FUNDAMENTAL RIGHTS OR HAND-ME-DOWN RESTRICTIONS: THE SPECTER OF SUMPTUARY LAW IN CLOTHING EXPRESSION DOCTRINES OF THE U.K., THE U.S., & CANADA

Taran Harmon-Walker[*]

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[*] J.D. Candidate, University of Georgia School of Law, 2021.

I. CLOTHING AS UNIQUE EXPRESSION

"The items with which we cover our bodies and the ways in which we style them are physically located at the border—a manipulable border—between our bodies and the rest of the world."[1] All forms of expression, outside of government prescription, create or invoke tension between the liberty of a citizen and the autonomy of a government to maintain social order. But resolving that tension becomes more complicated when regulating dress. On one hand, international organizations such as the United Nations have declared that the wearing of clothes constitutes a human right.[2] In fact, even the most permissive countries consider dress a social and legal *duty*, requiring some degree of dress in public.[3] On the other hand, despite the necessity of clothing, dress can also express a myriad of different messages. Explicitly, clothing can include written words conveying particular statements or even other forms of art.[4] Implicitly, clothing—or lack thereof[5]—can actively or passively signal personal identity,[6] protest,[7] or any of many other messages. Yet still, a wearer may not intend to convey any message by the clothing that they wear or may accidentally send a message they do not intend.[8]

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[1] Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 13 (2006).

[2] *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 ¶ 1 (Dec. 10, 1948), https://www.un.org/en/universal-declaration-human-rights ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . clothing . . . .").

[3] *But cf.* discussion *infra* Sections III.A.1.a, III.B.1.a (concerning nudity as expression legal arguments).

[4] *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (overturning a man's conviction for breaching the peace for wearing a jacket with the words "Fuck the Draft"); *cf.* Gabrielle Bruney, *Melania Trump Admitted That She Wore Her "I Really Don't Care" Jacket to Send a Message*, ESQUIRE, (Oct. 13, 2018), https://www.esquire.com/news-politics/a23760074/melania-trump-i-really-don-t-care-jacket/ (explaining the meaning of the writing "I Really Don't Care, Do U?" on the First Lady's jacket was heavily debated for almost three months, based on the context of her wearing it at a time of concern about detained children at the southern border of the United States).

[5] *See, e.g.,* City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (accepting that nude dancing can be an erotic message).

[6] *Cf.* Star v. Gramley, 815 F. Supp. 276 (C.D. Ill. 1993) (an American court refusing to make a prison allow an assigned-male prisoner to wear female clothes or makeup to express their gender identity).

[7] *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (finding black armbands worn to protest the war in Vietnam to be expressive).

[8] *Cf.* Gabrielle Bruney, *supra* note 4.

Despite Western[9] states' reputations for protecting the individual liberties of its citizens[10]—particularly that of expression—these states only indirectly acknowledge a legal right to expression through desired clothing. For example, since 2004, at least nine other countries and many cities in Europe banned the wearing of face coverings in public places,[11] and debate surrounding those laws focuses on the religious nature of face coverings rather than their donning as a purely expressive act.[12] International charters vaguely mention "expression" but fail to define it.[13] Further, universal standards call for places of employment to insist on grooming policies, where violations can result in termination.[14] In the public sphere, most countries limit freedom of expression when such freedom interferes with sufficiently strong government interests, such as preventing breaches of the peace.[15] Perhaps surprisingly, both ideological wings of the popular political spectrum in representative governments support such restrictions.[16]

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[9] While the "West" or "Western world" is subjective in scope and opaque in literal definition, it remains a common self-identifying term among the populace of certain nations. *See Western World*, SCIENCEDAILY, https://www.sciencedaily.com/terms/western_world.htm (last visited Oct. 18, 2020) ("In the contemporary cultural meaning, the phrase 'Western world' includes Europe, as well as many countries of European colonial origin with substantial European ancestral populations in the Americas and Oceania.").

[10] *See The Universal Declaration of Human Rights (1948)*, EUR. COMM'N, https://ec.europa.eu/anti-trafficking/legislation-and-case-law-international-legislation-general-declarations/universal-declaration-human_en (last visited Sept. 18, 2020) (calling the West-dominating U.N.'s Universal Declaration of Human Rights the "first global expression of rights to which all human beings are entitled").

[11] The list of European nations with full or partial bans on face-covering dress includes Austria, Belgium, Bulgaria, Denmark, France, Germany, Latvia, the Netherlands, and Norway. Marta Rodriguez Martinez & Veronica Sarno, *Has COVID-19 Destroyed the Case for Banning the Burqa in Europe?*, EURONEWS (Sept. 28, 2020), https://www.euronews.com/2020/09/23/has-covid-19-destroyed-the-case-for-banning-the-burqa-in-europe.

[12] *See, e.g.*, El-Alloul c. Att'y Gen. of Que., 2018 CarswellQue 8475 (Can. Que.) (WL) (the Quebecois court finding that wearing a head scarf for religious purposes is expressive and thus worthy of protection).

[13] For example, the Universal Declaration of Human Rights states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Universal Declaration of Human Rights, *supra* note 2, at art. 19.

[14] *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc) (a female bartender was terminated for refusing to wear makeup, which was not considered a prima facie case for discrimination).

[15] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 569–72 (1942) (a Jehovah's Witness repeating "offensive, derisive and annoying words and names" constituted fighting words and thus promoted a breach of the peace); *see also* Gough v. United Kingdom, App. No. 49327/11 (Oct. 28, 2014), http://hudoc.echr.coe.int/eng?i=001-147623 (recounting a nudist's decision to be constantly nude in public and in court, which constituted a serial breach of the peace).

[16] *Compare* David A. Graham, *A Brief History of the GOP War on Yoga and Its Pants*, ATLANTIC (Feb. 11, 2015) (cataloguing American conservatives' attempts to expand indecent exposure laws, including to "tight-fitting beige clothing"), *with* Sarah A. Harvard, *Western*

And despite the encroachment of non-conformist millennials on entrenched political power,[17] recently governments have enacted new and highly publicized legal restrictions of certain forms and choices of dress in recent years.[18]

Yet nothing about such restrictions surprise us, despite the decades-long rise in cries for protection of the freedom of speech. Governments have controlled bodies and body coverings for at least thousands of years. "Sumptuary laws," which codify how individuals of different social classes and roles may dress in various dimensions, hallmarked legal systems from 215 B.C. until only the last few centuries.[19] As of 2020, sumptuary laws are much harder to identify and much more readily justified by concerns other than maintenance of class structures. Yet laws targeting the specific clothing habits of disenfranchised minorities evidence that modern clothing expression restrictions approximate the effects of long-established class-based legal repression.[20]

This Note will explore the legal doctrines restricting and protecting clothing expression rights in the United Kingdom and two of its former colonies, the United States of America and Canada. It seeks to identify how countries that are historically linked by a suppressive sumptuary code treat modern expression through clothing. Analyzing jurisprudence specific to clothing expression helps to tease out an expressive right that closely cleaves to body autonomy and can highlight sumptuary-style justifications that are inconsistent with modern sensibilities. As the only form of expression universally considered a human need,[21]

Liberals Claim Burqa Bans Protect Muslim Women. These Experts Say Otherwise., MIC (May 19, 2017) (left-enacted face-veil bans in Europe on arguably paternalistic, atheistic bases).

[17] For millennials, the ability to adopt a non-uniform personal aesthetic appears to be more important than for prior generations. This is directly reflected in broad relaxation of corporate dress codes. *See* Sarah Landrum, *Are Millennial Employees Driving Casual Dress Codes?*, FORBES (June 16, 2017, 1:49 PM), https://www.forbes.com/sites/sarahlandrum/2017/06/16/are-millennials-driving-casual-dress-codes/#6668dcb83cc1 (pointing to various factors shifting workplace dress codes, including the transfer of economic power to tech-savvy young people, relaxed "decency" standards, and a general philosophical shift to focus on the internal over the external).

[18] *See, e.g.*, Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 770 (9th Cir. 2014) (concerning two American high school students who were sent home for wearing shirts depicting the American flag, on the basis that they were at risk of harm from other students).

[19] *Sumptuary Law*, ENCYC. BRITANNICA, https://www.britannica.com/topic/sumptuary-law (last updated Feb. 6, 2009).

[20] *See, e.g.*, Andre Perry, *Dress Codes Are the New 'Whites Only' Signs*, HECHINGER REP. (Feb. 5, 2020), https://hechingerreport.org/dress-codes-are-the-new-whites-only-signs (spotlighting examples of dress codes targeting Black students for having dreadlocks, hair extensions, or preventing them from wearing traditional head wraps). Note that choice of hairstyle or dress is far from the only form of cultural expression targeted by the legal system. *See, e.g.*, ANDREA L. DENNIS & ERIK NIELSON, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA (2019) (showing that rap lyrics depicting violence are more often treated as evidence than similarly violent lyrics from other musical genres).

[21] *See Purpose of Clothing*, TEXTILE SCH., https://www.textileschool.com/500/purpose-of-clothing-10-reasons-to-wear-clothes (last updated Oct. 20, 2018) (giving ten reasons to

clothing expression deserves more than simplistic, abstracted, or secondary status in legal discussions on fundamental rights.

Section II of this Note assesses the historical background of clothing expression rights in each country of this review in turn, starting with the oldest (the United Kingdom) and ending with the youngest (Canada). Section III focuses on the legal doctrines of each nation, first providing the context for clothing expression litigation in the country, both the relevant historical background and modern developments. Each subsection of Section III will examine major clothing expression litigation in up to three procedural forms: broad restrictions in certain settings, specific restrictions on disenfranchised populations, and restrictions through individual adjudications. Section IV then offers conclusions of the distinctive characteristics of each nation's free expression jurisprudence.

Ultimately, the United States offers a relatively unclear and dispersed protection of clothing expression. Because of its strong common law tradition and federalist ideals, each state's judicial bodies and local governments enjoy significant discretion to cling to sumptuary ideals. In contrast, the U.K. utilizes uniform and strong nation-wide protections for traditional forms of clothing expression. The U.K. appears to protect the wearing of clothing until the murky subject of "offense" may invoke an ancient, potentially classist response. Canada provides the clearest example of strong clothing expression protection jurisprudence, eschewing tradition for "reasonableness."

II. HISTORY OF LAWS TARGETING CLOTHING

For millennia, humans maintained laws strictly limiting what different citizens and non-citizens could wear.[22] These are the most visible form of sumptuary codes, systems of restrictions on personal expression ranging in seriousness and invasiveness across history.[23] While several academic lenses help explain the

wear clothes, including a need for protection, safety, and sanitation). *Compare* Susan B. Kaiser, *Fashion and Identity*, LOVETOKNOW, https://fashion-history.lovetoknow.com/fashion-history-eras/fashion-identity (last visited Sept. 17, 2020) (arguing that it is vital that individuals "announce who they are" through appearance), *with* Frederick Rosen, *Basic Needs and Justice*, 86 MIND 88 (1977) (arguing that the concept of "need" is ambiguous and that there are multiple levels of "need" for clothing). Note that while clothes are a need, the fashion industry is such a major economic driver in developing countries that clothes are relatively cheap. *See How Fast Fashion is Destroying Developing Countries*, 1 MILLION WOMEN (Feb. 12, 2016), https://www.1millionwomen.com.au/blog/how-fast-fashion-destroying-developing-countries .

[22] *Sumptuary Law*, *supra* note 19.

[23] Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 812 (2010) (footnotes omitted) ("A society's sumptuary code is its system of consumption practices, akin to a language . . . by which individuals in the society signal through their

impact of sumptuary codes throughout history, academia rarely debates that sumptuary codes were a tool used to enforce and perpetuate classism in many classical societies.[24]

A. Sumptuary Law in the United Kingdom: Old Habits

The term "sumptuary law" originally comes from medieval England. Medieval English governments used laws targeting "sumptuousness," i.e. luxury,[25] to theoretically prevent sin and over-consumption that they deemed a detriment of society, and to actually control spending.[26] While the laws targeted all forms of social habits and behavior, laws restricting clothing were constantly visible and may seem absurd by modern standards.[27] Nonetheless, the history of such restrictions is long and explicitly classist. For a stark example, the only law passed by English Parliament in the year 1337 banned the wearing of fur and imported cloth, but excepted persons of lord-status or higher to wear fur and "the King, Queen, and their Children" to wear imported cloth.[28]

Through the next three centuries, prohibitions and restrictions in England only increased in number and degree. Lower-class persons were required to wear badges or even brands to denote their class rank, all with the stated justification of preventing poverty and crime.[29] In contrast to higher modern scrutiny on the dress of women, English sumptuary codes at that time more exhaustively restricted clothing for men than for women.[30] In addition, U.K. sumptuary laws

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consumption their differences from and similarities to others."). In his exhaustive analysis, Professor Beebe's article focuses on intellectual property law as a modern, global incarnation of sumptuary codes. This Note focuses on non-commercial and non-commercial-litigation methods of enforcement of personal dress.

[24] *See, e.g.*, *id.* at 813 (stipulating that elitism is a basis of sumptuary law in general, as controls over consumption of luxury goods were imposed when the governing classes come to believe that levels of consumption no longer reliably differentiated various classes of society); *cf.* Peter Goodrich, *Signs Taken for Wonders: Community, Identity, and a History of Sumptuary Law*, 23 L. & SOC. INQUIRY 707, 724 (1998) ("What the history of sumptuary regulation most enduringly transmits is a sense of the dependence of law upon the construction and maintenance of images of propriety, reason, and authority.").

[25] *Sumptuous*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/sumptuous (last visited Sept. 15, 2020).

[26] *See generally* RUTHANN ROBSON, DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES (1st ed. 2013) (comprehensively examining American constitutional litigation regarding dress).

[27] *See* Beebe, *supra* note 23, at 812–13 (using as an example a 1463 English ordinance limiting the extent to which shoes could extend beyond toes of persons "of rank" to two inches).

[28] *See* ROBSON, *supra* note 26, at 8–9 ("The banning of wearing fur contained a more extensive exception for 'the King, Queen, and their Children, the Prelates, Earls, Barons, Knights, and Ladies.'").

[29] *Id.* at 10–15.

[30] *Id.* at 12.

occasionally addressed sexuality, in explicit provisions for ignoble males and female sex workers.[31]

B. Clothing Speech Rights in the United States of America: Enumerated Freedoms for Some

The U.K. and the United States legally separated centuries ago, and while the two share a language and some cultural norms, the United States has faced its own unique clothing expression issues throughout its shorter history. Before the United States declared its independence from England, colonists regulated dress with sumptuary laws enforcing a puritan aesthetic, as well as a distinct method of badging wrongdoers with certain letters made of cloth, often scarlet as in the eponymous novel.[32] Unlike medieval Britain,[33] the colonies' laws targeted women, and women often broke them for wearing an excess of lace.[34] Moreover, the restrictions did not uniformly target all women. For example, laws denied free women of color the right to wear headdresses.[35]

After the United States revolted from Britain,[36] the Founders considered adding a sumptuary provision of the Constitution, but never ratified one.[37] Sumptuary law believers such as George Mason and John Adams argued that sumptuary laws enabled civic republicanism by promoting equality of dress.[38] That sumptuary conception of equality never took hold.[39] Instead, the United States conditionally adopted the Constitution with the addition of a Bill of Rights which enumerated certain freedoms, including the "freedom of speech."[40]

The Bill of Rights, in theory and as strictly written, provided explicit personal protections against government overreach. Yet in interpretation and

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[31] *Id.* at 12–13.

[32] *See* ROBSON, *supra* note 26, at 21 (*referring to* NATHANIEL HAWTHORNE, THE SCARLET LETTER (1850); *relying on* 1–3 Records of the Governor and Company of the Massachusetts Bay in New England: Printed by Order of the Legislature (Nathaniel B. Shurtleff ed.) (1853)) (specifying Massachusetts Bay Colony).

[33] *See* discussion *infra* Section II.B (discussing the history of sumptuary laws in the U.K.).

[34] ROBSON, *supra* note 26, at 23.

[35] *Africans in French America*, NAT'L PARK SERV., https://www.nps.gov/ethnography/aah/aaheritage/frenchama.htm (last visited Oct. 29, 2020).

[36] *See* ROBSON, *supra* note 26, at 28 (attributing the revolution at least in part to commercial restrictions of commodities including apparel, such as the British Hat Act, which restricted the ability of Americans to make hats and Thomas Jefferson labeled "an instance of despotism to which no parallel can be produced in the most arbitrary ages of British history").

[37] *Id.* at 31.

[38] *Id.* at 31–32.

[39] *Id.* at 32.

[40] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." (emphasis added)).

enforcement, the panoply of constitutional rights only counted for white male citizens and only against the federal government.[41] State governments could openly deny the rights of disenfranchised groups until the ratification of the Fourteenth Amendment in 1868.[42]

Perhaps the most egregious sumptuary restrictions of clothing in modern history appeared in the Southern slave codes, a legal framework designed to ensure immediate identification of slaves and "to avoid stoking 'theire foolish pride.'"[43] The codes not only enforced style upon slaves but limited the material of their clothing; for example, Virginia required slaves to wear blue canvas and South Carolina detailed "a variety of cheap, rough fabrics 'not exceeding ten shillings per yard.'"[44] After emancipation, Jim Crow laws enabled rampant discrimination in local laws approximating the effects of sumptuary codes.[45] Slowly America repealed many laws segregating and otherwise openly discriminating against people of color, but more subtle policing of Black bodies and expression lives on in dress codes targeting aesthetics specific to Black culture today.[46]

During the nineteenth century, private rules slowly replaced most sumptuary laws. For example, many demanded workplace uniforms to "help identify members of the working class and to further retain the visual hierarchy that was no

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[41] One example is the right to vote, which while required for the existence of the democratic representative government in the United States, was not provided to non-white or non-male citizens. *See* U.S. CONST. amend. XV, § 1 (granting the right to vote to non-white persons); U.S. CONST. amend. XIX (granting the right to vote to non-male persons).

[42] *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[43] Lucille M. Ponte, *Echoes of the Sumptuary Impulse: Considering the Threads of Social Identity, Economic Protectionism, and Public Morality in the Proposed Design Piracy Prohibition Act*, 12 VAND. J. ENT. & TECH. L. 45, 64 (2009) (quoting KATHLEEN M. BROWN, GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA 154 (1996)).

[44] Ponte, *supra* note 43 (quoting BROWN, *supra* note 43).

[45] KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE 34 (2012).

[46] *See* Perry, *supra* note 20 (reporting that a student was suspended mere months before graduation for wearing his hair in dreadlocks, with the superintendent "implying that dreadlocks are linked to bad performance"). In addition to marginalization and targeting, Black American identity is still co-opted, exploited, and even desecrated by White Americans in a multitude of public ways. For arguably the most extreme example, see Wil Haygood, *Why Won't Blackface Go Away? It's Part of America's Troubled Cultural Legacy*, N.Y. TIMES (Feb. 7, 2019), https://www.nytimes.com/2019/02/07/arts/blackface-american-pop-culture.html (describing the first performance of Thomas Dartmouth Rice's "Jump Jim Crow" in blackface); *see also* Samara Lynn, *Bots in Blackface—The Rise of Fake Black People on Social Media Promoting Political Agendas*, BLACK ENTER. (Aug. 22, 2019), https://www.blackenterprise.com/bots-in-blackface-the-rise-of-fake-black-people-on-social-media (finding fake social media profiles meant to suppress Democratic votes).

longer mandated by law."[47] Throughout the twentieth century, the United States grappled with chaotic shifts in its demographics[48] and wealth distribution,[49] which necessitated more comprehensive understanding of the boundaries of constitutional rights.[50] Judges reacted to these gradual but overwhelming shifts with sudden, dramatic holdings, broadly applying rights in entirely new or newly-accepted contexts.[51] Such holdings would inevitably clash with groups that preferred the status quo of distinct class distinctions and associated sumptuary requirements.

U.S. society has been on high alert regarding legal decisions over the freedom of speech for decades. Although great debate surrounds the details, the Supreme Court explicitly understands "speech" to include "expressive conduct."[52] The Court's jurisprudence evolved to treat laws impacting such expression differently, based on whether statutes deliberately target the content of expression.[53] The Court classifies laws that deliberately target the content of expression as "content-based," and laws that do not as "content-neutral."[54] The Court subjects content-based laws to the "strict scrutiny" standard: for constitutional validity, they must be "narrowly tailored to serve a compelling state interest."[55] On the

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[47] Ponte, *supra* note 43, at 64.

[48] *See generally* U.S. CENSUS BUREAU, CENSR-4, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 1 (2002), https://www.census.gov/prod/2002pubs/censr-4.pdf (finding that during the 20th century: the share of American persons in metropolitan areas almost tripled, the median age increased by over 50%, the number of non-Southern states with populations of at least 10% minority races increased from two to twenty-six, and the Hispanic population more than doubled).

[49] *See* Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality (last updated Jan. 13, 2020).

[50] The power of the Court—and its existence as a political institution—was made glaringly obvious to the American public with Roosevelt's open threat to pack the court to ensure the constitutionality of the New Deal. *FDR Announces "Court-Packing Plan"*, HISTORY, https://www.history.com/this-day-in-history/roosevelt-announces-court-packing-plan (last updated Feb. 4, 2020).

[51] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 114 (1973) (establishing that women have an inherent right to abort a pregnancy in certain scenarios).

[52] Texas v. Johnson, 491 U.S. 397, 406–07 (1989) (finding that while the American government "generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," it is not "the nature of the expression, but the governmental interest at stake, that helps determine whether a restriction on that expression is valid").

[53] *See* Boos v. Barry, 485 U.S. 312, 320 (1988). *But see* Reed v. Town of Gilbert, 576 U.S. 155 (2015) (where the holding was unanimous but the majority and each of the three concurring opinions had different methodologies to explain when a law was "content-based").

[54] *Boos*, 485 U.S. at 324.

[55] *Boos*, 485 U.S. at 334; *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785–86 (1978) (finding a plain violation of the First Amendment where "the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people").

other end of the spectrum, the Court subjects a content-neutral law only incidentally affecting expression to a test established in *United States v. O'Brien*.[56] The *O'Brien* test requires the law to further an "important" governmental interest "unrelated to the suppression of free expression" in a fashion "no greater than is essential to the furtherance of the government interest."[57] In the middle, the Court subjects a content-neutral law directly targeting the time, place, or manner of expressive content to a lower standard of "intermediate scrutiny": for constitutional validity, it must be "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication."[58]

Recently, appellate courts have upheld bans on the wearing of certain flags,[59] and prosecutors may use clothing that appears to symbolize gang membership as evidence for sentencing enhancements, including the death penalty.[60] Outcomes of such cases continue to stir up ideological controversy and form modern tinder for the ancient accusation that American law often fails to provide equal protection to all of its citizens.[61]

C. Clothing Expression Rights in Canada: Global Considerations

Britain granted Canada legislative freedom in 1926,[62] and the Constitution of Canada was later signed into law in 1982,[63] making Canada's break from Britain

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[56] United States v. O'Brien, 391 U.S. 367, 382 (1968) ("[B]ecause of the Government's substantial interest . . . [the law at issue] is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach . . . .").

[57] City of Erie v. Pap's A.M., 529 U.S. 277, 278 (2000) (holding *O'Brien* to establish an applicable test).

[58] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[59] *See, e.g.*, State v. Mitchell, 288 N.E.2d 216, 219 (Ohio Ct. App. 1972) (holding that a man violated a state flag statute by embroidering a representation of the flag upon a patch on the seat of his jeans).

[60] *See, e.g.*, State v. Gonzalez, 345 P.3d 1168, 1178 (Utah 2015) (finding that even though evidence of gang membership is improper as back door to introducing character evidence, trial courts may admit gang-related evidence such as clothing when it does not relate to the "bad acts"); Anderson v. State, 901 S.W.2d 946, 950 (Tex. Crim. App. 1995) (holding that evidence of membership with a gang that had a bad reputation was admissible during the punishment phase of a murder trial because it was relevant to his character).

[61] *Cf.* Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533 (2006) (arguing the Supreme Court's "intent standard" for equal protection is fundamentally flawed).

[62] *See* Statute of Westminster 1931, 22 & 23 Geo. 5 c. 4, § 4 (UK), http://www.legislation.gov.uk/ukpga/Geo5/22-23/4/section/4 (providing legislative but not constitutional autonomy from the U.K.'s parliament).

[63] *See* Proclamation of the Constitution Act, 1982, LIBR. & ARCHIVES CAN., https://www.bac-lac.gc.ca/eng/discover/politics-government/proclamation-constitution-act-1982/Pages/proclamation-constitution-act-1982.aspx (last visited Sept. 16, 2020) (describing

much more recent than that of the United States. Section Two of the Canadian Charter of Rights and Freedoms, a bill of rights entrenched in the constitution from its conception, lists freedom of speech as a "fundamental" freedom.[64] Notably, the section groups freedom of expression with the freedoms of "thought, belief, [and] opinion."[65] However, the freedom is not absolute. Section One of the Charter allows the state to subject enumerated rights and freedoms to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[66] Such justification requires that Canadian laws pass a two-step test established in *R. v. Oakes*.[67] The first step requires a "pressing and substantial" objective relating to "societal concerns."[68] The second step constitutes a proportionality test with three components: (1) the law must be "carefully designed to achieve the objective . . . and rationally connected to that objective"; (2) it should impair the right or freedom as little as possible; and (3) there "must be a proportionality between the *effects* of the limiting measures and the objective."[69]

Despite the seemingly straightforward Charter and *Oakes* test, Canadian jurisprudence faces unique expression issues as an indirect result of its history and relationship with France. While the United States lacks an official, federally mandated language,[70] and the U.K. only legally requires English and Welsh in Wales,[71] Canada is federally bilingual, requiring both English and French in legislation and adjudication.[72] However, since the 1970s, Quebec only recognizes French as its official language, and deliberately enacted multiple laws to curtail the use of English.[73] Moreover, Quebec adjudicates civil law matters under a

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the history behind the signing of the Canadian Constitution). The signing was performed by Queen Elizabeth II, who remains Queen and Head of State in Canada in a capacity separate from her role as the British monarch, though it appears to be a mostly honorary title. *Her Majesty Queen Elizabeth II*, GOV'T OF CAN., https://www.canada.ca/en/canadian-heritage/services/royal-family/queen.html (last visited Sept. 16, 2020).

64 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 2(b) (U.K.).

65 *Id.*

66 *Id.* § 1.

67 R. v. Oakes, [1986] S.C.R. 103, ¶ 73–74 (Can.).

68 *Id.* ¶ 73.

69 *Id.* ¶ 74.

70 Harmeet Kaur, *FYI: English Isn't the Official Language of the United States*, CNN, https://www.cnn.com/2018/05/20/us/english-us-official-language-trnd/index.html (last updated June 15, 2018).

71 *Official Languages Scheme*, NAT'L ASSEMBLY FOR WALES, https://www.assembly.wales/en/abthome/about_us-commission_assembly_administration/official_languages/Pages/ols.aspx (last visited Sept. 18, 2020).

72 Official Languages Act, R.S.C. 1985, c 31 (4th Supp.) (Can.), https://laws-lois.justice.gc.ca/PDF/O-3.01.pdf.

73 *See* Official Languages Act, S.Q. 1974, c 6 (Can.), https://www.uottawa.ca/clmc/officia

constitution-like Civil Code, based on and inspired by the Napoleonic Code of 1804.[74] As a result, majorly-publicized expression disputes typically revolve around the clash between federal freedom and Quebec's unique restrictions.[75]

III. MODERN CLOTHING EXPRESSION DOCTRINES

Since the Age of Enlightenment, sumptuary laws explicitly prescribing dress for certain social classes all but disappeared from legal codes of the U.K. and its former colonies.[76] But modern legal theorists, such as Carleton University's Professor Alan Hunt, believe sumptuary laws live on in ordinances, such as those targeting pornography.[77] Judges uphold, ignore, or strike down such ordinances, so examination of litigation is a useful method to find the practical impacts and interpretations of more subtle laws affecting personal expression.

A. Clothing Expression Litigation in the U.K.

The United Kingdom lacks a written constitution providing for the protection of freedom of expression, but in 1973 the U.K. joined twenty-eight countries in the European Union (EU) in 1973,[78] and in 2000 it incorporated the European Convention on Human Rights (Convention) into its domestic law under the Human Rights Act.[79] Article 10 of the Convention protects freedom of expression,

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l-language-act-1974 (making French the sole official language of Quebec); *see also* Kamila Hinkson & Loreen Pindera, *Only Quebecers Legally Entitled to go to English School Have Right to be Served in English, Premier Says*, CBC NEWS (Nov. 5, 2019. 8:21 AM) (reporting that Premier Legault stated that immigrants must only receive government services in French, while the "historic English minority" would be able to receive all services in English).

[74] *Where Our Legal System Comes From*, CAN. DEP'T OF JUST., https://www.justice.gc.ca/eng/csj-sjc/just/03.html (last modified Oct. 10, 2016). The Civil Code explicitly protects privacy and autonomy rights in various ways. *See* Civil Code of Quebec, S.Q. 1991, c 64 (Can.).

[75] *See, e.g.*, Rob Quinn, *Quebec Tells French Woman She Failed to Prove Ability to Speak French*, NEWSER (Nov. 8, 2019, 3:01 AM) (reporting that a French woman moved to complete her PhD at a French-language school in Quebec and applied to a fast-track program to settle in Quebec, but was rejected because one of the five chapters of her thesis was written in English).

[76] Cynthia Crossen, *Why Sumptuary Laws, Despite a Rich History, Never Lasted Very Long*, WALL ST. J. (June 15, 2009, 11:59 PM), https://www.wsj.com/articles/SB11187851319 2859553.

[77] ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW 361, 389 (1996) (arguing that "sumptuary laws did not so much 'die' as undergo a process of transfiguration or metamorphosis such that the original is barely recognizable in the resultant").

[78] *The EU in Brief*, EUR. UNION, https://europa.eu/european-union/about-eu/eu-in-brief_en (last visited Sept. 18, 2020) (explaining that the E.U.'s main purpose was free trade and movement of people within the network).

[79] *The Human Rights Act*, EQUAL. & HUM. RTS. COMM'N, https://www.equalityhumanrights.com/en/human-rights/human-rights-act (last updated Nov. 15, 2018).

which includes the freedom to "receive and impart information and ideas without interference by public authority and regardless of frontiers."[80] However, the Convention also subjects freedom of expression to various restrictions as "necessary in a democratic society," including "for the protection of health or morals, [and] for the protection of the reputation or rights of others."[81] Additionally, a popular but unproven theory holds that U.K. citizens maintain a negative right to freedom of expression under the common law, such that they may not be forced to express themselves.[82]

The Convention fails to define "expression" with particularity, though such an observation applies to each constitution in this review.[83] Typically, courts may hold laws incidentally impacting expression unlawful only when case law establishes that something traditionally accepted as "expression" suffers an impact. However, mere participation in a traditional activity, such as foxhunting, does not meet the definition of "freedom of expression to 'physical and visible participation in the cultural life of [a] community.'"[84]

Note that on February 1, 2020, the U.K. became the first member state to withdraw from the EU. Its withdrawal may call into question the precedential value of twenty years under the Convention (and various other legal arrangements including matters of trade, financial services, and intellectual property).[85]

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[80] Council of Europe, *European Convention on Human Rights, as Amended by Protocols Nos. 11 and 14, Supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16*, art. 10 ¶ 1 (1950).

[81] *Id.* at 13.

[82] *See* Gillberg v. Sweden, 1676 Eur. Ct. H. R. 471 ¶ 86 (2010) (holding that there was no right to withhold research when it was work-product created while under employment, but also holding that "[t]he Court does not rule out that a negative right to freedom of expression is protected under Article 10 of the Convention").

[83] *See* Council of Europe, *supra* note 80 ("Everyone has the right to freedom of expression. This right shall *include* freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." (emphasis added)); *see also Canadian Charter*, c 11, § 2(b) (U.K) ("Everyone has the following fundamental freedoms: . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication"); U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[84] Whaley v. Lord Advocate, [2004] S.C. 78, 119–20 (Scot.) (finding two foxhunters could not justify striking the Protection of Wild Mammals Act for preventing expression of their foxhunting culture).

[85] *See generally* COMPLEXITY'S EMBRACE: THE INTERNATIONAL LAW IMPLICATIONS OF BREXIT (Oonagh E. Fitzgerald & Eva Lein, eds., 2018) (a compilation of private academic papers involving implications of Brexit).

1. Broad Restrictions in Certain Settings

a. In "Public"

International and U.K. news monitor developments in the EU regarding the possibility and reality of bans on "facial veils" in public places, enacted as a reaction to traditional Muslim clothing that covers the face apart from the eyes.[86] France, a proudly secular nation,[87] enacted a ban on Islamic facial veils which was not modified even when face masks became mandatory at the height of the COVID-19 pandemic.[88] Despite the Convention's explicit protection of freedom of expression as a right, the European Court of Human Rights found that the French ban did not violate the right to freedom of expression, right to privacy, or freedom of religion.[89] Nonetheless, despite a number of calls for facial veil bans in the U.K., none came close to succeeding, with public pushback to suggestions for one.[90]

On the opposite end of the spectrum from veils, which the U.K. has not yet banned, is the U.K.'s negative treatment of nudity. Nude dancing and even sunbathing maintains healthy popularity around the world, but few nations consider nudity itself to constitute a form of expression.[91] In the U.K., one man who believed in free social nudity was arrested forty-two times for refusing to wear clothes in public or in court.[92] When he complained that his repeated convictions breached the Convention, the European Court of Human Rights held that the plaintiff's nudity could not be unjustly interfered with as a form of expression.[93] However, it also held that British officials rightfully exercised discretion in considering the impact of the plaintiff's nudity on the community on each particular occasion.[94] Moreover, although existence as a nudist could constitute part of the

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[86] *The Islamic Veil Across Europe*, BBC NEWS (May 31, 2018), https://www.bbc.com/news/world-europe-13038095.

[87] *See* Vijay Singh, *French State School Today Is an Incarnation of Its Secular Tradition*, INDIAN EXPRESS (Nov. 7, 2020, 9:04 AM), https://indianexpress.com/article/opinion/columns/france-secularism-emmanuel-macron-islamic-radicalism-6981220/.

[88] Jason Silverstein, *France Will Still Ban Islamic Face Coverings Even After Making Masks Mandatory*, CBS NEWS (May 12, 2020, 5:09 PM).

[89] SAS v. France, [2015] 60 EUR. H.R. REP. 11.

[90] *Conservative Chairman Calls for Apology from Boris Johnson over Burka Remarks*, BT NEWS (Aug. 7, 2018, 2:12 PM), https://jerseyeveningpost.com/news/uk-news/2018/08/07/conservative-chairman-calls-for-apology-from-boris-johnson-over-burka-remarks/.

[91] *See, e.g.*, S. Fla. Free Beaches, Inc. v. City of Miami, 734 F.2d 608, 610 (11th Cir. 1984) (agreeing with another court's opinion that "[n]udity is protected as speech only when combined with some mode of expression" (quoting Chapin v. Town of Southampton, 457 F. Supp. 1170, 1174 (E.D.N.Y. 1978))).

[92] Gough v. United Kingdom, App. No. 49327/11 (Oct. 28, 2014).

[93] *Id.* at 26.

[94] *Id.* at 27.

plaintiff's identity—and maintaining a nude state could be expression of his personality—"a distinction must be drawn between carrying out an activity for personal fulfillment and carrying out the same activity for a public purpose."[95] Thus, an act of protest did not qualify for protection.[96] The court also noted that even if the plaintiff alleged a claim under Article 9 of the Convention, which facially protects "beliefs" that may include a belief in social nudity, such beliefs must meet requirements of "cogency, seriousness, cohesion and importance."[97]

b. In "the Workplace"

Litigation in the U.K. appears defendant-friendly in interpreting the aims of dress policies in workplaces. In *Kara v. United Kingdom*, a British man who preferred to wear "women's clothing"[98] applied to the European Commission on Human Rights, alleging an interference with privacy, prevention of his self-expression, and discrimination on the basis of sex when a dress code forced him to wear "men's clothing."[99] The Commission agreed that such a code constituted an interference with private life as protected by Article 8(1) of the Convention, but found the interference justified under Article 8(2) of the Convention.[100] Specifically, the court found that the dress code safeguarded the employer's "public image and facilitate[ed] its external contacts."[101]

2. Specific Restrictions on Disenfranchised Populations

Even though the United Kingdom lacks a written constitution, it made explicit through legislation that education constitutes a fundamental human right within its own jurisdiction.[102] However, while lower U.K. courts have found that such a right may enhance and embolden freedom of expression, the upper courts do not always feel the same. In *R. v. Denbigh High School*, a female Muslim student alleged that her high school violated her access to education by enforcing a dress code that prohibited her desired religious covering.[103] The lower court found that this violated the right to education, but the Appellate Committee of the House of Lords disagreed.[104] The House of Lords found that where a student could apply

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[95] *Id.* at 26.
[96] *Id.* at 27.
[97] *Id.*
[98] For an argument that it is erroneous to assign gender to clothing, see Galia Godel, *Clothing Has No Gender*, CEREBRAL SEXUALITY (June 19, 2018), https://cerebral-sexuality.com/2018/06/19/clothing-has-no-gender.
[99] Kara v. United Kingdom, 27 Eur. Comm'n H.R. Dec. & Rep. 272, 273 (1999).
[100] *Id.* at 273–74.
[101] *Id.*at 274.
[102] Human Rights Act 1998 c. 42, sch. 1, part 2, art. 2.
[103] R. v. Denbigh High Sch. [2006] UKHL 15, [2007] 1 AC 100 (appeal taken from Eng.).
[104] *Id.*

to transfer to another school, a school's restriction on the student's religious garb did not "exclude" the student from her right to education.[105]

B. Clothing Expression Litigation in the United States

What defines "free expression" in the U.S. legal sphere? U.S. courts usually fail to clarify, often merely stipulating an act's expressive nature or relying on the determinations of precedent.[106] For example, the Supreme Court held that a person's choice to act "passive during a flag salute ritual" constitutes expression,[107] but that "being in a state of nudity" without something more (like dancing) does not.[108] While the general public increasingly accepts personal clothing style as a form of expression, legislatures frequently enact and justify state laws directly prescribing certain clothing as combating "secondary effects" of clothing under the auspices of individual states' broad "police power."[109]

1. Broad Restrictions in Certain Settings

a. In "Public"

The most visible examples of clothing restrictions take place in "public places," where, by default, the citizenry at large may most easily witness the effects of prohibitions and complain to the government if they are unfair. Generally, U.S. courts allow operators of county fairs or other public events to proscribe wearing specified types of "clothing or accessories they reasonably believe might lead to substantial disruption of or material interference with the event."[110] However, the legality of such private prohibitions is murkier when it comes to adequacy of notice and law enforcement discretion. The Court found a dress code impermissibly broad when "it is impossible to objectively determine whether the wearing of particular apparel or accessories is or would be thought by a law enforcement official to be within the ambit of its prohibitions."[111]

Cohen v. California is perhaps the most famous U.S. case of clothing expression in a public place.[112] In 1971, a day after one million college and high school

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105 *Id.*

106 *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music is one of the oldest forms of human expression.").

107 W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943).

108 City of Erie v. Pap's A.M., 529 U.S. 277, 278 (2000).

109 *See id.* at 279 (the ordinance at issue purported to combat "crime and other negative secondary effects caused by the presence of adult entertainment establishments").

110 Gatto v. Cnty. of Sonoma, 98 Cal. App. 4th 744, 777 (2002); *see also* Mutual Loan Co. v. Martell, 222 U.S. 225, 232 (1911) (explaining that the police power grants legislatures authority to preserve the "public health, safety, morals, or general welfare").

111 *Gatto*, 98 Cal. App. 4th at 775.

112 Cohen v. California, 403 U.S. 15, 16 (1971).

students boycotted class in opposition to the Vietnam War,[113] police arrested Paul Cohen in the Los Angeles County Courthouse for wearing a jacket that visibly read "Fuck the Draft."[114] The California State Court of Appeal upheld a conviction of "disturb[ing] the peace" under the California Penal Code,[115] holding that the defendant's passive conduct constituted "offensive conduct," which could "cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably [sic] remove his jacket."[116]

On appeal, the Supreme Court found the justification for this conviction lacking in persuasive power for several reasons.[117] First, the California Penal Code section at issue applied throughout the entire state, rather than tailored to individual settings that might invite a "decorous atmosphere."[118] Second, while evocative, the Court did not find the words "obscene," which the Court limits to significantly "erotic" language.[119] Third, the words on the jacket did not constitute "fighting words," and "[n]o individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."[120]

Perhaps the most interesting reason the Court found the statute overbroad in this application concerned the rights of "unwilling or unsuspecting viewers" subjected to the words on the jacket.[121] The Court found that while government may, at times, shut off discourse solely to protect others from hearing it, the Court "consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.'"[122]

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[113] MARK D. HARMON, FOUND, FEATURED, THEN FORGOTTEN 32 (2011).

[114] *Cohen*, 403 U.S. at 16.

[115] *Id.* (quoting CAL. PENAL CODE § 415 (repealed 1974)) (the statutory language prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct").

[116] *Cohen*, 403 U.S. at 17 (quoting People v. Cohen, 1 Cal. App. 3d 94, 99-100 (1969)).

[117] *Cohen*, 403 U.S. at 17.

[118] *Id.* at 19.

[119] *Id.* at 19–20 (such eroticism-focused "obscenity" falls into "those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed").

[120] *Id.* at 20.

[121] *Id.* at 21.

[122] *Id.* (citing Rowan v. U. S. Post Off. Dep't, 367 U.S. 728 (1970)). The Court simultaneously "recognized" the proposition that "unwelcome views and ideas which cannot be totally banned from the public dialogue" may be prohibited by governments to maintain the "privacy of the home." *Cohen*, 403 U.S. at 21.

State prohibitions on public nudity comprise the most common and traditional[123] broad restrictions on clothing expression in public.[124] U.S. laws regarding nudity and "public indecency" differ among states,[125] but generally the law prohibits nudity in public places, as well as on personal property when the nude person exposes themself to the public.[126] Most state laws promulgate specific rules about nudity around children and nudity intended to arouse oneself or another person, but some states leave specificity to community standards.[127] Of course, the fact that such laws exist unchallenged does not mean they pass constitutional muster.

Despite furor over female nipples in public, the U.S. protection of liberty typically allows men to expose their nipples in public. The Eleventh Circuit found unconstitutional a gender-neutral ordinance in Palm Beach, Florida, prohibiting the exposure of nipples, specifically because it prohibited the exposure of male nipples.[128] The court found no reasonable relationship between male shirtlessness and the town's history, tradition, identity, or quality of life—a threshold required to show a "legitimate interest in the personal dress of [the town's] citizens at large."[129] In a footnote of the court's opinion, the Eleventh Circuit indicated that an asserted moral interest would require a uniform prohibition of male nipples both in-town and on the beach, and the beach prohibition specifically targeted females.[130]

Like most beaches, private businesses can constitute "places of public accommodations," and thus are subject to laws targeting establishment-affecting commerce[131] if they are not "private clubs."[132] In *City of Erie*, the U.S. Supreme Court found that an ordinance prohibiting "public nudity" can constitutionally

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[123] One might reasonably quarrel with use of the breadth of the word "traditional" in this context, as traditions change dramatically over time. *See, e.g.*, Kristin Toussaint, *This Woman's One-Piece Bathing Suit Got Her Arrested in 1907*, BOSTON GLOBE (July 2, 2015), https://www.boston.com/news/history/2015/07/02/this-womans-one-piece-bathing-suit-got-her-arrested-in-1907(spotlighting Annette Kellerman, a competitive swimmer and later a silent-movie star, who was arrested for wearing a one-piece swimsuit in a time when women typically swam in dresses and stockings).

[124] Note that the federal government's prohibitions on nudity generally pertain to the military.

[125] Georgia's Public Indecency law prohibits "in a public place . . . (3) A lewd appearance in a state of partial or complete nudity." GA. CODE ANN. § 16-6-8 (2019).

[126] *See Nudity and Public Decency Laws in America*, HG.ORG, https://www.hg.org/legal-articles/nudity-and-public-decency-laws-in-america-31193 (last visited Sept. 16, 2020).

[127] *Id.*

[128] DeWeese v. Town of Palm Beach, 812 F.2d 1365 (11th Cir. 1987).

[129] *Id.* at 1367–68.

[130] *Id.* at 1368 n.7.

[131] *See* 42 U.S.C. § 2000(a)-(b) (prohibiting discrimination or segregation in places of public accommodation).

[132] *See* 42 U.S.C. § 12187 (allowing an exemption to public accommodation laws for private clubs and religious organizations).

regulate nude dancing inside commercial establishments.[133] The Court's justification relied on a federalism ideal, giving discretion to the city's "efforts to protect public health and safety [which] are clearly within its police powers."[134] The Court found that when an ordinance has a "*de minimis*" impact on the dancers' expression—there, requiring nude dancers to wear pasties and G-strings—it cannot be "content based."[135] While applying the *O'Brien* test,[136] the Court reiterated its *de minimis* justification to satisfy the requirement that the restriction "is no greater than is essential to the furtherance of the government interest."[137]

City of Erie only exemplifies several federal appeals cases finding female nipple exposure as non-essential to expression, as one could express the same erotic message without "dropping the final stitch."[138] One may wonder whether or not every Supreme Court decision increases the power of the message behind removing that final stitch.

b. In "the Workplace"

The United States jurisprudence regarding dress codes in the workplace permits employers substantial deference, such that finding litigation that ultimately found for the employee is difficult.[139] Further, the government subjects its own employees—especially police, teachers, firefighters, and soldiers—to standards which may seem overly harsh compared to the private sphere. As such, federal employer discretion over the physical appearance of employees may comprise the upper limit for valid restrictions in the United States.

U.S. police serve as perhaps the most interesting study of the power of the United States over public employees. The police manifest the power of states to exercise their "police powers," but they also exist as individual citizens with individual rights. The dichotomy came to a head in *Kelley v. Johnson*, where a police officer named Kelley argued that the judicial deference given to the regulation of soldiers could not apply to police officers.[140] Kelley claimed that a hair

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133 City of Erie v. Pap's A.M., 529 U.S. 277, 279 (2000).

134 *Id.*

135 *Id.*

136 *See* discussion *supra* Section II.B (explaining the *O'Brien* test).

137 *City of Erie*, 529 U.S. at 280.

138 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 587 (1991) (Souter, J., concurring) (plurality opinion) ("Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message."); *see also* J&B Entm't, Inc. v. City of Jackson, 152 F.3d 362 (5th Cir. 1998) (finding that a local ordinance restricting dancers wearing G-strings and pasties only restricted expression as much as was necessary to achieve the state's purpose).

139 *But see* Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (concerning a Title VII action alleging that the employer had fired its transgender employee because she refused to abide by its conception of her gender).

140 Kelley v. Johnson, 425 U.S. 238 (1976). The "unique judicial deference" to military regulations applies, at least, to hair-cutting regulations. *Id.* at 246.

regulation statute violated his retained individual right to liberty under the Due Process clause.[141] The Supreme Court disagreed, holding that the government's "wide latitude" in the "dispatch of its own internal affairs" required only a "rational connection" between the regulation and the exercise of its police powers.[142] The Court thus impliedly held that police officers' obligations as public officials overwrite their individual liberties to some degree.

2. Specific Restrictions on Disenfranchised Populations

a. Inmates

Perhaps recognizing the continued military armament and dominance of the United States in the international community, the Court maintains that "no governmental interest is more compelling than the security of the Nation."[143] While "security of the nation" often refers to international threats, domestic government security services supervised the imprisonment of over one and a half million people[144] and jailing of over ten million in 2016.[145] Unfortunately, the U.S. Supreme Court has not communicated the extent of prisoners' fundamental rights involving clothing.[146] Incarceration with surveillance precludes a full right to privacy, which only increases its punitive value. Rules mandate that most prisoners wear cheaply made uniforms, without enabling customization that could express individuality.[147]

For prisoners in demographic minorities, infringements on personal identity can resemble the old sumptuary laws which reinforce the grant of different expressive rights to different social classes. The particular treatment of transgender prisoners exemplifies modern and implicit but fundamental differences in the fundamental expressive rights of different sectors of adult society.[148] Despite the

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[141] *Id.* at 244.

[142] *Id.* at 247.

[143] Haig v. Agee, 453 U.S. 280, 307 (1981).

[144] BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 251149, PRISONERS IN 2016 (Aug. 7, 2018), https://www.bjs.gov/content/pub/pdf/p16.pdf.

[145] BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 251210, JAIL INMATES IN 2016 (Feb. 22, 2018), https://www.bjs.gov/content/pub/pdf/ji16.pdf.

[146] *But see* Estelle v. Williams, 425 U.S. 501, 512 (1976) ("[T]he State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes . . . .").

[147] *See, e.g.*, FED. BUREAU OF PRISONS, INMATE INFORMATION HANDBOOK 11 (2012) ("Clothing . . . alterations . . . will be handled by Clothing Room staff only. Clothing which has been altered by an inmate could result in disciplinary action.").

[148] Before changes in the 2013 edition, the American Psychiatric Association effectively recognized transgenderism as a medical and mental disorder, placing expression of personal identity of transgender persons in the hands of third parties (physicians). *See* Ally Windsor Howell, *A Comparison of the Treatment of Transgender Persons in the Criminal Justice Systems of Ontario, Canada, New York, and California*, 28 BUFF. PUB. INT. L. J. 133, 137 (2010).

authority of physicians to control the process and expense of transitioning, many states enact additional procedural barriers making it difficult to transition, pursue rights, or perform regular duties while identifying to a gender other than the one assigned at birth.[149] Thus, beyond the personal safety concerns of assigning transgender persons to prisons of their birth-assigned gender,[150] prisons usually force transgender persons to wear clothing that expresses the opposite of their gender identity.

While the U.S. Supreme Court has not recently ruled on the processing of transgender people in prison, it has denied the chance to overrule various state statutes and regulations that prevent imprisoned transgender people from exercising a right to freedom of expression. In *Star v. Gramley*, an Illinois district court considered the plight of a transgender plaintiff who desired to wear makeup and "female" apparel.[151] The court found that no right to express oneself wearing clothing could overcome a "legitimate security concern[]."[152] Perhaps surprisingly, the court accepted the prison's victim-blaming argument that allowing female accoutrements would "provoke and/or promote homosexual activity or assault, thereby creating safety and security risks."[153]

While at least one Supreme Court case established that federal laws protecting religious expression can impact prison grooming policies,[154] the Court has not explored the legal space for *clothing* as its own form of expression in prison. As the Court accepts the tight control of expression within federal prisons, clothing cases generally concern the inadequacy of the quality of clothing provided.[155] As such, federal appellate courts have heard only two cases related to freedom of expression without relying on another right, one of them extremely tangential.[156]

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149 *See id.* at 143 (noting that states can make a variety of facilitating procedures easier or more difficult, including changing name or sex on documents of identification and prohibiting discrimination on the basis of gender identity).

150 The Bureau of Justice Statistics estimated that from 2011–2012, 39.9% of 3,209 transgender prisoners were sexually victimized in prison. BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–2012 (2018), https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf.

151 Star v. Gramley, 815 F.Supp. 276 (C.D. Ill. 1993).

152 *Id.* at 278.

153 *Id.*

154 *See* Holt v. Hobbs, 574 U.S. 352 (2015) (finding the Department of Corrections grooming policy burdened a Muslim prisoner's exercise of religion under the Religious Land Use and Institutionalized Persons Act).

155 *See, e.g.*, Smith v. Mobley, 532 F.3d 1270 (11th Cir. 2008) (an inmate complained about wearing substandard clothing in winter weather conditions).

156 *See* Robinson v. Boyd, 276 F. App'x 909 (11th Cir. 2008) (in a short *per curiam* decision, the Eleventh Circuit found that the defendant was not constitutionally protected against discipline by a correctional officer when he asked to wear "warm gear" and then argued with the response).

Weaver v. Jago, a Sixth Circuit case, is the only federal appellate case that has considered a true expression-in-prison argument.[157] There, the defendant argued that prison officials violated his "right to govern his personal appearance and his right to the free expression of his African heritage" by promulgating and enforcing a hair length regulation.[158] The lower court granted summary judgment for the prison, which the Sixth Circuit reversed.[159] The court recognized that the "State's interest in maintaining order and discipline must be shown to outweigh the inmates' First Amendment rights."[160] However, despite acknowledging the defendant's "right to govern his personal appearance and his right to the free expression of his African heritage" argument, the panel apparently reversed based solely on the third "freedom of *religious* expression" argument.[161] Examining federal jurisprudence thus indicates that the United States provides little to no constitutional protection for clothing expression for inmates.

b. Children

Clothing expression lawsuits almost always involve children and, specifically, children's rights to wear what they want to school. At least ninety-two U.S. Supreme Court cases have dealt with the First Amendment in the context of children's expression in schools,[162] and the sheer bulk, range, and history of issues inherent in school dress codes have concerned thousands of journal articles and hundreds of treatises.[163] The volatile combination of compulsory school attendance, parental rights, traditional state authority over education, the idealism of youth, and hormones perpetuate a Tolkien-esque[164] battle of policy, adjudicated state by state and claimant by claimant.[165]

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157 Weaver v. Jago, 675 F.2d 116 (6th Cir. 1982).

158 *Id.* at 117.

159 *Id.* at 119.

160 *Id.*

161 *Id.* at 118 (emphasis added).

162 *See generally* Randy J. Sutton, *Application of First Amendment in School Context—Supreme Court Cases*, 57 A.L.R. FED. 2D 1 (2011).

163 *See, e.g.*, Lotem Perry-Hazan, *Freedom of Speech in Schools and the Right to Participation: When the First Amendment Encounters the Convention on the Rights of the Child*, 2015 BYU EDUC. & L.J. 421 (2015); RONNA GREFF SCHENIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION (2019); Mitchell J. Waldman, *What Oral Statement of Student is Sufficiently Disruptive so as to Fall Beyond Protection of First Amendment*, 76 A.L.R. FED. 1 (2011).

164 *See Battle of Five Armies*, TOLKIEN GATEWAY, http://tolkiengateway.net/wiki/Battle_of_Five_Armies (last visited Sep. 18, 2020) (explaining that the "Battle of Five Armies" in J.R.R. Tolkien's The Hobbit was a fantastical battle between many factions).

165 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (stipulating that "[p]roviding public schools ranks at the very apex of the function of a State" but still holding that Wisconsin must show with particularity why it would not grant an exemption to Amish children whose high school attendance would be contrary to the Amish religion and way of life).

Tinker v. Des Moines Independent Community School District persists as the eminent case outlining U.S. doctrine on the freedom of clothing expression in schools.[166] Protesting a policy enacted by principals in Des Moines, three students from two different high schools and one junior high school chose to wear black armbands to publicize their objections to hostilities in Vietnam.[167] As a result, the schools suspended the three students.[168] The Supreme Court found that students "are 'persons' under our Constitution . . . possessed of fundamental rights which the State must respect . . . [and] may not be confined to the expression of those sentiments that are officially approved."[169] The Court pointed to a special interest in presenting a robust exchange of ideas to students, describing the classroom as a "marketplace of ideas."[170] It further articulated that students' education in school does not stop at the classroom but extends to every interaction with other students.[171] The Court found that schools must allow students to express opinions on campus unless their conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[172] As the black armband demonstration did not invite disruption, disorder, or invasion, the prohibition was unconstitutional.[173]

As far as clarity, the *Tinker* standard provides little. Since *Tinker*, lower courts have held that, when satisfied, the *Tinker* "material disruption or substantial disorder or invasion" standard does not preclude all content-based limitations.[174] While courts have upheld bans on Confederate flags on clothing across the country,[175] the results of litigation regarding other expression appear to depend on whether school officials have a fear of disruption, regardless of whether such disruption occurs. A Nevada court held that any reasonable jury could conclude that a ban on T-shirts honoring students killed by gang members created a "specific and significant fear . . . [of] disruption."[176] A New Jersey court rejected a school's argument that it could prohibit students from wearing "Hitler youth"

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166 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

167 *Id.* at 504.

168 *Id.*

169 *Id.* at 511.

170 *Id.* at 512.

171 *Id.* at 513.

172 *Id.*

173 *Id.* at 514.

174 *See, e.g.*, Westfield High Sch. L.I.F.E. Club v. City of Westfield, 249 F.Supp.2d 98, 111 (Mass. Dist. Ct. 2003).

175 *See, e.g.*, Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426 (4th Cir. 2013) (holding that a school did not violate free speech rights by prohibiting a student from wearing clothing displaying the Confederate flag); B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 740 (8th Cir. 2009) (specifying that "viewpoint discrimination . . . is not violative of the First Amendment if the *Tinker* standard . . . is met").

176 Kuhr v. Millard Pub. Sch. Dist., No. 8:09CV363, 2012 WL 1402637, at *1 (D. Nev. Apr. 23, 2012) (concerning a T-shirt that honored a student allegedly killed by a rival gang, which school officials believed would elicit a violent response from rival gangs).

buttons because the defendant school failed to demonstrate a fear of disruption.[177] Perhaps the most controversial and widely-panned school dress code decision came from the Ninth Circuit, which found constitutional an assistant principal giving students a choice to remove their shirts displaying the U.S. flag or leave school with an excused absence. [178] That court found that the assistant principal reasonably believed that wearing the shirts would cause substantial disruption or violence to the educational environment.[179] Perhaps unsurprisingly, the decision to prevent U.S. students from displaying the U.S. flag proved to be shocking and unpopular across the country.[180]

3. Restriction Through Adjudication

The United States provides wide latitude in the treatment of "gang"[181] expression in legal adjudication, indicating the limitations of "freedom of association."[182] While the U.S. Supreme Court hesitates to weigh in on the particulars of the treatment of gang clothing expression in criminal proceedings, federal appellate courts generally differ in treatment of gang expression. Variances in "supervised release"[183] restrictions on clothing helps to clarify the reasoning of the courts.

In *United States v. Washington*, the Eighth Circuit remanded a case where supervised release conditions were unconstitutionally vague.[184] The condition at

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[177] DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 645 (D.N.J. 2007) (rejecting a ban on "Hitler youth" buttons because there was no swastika or "sieg heil" salute).

[178] *See* Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 779 (9th Cir. 2014) (holding that requiring students to change shirts with the American flag raised no violations of constitutional rights).

[179] *Id.* at 780.

[180] *See, e.g.*, Eugene Volokh, *Not Safe to Display American Flag in American High School*, WASH. POST (Feb. 27, 2014, 2:35 PM) (accusing the Dariano decision of encouraging "thuggery" based on the facts).

[181] The term "gang" refers to the usage of the word by the adjudicating courts, which interpret behavior to be "gang-related" based on various factors, including statutory definitions. *Cf.* WHAT IS A GANG? DEFINITIONS, NAT'L INST. OF JUST. (2011) (stipulating that "[t]here is no universally agreed-upon definition of 'gang' in the United States," then giving five criteria for the federal definition of gang as used by the DOJ and ICE).

[182] *See* NEIL P. COHEN, LAW OF PROBATION AND PAROLE § 9.5 (2d ed. 2019) (discussing how different circuit courts address association issues in various cases).

[183] Also called "special or mandatory parole," "supervised release" is a federal judge-ordered "preliminary period of freedom for recently released prisoners . . . imposed at the time of sentencing, and is for the prisoner to serve after completing his or her prison sentence." Monica Steiner, *What is Federal Supervised Release?*, NOLO (last visited Sept. 18, 2020), https://www.nolo.com/legal-encyclopedia/what-federal-supervised-release.html; *see also* 18 U.S.C. § 3583 (2020) (laying out the required conditions for supervised release). *But cf.* United States v. Haymond, 139 S. Ct. 2369 (2019) (finding that 18 U.S.C. § 3583(k), instituting a mandatory minimum period of supervised release, was unconstitutional).

[184] United States v. Washington, 893 F.3d 1076, 1081 (8th Cir. 2018).

issue stated: "The defendant must not knowingly associate with any member, prospect, or associate member of any gang," but the court found the term "gang" undefined by "any relevant statute" and that "the term 'associate member' also lacks specific meaning."[185] Further, the *Washington* court pointed out that the Supreme Court "admoni[shed] that 'association' should not be read to include 'incidental contacts.'"[186]

In *United States. v. Green*, the Second Circuit found a supervised release prohibition from wearing "colors . . . relative to [criminal street] gangs" impermissibly vague under the Fifth Amendment.[187] However, the *Green* court made clear that they "uphold broad conditions of supervised release so long as they are sufficiently clear to provide the defendant with notice of what conduct is prohibited."[188]

In *United States v. Brown*, the Ninth Circuit found a condition of supervised release too vague when it prohibited wearing clothing that "may connote" affiliation with certain gangs.[189] The court employed the "plain error" standard in holding the district court was in error for imposing a condition with such breadth and indiscriminate nature.[190] In contrast, the Sixth Circuit did not reach the question of potential vagueness in *United States v. Banks*, notwithstanding the district court failing to state its rationale.[191] There, the supervised release of the defendant barred displaying any "reasonably construable sign of gang affiliation."[192] Despite very broad language, the court found no abuse of discretion, as the condition served the purpose of "deterring future criminal conduct and thus protecting the public."[193]

Washington and *Brown* stand for one method by which the U.S. legal system deals with expression rights as applied to clothing: focusing on how overbroad prohibitions create notice issues about clothing protected by the Constitution.[194] The outcomes from different standards of review applied between *Brown* and *Banks* indicates another, less reliable method, in counting on the discretion of individual adjudicators to correct injustices.

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185 *Id.*

186 *Id.* at 1082.

187 United States v. Green, 618 F.3d 120, 124 (2d Cir. 2010).

188 *Id.* (citations omitted).

189 United States v. Brown, 223 F. App'x 722, 724 (9th Cir. 2007).

190 *Id.*

191 United States v. Banks, 722 F. App'x 505, 512 (6th Cir. 2018).

192 *Id.* at 512–13.

193 *Id.* at 514.

194 *Cf.* United States v. Graham, 772 F. App'x 507, 507 (9th Cir. 2019) (quoting United States v. Wolf Child, 699 F.3d 1082, 1090 (9th Cir. 2012)) (holding that even though the defendant's sibling was a gang member, a prohibition on contact with gang members did not implicate a "particularly significant liberty interest").

C. Clothing Expression Litigation in Canada

Canada stands as the youngest nation in this investigation and occupies a middle jurisdictional distance between the United States and the U.K., having more recently distinguished U.K. law. Reflecting its relatively young age as an independent nation, Canada mimicked the EU and enacted a Charter of Rights and Freedoms protecting "freedom of . . . expression" within "reasonable limits."[195] Canada is not a stranger to issues concerning a general right to expression, particularly in regard to freedom of the press[196] and censorship.[197] Nonetheless, Canada's clothing expression jurisprudence indicates a heavy focus on practical issues rather than concerns steeped in tradition.

1. Broad Restrictions in Certain Settings

a. In "Public"

Legal controversies in Canada regarding clothing expression in public places are few and far between, with one exception: courtrooms. As in most justice systems, Canada's judges maintain a large amount of independence in deciding the procedures associated with their courtroom proceedings, theoretically to help enable their impartiality.[198] But that independence is limited, as shown in *El-Alloul c. Attorney General of Quebec*.[199] In that case, the Quebec Court of Appeal set aside the judgment of the trial court, which refused to hear a woman's case because she chose not to remove her hijab in the courtroom.[200] The trial court determined that the Regulation of the Court of Quebec dress code could forbid wearing a hijab, for otherwise the plaintiff's rights would unduly hinder the authority of judges.[201]

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[195] *Canadian Charter*, c. 11.

[196] Canada has experienced pseudo-martial law more recently than both the United States and the U.K. In 1970, a Quebecois separatist faction kidnapped the Deputy Premier and a British diplomat, and Prime Minister Trudeau invoked the only peacetime use of the War Measures Act in response. This event was dubbed the October Crisis, and resulted in the jailing of Quebecois journalists. Dominique Clément, *October Crisis*, CAN.'S HUM. RTS. HIST., https://historyofrights.ca/history/october-crisis (last visited Sept. 16, 2020).

[197] *See, e.g.*, Little Sisters Book & Art Emporium v. Canada, [2000] 2 S.C.R. 1120 (Can.) (finding, in a case of LGBT literature importation that was presumed to be obscene, that the onus must be on the government to prove obscenity, rather than allowing a preemptive bar based on possible obscenity).

[198] *See* Right Honourable Beverley McLachlin, P.C., Chief J. of Can., Remarks at the Conference on Law and Parliament (Nov. 2, 2006) (transcript available at https://www.scc-csc.ca/judges-juges/spe-dis/bm-2006-11-02-eng.aspx).

[199] El-Alloul c. Att'y Gen. of Que., 2018 CarswellQue 8475 (Can. Que.) (WL).

[200] *Id.* ¶ 17.

[201] *Id.*

The Quebec Court of Appeal disagreed, holding that the dress code could not hinder a practice of expressing a sincerely held religious belief unless the practice conflicts with an overriding public interest.[202] The court noted that a full facial covering, such as a niqab—which could hinder proper identification of litigants and proper assessment of witnesses' credibility—might present overriding public interest concerns.[203] Ultimately, however, the court found a presumption that a known religious practice avoids a dress code restriction in a courtroom.[204]

b. In "the Workplace"

Union protection is a hallmark of Canadian litigation. Unions often challenge dress codes and the challenges are usually resolved by arbitration. This often includes hospital unions challenging dress codes theoretically meant to promote hygiene.[205] Decisions often rest on the language of collective bargaining agreements between employer and union, which often give the hospital discretion to enforce "reasonable" rules impacting clothing expression.[206]

The quasi-judicial power of the Canada Labour Relations Board (CLRB) protects a specific form of symbolic workplace expression through wearing union badges, despite a presumption that such badges encourage confrontation. CLRB's badge cases may indicate that the statutory right to labor organization outweighs the right to freedom of expression.[207] In *I.C.T.U. v. Ottawa-Carleton Regional Transit Commission*, the CLRB accepted that when employees attempt to change bargaining agents, wearing badges to signify their new loyalty "is, as a rule, emotional, volatile and, for some, very disturbing and highly traumatic."[208] Nonetheless, "[a]ny incidental inconvenience for an employer must be weighed against the right of employees to select and belong to a trade union of their choice."[209] In *Communications Workers of Canada v. A.A.S. Tele-*

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[202] *Id.* ¶ 94. In its reasoning, the court cited the words of a Justice of the Supreme Court of Canada, who acknowledged secularism's "respect for religious differences." *Id.* ¶ 65 (citing Loyola High Sch. v. Quebec, [2015] 1 S.C.R. 613, ¶ 43 (Can.).

[203] *Id.* ¶ 93.

[204] *Id.* ¶ 91.

[205] *See, e.g.*, W. Lincoln Mem'l Hosp. v. Christian Labour Ass'n of Can., Local 302 (2004), 126 L.A.C. 4th 1 (Can. Ont.) (finding a hospital's prohibition of nose rings violated a collective bargaining agreement with the union because it was not reasonable to believe that the prohibition promoted hygiene).

[206] *Id.* ¶ 9.

[207] *See generally* I.C.T.U. v. Ottawa-Carleton Reg'l Transit Comm'n, 1984 CarswellNat 768 (Can. L.R.B.) (WL) (holding that, while a union member's wearing of a union pin constituted a lawful exercise of their right of expression under the Canada Labour Code and the Labour Relations Act, these expression protections are subject to exceptions in that consider the right to labor organization).

[208] I.C.T.U. v. Ottawa-Carleton Reg'l Transit Comm'n, [1984] CarswellNat 768, ¶ 21 (Can. L.R.B.).

[209] *Id.*

Communications Ltd., the CLRB found an employers' freedom of expression limited when it interfered with a trade union, but that collective bargaining "wear and tear" did not constitute such interference.[210]

c. Places with Alcohol

In Saskatchewan, the Safer Communities and Neighborhoods Act (SCNA) prohibited "gang colours," which include "any sign, symbol, logo or other representation identifying, associated with or promoting a gang" in premises permitted to have alcohol.[211] It defined "gang" to include individuals "who associate with each other for criminal or other unlawful purposes."[212] The Saskatchewan Provincial Court found the SCNA provision—which was "simply [a] dress code"[213]—"both overbroad and underbroad."[214] Its overbreadth especially concerned the "other unlawful purposes" language, and it thus failed to impair free expression as little as reasonably possible.[215] The SCNA provision was underbroad because it only dealt with "wearing," rather than many other methods by which one may display gang colors.[216]

While nudity in Canada enjoys technical legality in public in every province, adjudications may restrict it in case of potential harm to others. The harm element features heavily in litigation regarding nudity in private, including regulations binding nudity restrictions to the sale of alcohol. In *Rio Hotel v. New Brunswick (Liquor Licensing Board)*, the court held that "freedom of expression" does not include nudity with the purpose of driving liquor sales.[217]

2. Specific Restrictions on Disenfranchised Populations

At least prior to COVID-19, Canada as a whole theoretically favored bans on the wearing of facial veils.[218] Yet case law indicates that Canada's courts strongly conceive of facial veils as expression, allowing for arguments that banning

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[210] Comms. Workers of Can. v. A.A.S. Telecomms. Ltd., 1976 CarswellNat 717, ¶ 31 (Can. Ont. L.R.B.) (WL).

[211] R. v. Bitz (2009), 349 Sask. R. 50, ¶ 5 (Can.) .

[212] *Id.*

[213] *Id.* ¶ 39.

[214] *Id.* ¶ 78.

[215] *Id.*

[216] *Id*.

[217] Rio Hotel v. New Brunswick (Liquor Licensing Board), [1987] 2 S.C.R. 59, ¶ 9 (Can.).

[218] According to Ipsos, 76% of Quebecois supported a bill requiring both people to be unveiled during interactions as or with public officials, and at least 57% of Canadians in other regions supported a similar bill. *Majority (68%) of Canadians Support Bill 62-Style Law in Their Province*, IPSOS (Oct. 28, 2017), https://www.ipsos.com/en-ca/news-polls/quebec-bill-62.

headscarves may constitute a form of persecution.[219] However, a sufficiently strong, rising security interest may eventually overcome the expression protection precedent: Canadian doctrine does still allow restrictions based on local police power interests because "overbreadth exists only if the adverse effect of legislation on individuals subject to it is grossly disproportionate to the state interest the legislation seeks to protect or achieve."[220]

3. Restriction Through Adjudication

Canada maintains a relatively high bar for the constitutionality of strip searches, the forced removal of clothing in order to search one's person.[221] After Canadian police arrested a man witnessed to traffic drugs, they strip-searched him and found a package of cocaine between the man's buttocks.[222] Rather than waiting for medical assistance, the officers exerted significant effort to force removal of the package, until finally succeeding.[223] The Canadian Supreme Court found the search unreasonable for various procedural reasons, as well as a violation of his fundamental rights, especially by failing to allow the man to remove his clothing.[224] The Court further denied that an arrested person's resistance entitled police to disregard his or her physical integrity.[225]

IV. CONCLUSION

With social and cultural pressures[226] provoking nationalistic, xenophobic, partisan, and paternalistic reactions across the world, the United States, Britain, and Canada face pressures to litigate the wearing of clothing, marginalizing the

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[219] *See* Aykut v. Canada (Minister of Citizenship & Immigration), [2004] F.C.R. 466, ¶ 42 (Can. Ont. C.A.) (holding that immigration claims are required to consider the banning of headscarves as a form of persecution).

[220] R. v. Bitz (2009), 349 Sask. R. 50, ¶ 67 (Can. Sask.) (citing R. v. Malmo-Levine, [2003] 3 S.C.R. 571, ¶ 143 (Can.)).

[221] *Cf.* Bell v. Wolfish, 441 U.S. 520 (1979) (holding that searching inmates' exposed body cavities after every visit from any person outside the institution was reasonable).

[222] R. v. Golden, [2001] 3 S.C.R. 679, ¶¶ 10, 19 (Can.).

[223] *Id.* ¶ 33.

[224] *Id.* ¶¶ 105, 113.

[225] *Id.* ¶ 116.

[226] Recently, global pressures have clearly risen surrounding the subject matter of immigration. *See, e.g.,* Simon Tisdall, *Rise of Xenophobia is Fanning Immigration Flames in EU and US*, GUARDIAN (June 22, 2018, 7:56 AM), https://www.theguardian.com/world/2018/jun/22/as-immigration-crisis-explodes-xenophobes-gain-ground-in-eu (linking Europe's immigration problem with the human crisis at the southern border of the United States because "like many European politicians, [President] Trump ignored the root causes of problematic migration—and, in many instances, the west's culpability").

expressive aspect in favor of strict necessity considerations. Despite similarity in doctrines and language, each of these three nations faced different legal questions regarding clothing expression and responded with different levels of respect for what approximates a sumptuary tradition. By comparing how each nation has typically dealt with sumptuary restrictions, one might better predict what will happen when legislatures and judiciaries encounter proposed, enacted, or *de facto* clothing restrictions for the first time.

United States doctrine is comparatively dispersed and steeped in tradition. The doctrine is dispersed due to the nation's federalist structure, allowing individual states to legislate via police powers, despite citizens' theoretically strong national First Amendment protections. The U.S. Supreme Court generally allows private restrictions of clothing expression, at least when finding little evidence of particularized discrimination. Meanwhile, U.S. restrictions may be all-encompassing for those suspected, indicted, or convicted of crimes, without much concern for the abridgement of their rights. There are also several examples of underbroad or overbroad restrictions in public places, with federal courts paradoxically allowing community standards to protect bearing of men's nipples while ruling that dancers revealing nipples only constitutes *de minimis* expression.

Ultimately, the validity of U.S. restrictions hinges on legislative intent matching compelling government interests, but there exists no bright-line test for determining such intent. Such ambiguity is ripe for enforcement of secret and retrograde sumptuary concerns. Perhaps most strikingly, the United States more clearly allows for restrictions of public officials—especially members of the military—than the other two nations.

United Kingdom doctrine cleaves to history but with strong national protections for individual dress-related rights, perhaps stronger than that of the United States. The U.K. appears relatively generous with government-endowed benefits, which shore up expression protections related to certain public spheres. However, while the U.K. provides strong protections for accepted, clear forms of expression, the process of reaching acceptance relies on either textualism or a tradition of avoiding offense.

One could frame the U.K.'s jurisprudence as tacitly enabling sumptuary law, though with some active exceptions, including that the U.K. has equivocated on protection or condemnation of facial veils. The relative instability of the text of the law—suddenly no longer undergirded by the Convention, let alone a written constitution—implies significant room for flexibility. The question remains whether flexibility will allow for strengthening clothing expression or allowing new arbitrary restrictions.

One could describe Canadian doctrine as reasonableness-based and modern; it strongly protects clothing expression and flatly denies morality arguments for restriction. Canadian jurisprudence focuses on the "reasonability" of any regulation that impacts the right to wear. The reasonableness standard includes security contexts such as strip searches to practical contexts such as hospital dress codes.

Canadian litigation strongly upholds the ability to unionize, and to campaign for union formation through worn symbols of solidarity. Canada models a liberal doctrine weighing individual clothing freedom highly.

Contrasting these doctrines and their myriad results, it is easier to anticipate that nations with relatively dispersed doctrines, including federalist structures like that of the United States, may only slowly respond to waves of popular demand for restrictions such as on facial veils. This would likely simultaneously slow nation-wide progress in expansion of clothing freedom and forestall populist incursions on existing clothing freedom. In addition, one may also extrapolate from Canada's case law results that "reasonableness"-focused legal systems may allow quick judicial adaptation to protect individual clothing freedoms as they become relevant, without necessarily allowing populism to infringe on such freedoms. On the other hand, giving responsibility to judges to make protective law in real time is delegating policymaking authority to usually-unelected experts with individual beliefs and agendas. The intense scrutiny of and pressure on Supreme Court Justices in the United States—usually called "activists" by the party which did not affirm them[227]—may give us pause in choosing to perpetuate such a delegation.

Ultimately, all Americans, Brits, and Canadians should understand why their laws exist in the first place, so that they might be more readily improved. Sumptuary restrictions of the past perpetuated by elitist or even fascist institutions can and have clearly deprived fundamental freedoms such as expression without modern justifications.[228] To identify and exorcize the specter of sumptuary law

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[227] *See* S.M., *Those "Activist" Judges*, Economist (July 8, 2015), https://www.economist.com/democracy-in-america/2015/07/08/those-activist-judges.

[228] For a contrasting perspective that considers sumptuary law vital to maintain the legal system's legitimacy, consider Professor Peter Goodrich's commentary:

> The detailed workings of law depend . . . not simply upon the institution and maintenance of a generalized love of law as the visible principle of social authority, but also and equally upon the repetition of that visibility of authority in the disparate regimes of institutional life and the plural regulations of the public sphere.
>
> The lesson of sumptuary law is in large part that . . . the task of legal scholarship is to attend to the detail of dress and the other forms of appearance of legal and political power. In a critical perspective, the visual surfaces of government should be read not as signs of an otherworldly power or of invisible causes but as the very presence and reality of governance in all facets of daily life.

Goodrich, *supra* note 23, at 724–25.

in our modern world will require continuing to shine a light on the justifications of modern restrictions and determine whether they are actually long dead.