment Author, *Tulsa Law Journal* (November 23, 1994) (on file with the *Tulsa Law Journal*).

204. EASTERN DISTRICT LOCAL RULE 30(g) (amended 1994) (amendment, as signed by Chief Judge Frank H. Seay, on file with the *Tulsa Law Journal*).

Frank H. Seay, reads: “[C]ounsel and court personnel should always be attired in a proper and dignified manner and should abstain from any apparel or ornament calculated to attract attention to themselves.”²⁰⁵ This new gender neutral dress code replaces the former code which stated, in part, “All female lawyers and female court personnel must wear dresses or suits.”²⁰⁶

Although it is hoped that the Northern and Western Districts of Oklahoma will follow the lead of the Eastern District and adopt gender neutral dress regulations regarding courtroom attire, this comment has proposed and encouraged the elimination of gender bias in all courts. In addition to “shocking,” the dress codes are harmful and unjustifiable.

[T]he achievement of full equality between the sexes, is one of the most important, though less acknowledged prerequisites of peace. The denial of such equality perpetuates an injustice against one-half of the world's population and promotes in men harmful attitudes and habits that are carried from the family to the workplace, to political life, and ultimately to international relations. *There are no grounds, moral, practical, or biological, upon which such denial can be justified . . .*²⁰⁷

New dress codes must be adopted. All Oklahoma federal district courts must reject dress codes that speak of gender distinctions, and encourage and support dress codes that speak of gender neutrality. A woman's prerequisite for access to the United States court rooms must not be a skirt or a dress; as a citizen of the United States, a woman must be allowed equal access on equal terms. Justice and the law require it; respect and dignity demand it.

Bethanne Walz McNamara

205. *Id.*

206. Former EASTERN DISTRICT LOCAL RULE 30(g).

207. *The Final Report of the Ninth Circuit Gender Bias Task Force, supra* note 7, at 731 (emphasis added) (quoting THE PROMISE OF WORLD PEACE: A STATEMENT BY THE UNIVERSAL HOUSE OF JUSTICE TO THE PEOPLE OF THE WORLD (Bahai Publishing Trust 1985)).

APPENDIX 1

DRESS CODE SURVEY

CONCERNING FEMALE EMPLOYEES & LAWYERS

Please check either yes or no.

Yes

No

- 1. Would you let a woman wear pants in your courtroom?
- 2. Would you require a woman to leave your courtroom if she were wearing pants?
- 3. Do you believe requiring women to wear a dress or skirt serves a valid purpose?
- 4. If not, do you think the rule should be changed?
- 5. If so, what is that purpose?

- 6. Do you think that a navy pantsuit can be as professional as a pink floral dress?

7. Comments:
 (Please attach extra sheets, if necessary)
