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Fashion Law: More than Wigs, Gowns, and Intellectual Property

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Fashion Law: More than Wigs, Gowns, and Intellectual Property

MARK K. BREWER*

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Clothes are never a frivolity: they always mean something.

–James Laver

I. INTRODUCTION

Law has finally discovered a love for fashion. Although other disciplines have scrutinized the fashion industry for decades,[1] until recently, legal scholarship was slow to adopt an interest in fashion, often treating fashion law as a subfield of intellectual property (IP).[2] Yet, the groundbreaking work of law's most stylish scholars, led by Professor Susan Scafidi,[3] has injected sartorial legal rigor into the study of fashion and the law. Over the past few years, interest in fashion law has led to an ever-growing body of academic and professional literature,[4] the establishment of formal academic

1. *See generally, e.g.*, ROLAND BARTHES, THE FASHION SYSTEM (Matthew Ward & Richard Howard trans., 1983) (analyzing the images and language that transmit concepts of fashion); Martin Christopher et al., *Creating Agile Supply Chains in the Fashion Industry*, 32 INT'L J. RETAIL & DISTRIBUTION MGMT. 367 (2004) (analyzing the markets, logistics, and supply chains in the fashion industry); Georg Simmel, *Fashion*, 62 AM. J. SOC. 541 (1957) (considering the manner in which society interacts with fashion).

2. Thomas Farkas, *Does the United Kingdom Need a General Law Against Unfair Competition? A Fashion Industry Insight (Part I)*, 33 EUR. INTELL. PROP. REV. 227, 228 (2011).

3. Scafidi's scholarship spans a number of areas related to fashion, creativity, and intellectual property, and her blog Counterfeit Chic (www.counterfeitchic.com) helped pioneer the field of fashion law. *See generally* SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW, at x–xii (2005) (considering various cultural phenomena and associated rights); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 795–96 (2001) (examining the ownership of intellectual property rights with respect to cultural property); Susan Scafidi, *Intellectual Property and Fashion Design*, 1 INTELL. PROP. & INFO. WEALTH 115 (2006) [hereinafter Scafidi, *Intellectual Property and Fashion Design*] (analyzing the key milestones of the history of intellectual property vis-à-vis the fashion industry).

4. *See generally* FASHION LAW: A GUIDE FOR DESIGNERS, FASHION EXECUTIVES, & ATTORNEYS (Guillermo C. Jimenez & Barbara Kolsun eds., 2d ed. 2014) [hereinafter FASHION LAW] (providing a practical, comprehensive overview of fashion law); URSULA FURI-PERRY, THE LITTLE BOOK OF FASHION LAW 89 (2013) (summarizing some of fashion law's most influential topics and case law); LOIS F. HERZECA & HOWARD S. HOGAN, FASHION LAW AND BUSINESS: BRANDS & RETAILERS (2013) (offering an expansive account of the key areas of business and fashion law relevant to legal and industry professionals); THE AMERICAN BAR ASSOCIATION'S LEGAL GUIDE TO FASHION DESIGN (David H. Faux ed., 2013) (detailing practical guidance on the main topics in fashion law).

programs,[5] the growth of active online media,[6] and an increasing interest from the professional legal community.[7] Rightfully so, IP issues have dominated fashion law given the importance of protecting designs, techniques, and other proprietary property associated with articles of fashion. However, to dismiss fashion law as a subfield of IP is as naïve as calling a Manolo just another shoe.[8] Clothing and fashion capture identities and beliefs, promote and restrict freedom, and adorn and protect the privacy and sanctity of the human body. Moreover, the law and society choose, compel, and promote fashions with profound impacts on human rights, psychology, development, health, and governance. Fashion law's rich and diverse collection encompasses not only IP, but also basic rights of expression and identity, working conditions, and business practices.

5. In 2006, the Fashion Institute of Technology offered the first fashion law course in the United States, with Fordham University offering the first law school course in fashion law in 2008. *See* Guillermo C. Jimenez, *A Survey of Fashion Law: Key Issues and Trends*, *in* FASHION LAW, *supra* note 4, at 2. Fordham University founded the first formal program in fashion law with its launch of an LLM in Fashion Law in the Autumn 2015. *See* Katie Berrington, *First Fashion Law Degree Announced*, VOGUE (June 23, 2015), http://www.vogue.co.uk/news/2015/06/23/fordham-university-first-fashion-law-degree-announced [https://perma.cc/48ZE-ALGV]; *see also Fashion Law: LLM in Fashion Law*, FORDHAM U., https://www.fordham.edu/info/23599/fashion_law [https://perma.cc/N6MB-5234]. Additionally, the University of Insubria and the Istituto Marangoni launched Italy's first fashion law postgraduate program in spring 2017. *See Fashion Law Master Course*, FASHION L., http://www.fashionmeetsrights.com/news/viewp/fashion-law—master-course- [https://perma.cc/ADD6-22RS].

6. *See generally* FASHION L., http://www.thefashionlaw.com [https://perma.cc/L8DB-TAGK] (offering timely coverage and analysis of emerging developments in fashion law); COUNTERFEIT CHIC, http://counterfeitchic.com [https://perma.cc/99KP-K6U5] (providing the leading commentary on all aspects of fashion law); SHEPPARDMULLIN: FASHION & APPAREL L. BLOG, http://www.fashionapparellawblog.com [https://perma.cc/J79Y-AK8N] (summarizing the main developments in the fashion and beauty industries).

7. Increasingly, law firms and professional organizations are creating fashion law practices. *See generally, e.g.*, FASHION L. & BUS., http://www.fashionlawbusiness.com [https://perma.cc/63PD-8MTG]; *Fashion Law Committee*, N.Y. ST. BAR ASS'N, http://www.nysba.org/EASLFashion.aspx [https://perma.cc/U6WL-E9D9].

8. Spanish designer Manolo Blahnik creates some of the most prized footwear in the minds of consumers, and his designs are featured regularly at some of the world's top museums. *See Manolo Blahnik: The Art of Shoes*, ST. HERMITAGE MUSEUM, https://www.hermitagemuseum.org/wps/portal/hermitage/what-s-on/temp_exh/2017/shoes/?lng=en [https://perma.cc/3N82-WCKK]; Penelope Parkin, *The Shoe's the Star—Manolo Blahnik at the Design Museum*, CULTURE24 (Feb. 7, 2003), http://www.culture24.org.uk/art/architecture-and-design/art14965 [https://perma.cc/PT63-8HPM]; Sandra Salibian, *Manolo Blahnik Unveils Exhibition in Milan*, WWD (Jan. 26, 2017), https://wwd.com/fashion-news/fashion-scoops/manolo-blahnik-unveils-exhibition-in-milan-10767652/ [https://perma.cc/J6GR-XQAR].

Against these considerations, this article frames the emerging field of fashion law and synthesizes its substance from an international perspective in order to raise the profile of fundamental areas in which the law and fashion intersect as well as identify key areas for future research. Part II examines the background on fashion law, initially focusing on its origins and then examining IP, traditionally the main area of the field. Additionally, the Article defines, frames, and justifies the emerging field of fashion law. Because an exhaustive analysis of the emerging trends in fashion law is beyond the scope of this Article, Part III only focuses on some of the most active areas to show the relevance and importance of the law in the world of fashion as well as indicates the need for further engagement by the academy, the legislature, and the judiciary. First, the Article explores deficiencies in current IP law, particularly how IP law may inhibit innovation and creativity. Second, the Article examines fashion's impact on society, including the manner in which fundamental rights and health issues inextricably connect with the fashion industry. Third, the Article analyzes the impact of the fashion industry on labor and weaknesses in the law. Fourth, the Article finally probes the fashion industry's relationship with environmental and corporate sustainability. Through such analysis, the Article illustrates the importance of the evolving field of fashion law to business and society as well as the rich research opportunities for legal scholars with a sense of sartorial curiosity.

II. BACKGROUND

A. The Emergence of Fashion Law

For millennia, laws have proscribed clothes, fashions, and styles;[9] however, fashion law as a field emerged only over the past few years, tracing its origins in the English-language literature[10] to the pioneering work of Professor Susan Scafini,[11] Guillermo C. Jimenez and Barbara Kolsun's seminal work *Fashion Law: A Guide for Designers, Fashion Executives, and Attorneys*,[12] and a number of innovative law review articles included below.

9. *See generally* ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW, at ix–x (1996) (summarizing the various rules and regulations dictating and restricting dress historically).

10. One of the earliest non-English language works specifically focusing on fashion law is Jeanne Belhumeur's *Droit International de la Mode*. *See generally* JEANNE BELHUMEUR, DROIT INTERNATIONAL DE LA MODE 11 (2000) (focusing primarily on intellectual property and European and international initiatives to provide protection to articles of fashion).

11. *See* Susan Scafidi, *Feather Dustup: Pharrell's Couture Culture Clash*, COUNTERFEIT CHIC (June 9, 2014), http://counterfeitchic.com/2014/06/feather-dustup-pharrells-couture-culture-clash.html [https://perma.cc/4CHZ-H7NG].

12. Jimenez, *supra* note 5, at 1.

The definition of fashion law reflects the fluidity of an emerging field even though rules governing dress have existed for thousands of years.[13] The leading authority on fashion law, the Fashion Law Institute at Fordham University in New York,[14] defines fashion law as "the legal substance of style, including all the issues that may arise throughout the life of a garment, starting with the designer's original idea and continuing all the way to the consumer's closet."[15] Hence, fashion law denotes not only the legal and regulatory framework applicable to the garment industry, but also the business, social, and ethical factors that underpin policy and legal developments. Admittedly, IP is fashion law's signature look; yet the field encompasses a much wider variety of legal issues,[16] including contracts, commercial and corporate law, employment law, international trade law, and other related subjects.[17]

As with any emerging field of the law,[18] critics may oppose the designation of a distinct area of "fashion law" as it has not yet been established as one single branch of the law.[19] Yet, the substance of fashion law links together a logical area in both substance and practice.[20] Further, fashion law's collection is hardly new[21] and contains a rich array of legal areas that "have long awaited

13. *See generally* RUTHANN ROBSON, DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES 8–33 (2013) (comprehensively analyzing rights to self-expression and clothing).

14. *See generally* FASHION L. INST., http://fashionlawinstitute.com [https://perma.cc/2PSC-C4JJ] (providing the most authoritative source on fashion law analysis).

15. *See What Is Fashion Law?*, FASHION L. INST., http://fashionlawinstitute.com/faqs#1 [https://perma.cc/5CU7-6BDW].

16. Susan Scafidi, *Fiat Fashion Law! The Launch of a Label—And a New Branch of Law*, *in* NAVIGATING FASHION LAW 7, 12 (Melissa Silvanic ed., 2012) [hereinafter Scafidi, *Fiat Fashion Law!*].

17. *See* Jimenez, *supra* note 5, at 2.

18. Over the past few decades, the law has added a number of new areas. *See* Frits W. Hondius, *Data Law in Europe*, 16 STAN. J. INT'L L. 87, 87 (1980); Jacqueline Peel, *Climate Change Law: The Emergence of a New Legal Discipline*, 32 MELB. U. L. REV. 922, 923 (2008); Norman Veasey, *The Emergence of Corporate Governance as a New Legal Discipline*, 48 BUS. LAW. 1267, 1267 (1993).

19. Joanna Buchalska, *Fashion Law: A New Approach*, 8 QUEEN MARY L.J. 13, 26 (2016).

20. Jimenez, *supra* note 5, at 2.

21. Some of the most venerable cases on both sides of the Atlantic display that fashion has long been a concern of the law. *See, e.g.*, Fashion Originators' Guild of Am., Inc. v. Fed. Trade Comm'n, 312 U.S. 457, 458 (1941) (considering the issue of "style privacy" and finding that practices of the Guild amounted to unfair restraints on competition); Wood v. Lucy, 118 N.E. 214, 215 (N.Y. 1917) (holding that a promise to market items of fashion on an exclusive basis constituted sufficient consideration to form an enforceable duty to

systematic recognition, attention, clarification, and instruction."[22] Moreover, the law has been flirting with fashion for some time. As Judge Seymour D. Thompson explained in the late Nineteenth Century, "'[T]he law' is a matter of fashion almost as much as a man's hat or a women's bonnet."[23] With respect to the legal academy, Professor Nuno Garoupa and Professor Thomas Ulen note that fashions in the law manifest themselves as "legal innovations" that may bring "a new technique, a new subject matter area, or the like into the study of either law generally or some area within the study of law."[24] Legal scholarship may quickly become fashionable by cascade effects, informational signatures, and reputational pressures[25] through the endorsement of influential legal scholars of ideas, concepts, or theories, thereby inducing a type of "herd behaviour" that creates particular fashions in the law.[26] Professor Cass Sunstein notes that the emergence and influence in the academy of feminism, critical legal studies, and the economics analysis of law at particular times all indicate the influence of "fads and fashions" in academic study and research.[27] Similarly, the academy has adopted various fashions with respect to legal pedagogy. Introduced in 1870 by Dean Christopher Langdell at Harvard Law School,[28] the Socratic method[29] has been the "defining element of American legal education"[30] for over a century.[31] Despite considerable criticism[32] and assertions that its dominance in legal pedagogy

use reasonable efforts to perform under the agreement); Poiret v. Jules Poiret Ltd., (1920) 37 RPC 177, 178 (U.K.) (holding that exhibitions by a celebrated French couturier in London created sufficient goodwill to enjoin the use of the same name by an English dressmaker).

22. Scafidi, *Fiat Fashion Law!*, *supra* note 16, at 13.

23. Seymour D. Thompson, *Fashions in the Law*, 11 GREEN BAG 487, 487 (1899).

24. Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555, 1564 (2008).

25. *See* Cass R. Sunstein, *Foreword: On Academic Fads and Fashions*, 99 MICH. L. REV. 1251, 1251 (2001).

26. Brian R. Cheffins, *The Trajectory of (Corporate Law) Scholarship*, 63 CAMBRIDGE L.J. 456, 473 (2004).

27. Sunstein, *supra* note 25, at 1255–56.

28. Eric Mills Holmes, *Education for Competent Lawyering—Case Method in a Functional Context*, 76 COLUM. L. REV. 535, 542 (1976).

29. *See* Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 12 (1996).

30. Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 113 (1999).

31. Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDU. 562, 563 (2015).

32. *See, e.g.*, Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 63 (1994) ("The performance aspect of a large Socratic classroom disables some women from performing up to their potential."); Benjamin V. Madison, III, *The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students*, 85 U. DET. MERCY L. REV. 293, 339 (2008) ("Legal education has fallen well behind other fields in responding to the increased awareness of how people learn and the best educational practices to respond to such

has past,[33] the Socratic method persists as law school's classic pedagogical look, albeit slightly restyled[34] along with a collection of other "didactic, inquiry, and discovery methods."[35] Such academic fashions indicate the dynamic nature of the discipline and invite further academic research.[36]

The legal profession itself has, at different times, enjoyed and suffered inconsistent levels of fashionability. Following decades of popularity, both legal education[37] and the profession have seemed to have lost their past allure[38] due to a combination of changing economic factors[39] and technological innovations.[40] In addition, various social and political trends have threatened the status of the legal academy and profession.[41] With the commoditization of legal practice[42] and sustained criticism of legal education,[43] particularly

discoveries."); Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don't Feminize*, 7 S. CAL. REV. L. & WOMEN'S STUD. 37, 37 (1997).

33. *See* Donald G. Marshall, *Socratic Method and the Irreducible Core of Legal Education*, 90 MINN. L. REV. 1, 2 (2005).

34. *See* Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDUC. 562, 562–63 (2015) (arguing that a refocus on the typical Socratic method pedagogy could produce more practice ready lawyers).

35. Friedland, *supra* note 29, at 13.

36. Other disciplines, such as management, study the various trends in the academic discourse as distinct from aesthetic fashion. *See* Eric Abrahamson, *Management Fashion*, 21 ACAD. MGMT. REV. 254, 254 (1996). Similarly, fashions in the law undoubtedly influence legal education, the judiciary, the practice of law, and law's position in society.

37. *See generally* BRIAN Z. TAMANAHA, *Preface* to FAILING LAW SCHOOLS (2012) (examining the crisis in legal education and calling for more flexibility and variation among law schools).

38. *See, e.g.*, William D. Henderson, *From Big Law to Lean Law*, 38 INT'L REV. L. & ECON. 5, 5 (2014); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 751 (2010); Brian Sheppard, *Incomplete Innovation and the Premature Disruption of Legal Services*, 2015 MICH. ST. L. REV. 1797, 1797 (2015).

39. *See* Henderson, *supra* note 38, at 14 (arguing that the traditional "artisan model of lawyering" is too expensive in a globalized world where "corporate clients need better, faster, and cheaper legal output").

40. *See generally* Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067 (2014) (exploring technological changes to the legal profession, including computerization, outsourcing, and insourcing).

41. *See* Thomas D. Morgan, *On the Declining Importance of Legal Institutions*, 2012 MICH. ST. L. REV. 255, 255 (2012).

42. *See* Richard Susskind, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES 33 (2008) (noting that "[l]awyers fear commoditization . . . [because] it seems to devalue the practice of law").

43. WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYER: PREPARATION FOR THE PROFESSION OF LAW 8 (2007) (asserting that "[s]tudents need a dynamic curriculum . . . [and] [l]egal education needs to be responsive to the needs of our time").

from practitioners who argue that legal scholarship lacks both relevance and theoretical integrity,[44] both the study and the practice of law must respond to changing business environments, new social norms and expectations, and the interconnected, globalized world. Unlike some of the more traditional areas of the law, fashion law uniquely captures the dynamics of modern consumer demand and the digital economy, rapid global communication and complex logistical chains, fundamental human rights questions, and accessible, high profile cases that appeal to a new generation of savvy students, businesses, and scholars. Hence, there is no better time to embrace fashion law.

As law is often reluctant to recognize emerging areas,[45] critics of fashion law would do well to consider the history of the study of law—and the academic literature's tendency to dismiss once emerging, but now well-established fields such as sports law[46] or cyber law.[47] Many other legal fields were also disjointed when they were first systematically organized, but today represent "coherent and fundamental building blocks of legal thought."[48] Therefore, neither the area's modernity nor its evolving nature should render fashion law a lesser field of study and practice.[49] Moreover, the dismissal of topical areas, which fall outside a constructed, rigid theory of law, neither extinguishes these fields nor diminishes their

44. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34–35 (1992).

45. Judge Easterbrook's dismissal of cyberlaw is perhaps the most celebrated recent miscalculation of emerging areas of the law. *See* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207. Although cyberlaw is clearly more visible, Professor Joan S. Howland challenges Judge Easterbrook's dismissal of equine law, noting that "horse racing and its associated legal norms are much older and well established than many legal doctrines from more well known, but comparatively younger, legal subjects." Joan S. Howland, *Let's Not "Spit the Bit" in Defense of "The Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing*, 14 MARQ. SPORTS L. REV. 473, 475 (2004).

46. Daniel E. Lazaroff, *The Influence of Sports Law on American Jurisprudence*, 1 VA. SPORTS & ENT. L.J. 1, 1–2 (2001); *see also* Matthew J. Mitten & Hayden Opie, *"Sports Law": Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 TUL. L. REV. 269, 272 (2010) ("'[S]ports law' has a legitimate place in a law school curriculum because of its challenging legal issues, multidisciplinary aspects, and practical relevance to a large sector of society, as well as the significant student interest which it generates.").

47. *See* Easterbrook, *supra* note 45, at 207; *see also* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 501 (1999) (critically examining constraints and efforts to regulate cyberspace).

48. Einer R. Elhauge, *Can Health Law Become a Coherent Field of Law?*, 41 WAKE FOREST L. REV. 365, 366 (2006).

49. For fundamental changes to legal education on both sides of the Atlantic, see SULLIVAN ET AL., *supra* note 43, at 8.

importance in the academy[50] or commerce.[51] Indeed, legal scholarship has been notoriously short-sighted and fickle in its tendency to challenge the relevance and significance of even the law's most prominent areas. Despite the apparent "death of contracts"[52]—that stalwart of the legal canon—the subject continues to occupy a prominent role in legal education and bar exams, vast amounts of billable hours, and countless pages of law reviews. Likewise, fashion law has emerged—and to put it simply: those who deny it are as philosophically sound—and sartorially culpable—as the emperor who has no clothes:[53] Modern courts,[54] progressive law schools,[55] and savvy lawyers[56] already confidently operate in this elegant corner of the law. Quite

50. *Cf.* Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773, 789 (1998). In particular, Professor Schauer notes: "As the law becomes more complex, however, what we see is not an increase in the number of general legal categories, but instead an increase in the number of legal topics and doctrines that are specific to pre-legal social, economic, cultural, and technological categories." *Id.*

51. *See* IMRAN AMED ET AL., THE STATE OF FASHION 2017, at 6 (2016), https://www.mckinsey.com/~/media/McKinsey/Industries/Retail/Our%20Insights/The%20state%20of%20fashion/The-state-of-fashion-2017-McK-BoF-report.ashx [https://perma.cc/9TYE-FK6S] (summarizing the main economic and business trends in the fashion industry). Worth $2.4 trillion, the value of the fashion industry surpasses the GDP of all but six countries. *Id.*

52. GRANT GILMORE, THE DEATH OF CONTRACT 1 (1974); *see also* Franklin G. Snyder & Ann M. Mirabito, *The Death of Contracts*, 52 DUQ. L. REV. 345, 348 (2014) (noting that "contract law as a distinct, coherent, and important body of law—the law generated through the appellate decisions of American courts and taught in American law schools for nearly a century and a half—is dying").

53. HANS CHRISTIAN ANDERSEN, THE EMPEROR'S NEW CLOTHES (1949).

54. In 2016 alone, high profile fashion law cases were featured in the rosters of courts on both sides of the Atlantic. *See, e.g.*, Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002, 1002 (2017) (considering when a feature of a useful article may receive protection under the Copyright Act); Cartier Int'l v. British Sky Broadcasting Ltd. [2014] EWHC 3354 (Ch) (Eng.) (ruling that the holders of trademarks may be granted injunctions against internet service providers to block websites).

55. *See supra* text accompanying note 5. In addition to Fordham Law School, the University of Insubria, and the Instituto Marangonia, a number of other educational institutions have centers for fashion law or courses on the subject. *E.g.*, *The Fashion, Arts, Media and Entertainment Law Center*, CARDOZO L. SCH., http://www.cardozo.yu.edu/FAMEcenter [https://perma.cc/G44R-3EEV]; *The Fashion Law Project*, LOY. L. SCH. L.A., http://www.lls.edu/academics/centers/thefashionlawproject/ [https://perma.cc/4UXX-N2KE]; *The Fashion Law Initiative*, N.Y. L. SCH., http://www.nyls.edu/innovation-center-for-law-and-technology/institutes-and-programs/fashion-law-initiative/ [https://perma.cc/6YD8-RU4Z].

56. A full list of law firms that practice fashion law is too numerous for this article, but such firms include both major international firms as well as boutiques including. *E.g.*, *Fashion*, FOX WILLIAMS, http://www.foxwilliams.com/fashion [https://perma.cc/TER2-VTPZ]; *Fashion Law: Luxury Goods, Designer Brands, & Retail*, ARRENT FOX, https://www.arentfox.com/practices-industries/fashion-law [https://perma.cc/6XX7-PN8H]; *Fashion Law*,

apart from IP, fashion law as a distinct field has now earned its place in academic study, scholarship, and professional practice. Before explaining the various aspects of fashion law in detail, this article first sketches the history of law and fashion.[57]

B. The Origins of Fashion Law

Historically, fashion has been associated with sumptuary laws that provided a means to regulate rank or position in society,[58] imposing dress codes—often with overtly sexist and racist rules—that granted the upper class the privilege to wear particular garments while prohibiting the lower classes from wearing specific items.[59] In ancient Greece, religious or secular rules often regulated clothing.[60] According to Harrianne Mills, these religious laws regulated the "cleanliness, the fabric, the color, and the design of the clothing" with rules for "the wearing of sandals, belts, headdresses, rings, and other gold ornamentation"[61] while similar laws governed secular dress.[62] Likewise, the *Lex Appia* set the standards of male Roman dress to denote social hierarchy,[63] and female Roman clothing marked "rank, status, and morality."[64] In medieval Europe, sumptuary regulation first appeared with Charlemagne's social ordering of the feudal system, and by the late 1300s, sumptuary laws were present throughout much of Europe.[65] Since the Middle Ages, various sumptuary laws attempted to limit expenditure on luxuries or

FOX ROTHSCHILD, http://www.foxrothschild.com/fashion-law/ [https://perma.cc/6XX7-PN8H]; *Fashion & Luxury Brands*, TAYLOR WESSING, https://united-kingdom.taylorwessing. com/en/consumer-and-retail/fashion-and-luxury-brands [https://perma.cc/6G7A-4BDV]; *Intellectual Property & IP Litigation*, CREFOVI, http://crefovi.com/london-law-firm-for-creative-industries-crefovi-practices/london-intellectual-property-law-firm-crefovi-intellectual-property/ [https://perma.cc/B9L4-9ND5]; *Luxury, Fashion and Beauty*, DENTONS, http://www.dentons.com/en/find-your-dentons-team/industry-sectors/luxury-fashion-and-beauty.aspx [https://perma.cc/TW8A-YETA]; *Luxury, Fashion and Retail*, MISHCON DE REYA, https://www.mishcon.com/services/fashion_and_retail-corporate [https://perma.cc/U9T6-M7ER].

57. Although a full account of the history of fashion law is beyond the scope of this article, Ruthann Robson provides an excellent account in her groundbreaking work. *See* ROBSON, *supra* note 13, at 5.

58. *See* HUNT, *supra* note 9, at 42.

59. C. Scott Hemphill & Jeannie Suk, *The Law, Culture and Economics of Fashion*, 61 STAN. L. REV. 1147, 1162 (2009).

60. Harrianne Mills, *Greek Clothing Regulations: Sacred and Profane?*, 55 ZEITSCHRIFT FÜR PAPYROLOGIE & EPIGRAPHIK 255, 257 (1984).

61. *Id.*

62. *Id.*

63. Kelly Olson, *Matrona and Whore: The Clothing of Women in Roman Antiquity*, 6 FASHION THEORY 387, 389 (2002).

64. *Id.* at 391.

65. Alan Hunt, *The Governance of Consumption: Sumptuary Laws and Shifting Forms of Regulation*, 25 ECON. & SOC'Y 410, 415 (1996).

to restrict types of clothing by class or other social category.[66] The earliest known law to regulate dress in England was Parliament's 1337 Charter,[67] addressing wool, fabrics, and animal skin,[68] which restricted dress based on class with prohibitions on wearing imported cloth and fur.[69] As Parliament significantly expanded rules over the next few centuries,[70] Professor Ruthann Robson has shown that various laws entrenched both economic and gender hierarchies by elevating the nobility, branding the poor, and limiting the freedom of women "[u]nder the guise of preventing crime and forestalling excess consumption."[71]

With colonialism, sumptuary laws took root outside of Europe.[72] To limit expenditure, the General Court of the Massachusetts Bay Colony in 1634 restricted the use of gold, silver, lace, and silk as well as certain items, including hats and other accessories.[73] By 1651, the Massachusetts General Court had moved to even stricter rules by attempting to restrict certain garments based on wealth and education, although it was unable to prescribe specific guidelines on enforcement.[74] Other colonies enacted further regulations on dress such as Virginia which prohibited—but notably did not define—an "excess of apparel" in 1619 and South Carolina which imposed a dress code for slaves through Acts of 1735 and 1740.[75] Increasingly, sumptuary laws took an economic tone as Great Britain began restricting the garments that its colonies could produce or export such as through the so-called Navigation Acts and the Hat Act.[76] By 1787, sumptuary laws *per se* were in decline at least in North America, and the U.S. Constitution includes neither "a mention of sumptuary laws, [n]or any reference to the power to direct individuals' 'love of distinction.'"[77] Hence, sumptuary laws fell out of fashion, subsequently leaving other legal means to regulate clothes.

66. *Id.*
67. 11 Edw. 3, c. 1–5 (Eng.).
68. ROBSON, *supra* note 13, at 8.
69. *Id.* at 9.
70. *See* Act for the Reformation of Excess Apparel 1553, 1 & 2 Phil. & M. c. 2–6; Act Against Wearing of Costing Apparel 1510, 1 Hen. 8 c. 14–15; Statute Concerning Diet and Apparel 1363, 37 Edw. 3, c. 1–19.
71. ROBSON, *supra* note 13, at 10.
72. *See id.* at 20–33.
73. *Id.* at 21–22.
74. *Id.* at 22.
75. *Id.* at 24.
76. *Id.* at 28–29.
77. *Id.* at 31.

C. Intellectual Property and the Fashion Industry

As sumptuary laws faded, industrialization and modernity saw the rise of IP laws.[78] Just as the little black dress[79] epitomizes fashion, IP has been the darling of fashion law[80] because IP protects a garment's originality—its main competitive advantage.[81] As such, IP in the fashion industry is a well-rehearsed topic in the academic literature; therefore, this Article provides only a brief summary and restricts its coverage to the United States and the European Union (EU), two of fashion's major players and markets. First, the following section considers IP and fashion in the United States, where the law has long deprived legal protection for designs.[82] Second, it briefly summarizes the laws of the European Union and certain of its member states, which in contrast to the U.S., offer enhanced protection for fashion design.[83]

1. Intellectual Property Law in the United States

As a general matter, U.S. IP law[84] has provided only limited protection for fashion design.[85] Over the past few years, a number of scholars have argued the merits for increasing protection while others have argued against such

78. The history of intellectual property in the fashion industry is anything but static and represents a rich cross-fertilization of various areas of the law vis-à-vis society and economic develop. *See* MEGAN RICHARDSON & JULIAN THOMAS, FASHIONING INTELLECTUAL PROPERTY 130–46 (2012). After considering the various factors that contributed to the dynamic area of intellectual property and its relevance to the development of fashion law, the authors poignantly note that much of the legal community has "forgot[ten] the utilitarian debates that lay behind [the] long nineteenth-century fashionings and refashionings, creating the myth of the law as always existing in some narrowly framed 'historical' form rather than—as it really was—in a constant state of flux in its efforts to deal with changing social, cultural and economic circumstances." *Id.* at 146.

79. FRED DAVIS, FASHION, CULTURE, AND IDENTITY 64 (1992).

80. *See* Hemphill & Suk, *supra* note 59, at 1150.

81. Alexandra Manfredi, *Haute Copyright: Tailoring Copyright Protection to High-Profile Fashion Designs*, 21 CARDOZO J. INT'L & COMP. L. 111, 115 (2012).

82. Daryl Wander, Note, *Trendsetting: Emerging Opportunities for the Legal Protection of Fashion Designs*, 42 RUTGERS L.J. 247, 251 (2010).

83. Matthew S. Miller, *Piracy in Our Backyard: A Comparative Analysis of the Implications of Fashion Copying in the United States for the International Copyright Community*, 2 J. INT'L MEDIA & ENT. L. 133, 141–44 (2008).

84. Industry efforts to combat style privacy through alternative means, such as guilds, have been unsuccessful. *See* Fashion Originators' Guild of Am., Inc. v. Fed. Trade Comm'n, 312 U.S. 457 (1941); Millinery Creators' Guild, Inc., v. Fed. Trade Comm'n, 312 U.S. 469 (1941).

85. *See* Marc Misthal, *Trademarks and Trade Dress*, *in* FASHION LAW, *supra* note 4, at 26.

enhanced laws.[86] Professor Susanna Monseau explains that, historically, copyright laws in the U.S. did not protect fashion as they have other creative industries "due to the division in the eyes of the law between the fine arts, like literature, music, and art, which are accorded copyright protection, and crafts, which are generally not."[87] Accordingly, U.S. IP laws recognize a distinction between works of art that may qualify for protection by copyright and "useful articles" which may not.[88] The U.S. Copyright Act[89] does not protect designs themselves because they are deemed functional items; however, particular elements of a design including "pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article"[90] may receive protection if they meet the test of "conceptual separability."[91] In addition to statutory law, U.S. courts have resisted the extension of copyright protection to items of fashion,[92]

86. *See, e.g.*, Hemphill & Suk, *supra* note 59, at 1150–51; Lauren Howard, *An Uningenious Paradox: Intellectual Property Protections for Fashion Designs*, 32 COLUM. J.L. & ARTS 333, 333–35 (2009); Miller, *supra* note 83, at 134–36; Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1689–91 (2006); Lynsey Blackmon, Comment, *The Devil Wears Prado: A Look at the Design Piracy Prohibition Act and the Extension of Copyright Protection to the World of Fashion*, 35 PEPP. L. REV. 107, 110–12 (2007); Lisa J. Hedrick, Note, *Tearing Fashion Design Protection Apart at the Seams*, 65 WASH. & LEE L. REV. 215, 216–18 (2008).

87. Susanna Monseau, *European Design Rights: A Model for the Protection of All Designers from Piracy*, 48 AM. BUS. L.J. 27, 32 (2011).

88. 17 U.S.C. § 101 (2012). "A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.'" *Id.*

89. *Id.* §§ 101–1301.

90. *Id.* § 101.

91. Galiano v. Harrah's Operating Co., 416 F.3d 411, 418 (5th Cir. 2005) (setting forth the two-prong test for "conceptual separability," including first, a determination of whether a design is useful and hence does not qualify for protection on this point, but instead proceeds to the second prong, where it may qualify for protection if the element in question could be separately identified and exist independently from the utilitarian aspects of the garment).

92. *See, e.g.*, Chosun Int'l, Inc. v. Chrisha Creations, Ltd., 413 F.3d 324, 327–28 (2d Cir. 2005) (holding that although copyright protection extended to garments whose design elements exist independently from the utilitarian function, the elements in question could not be separated).

determining that the creative aspects of clothing cannot be separated from general functionality.[93]

Trademark law[94] generally offers the most effective IP protection in the U.S.[95] through safeguarding distinctive logos or trade names to the extent they serve to identify the source of the product.[96] A word, name, symbol, or device[97] may acquire trademark protection in the normal course of commerce, and once acquired may be registered with the United States Patent and Trademark Office.[98] Because of the difficulty in securing design protection,[99] fashion designers often rely on labels, which may have trademark protection,[100] to protect their products, although color,[101] design, or packaging may also receive trademark protection.[102] Further, trademark laws protect so-called "trade dress," when the visual attributes of a product signal its source but are not functional.[103] In *Wal-mart Stores v. Samara Brothers*, the U.S. Supreme Court recognized two categories of "trade dress": the protection of product design and the protection of product packaging.[104] For product packaging protection, the packaging of the product must be inherently distinctive or have acquired a so-called secondary meaning[105] as explained below. Regarding design protection, the Court held that the actual product might not be protected, as it could not be inherently distinctive;[106] however, a product's packaging may be protected when it is inherently distinctive.[107] Both design and packaging may receive protection when they have acquired a secondary meaning, or when the public associates the design or packaging with the brand.[108] A particular problem associated with trade dress is the

93. Arielle K. Cohen, *Designer Collaborations as a Solution to the Fast-Fashion Copyright Dilemma*, 11 CHI.-KENT J. INTELL. PROP. 172, 177 (2012).
94. *See generally* Lanham Act, 15 U.S.C. §§ 1051–127 (2012).
95. Scafidi, *Intellectual Property and Fashion Design*, *supra* note 3, at 121.
96. Misthal, *supra* note 85, at 28.
97. 15 U.S.C. § 1127.
98. *See* Misthal, *supra* note 85, at 30–39 (explaining the process of registration).
99. *See, e.g.*, Louis Vuitton Malletier v. Burlington Coat Factory Warehouse Corp., 426 F.3d 532, 534 (2d Cir. 2005) (considering the "likelihood-of-confusion" in items of fashion and determining that a side-by-side comparison is adequate and attention to wider market conditions is necessary under the Lanham Act).
100. *See* Scafidi, *Intellectual Property and Fashion Design*, *supra* note 3, at 120.
101. Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 171–74 (1995). For a full discussion of trademark protection for colors, see Sunila Sreepada, Note, *The New Black: Trademark Protection for Color Marks in the Fashion Industry*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1131, 1135 (2009).
102. *See* Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 209 (2000).
103. Misthal, *supra* note 85, at 36.
104. *Wal-Mart Stores, Inc.*, 529 U.S. at 209.
105. *Id.* at 210–11.
106. *Id.* at 212–13.
107. *Id.* at 213–15.
108. *Id.* at 211–14.

requirement that the public is able to recognize an item as the work of a particular fashion house without referring to its label. Such standard renders this protection inapplicable for most designs as only rarely do they achieve the requisite "iconic recognition" to acquire trade dress status.[109] The envy of shoe fashionistas around the world,[110] Christian Louboutin's signature "lacquered red sole"[111] provides a particularly elegant example of trade dress. In *Christian Louboutin v. Yves Saint Laurent*, the U.S. Court of Appeals for the Second Circuit held that Louboutin's distinctive red soles had acquired limited secondary meaning due to their association as a defining feature of the brand.[112]

Although more limited than trademark, patent law offers protection for functional fashion designs or design elements that are substantially innovative and reach the requirements for patenting an invention.[113] The U.S. Patent Act allows protection for designs for shoes, handbags, jewelry, and other items through obtaining a design patent valid for fifteen years.[114] A design patent protects the concept of the product, not the product itself, and must be novel and non-functional, meaning that apparel that is deemed functional is not entitled to patent protection.[115] Although some scholars may discount the importance of design patents, they nonetheless offer a means for protection of certain articles of fashion.[116]

109. Cohen, *supra* note 93, at 175.

110. *See* Hadley Freeman, *Christian Louboutin: How Killer Heels Conquered Fashion*, GUARDIAN (Mar. 19, 2010), https://www.theguardian.com/lifeandstyle/2010/mar/19/christian-louboutin-high-heels [https://perma.cc/JNQ4-T3ZM].

111. "The mark consists of a lacquered red sole on footwear." RED SOLE MARK, Registration No. 3,361,597.

112. 696 F.3d 206, 212 (2d Cir. 2012). For a full discussion, see Monica Sullivan, Comment, *After* Louboutin*: Responding to Trademark Ownership of Color in Creative Contexts*, 64 MERCER L. REV. 1047, 1047 (2012). The author concludes: "The protection of color in the fashion context is unlikely to be limited any further in light of the fact that the *Christian Louboutin* case has reached finality (for now)." *Id.* at 1075–76.

113. Scafidi, *Intellectual Property and Fashion Design*, *supra* note 3, at 122.

114. 35 U.S.C. § 173 (2017).

115. Elizabeth Ferrill & Tina Tanhehco, *Protecting the Material World: The Role of Design Patents in the Fashion Industry*, 12 N.C. J.L. & TECH. 251, 278–79 (2011).

116. *See id.* at 277–89 (discussing design protections, the application for design protection, and the elements that provide a strong design patent).

2. Intellectual Property Law in the European Union

In contrast to the minimal protection under U.S. IP law, European law offers enhanced protection both at the national and European Union levels.[117] The EU Designs Protection Directive[118] provides a regulatory framework for the protection of "designs by registration"[119] in the European Union.[120] The Directive defines design as "the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation."[121] To qualify for protection, a design must "be new . . . and have individual character," meaning that "the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter, and . . . those features of the component part fulfill in themselves the requirements as to novel and individual character."[122] In addition, EU Regulation 6/2002 provides protection for registered rights for five years with a possible renewal for twenty-five years, and for unregistered rights for three years.[123] Further, Directive 2004/48/EC requires Member States to adopt "measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights"[124] and provides specific rights to parties who reasonably show infringement of their intellectual property rights[125] to prevent such goods from "entry into or movement within the channels of commerce."[126] Council Regulation 1383/2003 provides a legal mechanism for custom authorities to take action on goods that may infringe IP rights.[127] In addition to EU protection, European national IP laws, particularly in the

117. *See* Tedmond Wong, Comment, *To Copy or Not To Copy, That Is the Question: The Game Theory Approach To Protecting Fashion Designs*, 160 U. PA. L. REV. 1139, 1148–52 (2012) (summarizing protection in the EU, France, and the United Kingdom).

118. Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the Legal Protection of Designs, 1998 O.J. (L 289).

119. *Id.* art. 3.

120. In contrast to self-executing European regulations, European directives oblige member states to achieve a policy aim without specifying the particular means of implementation.

121. Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the Legal Protection of Designs, art. 1(a), 1998 O.J. (L 289).

122. *Id.* art. 3.

123. Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs, art. 11–12, 2002 O.J. (L 3).

124. Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, ch. II, § 1, art. 3, 2004 O.J. (L 195).

125. *Id.* § 2, art. 7.

126. *Id.* § 4, art. 9.

127. Council Regulation (EC) NO 1383/2003 of 22 July 2003 Concerning Customs Action Against Goods Suspected of Infringing Certain Intellectual Property Rights and the Measures To Be Taken Against Goods Found To Have Infringed Such Rights, art. 1, 2003 O.J. (L 196) 7.

United Kingdom,[128] France,[129] Italy,[130] Germany,[131] and the Netherlands[132] provide additional rigorous protection. With the 2016 referendum on the UK's membership in the EU, there are likely to be significant legal developments in the UK as it redefines its legal relationship with the body of EU law. In any case, the UK will be subject to EU law until it formally leaves the EU, a process triggered by the Conservative Government's invocation of Article 50 of the Lisbon Treaty[133] in March 2017.

III. ANALYSIS

Just as the Chanel 2.55 handbag, the Burberry trench coat, and a navy blazer constitute some of fashion's "classic" pieces,[134] the emerging field of fashion law is developing its collection beyond a particular focus on IP; therefore, the remainder of this Article analyzes key areas for further research.[135] This analysis will cover much of Professor Scafidi's "four basic pillars"—"intellectual property," "business and finance," "international trade and government regulation," and "consumer culture and civil rights"—although this Article will not address the various commercial arrangements that underline the business of fashion law as so doing would make the scope of the

128. *See* Copyright, Designs and Patents Act 1988, c. 48 (Gr. Brit.); Registered Designs Act 1949, c. 88 (Gr. Brit.); The Registered Designs Regulations 2001, SI 2001/3949 (Gr. Brit.) (implementing Directive 98/71/EC).

129. *See* Code de la Propriété Intellectuelle [C. Prop. Intell.] [Intellectual Property Code] (Fr.) (providing comprehensive protection for designs).

130. *See* Legge 22 aprille 1941, n. 633, G.U. July 16, 1941, n. 166 (It.) (Italian Copy Law); *see also* Decreto Legislativo 10 febbraio 2005, n.273, C. proprieta industrial Dec. 12, 2002, n.30 (It.) (Code of Industrial Property) (granting broad copyright protection to articles of fashion and requiring industrial designs to have artistic value).

131. *See* Gesetz *ü*ber den rechtilichen Schutz von Mustern und Modellen - Geschmacksmustergesetz [GeschmMG] [Act on the Legal Protection of Designs], Mar. 12, 2004, BUNDESGESETZBLATT, Teil I [BGBL I] at 122 (Ger.); Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, BUNDESGESETZBLATT, Teil I [BGBL I] at 1273 (Ger.) (providing copyright protection for a design if is of high artistic value and it is sufficiently novel, differing from previous designs to the extent that it is regarded as an individual intellectual creation).

132. *See* Benelux-Verdrag Inzake de Intellectuele Eigendom 25 februari 2005, Trb. 2005 (Benelux Convention on Intellectual Property); Auteurswet 23 september 1912, Stb. 1912 (Neth.) (Dutch Copyright Act).

133. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 OJ (C 306) 1.

134. MALCOLM BARNARD, FASHION THEORY: AN INTRODUCTION 71 (2014).

135. *See* Scafidi, *Fiat Fashion Law!*, *supra* note 16, at 11.

current work unmanageable.[136] Instead, the first section focuses on the particular deficiencies of the current IP law framework in providing protection to articles of fashion and designers. The second section examines fashion's interplay with society, focusing on fundamental human rights with respect to clothing, ethical issues in fashion advertising, and certain laws designed to regulate the fashion industry's impact on health. The third section analyzes the legal challenges facing adequate labor regulation for the fashion industry. The fourth section considers the deficiencies in the law that inhibit greater sustainability in the fashion industry. The article concludes by encouraging diversification of fashion law's research agenda from primarily IP into other areas that are fundamental to the industry and the law.

A. Protection of Intellectual Property in the Fashion Industry and Its Deficiencies

With an international patchwork of IP laws and various levels of global enforcement,[137] the fashion industry continues to face legal challenges to protecting its value.[138] Although IP is the most developed area of fashion law,[139] it nonetheless suffers from a number of weaknesses. As Professor Andrew Beckerman-Rodau notes, the law's inconsistent IP framework for clothing creates an unpredictable regime characterized by an arbitrary approach to the protection of items of fashion.[140] As a chorus of scholars has persuasively set forth the arguments for enhanced protection,[141] a comprehensive overview

136. However, an increasing body of literature summarizes the various commercial issues that influence fashion law and are deserving of further academic research. *See, e.g.*, FASHION LAW, *supra* note 4; HERZECA & HOGAN, *supra* note 4.

137. According to the European Commission, €60,0694,518 worth of counterfeit clothing, €24,523,125 worth of counterfeit clothing accessories, €62,702,690 worth of counterfeit shoes, €56,089,097 worth of bags (purses, wallets, etc.), and €12,815,215 worth of jewelry or other accessories entered the European Union in 2014. EUROPEAN COMM'N, REPORT ON EU CUSTOMS ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: RESULTS AT THE EU BORDER 2014, at 28 (2015), https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2015_ipr_statistics.pdf [https://perma.cc/94RU-CCG8].

138. *See* Kevin V. Tu, *Counterfeit Fashion: The Interplay Between Copyright and Trademark Law in Original Fashion Designs and Designer Knockoffs*, 18 TEX. INTELL. PROP. L.J. 419, 420–21 (2010).

139. *See* Hemphill & Suk, *supra* note 59, at 1150.

140. Andrew Beckerman-Rodau, *The Problem with Intellectual Property Rights: Subject Matter Expansion*, 13 YALE J.L. & TECH. 35, 79 (2011).

141. *See, e.g.*, Matteo Mancinella, *Copyright Subject Matter and a "Light" for Designers' Rights*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 523, 525 (2013); Loni Schutte, *Copyright for Couture*, 10 DUKE L. & TECH. REV. 1, 3 (2011); Aya Eguchi, Note, *Curtailing Copyright Couture: The Merits of the Innovative Design Protection and Piracy Prevention Act and a Licensing Scheme for the Fashion Industry*, 97 CORNELL L. REV. 131, 157 (2011).

is beyond the scope of this Article. Instead, the following highlights some of the most problematic *lacunae* in the law.

First, various jurisdictions either lack or fail to enforce appropriate IP laws.[142] As discussed above, the European Union offers a high level of IP protection, while the U.S. restricts protection to functionality rather than style or design, and other countries offer no legal protection for either functionality or design.[143] Moreover, as poignantly expressed by Professor Brian Hilton *et al*., "[i]t is always possible to find a country where one can manufacture blatant copies or counterfeits with no fear of falling foul of the law."[144] Without robust global standards and vigorous enforcement, the fashion industry faces significant challenges in protecting its value.

Even though IP has been the staple of fashion law, the depiction of "IP producers as powerful and IP users as weak" is not completely accurate in the case of the U.S.[145] With 38% of the global top 200 fashion companies by market capitalization based in North America,[146] some argue that the fashion industry is "a thriving and powerful business that operates outside traditional intellectual property law."[147] Notwithstanding the economic power of large fashion firms, such a simplistic view of the industry overinflates the economic power of fashion firms, ignores the ethical arguments[148] for stronger IP protection, and fails to adequately consider small and emerging designers.[149] Further, weak IP laws continue to disadvantage fashion designers in the U.S. compared with their counterparts in other parts of the world,

142. Tai-Heng Cheng, *Power, Norms, and International Intellectual Property Law*, 28 MICH. J. INT'L L. 109, 111–12 (2006).

143. Brian Hilton et al., *The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues*, 55 J. BUS. ETHICS, 345, 345 (2004).

144. *Id.* at 345–46.

145. Cheng, *supra* note 142, at 119.

146. *FashionUnited Launches Top 200 Global Fashion Companies*, FASHIONUNITED (Dec. 1, 2015), https://fashionunited.info/news/business/top200/2015120174 [https://perma.cc/W4QY-BP36].

147. Victoria R. Watkins, *Copyright and the Fashion Industry*, LANDSLIDE, Jan./Feb. 2011, at 53, 54.

148. *See* Hilton et al., *supra* note 143, at 348; *see also* Brian Angelo Lee, *Making Sense of "Moral Rights" in Intellectual Property*, 84 TEMP. L. REV. 71, 90 (2011) (arguing that an economics-based account of intellectual property is inadequate, as non-economic moral considerations play as important a role in American intellectual thought).

149. Burberry's efforts to protect its signature checkered design illustrates the great efforts and expense that established designers must routinely take to protect their designs, and which less established designers are unlikely to match. *See* Burberry Ltd. v. Euro Moda, Inc., No. 08 Civ. 5781, 2009 WL 1675080, at *1 (S.D.N.Y. June 10, 2009).

most notably in Europe.[150] Yet, Congress has perennially failed to pass stricter IP law for fashion, "primarily for fear of restraining competition or promoting litigiousness."[151] Aside from political reluctance to strengthen IP law, there is also a lack of consensus between designers[152] and scholars for enhanced protection, with some scholars arguing that enhanced IP protection is unnecessary and that copying actually sparks creativity, which Professor Kal Raustiala and Professor Christopher Sprigman term the "privacy paradox."[153] According to this theory, copying benefits designers through the process of "induced obsolescence" that occurs when copying accelerates fashion cycles by causing the most fashionable consumers to demand new styles as soon as copyists have produced knock-off copies for the masses.[154] Proponents of the theory further argue that copying benefits consumers who demand trendy styles but who cannot afford the more expensive originals that are either protected by trademarks or suitably different from the copies to the extent they retain their value among the elites.[155] Moreover, adherents of the theory argue that copying promotes so-called "anchoring," the term that describes the process by which new trends emerge, converge, and capture the imagination of consumers.[156] Given the strong arguments for and against stricter IP protect of items of fashion, U.S. legislative efforts have stumbled in providing a legal regime that suitably protects designers and their garments.[157]

In response to the weakness of IP laws in the U.S., designers, fashion companies, and courts have developed other means to enhance the protection of designs and products. For example, designers have increasingly relied on prominent logos[158] to the detriment of more innovative product designs.[159]

150. *See* Miller, *supra* note 83, at 141–44.

151. Note, *The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment*, 127 HARV. L. REV. 995, 999 (2014) [hereinafter *The Devil Wears Trademark*].

152. *See* L.J. Jackson, *Some Designers Say Their Work Deserves Copyright Protection; Others Say It Would Harm the Industry*, A.B.A. J. (July 2011), http://www.abajournal.com/magazine/article/the_genuine_article [https://perma.cc/U8EJ-GBXJ].

153. *See* Raustiala & Sprigman, *supra* note 86, at 1691. The authors point out that their "core claim is that piracy is paradoxically beneficial for the fashion industry, or at least piracy is not very harmful." *Id.* at 1727.

154. *Id.* at 1722.

155. *See id.* at 1722–23.

156. *Id.* at 1729.

157. In the past few years, Congress has failed to pass a number of proposed legislative initiatives that would have addressed the lack of IP protection for fashion articles. *See* Innovative Design Protection Act, S. 3523, 112th Cong. (2012); Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. (2010); Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).

158. *See* Scafidi, *Intellectual Property and Fashion Design*, *supra* note 3, at 121.

159. *See The Devil Wears Trademark*, *supra* note 151, at 996.

Logos are not simply artistic flairs,[160] but they are often paramount to the design itself as they provide one of the few means of protection. Therefore, such logoization stifles creativity by forcing designers to rely on logos to adequately protect a product in the absence of robust legal design protection.[161] To halt this logoization, Congress should reform IP law by adopting *sui generis* legislation to protect fashion design.[162]

Beyond logoization, current IP law may restrict creativity and customer choice in other ways. To explain, where designers have produced garments that have achieved an inherently distinctive look—and thus qualify for IP protection—the law often disincentivizes innovative designs that may be constrained by the inability to adequately protect them if such designs are deemed to vary too greatly with the designs typically associated with the particular brand.[163] This situation simultaneously disadvantages new designers whose styles are not yet well-known, established designers who wish to experiment with new "looks," and society at large that would benefit from enhanced creativity and greater consumer choice. Moreover, Professor Scott Hemphill and Professor Jeannie Suk note that the existing IP regime of limited legal protection "tends, if anything, to push fashion consumption and production in the direction of status and luxury rather than more polyvalent production."[164] The limited IP regime further skews the market to large, established fashion companies that have the resources and legal counsel to protect their designs, which often regard copycat designs as "flattery" devoid of any real threat.[165] Meanwhile, the law significantly undermines emerging designers who often lack the resources, legal mechanisms, and ability to indicate a unique source to adequately protect their fashions from copying and lack the public notoriety to benefit in the same way more established brands do.[166] Therefore, the law's lack of

160. *See id.* at 1002; Jacqueline Lechtholz-Zey, Comment, *Third Time's a Charm? Why Congress Should Modify the Newest Incarnation of the Design Piracy Prohibition Act*, 30 LOY. L.A. ENT. L. REV. 511, 531 (2010).

161. *The Devil Wears Trademark*, *supra* note 151, at 1011.

162. *Id.* at 996.

163. Hemphill & Suk, *supra* note 59, at 1166, 1176; *see* Miller, *supra* note 83, at 135–36; Lisa J. Hendrick, Note, *Tearing Fashion Design Protection Apart at the Seams*, 65 WASH. & LEE L. REV. 215, 216–22 (2008).

164. Hemphill & Suk, *supra* note 59, at 1179.

165. Margaret E. Wade, Note, *The Sartorial Dilemma of Knockoffs: Protecting Moral Rights Without Disturbing the Fashion Dynamic*, 96 MINN. L. REV. 336, 340 (2011).

166. *Id.* at 341.

adequate protection distorts design and unduly harms small and emerging designers.

Aside from the manner in which IP laws may entrench established designers, the law has failed to adapt to technological advances. As production costs have declined sharply, concurrently with an acceleration of the speed of production,[167] exact runway design copies may appear in discount shops before distribution of authentic copies.[168] This atmosphere of rapid production cycles and limited design protection provides the platform for the "fast fashion" model,[169] pioneered by the Spanish company Zara and effectively used by other retailers including H&M, Forever 21, and Topshop.[170] With short production times and trendy designs,[171] the fast fashion business model delivers designs inspired by "high-cost luxury fashion trends" at minimal costs.[172] Rather than investing in design, fast fashion companies take inspiration from trends and customer behavior,[173] thereby reducing creativity and instead driving innovation away from fashion's expressive capacity in favor of its conferral status.[174] In particular, fast fashion disincentivizes the development of new designs, as copies harm the value of original designs.[175] Ultimately, this drag on innovation further favors established, well-known designs, further disadvantaging emerging designers.[176]

Against these developments, it is important to point out that the law is ill-equipped to protect designers in the world of fast fashion that rapidly converts "catwalk styles" into mass-produced items, aided by the fashion press, which often focuses on common features of designs in order to identify specific season looks.[177] Moreover, the prevalence of social media and its influence on style[178] at once disperses the latest trends to the masses,[179]

167. Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 834–35 (2010).
168. *Id.* at 835.
169. Wong, *supra* note 117, at 1153–54.
170. ELIZABETH L. CLINE, OVER-DRESSED: THE SHOCKINGLY HIGH COST OF CHEAP FASHION 96 (2012).
171. According to Cachon and Swinney, fast fashion includes "short production and distribution lead times" and "highly fashionable ('trendy') product design." Gérard P. Cachon & Robert Swinney, *The Value of Fast Fashion: Quick Response, Enhanced Design, and Strategic Consumer Behavior*, 57 MGMT. SCI. 778, 778 (2011).
172. Annamma Joy et al., *Fast Fashion, Sustainability, and the Ethical Appeal of Luxury Brands*, 16 FASHION THEORY 273, 275 (2012).
173. Nebahat Tokatli, *Global Sourcing: Insights from the Global Clothing Industry—The Case of Zara, a Fast Fashion Retailer*, 8 J. ECON. GEOGRAPHY 21, 22–23 (2007).
174. Hemphill & Suk, *supra* note 59, at 1170.
175. *Id.* at 1174.
176. *Id.* at 1176–77.
177. *See* Tokatli, *supra* note 173, at 29.
178. *See* Wade, *supra* note 165, at 343.
179. *See* Wander, *supra* note 82, at 258–59.

which benefits fast fashion companies more than the actual designer.[180] Further, fast fashion companies have focused their infrastructure on rapid communications networks and efficient supply chains rather than actually shaping new styles.[181] As a result, fast fashion may ultimately harm creativity in the industry, providing consumers with fewer innovative designs from which to choose. Fast fashion further encumbers longer-term creativity because established fashion companies necessarily enjoy a favored position vis-à-vis newer designers who lack well-known marks that attract customer patronage.[182] Congress and other more forward-thinking legislatures should consider new forms of legal protection for the innovative ideas and contributions of designers.[183]

Even though trademarks provide the primary legal protection of brands and licenses,[184] the limitations of trademark protection mean that other factors play a key role in ensuring the long-term value of brands.[185] For example, U.S. trademark law provides that the owner of a famous trademark has the right to bring a dilution action against an item that tarnishes or disturbs the distinctiveness of the trademark.[186] In contrast, the holder of a trademark that has not reached such high notoriety—which is often the case except for the most well-known designers—will only be able to bring an action to enforce the trademark under more restricted circumstances. In the strictest sense, trademark law may protect the brand; yet, a brand encompasses the full image of a fashion designer and can be influenced by much more than counterfeits and dilution.[187] The current legal approach to brands often fails to address these other issues and myopically focuses

180. *See* Tokatli, *supra* note 173, at 29.
181. *Id.*
182. *See* Amy L. Landers, *The Anti-Economy of Fashion; An Openwork Approach to Intellectual Property Protection*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 427, 465 (2014).
183. For one such innovative approach, see *id.* at 430.
184. Henry Welt, *Fashion Entrepreneurship: Starting and Developing the Business*, *in* FASHION LAW, *supra* note 4, at 176.
185. *See* Peter M. Kort et al., *Brand Image and Brand Dilution in the Fashion Industry*, 42 AUTOMATICA 1363 (2005) (quantitatively evaluating the importance of sales volumes on the dilution of brands).
186. 15 U.S.C. § 1125(c)(1) (2012).
187. *Cf.* Watkins, *supra* note 147, at 54 ("Due to limited legal protection, the fashion industry relies more on business methods, such as strong brand marketing in commercials and print ads to create brand identity and customer loyalty. Fashion, thus, fosters a thriving and powerful business that operates outside of the traditional intellectual property law.").

on the limited tools of IP protection, which may be neither available nor effective.

Moreover, technological advances[188] and the public's insatiable appetite for further innovation destabilizes the foundation upon which IP law rests. Additive manufacturing—or "3D printing"—poses particular problems with respect to counterfeiting and the authenticity of garments,[189] particularly when the limited empirical data on fashion counterfeiting suggests that consumers may regard fashion copying as less egregious than counterfeiting in other industries.[190] As fashion designers and manufacturers experiment with 3D printing,[191] it has become increasingly important to consider not only the "implicit technological constraint" risks that technology poses to the foundations of IP[192] but also the future relevance of protecting designs and fashion apparel. In the context of the mined diamond industry that has faced competition from synthetic diamonds, Professor Barton Beebe argues that the prevalence of high quality imitations will eventually undermine the scarcity of diamonds.[193] By analogy, it follows that without adequate IP laws, exact copies of fashion items risk eroding the authenticity of brands through inhibiting the detection of counterfeits as well as raising issues of quality control.[194] As technology continues to outpace the appropriate law to regulate it, legal scholarship is all the more important in this area as a means to inform policymakers and lay the foundation for effective regulation.

Against the lack of adequate IP protection as well as technological threats to its integrity, Professor Christophe Geiger notes that the "public

188. *See* Wander, *supra* note 82, at 257.

189. *See* Dhani Mau, *How 3-D Printing Could Change the Fashion Industry for Better and for Worse*, FASHIONISTA (July 19, 2013), https://fashionista.com/2013/07/how-3-d-printing-could-change-the-fashion-industry-for-better-and-for-worse [https://perma.cc/5R3T-UJGT].

190. Joanna Large, *Consuming Counterfeits: Exploring the Assumptions About Fashion Counterfeiting*, 9 PAPERS FROM BRIT. CRIMINOLOGY CONF. 3, 16 (2009), http://www.britsoccrim.org/volume9/wholedoc09.pdf [https://perma.cc/M28W-HHYP].

191. Jeanette Cuzella, *Fast Fashion: A Proposal for Copyright Protection of 3D-Printed Apparel*, 13 COLO. TECH. L.J. 369, 370 (2015). In particular, Dutch designer Iris van Herpen has led the fashion industry in the use of 3D-printing by working with architects and engineers to pioneer works, which have appealed to trendsetters such as Lady Gaga and Björk. *See* Mark Holgate, *Meet Iris van Herpen, the Dutch Designer Boldly Goes into the Future*, VOGUE (Apr. 28, 2016), http://www.vogue.com/article/iris-van-herpen-dutch-designer-interview-3d-printing [https://perma.cc/H2ZX-46S2]; Liz Logan, *The Dutch Designer Who Is Pioneering the Use of 3D Printing in Fashion*, SMITHSONIAN (Nov. 6, 2015), http://www.smithsonianmag.com/innovation/dutch-designer-who-pioneering-use-3d-printing-fashion-180957184/ [https://perma.cc/5QW7-4K4T].

192. Harry Surden, *Technological Cost as Law in Intellectual Property*, 27 HARV. J.L. & TECH. 135, 151 (2013).

193. Beebe, *supra* note 167, at 833.

194. Mau, *supra* note 189.

at large" has questioned the very foundation of IP.[195] In particular, IP law tends to promote the interest of Western notions of property without appropriately protecting indigenous cultural property or other views of property.[196] Current IP regulatory structures reflect Western notions of property without adequately appreciating the unique dichotomy between the indigenous knowledge and the people to which it belongs.[197] For example, Professor Peter Shand argues that the unauthorized incorporation of indigenous Maori patterns in Jean-Paul Gaultier's Spring/Summer 2000 lines not only misappropriated the cultural design but also did it in a gravely offensive manner, noting that the pieces did "not seem to even enter into the ken of a blithe spirit of contemporary fashion."[198] Additionally, cultural and artistic traditions may actually conflict with basic assumptions of Western IP law.[199] In stark departure from the Western philosophical foundations of IP law, China historically has regarded imitation as "a noble art" rather than "a moral offense."[200] Hence, Western notions of IP may run counter to traditional Chinese morality by concentrating important elements of "life, culture, and society" from the public domain into a limited number of IP right holders.[201] Increasing globalization demands that comparative legal scholarship examines this clash of cultures and notions of property.

195. Christophe Geiger, *"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 INT'L REV. INTELL. PROP. & COMPETITION L. 371, 373 (2006).

196. *See* David S. Welkowitz, *Privatizing Human Rights? Creating Intellectual Property Rights from Human Rights Principles*, 46 AKRON L. REV. 675, 717–21 (2013) (arguing that others may seek to exploit traditional knowledge and granting greater protection to the owners of traditional knowledge "would not necessarily favor the usual IP rights regime").

197. Peter Shand, *Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion*, 3 CULTURAL ANALYSIS 47, 61 (2002).

198. *Id.* at 74. Professor Shand praises the approach of Moontide, the New Zealand swimsuit company, in its consultation with the local community for its use of indigenous designs that reflect not only commercial viability but also cultural respect. *Id.* at 71–72.

199. *See* Welkowitz, *supra* note 196, at 717–21; *see also* Wanjiku Karanja, *The Legitimacy of Indigenous Intellectual Property Rights Claims*, 1 STRATHMORE L. REV. 165, 173–76 (2016) (examining the limitations of intellectual property law to protect indigenous knowledge and proposing potential alternative forms of protection).

200. Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt To Use Shakespeare To Reconfigure the U.S.–China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 17 (2001).

201. *Id.*

B. Society and Fashion Law

Throughout history, fashion has exerted a fundamental influence on society,[202] and the media, civil society, and others have routinely criticized the industry's role and impact on the public, often demanding changes in the law to curtain the alleged offensive behavior.[203] As fashion necessarily exists to distinguish its adherents,[204] it has often exerted a divisive force in society as well as acted as a visible symbol of inequality, encouraging the fashionable to distinguish themselves through "conspicuous consumption."[205] Historically, one of fashion's dominant theories associated with Thorsten Veblen holds that social elites adopt particular fashions in order to distinguish themselves from those of a lower class;[206] yet, unlike previous social epochs, rapid, inexpensive production methods have democratized fashion,[207] delivering popular designs and trends within the reach of most consumers.[208] This democratization, fueled by the rise of "chic-cheap" courtesy of design copyists, has loosened the distinction between exclusive designers and those who market to the masses.[209] Further, the fast fashion movement has largely defeated the moral critique of fashion's exclusive right of the wealthy[210] as Professor Nebahat Tokatli has demonstrated that fast fashion retailers have generally refocused consumption away from "exclusivity, glamour, originality,

202. *See generally* THE FORCE OF FASHION IN POLITICS AND SOCIETY: GLOBAL PERSPECTIVES FROM EARLY MODERN TO CONTEMPORARY TIMES (Beverly Lemire ed., 2010) (providing a collection of studies that explore various cultural, economic, and political developments through the lens of fashion).

203. *See generally, e.g.*, CAROLINE WEBER, QUEEN OF FASHION: WHAT MARIE ANTOINETTE WORE TO THE REVOLUTION (2006) (examining the power of fashion in the context of the French Revolution); Donald Quataert, *Clothing Laws, State, and Society in the Ottoman Empire*, 1720–1829, 29 INT'L J. MIDDLE EAST STUD. 403, 403 (1997) (discussing the role of clothing in transforming politics and society in the Ottoman Empire in the 18th and 19th Century); Mary Louise Roberts, *Samson and Delilah Revisited: The Politics of Women's Fashion in 1920s France*, 98 AM. HIST. REV. 657 (1993) (analyzing the evolution of women's fashion and its critics in France in the early 1900s).

204. *See* Georg Simmel, *Fashion*, 10 INT'L Q. 130, 138 (1904).

205. *See* THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS 68–101 (1912).

206. *See id.* at 171.

207. Margaret Chon, *Slow Logo: Brand Citizenship in Global Value Networks*, 47 U.C. DAVIS L. REV. 935, 957 (2014).

208. *See* Farkas, *supra* note 2, at 227.

209. Susanna Monseau, *European Design Rights: A Model for the Protection of All Designers from Privacy*, 48 AM. BUS. L.J. 27, 36 (2011).

210. However, more recent research has argued that "[t]he traditional economic account of the fashion process incorrectly assumes that individuals and groups innovate new fashions primarily to assert their status as hierarchically superior to others." Beebe, *supra* note 167, at 822.

luxury, and life style" and toward "'massclusivity' and 'planned spontaneity.'"[211]

Regardless of motivations, the law indirectly sets some limits on conspicuous consumption through restrictions on the supply chain of the fashion industry, such as the use of certain precious metals,[212] diamonds,[213] and animal products.[214] Beyond these limits on raw materials, the laws regarding dress have moved away from historical sumptuary regulations and become more influenced by basic notions of freedom of expression, speech, and religion. Article 19 of the Universal Declaration of Human Rights[215] and Article 19 of the International Covenant on Civil and Political Rights[216] recognize a universal right to freedom of expression.[217] In the United States, a number of courts have wrestled with concepts of freedom of speech and freedom of expression in the context of clothing.[218] U.S. law does not allow true political speech to be curtailed,[219] but courts recognize various exemptions,[220]

211. Tokatli, *supra* note 173, at 23.

212. Section 1502 of the Dodd-Frank Wall Street Reform and Protection Act provides a regulatory regime to require publicly traded companies in the United States to disclose the origin of so-called conflict minerals (including gold) from the Democratic Republic of Congo or adjoining countries. *See* 15 U.S.C. § 78m(p) (2012).

213. The Kimberly Process provides a UN-mandated registration system to eradicate trade in so-called conflict diamonds. *See What Is the Kimberly Process?*, KIMBERLY PROCESS, https://www.kimberleyprocess.com/en/what-kp [https://perma.cc/KKZ8-FHN9].

214. With 182 signatories, the Convention on International Trade in Endangered Species of Wild Fauna and Flora provides an international approach to the regulation of animal products, such as trade in ivory, various types of fur, and other materials that may be used in the fashion industry. *See What Is CITES?*, CITES, https://www.cites.org/eng/disc/what.php [https://perma.cc/W3NJ-SDGF].

215. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), http://www.refworld.org/docid/3ae6b3712c.html.

216. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966), http://www.refworld.org/docid/3ae6b3aa0.html.

217. For a succinct summary of salient aspects of the right of freedom of expression in the United States and Europe, see Elisabeth Zoller, *Foreword: Freedom of Expression: "Precious Right" in Europe, "Sacred Right" in the United States?*, 84 IND. L.J. 803, 803 (2009).

218. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Tinker v. Des Moines Indep. Cmty. Dist., 393 U.S. 503 (1969); Phillips v. Anderson Cty. Sch. Dist. Five, 987 F. Supp. 488 (D.S.C. 1997).

219. *See Cohen*, 403 U.S. at 15, 18.

220. For example, the U.S. Supreme Court has limited content-based restrictions on speech that incites hatred, Schenck v. United States, 249 U.S. 47 (1919), and that is obscene, Roth v. United States, 354 U.S. 476 (1957), in addition to so-called time, manner, and place restrictions, Schneider v. State, 308 U.S. 147 (1939). Further, courts have recognized that public schools are typically closed forums, in which the government retains significant

including restrictions on clothing that school students may wear.[221] Nevertheless, the U.S. Supreme Court has recognized that students do not "shed their constitutional rights to freedom of free speech or expression at the schoolhouse gate."[222] UK courts have also recognized freedom of religion as a decisive factor in determining the right of school pupils to wear certain religious styles or dress.[223] Although freedoms of speech, expression, and religion in the U.S. and UK have played decisive factors in guiding the law,[224] other countries, most notably France and Turkey, have identified alternative policy considerations for restricting religious dress in schools.[225] In contrast, a number of other countries grant constitutional protections for more permissive dress than France, Turkey, the U.S., and the UK.[226] However, given that the law is concerned with notions of rights of expression or religion, an actual right to "freedom of dress" remains elusive despite strong arguments, including those by Professor Gowri Ramachandran, who argues that the "connection between freedom of dress and a notion that control over our own bodies is essential to human dignity."[227]

Although the law often accords schools greater discretion to create, implement, and enforce rules, employees enjoy limited freedom of expression in the workplace as courts often defer to employer dress codes.[228] Therefore, fashion choices, dress codes, and diverging sartorial tastes in the office may raise significant legal issues. Professor Deborah Rhode's groundbreaking

control over speech. *See* Christopher B. Gilbert, *We Are What We Wear: Revisiting Student Dress Codes*, 1999 BYU EDUC. & L.J. 3, 6 (first citing Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996); then citing Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118, 9 F.3d 1295 (7th Cir. 1993)).

221. *See generally* ROBSON, *supra* note 13, at 103–05 (considering the seminal U.S. Supreme Court case *Tinker v. Des Moines Independent Community School District* that required schools to show that student attire would substantially and materially interfere with appropriate levels of discipline).

222. *Tinker*, 393 U.S. at 506.

223. Dianne Gereluk, *"Why Can't I Wear This?!" Banning Symbolic Clothing in Schools*, PHIL. EDUC. Y.B., 2006, at 106, 106–07.

224. *See id.* at 107.

225. Banu Gökarıksel & Katharyne Mitchell, *Veiling, Secularism, and the Neoliberal Subject: National Narratives and Supranational Desires in Turkey and France*, 5 GLOBAL NETWORKS 147, 148 (2005).

226. *See* Ken Alston, *Freedom of Expression and School Dress Codes South African and International Perspectives*, 11 AUSTL. & N.Z.J.L. & EDUC. 83, 85 (2006) (discussing regulation of student dress codes in New Zealand, Canada, the United States, and South Africa).

227. Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 36 (2007).

228. *See* Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 535, 538 (2007).

The Beauty Bias[229] brought the topic of appearance discrimination to the forefront of employment discrimination law.[230] Clothing and fashion choices that may accentuate the employee's appearance often play a role in cases of appearance discrimination.[231] Most modern legal systems clearly prohibit gender discrimination and sexual harassment; yet, appearance discrimination largely lacks legal redress[232] unless accompanied by other forms of discrimination.[233] Some scholars argue that employers require dress codes to limit expression in the workplace and promote "the goals and values of the organization's leadership,"[234] asserting that "dress and grooming decisions serve as proxies for business judgment,"[235] which has some support in case law.[236] However, such dress codes may impact unfairly based on gender, religion, or national origin.[237] Despite the fact that society may continue

229. DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW, at xii (2010).

230. William R. Corbett, *Hotness Discrimination: Appearance Discrimination as a Mirror for Reflecting on the Body of Employment-Discrimination Law*, 60 CATH. U. L. REV. 615, 617 (2011).

231. *Cf.* Jessica Fink, *Madonnas and Whores in the Workplace*, 22 WM. & MARY J. WOMEN & L. 255, 266–69 (2016) (summarizing recent case law in which physical appearance and clothing choices played a role in the termination of employment).

232. *See, e.g.*, Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 65 (Iowa 2013). For comprehensive analyses of the case, see Kibum Byun, *You Can Get Fired for Flirting: Critique of Sex Discrimination Law in the Workplace Through* Nelson v. Knight, 21 CARDOZO J.L. & GENDER 259, 260 (2014); Catherine E. Mendola, *Root Canal of the Problem: The Iowa Supreme Court's Protection of Male Impulses over Female Traits*, 34 B.C. J.L. & SOC. JUST. ELECTRONIC SUPPLEMENT 14 (2014), http://lawdigitalcommons.bc.edu/jlsj/vol34/iss3/2; Kristy Dahl Rogers, *An Irresistible Attraction: Rethinking Romantic Jealousy as a Basis for Sex-Discrimination Claims*, 64 DUKE L.J. 1453 (2015).

233. *See* Bill Visone, Comment, *Cramping Your Style: Personal Appearance in the Workplace*, 30 GEO. IMMIGR. L.J. 359, 361 (2016) (discussing U.S. federal civil rights law prohibiting discrimination under Title VII of the Civil Rights Act of 1964).

234. Karen DaPonte Thornton, *Parsing the Visual Rhetoric of Office Dress Codes*, 12 LEGAL COMM. & RHETORIC 173, 174 (2015).

235. *Id.* at 179.

236. Courts have recognized that employers may have bona fide business purposes for enforcing restrictions on employees' choice of hairstyle. *See* FURI-PERRY, *supra* note 4, at 137–39 (first citing Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981); then citing Harper v. Blockbuster Ent. Corp., 139 F.3d 1385 (11th Cir. 1998); and then citing Burchette v. Abercrombie & Fitch Co., No. 08 Civ. 8786, 2010 WL 1948322 (S.D.N.Y. May 10, 2010)).

237. *See, e.g.*, Webb v. City of Philadelphia, 562 F.3d 256, 262 (3d Cir. 2009) (holding that a police department's ban on headscarves that adversely affected an employee of Indian origin was valid for public safety reasons even when the plaintiff established a prima facie case of religious discrimination); Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 137–38 (1st Cir. 2004) (holding that an undue hardship on the employer may

to identify certain attire as "professional" in the workplace, generational changes challenge these established norms.[238] Moreover, appearance discrimination that adversely affects individuals based on a variety of features, beliefs, and style choices raises serious questions about the role of law in the context of fashion and apparel.

Cultural and social factors connected with identity may play strong influences in choices of dress.[239] In particular, religious codes or practices[240] may prescribe a variety of rules regarding dress, which may conflict with laws and regulations of various jurisdictions, challenging notions of religious freedom vis-à-vis societal pressures.[241] Additionally, Professor Mary Lou O'Neil notes that various regimes may regulate clothing in an attempt to "bind individuals to the regime and create a model citizen that will support it."[242] While a number of laws regulate the wearing of religious dress or symbols,[243] the 2010 French law prohibiting headscarves[244] in public places[245] was the first by a European country to

justify dress codes that may discriminate on the basis of religion in certain circumstances); Visone, *supra* note 233, at 366 (citing Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1109 (9th Cir. 2006) (finding that different grooming standards for male and female employees may not constitute sex discrimination)).

238. *See* Jean M. Twenge & Stacy M. Campbell, *Generational Differences in Psychological Traits and Their Impact on the Workplace*, 23 J. MANAGERIAL PSYCH. 862, 868–69 (2008).

239. *See* Mary Ellen Roach-Higgins & Joanne B. Eicher, *Dress and Identity*, CLOTHING & TEXTILES RES. J., Summer 1992, at 1, 4–5 (1992).

240. *Id.* at 6.

241. *See, e.g.*, FURI-PERRY, *supra* note 4, at 89–92 (discussing challenges to restrictions on religious dress in the workplace in *Goldman v. Weinberger*, 475 U.S. 503 (1986) and *Xodus v. Wackenhut Corp.*, 619 F.3d 683 (7th Cir. 2010)).

242. Mary Lou O'Neil, *You Are What You Wear: Clothing/Appearance Laws and the Construction of the Public Citizen in Turkey*, 14 FASHION THEORY 65, 66 (2010).

243. *See* ROBSON, *supra* note 13, at 128–52.

244. Although religious headscarves comprise a wide variety of coverings, including the niqab, burqua, or burka, which more correctly denotes a veil *covering* the entire body, and others, this discussion uses several terms based on the particular regulations or issues addressed. *See* GARY WATT, DRESS, LAW AND NAKED TRUTH: A CULTURAL STUDY OF FASHION AND FORM 132 (2013).

245. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 Prohibiting the Concealment of the Face in Public Space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Oct. 12, 2010, p. 18344, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022911670&categorieLien=id [https://perma.cc/4ZR7-Y6ZE].

ban the wearing of the face veil in general public[246] in modern times,[247] although several other European countries have either considered or enacted various restrictions,[248] and there are yet other national and local bans throughout the world.[249] Despite fierce criticism,[250] the European Court of Human Rights (ECHR) upheld the ban[251] on the basis that "open-face communication constitutes an indispensable requirement of 'living together' in society."[252] Echoing the ECHR ban, the European Court of Justice held that companies could prohibit headscarves in the workplace as part of a general prohibition on religious symbols and dress.[253] On the other side of the Atlantic Ocean, the U.S. Supreme Court recently considered the responsibilities of employers in hiring decisions where the

246. Lina Ragep Powell, *The Constitutionality of France's Ban on the Burqa in Light of the European Convention's* Arslan v. Turkey *Decision on Religious Freedom*, 31 WIS. INT'L L.J. 118, 121 (2013). Although contemporary discussion of headscarves is associated with the observance of particular religious practices, veils have occupied a prominent place in European fashion historically whether for social, religious, or sartorial reasons. *See* WATT, *supra* note 244, at 137–42.

247. *Cf. id.* at 142 (noting that in the 1400s, James II issued a strict prohibition on female face veils in church).

248. Sally Pei, Note, *Unveiling Inequality: Barca Bans and Nondiscrimination Jurisprudence at the European Court of Human Rights*, 122 YALE L.J. 1089, 1090–92 (2013). In January 2017, the ruling coalition in Austria agreed to restrict full-faced veils in public, and German Chancellor Angela Merkel called for the prohibition of full-faced veils where possible. In addition to bans in France and Turkey, Belgium has had a full-faced veil ban since July 2011, while legislations to restrict full-faced veils are pending in the Dutch Staten-Generaal. Local restrictions exist in other European countries, including Italy, Spain, Russia, and Switzerland. *See The Islamic Veil Across Europe*, BBC (Jan. 31, 2017), http://www.bbc.co.uk/news/world-europe-13038095 [https://perma.cc/S3UR-ZEPC].

249. *Banning the Burqa*, ECONOMIST (Feb. 13, 2016), http://www.economist.com/news/middle-east-and-africa/21692902-why-more-countries-are-outlawing-full-face-veil-banning-burqa [https://perma.cc/6L3S-BTCV].

250. *See* WATT, *supra* note 244, at 134–37. In summarizing the arguments against the ban, Watt points out: "The problem with the French law is that it is politically illogical to force someone to be free, and in practice the effect of such a ban must be to compel many women to remain hidden indoors who might otherwise have been free to venture out in public." *Id.* at 134.

251. S.A.S. v. France, App. No. 43835/11, 2014-III Eur. Ct. H.R. 341, 381, ¶¶ 157–58 (2014).

252. Armin Steinbach, *Burqas and Bans: The Wearing of Religious Symbols Under the European Convention of Human Rights*, 4 CAMBRIDGE J. INT'L & COMP. L. 29, 31 (2015).

253. European Union Press Release No 30/17, An Internal Rule of an Undertaking Which Prohibits the Visible Wearing of Any Political, Philosophical or Religious Sign Does Not Constitute Direct Discrimination (Mar. 14 2017), https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/cp170030en.pdf [https://perma.cc/C7SR-6AEA].

wearing of a headscarf motivates a hiring decision.[254] In *EEOC v. Abercrombie & Fitch Stores, Inc.*,[255] the Supreme Court held that an employer may be liable for discrimination "if religion motivates an adverse employment action, regardless of whether the employer's perception of the employee's religion is accurate."[256] Thus, the case establishes a means by which an employer may be liable for a refusal to hire if a potential employee's dress indicates a particular religion or belief.[257] Finally, in one of the latest of many attempts of the state to regulate beachwear,[258] dozens of towns in France introduced bans on swimsuits designed for "women who practice sartorial hijab" that cover all of the body excluding the face, hands, and feet,[259] commonly called burkinis.[260] In late August 2016, the *Conseil d'Etat*, France's highest administrative court, ruled that these bans were illegal as they violated fundamental liberties.[261] Although an exhaustive discussion on these developments is beyond the scope of this Article, they illustrate the inextricable connection between fashion, the law, and human rights, raising divisive questions for the judiciaries in a multicultural world.[262]

Beyond rights of freedom of expression, speech, and religion for individuals wearing particular garments, fashion raises fundamental legal and ethical questions regarding freedom of expression and creativity guaranteed by international law with respect to designers.[263] For example, Moschino's fall/winter 2014 collection inspired in part by McDonalds' logos has been

254. *See* Dallan F. Flake, *Religious Discrimination Based on Employer Misconception*, WIS. L. REV. 87, 130 (2016).

255. 135 S. Ct. 2028 (2015).

256. Flake, *supra* note 254, at 91.

257. *See* Jeffrey M. Hirsch, EEOC v. Abercrombie & Fitch Stores, Inc.*: Mistakes, Same-Sex Marriage, and Unintended Consequences*, 94 TEX. L. REV. 95, 100 (2016).

258. *See* Alissa J. Rubin, *From Bikinis to Burkinis, Regulating What Women Wear*, N.Y. TIMES (Aug. 27, 2016), https://www.nytimes.com/2016/08/28/world/europe/france-burkini-bikini-ban.html?_r=0.

259. Shannon Fitzpatrick, *Covering Muslim Women at the Beach: Media Representations of the Burkini*, 2009 UCLA THINKING GENDER PAPERS 1, 1, https://cloudfront.escholarship.org/dist/prd/content/qt9d0860x7/qt9d0860x7.pdf?t=lnrgkd [https://perma.cc/FEA8-5VN2].

260. Burkinis derive from the original garment designed by Aheda Zanetti and copyrighted under the name Burquini. *See About Us*, AHIIDA, https://ahiida.com/pages.php?pageid=2 [https://perma.cc/GU3E-WHBC].

261. Conseil d'Etat [CE] [highest administrative court], Aug. 26, 2016, 402742, 40277, http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-ordonnance-du-26-aout-2016-Ligue-des-droits-de-l-homme-et-autres-association-de-defense-des-droits-de-l-homme-collectif-contre-l-islamophobie-en-France [https://perma.cc/5XCS-FSTH].

262. *See* Nicholas Gibson, *Faith in the Courts: Religious Dress and Human Rights*, 66 CAMBRIDGE L.J. 657, 694 (2007).

263. U.N. Human Rights Council, Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, 3, A/HRC/23/34 (Mar. 14, 2013).

criticized both for promoting unhealthy eating habits[264] as well as mocking low-paid employees,[265] not to mention potential copyright violations.[266] Beyond these criticisms, other elements of pop culture inspired the collection,[267] raising freedom of speech issues.[268] As other art forms, fashion often shocks and may convey a range of political statements. Yet, fashion enjoys the protection of the law vis-à-vis IP law, licensing, and other legal mechanisms, unlike paintings, sculptures, and other artistic pieces. Fashion's connection with commerce, and thus commercial free speech, raises a host of research questions defining the relationship between the law, fashion, society, and commerce. Given that other brands, perhaps most notably Benetton,[269] continue to test the boundaries of ethics and freedom of expression through designs and advertisements, the law will undoubtedly evolve with society.

Further, many have harshly criticized the fashion industry for promoting unhealthy body images[270] with its preference for a certain body type. Critics have increasingly scrutinized fashion's reliance on "skinny models" over the past few years,[271] calling for further regulation and arguing that such practices

264. Hanna Marriott, *Fast-Food Fashion: Moschino Accused of 'Glorifying' McDonald's Logo*, GUARDIAN (July 12, 2014, 7:03 PM), http://www.theguardian.com/fashion/2014/jul/13/moschino-glorifying-mcdonalds-logo-fashion [https://perma.cc/K7HK-63KQ].

265. Alice Fisher, *Jeremy Scott: I Try To Convey Joy in the Clothes I Design*, GUARDIAN (Sept. 14, 2014, 4:15 AM), http://www.theguardian.com/fashion/2014/sep/14/jeremy-scott-fashion-designer-moschino [https://perma.cc/ZZ2W-LTEN].

266. *See* Anjli Patel, *Did Moschino Dilute McDonald's Trademark?*, BUS. FASHION (Mar. 3, 2014, 11:00 AM), https://www.businessoffashion.com/articles/news-analysis/moschino-dilute-mcdonalds-trademark [https://perma.cc/5ALM-R58L].

267. *See* Jessica Bumpus, *Autumn/Winter 2014–2015 Ready To Wear: Moschino*, VOGUE (Feb. 20, 2014), http://www.vogue.co.uk/fashion/autumn-winter-2014/ready-to-wear/moschino [https://perma.cc/9A42-LDRU].

268. U.S. CONST. amend. I; International Covenant on Civil and Political Rights, art. 19, *registered ex officio* Mar. 23, 1976, 999 U.N.T.S. 171, 178; Council of Europe, European Convention on Human Rights, art. 10, *opened for signature* Nov. 4, 1950, E.T.S. No. 005 (as amended by CETS No. 194 and previous).

269. *See* Stephanie Simon, *Benetton Sued over Death Row Visits*, L.A. TIMES (Feb. 24, 2000), http://articles.latimes.com/2000/feb/24/news/mn-2088 [https://perma.cc/RR5F-2VH6]; Alessandro Speciale, *Vatican Settles with Benetton over Pope-Kissing Ad*, WASH. POST (May 15, 2012), https://www.washingtonpost.com/national/on-faith/vatican-settles-with-benetton-over-pope-kissing-ad/2012/05/15/gIQAN2yrRU_story.html [https://perma.cc/D7NK-8RAR].

270. *See* J. Kevin Thompson & Leslie J. Heinberg, *The Media's Influence on Body Image Disturbance and Eating Disorders: We've Reviled Them, Now Can We Rehabilitate Them?*, 55 J. SOC. ISSUES 339, 340–44 (1999).

271. *See* FURI-PERRY, *supra* note 4, at 147. The author summarizes the, often alarming, "industry standard" of using skinny models based on the way clothing "stand[s] out" on

destroy confidence and promote unhealthy body images.[272] Considering the relationship between body image and the protection of health and safety, there exists a reasonable nexus between fashion and the law to address these issues; yet, the law in many countries has largely neglected or delegated responsibility for these issues to other stakeholders.[273] Countries in continental Europe and Israel[274] appear to be the exception to the laissez-faire approach to law elsewhere on these matters.[275] With its pre-eminent position in the world of fashion, France's introduction of health concerns into the modeling industry represents a particularly important development in fashion law. On April 3, 2015, France's National Assembly passed legislation[276] that led to a requirement that models obtain a doctor's certificate attesting to their healthy weight based on age and other characteristics as well as restrictions on the retouching of fashion model photographs.[277] The legislation followed similar laws adopted in Italy, Spain, and Israel.[278] However, the law has its critics, who argue that it oversimplifies the complex psychology of body image, does not address the actual causes of anorexia

gaunt figures, society's ideal standards of beauty, and the difficulty of ordinary consumers to attain such a "slim silhouette." *Id.*

272. Haroon Siddique, *Yves Saint Laurent Ad Banned for Using 'Unhealthily Underweight' Model*, GUARDIAN (June 2, 2015, 7:01 PM), http://www.theguardian.com/media/2015/jun/03/yves-saint-laurent-ad-ban-underweight-model [https://perma.cc/BE6H-SPXX].

273. *See* FURI-PERRY, *supra* note 4, at 148 (noting the self-regulation in the fashion industry through such organizations such as the Camera Nazionale della Moda Italiana in Italy—the organizers of Fashion Week in both Milan and Rome—in conjunction with the Italian Government to prohibit using models under the age of sixteen and to require medical certificates attesting to the models' health); *see also CFDA in 2017: The Health Initiative Evolves*, COUNCIL FASHION DESIGNERS AM. (Dec. 21, 2017), https://cfda.com/news/cfda-in-2017-the-health-initiative-evolves-to-include-sexual-harassment [https://perma.cc/28DA-AZEX] (forming a health initiative in 2007 that supports the health of models).

274. *See generally* Julie Gladstone, Note, *The Skinny on BMI-Based Hiring: An Assessment of the Legality and Effectiveness of Israel's Weight Restriction Law*, 15 WASH. U. GLOBAL STUD. L. REV. 495 (2016) (analyzing the background that led to adoption of the law and criticizing it vis-à-vis Israel's Basic Law and relevant case law).

275. *See generally, e.g.*, Marilyn Bromberg & Cindy Halliwell, *"All About That Bass" and Photoshopping a Model's Waist: Introducing Body Image Law*, 18 U. NOTRE DAME AUSTL. L. REV. 1 (2017).

276. Alissa J. Rubin, *French Bill Barring Ultrathin Models Clears a Hurdle*, N.Y. TIMES (Apr. 3, 2015), https://www.nytimes.com/2015/04/04/world/europe/french-bill-barring-ultrathin-models-clears-a-hurdle.html.

277. *Arrêté du 4 mai 2017 relatif au certificat médical permettant l'exercice de l'activité de mannequin* [Order of May 4, 2017 on the Medical Certification Allowing the Exercise of the Model Activity], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O] [Official Gazette of France], May 5, 2017, p. 71, https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000034580535.

278. Jennifer Sky, *Are Models Being Forced into Extreme Measures To Conceal Their Weight?*, OBSERVER (Apr. 21, 2015), http://observer.com/2015/04/young-models-are-not-to-blame-for-industry-pressure-to-be-thin/ [https://perma.cc/8HPR-KWT8].

nervosa or bulimia, and instead, may disproportionately affect certain models.[279] In particular, Professor John Evans *et al*. argue that such laws may lack a nuanced approach necessary to address the complex network of psychological "issues relating to power and control" that underlie body image and eating disorders, and thereby fail to address serious health concerns, while stigmatizing vulnerable individuals.[280] In 2015, the UK Advertising Standards Authority (ASA) banned an advertisement published in *Elle* magazine that "featured a black and white photograph of a woman lying on the floor with her hands on her head" after finding that the advertisement was irresponsible based on the depiction of a model who was "unhealthily thin."[281] Likewise, the ASA banned an irresponsible Gucci advertisement featuring another "unhealthily thin" model.[282] Granted, the rulings provide a step in the right direction; yet, the lack of guidance on what constitutes "too skinny" exposes fashion companies, advertisers, the media, and models to scrutiny without an adequate means to gauge public and political expectations. Moreover, legislators in the United States may not so easily duplicate reforms in Europe because commercial free speech protections could restrict the regulation of retouching photographs in advertising.[283] Although other disciplines have examined various health and body image issues in detail,[284]

279. *See* Tracy McNicoll, *Is France's Proposed Law To Ban Ultra Thin Models Really a Good Idea?*, N.Y. TIMES (Apr. 20, 2015), http://nytlive.nytimes.com/womenintheworld/2015/04/20/is-frances-proposed-law-to-ban-ultra-thin-models-really-a-good-idea/.

280. John Evans et al., *"The Only Problem Is, Children Will Like Their Chips": Education and the Discursive Production of Ill-health*, 11 PEDAGOGY CULTURE & SOC'Y 215, 216 (2003).

281. *ASA Adjudication on Yves Saint Laurent SAS t/a Saint Laurent Paris*, ASA (June 3, 2015), https://www.asa.org.uk/rulings/yves-saint-laurent-sas-a15-292161.html [https://perma.cc/4HNN-8XJ6].

282. *ASA Ruling on Guccio Gucci SpA*, ASA (Apr. 6, 2016), https://www.asa.org.uk/rulings/guccio-gucci-spa-a15-321743.html [https://perma.cc/WP6B-BNPM].

283. *See* Kerry C. Donovan, *Vanity Fare: The Cost, Controversy, and Art of Fashion Advertising Retouching*, 26 NOTRE DAME L.J. ETHICS & PUB. POL'Y 583, 609 (2010). Donovan examines the possibility of regulating retouched fashion advertisements and concludes that "a warning label system" could pass scrutiny under the main test of commercial speech as outlined in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*. *Id.* at 619; *see* 447 U.S. 557, 561–63 (1980).

284. *See, e.g.*, Shelly Grabe et al., *The Role of the Media in Body Image Concerns Among Women: A Meta-Analysis of Experimental and Correlational Studies*, 134 PSYCHOL. BULL. 460, 471 (2008) (analyzing research studies that suggest exposure to advertisements featuring ideally thin models lead to a range of body image issues); Emma Halliwell & Helga Dittmar, *Does Size Matter? The Impact of Model's Body Size on Women's Body-Focused Anxiety and Advertising Effectiveness*, 23 J. SOC. & CLINICAL PSYCHOL. 104, 120 (2004) (arguing that exposure to advertisements featuring particularly thin models in

the legal literature is limited; therefore, this area offers rich research opportunities that focus on fashion's impact on society with respect to health, particularly with the flurry of new regulations on these matters.

C. The Fashion Industry and Labor Issues

A host of national laws,[285] international standards,[286] and best industry practices[287] regulate labor in the fashion industry. The International Labour Organization (ILO) seeks to ensure adequate international safeguards for labor to ensure basic standards among all countries.[288] Recognizing the economic impact of poor safety and working conditions, the G7 has worked to promote enhanced labor rights and working conditions in global supply chains through the promulgation of standards of due diligence in the textile and garment industry.[289] In conjunction with the ILO, the G7 has called for the establishment of a "Vision Zero Fund" to provide compensation for garment factory workers injured in work-related accidents as well as promote enhanced fire inspection and safety regulations.[290]

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advertisements raises anxiety levels among women although they are no more effective than advertisements featuring more realistically sized women); Alan Roberts & Emily Good, *Media Images and Female Body Dissatisfaction: The Moderating Effects of the Five-Factor Traits*, 11 EATING BEHAV. 211, 215 (2010) (suggesting that personality traits play a significant role in the manner in which one reacts to idealized body images).

285. The nature of national laws varies widely between countries. For example, in the United States, the main legal protection is contained in the National Labor Relations Act of 1935, and in India, the Constitution of India and the Industrial Disputes Acts of 1947 provide significant labor protections. 29 U.S.C. §§ 151–69 (2012); No. 14 of 1947, INDIA CODE (2017); *e.g.*, INDIA CONST. arts. 19 (protecting the right to join a union), 23 (prohibiting forced labor), 24 (prohibiting child labor), 43 (introducing a right to a living wage).

286. *See Conventions and Recommendations*, INT'L LAB. ORG., http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang—en/index.htm [https://perma.cc/KNJ9-UTH3].

287. *See, e.g.*, Dara O'Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31 POL'Y STUD. J. 1, 2 (2003) (analyzing multi-stakeholder codes and monitoring mechanisms of labor standards); John Gerard Ruggie, *The Theory and Practice of Learning Networks: Corporate Social Responsibility and the Global Compact*, 27 J. CORP. CITIZENSHIP, Spring 2002, at 27, 35 (summarizing the manner in which the UN Global Compact may help promote best international corporate practices in a number of areas, including labor standards); Don Wells, *"Best Practice" in the Regulation of International Labor Standards: Lessons of the U.S.–Cambodia Textile Agreement*, 27 COMP. LAB. L. & POL'Y J. 357, 360 (2006) (examining best labor practices within the context of a particular bilateral agreement).

288. Int'l Lab. Org. [ILO], *Constitution of the International Labour Organisation*, pmbl., http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO [https://perma.cc/Z25J-8DEW].

289. Group of Seven [G7], *Leader's Declaration G7 Summit*, at 1, 4–5 (June 7–8, 2015), https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf [https://perma.cc/HKT3-77LT].

290. *Id.* at 5.

Despite these initiatives, reports of poor labor standards are endemic in the fashion industry.[291] Global fashion production and distribution networks involve complex networks of separate entities pressured to minimize costs while simultaneously immunizing large North American or European retailers[292] from liability for failures of the practices of other firms in their supply chains.[293] For domestic labor issues, various jurisdictions in the developed world have stringent laws to protect workers;[294] however, in a number of developing countries, these standards are anything but uniform, and even when high standards exist legally, they are often ignored in practice.[295] With the hundreds—or more—firms involved in the manufacturing processes of the world's top apparel companies, such companies inevitably struggle to ensure compliance with relevant human rights obligations,[296] often relying on poorly educated women and children who have little choice but to accept lower wages and poorer working conditions.[297] Recent disasters

291. *See* Int'l Lab. Org. [ILO], *Wages and Working Hours in the Textiles, Clothing, Leather and Footwear Industries*, GDFTCLI/2014, at 12–25 (2014), http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@sector/documents/publication/wcms_300463.pdf [https://perma.cc/XE95-EVP9]; *e.g.*, Enrico D'Ambrogio, *Workers' Conditions in the Textile and Clothing Sector: Just an Asian Affair? Issues at Stake After the Rana Plaza Tragedy*, EUR. PARLIAMENTARY RES. SERV. BLOG (Sept. 3, 2014), https://epthinktank.eu/2014/09/03/workers-conditions-in-the-textile-and-clothing-sector-just-an-asian-affair-issues-at-stake-after-the-rana-plaza-tragedy/ [https://perma.cc/4Q2V-84ZW]; Aruna Kashyap, *"Work Faster or Get Out": Labor Rights Abuses in Cambodia's Garment Industry*, HUM. RTS. WATCH (Mar. 11, 2015), https://www.hrw.org/report/2015/03/11/work-faster-or-get-out/labor-rights-abuses-cambodias-garment-industry [https://perma.cc/XJ8L-FVU4].

292. Although tenuous, case law suggests that some courts may be prepared to hold such North American or European retailers liable for some injustices in their supply chains when they have exerted a significant influence over the manufacturing process. *See, e.g.*, Liu v. Donna Karan Int'l, Inc., No. 00 Civ. 4221, 2001 WL 8595, at *3 (S.D.N.Y. Jan. 2, 2001); Lopez v. Silverman, 14 F. Supp. 2d 405, 408–09 (S.D.N.Y. 1998).

293. *See* Iris Marion Young, *Responsibility and Global Justice: A Social Connection Model*, 39 ANALES CÁTEDRA FRANCISCO SUÁREZ 709, 714–15 (2005).

294. *Pressure Grows To Protect Domestic Workers*, HUM. RTS. WATCH (Oct. 27, 2013, 10:01 PM), https://www.hrw.org/news/2013/10/27/pressure-grows-protect-domestic-workers [https://perma.cc/ARQ3-6BU2].

295. *See, e.g.*, Uma Rani et al., *Minimum Wage Coverage and Compliance in Developing Countries*, 152 INT'L LAB. REV. 381, 381–82 (2013). Rani et al. consider minimum wage standards in developing countries, finding that "a higher level of minimum wages—as in Costa Rica, India, Indonesia, Peru, the Philippines, South Africa and Turkey—tends to be associated with lower rates of compliance." *Id.* at 394.

296. Symposium, *International Fashion Trends: The Business of International Fashion Law*, 21 CARDOZO J. INT'L & COMP. L. 795, 801–02 (2013).

297. Duygu Turker & Ceren Altuntas, *Sustainable Supply Chain Management in the Fast Fashion Industry: An Analysis of Corporate Reports*, 32 EUR. MGMT. J. 837, 839 (2014).

such as the Rana Plaza collapse[298] continue to illustrate the law's failure to provide proper, effective safeguards and remedies for injuries.[299] Moreover, the fast fashion industry further contributes to an environment where fair labor conditions are at risk[300] because tight supply chains increase pressure on suppliers, which in turn puts safe and ethical practices in jeopardy[301] and exploits and sustains the conspicuously uneven global wage regime.[302]

Despite the fact that a number of international legal initiatives attempt to improve labor standards, these inevitably fall short because there is no adequate international enforcement mechanism. As actual labor practices in international supply chains reflect not only national employment law and specific market factors, but also the influence and pressure of non-state actors,[303] there is considerable scope to influence labor conditions through non-legal channels. According to Professor Kevin Kolben, this "private regulation" includes practices largely falling outside the remit of state oversight that address working conditions as well as the relationship between employers and employees.[304] As such, so-called "soft law," which provides general obligations based on international law, codes, standards, and norms,[305] may provide a more appropriate set of rules than "hard law" in the absence of effective global enforcement mechanisms.[306]

298. *See* Ruth Sullivan, *The Devastating Cost of Cheap Outsourcing*, FIN. TIMES (June 16, 2013), http://www.ft.com/cms/s/0/3f06b218-d36a-11e2-b3ff-00144feab7de.html#axzz3cz9WQHx8.

299. *See Bangladesh: Years After Rana Plaza, Workers Denied Rights*, HUM. RTS. WATCH (Apr. 22, 2015, 12:45 AM), https://www.hrw.org/news/2015/04/22/bangladesh-2-years-after-rana-plaza-workers-denied-rights [https://perma.cc/F66V-G2B7].

300. *See id.*

301. Liz Barnes & Gaynor Lea-Greenwood, *Fast Fashioning the Supply Chain: Shaping the Research Agenda*, 10 J. FASHION MARKETING & MGMT. 259, 268 (2006).

302. *See* CLINE, *supra* note 170, at 43. Cline reports that the average American garment manufacturing wages are four times more than those in China, eleven times more than those in the Dominican Republic, and thirty-eight times more than those in Bangladesh, where the minimum monthly wage for operators of sewing machines is $43 per month. *Id.*

303. David J. Doorey, *In Defense of Transnational Domestic Labor Regulation*, 43 VAND. J. TRANSNAT'L L. 953, 957 (2010).

304. Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203, 225–26 (2007).

305. *See* Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 418 (2000).

306. *See* Yossi Dahan et al., *Global Justice, Labor Standards and Responsibility*, 12 THEORETICAL INQUIRES L. 439, 446 (2011). The authors note that "[i]n the age of globalization, which is characterized by a decrease in state governance, various labor institutional arrangements have been called upon to assume responsibility for workers' rights[, including] . . . standards prescribed by the International Labor Organization (ILO), private modes of regulation included under the umbrella of Corporate Social Responsibility, as well as unilateral, bilateral and multilateral agreements that link together trade and labor standards." *Id.*

Legal research into the interplay between international laws, standards, and soft law could help identify and promote more effective approaches to improving labor conditions in fashion supply chains. In particular, several areas of concern require a number of legal and non-legal reforms to ensure safe working conditions in the fashion industry's supply chain as pointed out by Professor Pauline Overeem and Professor Martje Theuws.[307] First, companies must monitor their entire supply chains and should engage in necessary corrective action on an ongoing basis rather than limiting their involvement with "the end manufacturing units" in their supply chains.[308] Second, fashion brands should understand their entire supply chains and improve the traceability of their raw materials.[309] Indeed, a number of companies, including Nike and Adidas, have implemented structures to ensure compliance with their obligations throughout the manufacturing process.[310] Third, Overeem and Theuws argue that companies should conduct reasonable due diligence prior to sourcing materials to identify potential human rights violations[311] and pay close attention to practices that may indicate signs of child labor, including low wages, or dominating cultural views.[312] Fourth, companies must not simply eliminate children from the workplace but also ensure they return to schools and provide for their other essential needs during the transition period.[313]

Beyond these specific actions, disclosure of key information provides transparency and encourages greater involvement by stakeholders. The theory behind disclosure requirements is that publication of full details will eliminate practices in which companies would not otherwise engage,[314] and transparency assures customers of the public commitment of companies to social justice.[315] The Worker Rights Consortium (WRC) has contributed significantly to greater transparency through its efforts to improve the working

307. *See* PAULINE OVEREEM & MARTJE THEUWS, FACT SHEET CHILD LABOUR IN THE TEXTILE & GARMENT INDUSTRY: FOCUS ON THE ROLE OF BUYING COMPANIES 6 (2014), https://www.somo.nl/wp-content/uploads/2014/03/Fact-Sheet-child-labour-Focus-on-the-role-of-buying-companies.pdf [https://perma.cc/7BM7-KWH3].
308. *Id.*
309. *Id.*
310. Kolben, *supra* note 304, at 226.
311. OVEREEM & THEUWS, *supra* note 307, at 6.
312. *Id.*
313. *Id.* at 7.
314. Doorey, *supra* note 303, at 955.
315. Debra Cohen Maryanov, Comment, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labour Standards in the International Supply Chain*, 14 LEWIS & CLARK L. REV. 397, 404 (2010).

conditions and labor protection of employees in the production of university apparel. In particular, the WRC independently monitors and investigates working practices, publishes publicly available reports, and provides assistance to workers in apparel factories.[316] Beyond the impact on working conditions at the production stage, Professor Douglas Kysar points out the manner in which so-called process-label products may be self-perpetuating because "the mere existence of such products on store shelves signals to the consumer" that there is sufficient demand for the products, which, in turn, encourages other consumers to purchase the goods.[317] Promoting consumer demand for apparel produced through fair working practices could provide a potent means to raise labor standards where the law is often ineffective.

In addition to disclosure of information, other reforms could be implemented such as so-called "jobber agreements" in the United States which govern the relationships among companies that outsource production of apparel and subsequently market the finished products to retailers.[318] Accordingly, companies manufacturing goods overseas would sign such jobber agreements setting out living wages in line with local laws and conditions with unions in their home country and the countries where they manufacture their goods.[319] The agreements would allow factory workers to rely on the provisions of these agreements in local courts "as third party beneficiaries."[320] This arrangement may provide an effective enforcement regime in the multi-jurisdictional supply chains of the apparel industry.

Aside from labor issues in supply chains, many have criticized the fashion industry for the poor labor standards of models.[321] Despite the common perception that models enjoy a glamorous profession, models have increasingly alleged[322] the difficulties of limited employment rights and a number of other labor issues.[323] In particular, the international nature of the profession subjects models to an array of legal systems that may offer rights, but such

316. *Mission*, WORKER RTS. CONSORTIUM, http://www.workersrights.org/about/ [https://perma.cc/39UU-9WWR]; *see also* Allie Robbins, *The Future of the Student Anti-Sweatshop Movement: Providing Access to U.S. Courts for Garment Workers Worldwide*, 3 AM. U. LAB. & EMP. L.F. 120, 128 (2013) (proposing legal reforms to allow access to U.S. courts for the victims of sweatshop labor practices).

317. Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 637–38 (2004).

318. Robbins, *supra* note 316, at 137.

319. *Id.*

320. *Id.*

321. *See, e.g.*, Alexandra R. Simmerson, Note, *Not So Glamorous: Unveiling the Misrepresentation of Fashion Models' Rights as Workers in New York City*, 22 CARDOZO J. INT'L & COMP. L. 153, 154 (2013).

322. *See, e.g.*, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Second Amended Class Action Complaint, Shanklin v. Wilhelmina Models, Inc., No. 6537022013, 2015 WL 13376551 (N.Y. Sup. Ct. Nov. 21, 2015).

323. *See* Simmerson, *supra* note 321, at 153–54.

rights may not always be publicized or enforced.[324] Models often complain of the difficulty in recovering payment for work rendered and a lack of support from agencies to help them recover compensation.[325] In addition to difficulties in receiving payment, many models struggle with the industry practice of payment in clothing, known as payment in "trade."[326] To combat these problems, the Model Alliance has drafted a Models' Bill of Rights which emphasizes professionalism, safety, confidentiality, and privacy; calls for transparency in compensation matters; provides enhanced levels of autonomy and control for models; seeks more specific disclosure about commissions and management costs; and demands improved conditions and specific guidelines for models under the age of eighteen.[327] Although the Models' Bill of Rights represents an important step toward increasing protection of models, it lacks the force of law and is dependent upon voluntary compliance of industry actors. Recognizing the seriousness and persistence of labor issues throughout the fashion industry, fashion law provides rich opportunities for research into the interplay between norms, rules, and regulations that govern the rights and obligations of those who work in the industry.

D. Fashion and Sustainability

Since the 1930s, legal scholars[328] and economists[329] have attempted to explain the organization and purpose of firms, developing various models that largely focus on the rights and duties of shareholders and directors. At the heart of these models lies the basic question of the purpose of a corporation. Among the theories focusing on the relationship between shareholders and management, two competing models have dominated scholarship. First, the dominant of these theories, the shareholder primacy model, stresses shareholder value maximization by focusing on maximizing

324. *Id.* at 154.
325. *See id.* at 189 (citing Sara Ziff, *Viewpoint: Do Models Need More Rights?*, BBC (Nov. 29, 2012), http://www.bbc.com/news/magazine-20515337 [https://perma.cc/3CJF-9EHU]).
326. *Id.* at 191.
327. *Models' Bill of Rights*, MODEL ALLIANCE, http://modelalliance.org/models-bill-of-rights [https://perma.cc/ZKA5-RJ2L].
328. *See, e.g.*, A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1365–68 (1932); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1146–48 (1932).
329. *See, e.g.*, R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 386–93 (1937).

corporate profits and the investment of shareholders.[330] Second, the main alternative model depicts the corporation as not only an economic entity but also one that may have a social impact or purpose.[331] Strict acceptance of the shareholder maximization model has particular importance in its application to the supply chains in the fashion industry, and the law often appears to have little concern about the inequalities it causes. Specifically, companies seeking to maximize shareholder profits will frequently employ the cheapest labor available, which means outsourcing production to jurisdictions where labor standards and wages are lower, as discussed above.[332]

Although the American judiciary and legal community continue to neglect corporate social responsibility, businesses around the globe and many other legal systems are increasingly placing a greater emphasis on responsibility and sustainability.[333] Professor Annamma Joy *et al.* define the concept of sustainability as the "complex and changing environmental dynamics that affect human livelihoods and well-being, with intersecting ecological, economic, and sociopolitical dimensions, both globally and locally."[334] The rapidly evolving products, geographically dispersed production and supply chains, and dependence on a number of raw materials, especially with respect to the fast fashion model, often exert a detrimental influence on both society and the environment.[335] In particular, the fashion industry's reliance on introducing new seasons of styles encourages a culture of consumption accompanied by the premature disposal of clothing,[336] including 12.7 million tons of discarded textiles in the United States alone—or 68 pounds for each American.[337] With its reliance on ever changing fashion cycles and promotion of "induced obsolescence" of styles as described above,[338] the fast fashion movement relies on significant textile production which causes pronounced environmental degradation through reliance on pesticides for cotton production,

330. *See* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 298–99 (2006) (citing A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931)).

331. *Id.* at 299 (citing Dodd, Jr., *supra* note 328, at 1148).

332. Nicole J. Krug, Note, *Exploiting Child Labor: Corporate Responsibility and the Role of Corporate Codes of Conduct*, 14 N.Y. L. SCH. J. HUM. RTS. 651, 658 (1998) (citing Joan M. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 TEMP. POL. & C.R.L. REV. 57, 66 (1994)).

333. *See* Backer, *supra* note 330, at 298.

334. Annamma Joy et al., *supra* note 172, at 274.

335. Turker & Altuntas, *supra* note 297, at 838.

336. *See* Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117, 122–23 (2009).

337. CLINE, *supra* note 170, at 122.

338. *See* Raustiala & Sprigman, *supra* note 86, at 1718–28.

chemical use in fabrics, and overgrazing of livestock.[339] Moreover, the fast fashion industry has a particularly large carbon footprint with its reliance on large geographic production and supply chains, often relying on airfreighting of merchandise, sometimes with partial orders.[340]

In response to these criticisms,[341] the fashion industry has shown an increasing interest in ethical behavior and sustainability over the past decade[342] despite the so-called "Fashion Paradox" that denotes the industry's inherent contradictions vis-à-vis sustainability with its emphasis on fast emerging trends and its complex supply chain.[343] Corporate social responsibility has become so important that all of the top twenty-five fashion companies in the world based on revenue[344] have adopted some form of corporate social responsibility report, code, or similar measure. Well-known designers have trumpeted sustainability in their designs, collections, or policies, including Stella McCartney[345] and Vivienne Westwood.[346] Beyond these initiatives, companies that source raw materials from sustainable sources as well as garments from factories in the developing world[347] can have a positive effect on the working conditions of the factories through adopting codes of ethics guaranteeing fair working conditions and wages as well as voluntarily certifying their products are made by factories that adhere to

339. Douglas A. Kysar, *Law, Environment, and Vision*, 97 NW. U. L. REV. 675, 722–23 (2003).

340. Barnes & Lea-Greenwood, *supra* note 301, at 268–69.

341. For a comprehensive account of the various criticisms of fashion's threats to sustainability, see generally LUCY SIEGLE, TO DIE FOR: IS FASHION WEARING OUT THE WORLD? (2011).

342. Joy et al., *supra* note 172, at 274.

343. *See genearlly* SANDY BLACK, ECO-CHIC: THE FASHION PARADOX (2008) (analyzing the fashion industry's response to environmental concerns about clothing production, industry practices, and the suitability of alternative modes of production and supply).

344. *Top 100 Fashion Companies Index*, FASHIONUNITED, https://fashionunited.com/i/top100 [https://perma.cc/28MX-J3KB].

345. *See* SANDY BLACK, THE SUSTAINABLE FASHION HANDBOOK 32 (2012).

346. *See id.* at 38.

347. *Id.* at 200–01. The author discusses the importance the Global Organic Textile Standard that provides a certification system for fibers that meet minimum organic content requirements, limited chemical processing, and ethical manufacturing procedures. *See also Global Organic Textile Standard: Ecology & Social Responsibility*, GLOBAL STANDARD, http://www.global-standard.org/the-standard.html [https://perma.cc/TD24-VMES] (last updated May 23, 2017) (promoting the use of organic textiles through formulating and supporting international standards for the production and trade of such products).

fair labor and human rights standards.[348] Next, a variety of soft law, including codes of conduct and voluntary standards, has become more important in improving corporate social responsibility and sustainability. Professor David Doorey points out that at the core of soft law is the realization that "some social and economic problems are more effectively addressed through indirect legal signals that guide, steer, or encourage changes in behavior by influencing the practical conditions under which behavioral norms emerge."[349] Thus, these codes provide corporations a non-legal mechanism to regulate themselves in response to consumer demands.[350] Furthermore, voluntary or involuntary reporting schemes[351] by which companies report their sustainability efforts provide "invaluable sources for exploring industrial practices."[352] Not only can codes of conduct provide enhanced protection for labor as discussed in the section above, they may also help provide a means to help avoid expensive litigation and onerous government regulation.[353] By adopting codes on such issues as well as other challenges facing the industry, fashion companies could make a real, positive difference where the law has failed. Granted, private regulation suffers from a number of deficiencies,[354] and as Elizabeth Cline points out, "[n]o amount of social compliance, sparkling showpiece factories, or glassed-in doctor[s'] cubes changes the fact that it is entirely legal to pay poverty wages in most of the world's factories."[355] Nonetheless, greater corporate social responsibility may provide an effective means to help enhance sustainability in the fashion industry. Given the fashion industry's reliance on a wide range of raw materials, ultra fast production, extensive logistic systems, and other factors that may adversely affect societies and the environment, further legal research into addressing these concerns could greatly enhance the profile of fashion law as a force for delivering sustainable solutions to imminent problems.

348. John A. Hall, *Human Rights and the Garment Industry in Contemporary Cambodia*, 36 STAN. J. INT'L L. 119, 171–73 (2000).

349. Doorey, *supra* note 303, at 957.

350. Maryanov, *supra* note 315, at 403.

351. As many of the world's largest fashion firms are publicly traded companies, the quality of their disclosure is of particular importance because "their success is now measured by stock performance [and], they are increasingly under pressure to perform well on the stock markets." Tokatli, *supra* note 173, at 23.

352. Turker & Altuntas, *supra* note 297, at 838.

353. Maryanov, *supra* note 315, at 400.

354. *See* Kolben, *supra* note 304, at 228–31.

355. CLINE, *supra* note 170, at 150.

IV. CONCLUSION

With its penchant for wigs and gowns, the legal profession and academy have come surprisingly late to fashion law, but the subject has now captured the imagination of the legal community. Further, its substance is slowly evolving from a subfield of IP into a rich collection of legal issues inextricably connected with human rights, social norms, international commerce, and a host of other topics. This Article attempts to synthesize previous research in order to clarify fashion law's definition and substance. Additionally, the Article identifies and critically examines some of fashion law's key emerging areas of research. By examining the power of clothes to adorn, liberate, oppress, enrich, and impoverish individuals and societies, this article strives to bring fashion law into the mainstream of legal scholarship, study, and practice.

If the law is to protect IP and the wide network of stakeholders in the fashion industry effectively, the legal academy and legal professionals must simply be more responsive to the fast-paced, global, and social media-influenced society in which we live. A particular fashion could take mere hours to spread around the world, while current methods of IP protection often require time-consuming registration. Beyond IP, fashion occupies an intensely emotive intersection between the freedoms of expression, speech, religion, and creativity vis-à-vis emerging societal trends. Further, the global fashion industry faces a number of challenges with respect to inequality in its means of production, its labor standards, and its other practices. Typically, the law should provide a comprehensive system of protection for rights as well as a means to obtain remedies; yet, the law has consistently fallen short of protection for the most vulnerable in the fashion industry and society. A greater awareness of the legal issues underpinning the fashion industry and its stakeholders could provide the lens to more effectively address these problems. Accordingly, this Article identifies a number of the most pressing issues and provides a first step toward formalizing the emerging field of fashion law and developing a research agenda for the law's most stylish area.