DESIGN AND DEVIANCE:
PATENT AS SYMBOL, RHETORIC AS METRIC
PART 1

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ABSTRACT: This project reveals the unrecognized power of gender and sexuality norms in the deep discourse of pivotal American case law on design patents. In Part 1, I show that late nineteenth-century cultural developments in the urban Northeast gave rise to a stigma surrounding the “ornamental” and “decorative” works under the then-exclusive legal purview of design-patent protection. Among the politically dominant segments of American society, the creation, appreciation, and consumption of design “for its own sake” grew increasingly intertwined with notions of frivolity, effeminacy, and sexual “deviance.” In Part 2, I will examine influential design-patent decisions from the 1870s through the 1930s against this cultural backdrop. My close reading of these decisions will demonstrate that federal judges, particularly in leading cases decided by the Second Circuit, increasingly used design-patent disputes as a vehicle for the performance and endorsement of prevailing gender norms. The resulting doctrine relegated design patents to near-total irrelevance as a viable form of intellectual property protection for a large and crucial portion of the twentieth century.


The most you can say of the long skirt is, it conceals ugly feet, crooked legs, and awkward attitudes. But we look upon these things as diseases, unnatural conditions. It is the violation of some law that makes people crooked and ugly, and some false state of mind that makes them awkward.

—Elizabeth Cady Stanton

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The “design patent” should, by any traditional measure, be a staple of the American IP regime. Yet it has long been dismissed as a trivial anomaly—as (to invoke one attorney’s recent, fraught characterization) “the red-headed stepchild of the intellectual property world.” Created by Congress at a time when the appearance of consumer goods was rapidly gaining in importance, design-patent protection provided for exclusive rights in “any new and original shape or configuration of any article of manufacture”—rights different from, and complementary to, those available for “useful inventions” through so-called “utility” patents. Just a few decades after the birth of design patents, however, their power in litigation was eviscerated through disparaging judicial rhetoric, doctrinal distortions, and increasingly frequent findings of invalidity. As a result, design patents languished in obscurity for decades, to be rescued from oblivion only in recent years.

On a superficial level, the marginalization of design patents can be largely traced to decisions of the Second Circuit between 1900 and 1930. To date, however, no one has provided a satisfactory account about why the influential


5. See Du Mont & Janis, supra note 4, at 842 n.26 (discussing the “design patent renaissance” over the past decade). Of course, it is not possible to pinpoint a single moment at which design patents became an effective nullity in litigation. As discussed below, most designers had likely come to view design patents as an unpromising vehicle for the assertion of rights in litigation at least a decade before the beginning of the Second Circuit’s 33-year refusal to uphold the validity of any challenged design patent. At the same time, design patents had regained some of their power even as informed commentators continued to characterize them as “meaningless.” See Mark P. McKenna & Katherine J. Strandberg, Progress and Competition in Design, 17 STAN. TECH. L. REV. 1, 47 n.234 (2013) (noting Ralph Brown’s 1987 characterization of design patents as “meaningless” and remarking that by the 2010s, “[t]imes have obviously changed”) (citing Ralph S. Brown, Design Protection: An Overview, 34 UCLA L. REV. 1341 (1987)). It warrants mention that the “irrelevance” and “meaninglessness” of design patents discussed by McKenna and Strandberg, and (for the most part) in this article, is limited to the litigation context. I do not address, for example, the procurement or licensing of design patents during the period under examination. Nor do I take any position on the (extra-doctrinal) repercussions of judicial invalidation of design patents—either on the quality or quantity output of designers, see id. at 48, or on the perpetuation of social norms via judicial endorsement. Such issues are secondary to this article’s primary objective: to shed light on unrecognized, and perhaps surprising, reasons for federal judges’ early evisceration of design-patent protection in the early twentieth century.

6. The key role of the Second Circuit (and thus my focus on its decisions over those of other courts) is explained below. In brief, the court’s leading role in design-patent jurisprudence in the early 1900s resulted in large part from its location in the U.S. design capital and the Supreme Court’s refusal to grant certiorari in a case squarely posing an issue of design-patent law after 1893. See discussion Charles E. Colman, Design and Deviance: Patent as Symbol, Rhetoric as Metric—Part 2, 56 JURIMETRICS J. 1 (forthcoming Fall 2015) [hereinafter Colman, Part 2].
American appellate-court judges presiding over pivotal disputes concerning design patents relegated them to a multi-decade-long period of near-total irrelevance in litigation. With this project, I seek to provide a historically, socially, and cognitively grounded explanation of why design patents were left out in the cold of the American intellectual property landscape for so many years.

This article argues, in brief, that turn-of-the-century federal appellate courts used design-patent cases as a way to implement, or “perform,” shifting norms and values implicating sex, morality, and ornament, marginalizing design patents in the process. Destabilizing phenomena in nineteenth-century American society, including women’s newly visible assertions of agency in the public sphere, the scientific “discovery” of homosexuality, and the outing of high-profile design advocates as sexual “deviants,” conspired to produce a powerful stigma surrounding design in the minds of politically dominant populations in large cities on the American East Coast.

Such associations indelibly impacted not only perceptions of design—especially among men—but also the main body of law governing exclusive rights available therein: design patent law. Early twentieth-century federal judges effectively used their decisions in design-patent disputes as a vehicle for the endorsement and implementation of sociocultural norms, distancing themselves from design in various ways. In doing so, these judges steered design-patent law away from its original legislative purpose, “the progress of the decorative arts”—a policy that, by the turn of the twentieth century, stood in tension with mainstream normative notions of American masculinity. The decisions in question had the cumulative effect of rendering design patents moot in federal-court litigation by 1930, which, in turn, produced distortions in other areas of American IP law.6

7. The only other in-depth scholarly treatment of this topic of which I am aware is Jason J. Du Mont’s A Non-Obvious Design: Reexamining the Origins of the Design Patent Standard, 45 Gonzaga L. Rev. 531, 532 (2010) (arguing that “design patent protection has witnessed dramatic pendulum swings between under and overprotection with more frequency than any other area of intellectual property law” because of courts “blindly forcing or tweaking substantive and procedural laws from the utility patent context to fit the peculiar nature of designs”); id. at 535 (contending that design patent’s idiosyncratic trajectory resulted from utility patent’s “nonobviousness requirement [being] forced on design patents through an odd series of administrative, legislative, and judicial mishaps”). While Du Mont’s work is illuminating in certain respects, I must depart from his analysis and conclusions for the reasons identified below.

8. See LAWRENCE ROSEN, LAW AS CULTURE: AN INVITATION 4 (2006) (“As a kind of categorizing imperative, cultural concepts traverse the numerous domains of our lives—economic, kinship, political, legal—binding them to one another . . . . Features that may not seem to be linked are [in fact] crucially related to one another: Our ideas of time inform our understanding of kinship and contract, our concepts of causation are entwined with the categories of persons we encounter, [and] the ways we imagine our bodies and our interior states affect the powers we ascribe to the state . . . .”); LAW, SOCIETY, AND HISTORY 3 (Robert W. Gordon & Morton J. Horwitz eds., 2011) (“[L]aw has little autonomy . . . . Law cannot consistently or for long periods remain out of sync with the interests of the powerful in society. The historian or social scientists looking for explanations of legal change will most likely find them in the study of social interests, forces, and demands—not in the doctrines, principles, or internal structures of the legal system.”).

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Of course, the suggestion that historical contexts and social norms influence the way judges think and adjudicate disputes is not new;10 indeed, the proposition has found substantial empirical support.11 Yet most legal scholars who have set out to reveal the political views, conceptual frameworks, and social norms underlying and influencing rulings and doctrine have completely ignored patent law12—and, in particular, design-patent law. To date, only a single scholar, Jason Du Mont, has tried to explain the multi-decade-long obsolescence of design patents,13 but his analysis does not take into account the timing of judicial marginalization of design-patent protection and emergence of “separability” principle in copyright jurisprudence is unlikely to be a coincidence. Over the past few decades, design patents have risen from the ashes, yet they remain decidedly marginalized. See DAN HUNTER, INTELLECTUAL PROPERTY 118 (2012) (containing only one paragraph, in a 228-page book, specifically addressing design patents); Paul J. Sutton, The Underappreciated Design Patent, WORLD INTELL. PROP. REV. (Feb. 16, 2015), http://www.worldpreview.com/contributed-article/the-underappreciated-design-patent (“[F]ar too little attention is afforded to the US design patent.”).

10. See Duncan Kennedy, Toward a Critical Phenomenology of Judging, in THE RULE OF LAW: IDEAL OR IDEOLOGY (Allan C. Hutchinson & Patrick Monahan eds., 1987); Adam Samaha, On the Problem of Legal Change, 103 GEO. L.J. 97, 109–10 (2014) (“A recognizable label for this perspective is ‘law and society.’ It moves our attention further upstream by adding antecedent processes distinguishable from legal institutions but that influence their presentation, such as the roles of organized interests and popular opinion; it also moves our attention further downstream by adding the effects of legal institutions on nonlegal actors, such as how people react to rules and results delivered by officials.”).

11. See, e.g., CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 15–16 (2006) (presenting findings “highly supportive” of “what is probably the most influential method for explaining judicial voting: the ‘attitudinal model,’” which posits that “judges have certain ‘attitudes’ toward areas of the law, and these attitudes are good predictors of judicial votes in difficult cases”); LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 8 (2013) (amassing statistics that “support the realist understanding” that both Supreme Court Justices and circuit-court judges often “fall back on their priors—which often have an ideological component” to reach rulings).


Professor Kara Swanson has compiled an invaluable bibliography of scholarly works on intellectual property law and gender, many first presented at American University Washington College of Law’s annual IP/Gender: Mapping the Connections symposium, where the manuscript of this article was first distributed. See IP/Gender—Mapping the Connections, Am. U. WASH. C. L., http://www.pijip.org/ip-gender/ (last visited Aug. 10, 2015).

13. See generally Du Mont, supra note 7. Du Mont’s account of design patent’s trajectory provides useful data points, but it would be a mistake to assume that policymakers’ particular methods of plotting and connecting those data points are mere “mishaps.” Where it appears there is not a rational order in actors’ application of “rules,” we can—and should—look more closely. See Mary Douglas, A History of Grid and Group Cultural Theory, Workshop on Complexity and...
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powerful cultural associations with design that occupied a central place in the social and cognitive landscape against which judges issued their rulings.14

This project exposes the heretofore unrecognized influence of design’s moral and sexual semiotics15 in foundational decisions on design patents issued by turn-of-the-century courts. Following this introduction, I proceed, in Part 1 of a two-article series, to examine the historical, cultural, and cognitive dynamics shaping popular thinking about “design” (and particularly, design taking the form of “ornament” and “decoration”) among the politically dominant segments of American society over the course of the nineteenth century. In Part 2, I will engage in a close reading of influential decisions from a pivotal period in design-patent history, which collectively reveal the footprint of the powerful confluence of events, ideas, personalities and objects explored in Part 1.16 The decisions under examination, particularly a series of Second Cir-

Cultural Theory in Honour of Michael Thompson 9–10 (June 27, 2005). http://projects.chass.utoronto.ca/cyber/douglas1.pdf (“[A]ctors sometimes seem to be behaving irrationally. [Such] insubordination is neither irrational nor immoral. It expresses their loyalties and moral principles, and their responsibilities to other members of their society.”). Indeed, this article scrutinizes pivotal judicial decisions for a deeper rationality grounded in powerful social norms concerning gender, sexuality, order, morality, and ornament. See discussion Victoria de Grazia, Introduction, in THE SEX OF THINGS: GENDER AND CONSUMPTION IN HISTORICAL PERSPECTIVE 1, 9 (Victoria de Grazia ed., 1996) (noting that laws “define appropriate standards of consumption” and that “the state is central to the activity of gendering consumption”).

14. Du Mont is far from alone in focusing primarily on the doctrinal and the economic. See, e.g., F. Scott Kieff, Property Rights and Property Rules for Commercializing Inventions, 85 MINN. L. REV. 697, 698 (2001) (noting “consensus among those studying the American patent system [in their] focus on utilitarian approaches”); accord Madhavi Sunder, IP*, 59 STAN. L. REV. 257, 257 (2006) (“Unlike its cousins property law and the First Amendment, which bear the weight of values such as autonomy, culture, equality, and democracy, in the United States intellectual property is understood almost exclusively as being about incentives. To put it bluntly, [under conventional scholarly wisdom,] there are no ‘giant-sized’ intellectual property values.”) But see Larry Owens, Patents, the “Frontiers” of American Invention, and the Monopoly Committee of 1939: Anatomy of a Discourse, 32 TECH. & CULTURE 1076, 1077–78 (1991) (“[W]hen, as they do, fundamental beliefs about progress and invention, patent systems . . . rest on more than economic calculation. Patents can be cultural icons as well as commercial tokens.”); Maurizio Vitta, The Meaning of Design, in DESIGN DISCOURSE: HISTORY, THEORY, CRITICISM 31, 36 (Victor Margolin ed., 1989) (“[E]ach cultural system indeed puts itself into a dialectical relationship with the society that has expressed it; design is no exception to the rule.”).

15. My previous work has noted the lack of nuanced scholarly and judicial engagement with the complexities of design, and fashion design, in particular. See Charles E. Colman, Trademark Law and the Prickly Ambivalence of Post-Parodies, 163 U. PA. L. REV. ONLINE 11, 27 (2014), http://www.pennlawreview.com//online//163-U-Pa-L-Rev-Online-11.pdf (“multidimensional accounts of fashion are almost entirely absent from (the decidedly sparse) legal scholarship and (the more voluminous, but often dismissive) case law on the subject in the United States”); Charles E. Colman, “A Female Thing”: Fashion, Sexism, and the United States Federal Judiciary, 4 VESTIGES: J. SARTORIAL MATTERS 53, 58–60 (2013) (“[I]t seems that fashion’s inferior status as ‘a female thing’ continues to haunt its treatment in litigation, with inevitable, if unquantifiable, effects on the outcome of disputes of great consequence for the parties—and by extension, for the evolution of US law more generally.”).

16. This project arguably shares certain key features with the work of Pierre Bourdieu, who mined anthropology, sociology, and linguistics to shed light on “the play of symbolic violence, or ‘misrecognition’ and ‘recognition’ of linguistic-communicative resources [by focusing not on] their ‘linguistic’ features but [on] the sociohistorical load they carry within a given social field.” Jan Blommaert, Pierre Bourdieu: Perspectives on Language in Society, in HANDBOOK OF
cuit rulings in the 1910s and 1920s, had the cumulative effect of marginalizing design patents as a viable form of IP protection for decades to come. This is an empirical argument,\textsuperscript{17} which requires drawing on the findings of cognitive scientists, linguists, anthropologists, and other scholars outside of traditional institutional lines drawn around “law.”\textsuperscript{18} Their work has yielded valuable insights into the way people (including judges) reason. Foremost among those insights, for present purposes, are the following principles:

(1) People do not always say precisely what they mean; further, reasoning occurs on both conscious and subconscious levels.\textsuperscript{19} As a result, the text of legal decisions cannot be taken at face value;\textsuperscript{20} judges, like everyone else, often reveal their reasoning both intentionally and inadvertently.\textsuperscript{21}

\textsuperscript{17} Though some have suggested otherwise, the quantitative is not exhaustive of the empirical. There are many useful metrics for determining the motivations of legal actors apart from the statistical analysis of case outcomes. While the “case-coding” method of analyzing judicial behavior can yield valuable insights, see, e.g., Barton Beebe, \textit{An Empirical Study of the Multifactor Tests for Trademark Infringement}, 94 CAL. L. REV. 1581 (2006), it sometimes fails to tell the whole story. That risk is particularly acute where, as here, (1) the body of relevant case law is relatively small, and (2) and a complex diachronic relationship exists between the rhetoric used by courts and the formal dispositions of the cases at issue.

\textsuperscript{18} See David Cohen & Allan C. Hutchinson, \textit{Of Persons and Property: The Politics of Legal Taxonomy}, 13 DALHOUSE L.J. 20, 20 (1990) (“To talk of law without politics or history is nonsensical. All lawyers must concede that what they do takes place in historical circumstances and has political consequences . . . . To understand fully the operation of law, it is necessary to come to grips with turbulent questions of metaphysics, ethics, sociology and ideology.”).

\textsuperscript{19} See Robyn Carston, \textit{Linguistic Meaning, Communicated Meaning and Cognitive Pragmatics}, 17 MIND & LANGUAGE 127, 133 (2002) (“The unconscious inferential processes internal to the modular mental systems, which mediate input and output representations, are very likely to be quite distinct from the conscious, normative rationalisations of personal-level thinking . . . . Linguistically decoded information is usually very incomplete and that pragmatic inference plays an essential role in the derivation of the proposition explicitly communicated.”).

\textsuperscript{20} See Robert W. Gordon, “Critical Legal Histories Revisited”: A Response, 37 LAW & SOC. INQUIRY 200, 210 n.3 (2012) (highlighting “the unreliability of legal sources as guides to social life”) (internal citations omitted).

\textsuperscript{21} The degree of explicit engagement varies greatly. See Carston, supra note 19, at 134 (“Implications are wholly external to, and distinct from, the linguistic meaning of a proposition explicitly communicated . . . .”).
Part of that reasoning occurs on a subconscious level, and is grounded in the values and biases of the communities of which one is (and wishes to remain) a member.22

These values and biases are conceptually organized through “structuring principles” like categorization and “metaphoric” and “metonymic” mappings,23 though which ideas originating in one domain of human experience are transferred to other domains.24 When cross-domain experiences crystallize into a set of common associations, I describe the resulting cognitive construct as a “connotative cluster.”

Because “linguistic categories have the same character as other conceptual categories,”25 people’s words and phrasing provides a window into the mechanics and substance of the deep discourse26 undergirding explicit reasoning.27

22. See, e.g., ROSEN, supra note 8, at 7 (“[L]aw is so inextricably entwined in culture that, for all its specialized capabilities, it may, indeed, best be seen not simply as a mechanism for attending to disputes or enforcing decisions, not solely as articulated rules or as evidence of differential power, and not even as the reification of personal values or superordinate beliefs, but as a framework for ordered relationships, an orderliness that is itself dependent on its attachment to all the other realms of its adherents’ lives.”).

23. See GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 68 et seq. (1987); STEVEN L. WINTER, A CLEARING IN THE FOREST: LIFE, LAW, AND MIND 4–6 (2001) (“It is the essence of our [traditional] concept of law that it operates as an external constraint, much like the impenetrable vegetation of [a] forest. Yet this very conception already places law in the domain of metaphor and imagination, which is to say in the internal realm of the human mind . . . . [Because of recent discoveries, however,] it is now possible to describe the structures of imagination. These mechanisms . . . . include mental operations such as basic-level categorization, conceptual metaphor, metonymy, image-schemas, idealized cognitive models, and radical categories . . . . Together, they transform our understanding of reasoning and categorization.”).

24. See GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 246 (The Univ. of Chic. Press ed., rev. ed. 2003) (“Do we systematically use inference patterns from one conceptual domain to reason about another conceptual domain? The empirically established answer is ‘yes.’ We call that phenomenon conceptual metaphor, and we call the systematic correspondence across such domains metaphorical mappings.”).

25. LAKOFF, supra note 23, at 67. See also id. at 69 (“In general, any element of a cognitive model can correspond to a conceptual category . . . . Each schema is a network of nodes and links. Every node [mirrors] a conceptual category.”).

26. The term “deep discourse” has idiosyncratic meanings in other disciplines; I do not allude to these concepts unless noted otherwise. In general, I use the term to refer to the patterns of subconscious reasoning that tracks the habitus of a set of social actors. See Blommaert, supra note 16, at 9 (“A concept such as habitus is an attempt at ‘macro’ generalization at the level of what we would call ‘micro’ practices—let us call it a ‘nexus concept’ in which different scale-levels of social behavior are shown to be dialectically connected. Habitus shows itself in every social activity—we always embody the sociohistorical realities that formed us as individuals who take specific (nonrandom) positions in a social field . . . .”).

27. See CHRIS HUTTON, LANGUAGE, MEANING AND THE LAW 34 (2009) ("[A]s we speak, write and listen, we are not constantly aware of contested labeling and the normativity of language . . . . [A]ll language use is potentially or latently monitored, contested or regulated by virtue of the fact that it can be represented as a form of behaviour, a judgment, ‘making a statement.’ Law is in this respect no different in essence from any other form of language . . . .").
(5) Periods of perceived instability often lead to efforts to preserve “order” by “shoring up” conventional “islands of meaning.”\textsuperscript{28} The implementation of binaries, like “masculine/feminine,” is a common cognitive and rhetorical technique for those seeking to preserve a particular conception of the status quo during periods of social change.\textsuperscript{29}

These principles will serve as useful lenses and tools for gaining an understanding of the cultural context in which design patents were situated and evaluated, and for parsing judicial rhetoric with the aim of shedding light on the courts’ deep discourse on design. With that said, the analysis offered in this piece is neither an exhaustive nor self-contained alternative to doctrinal, economic, or other factors contributing to the development of design-patent doctrine.\textsuperscript{30} Indeed, anyone attempting to reveal the multiple layers of meaning of historical materials must make peace with the fact that the “probable and the speculative will coexist.”\textsuperscript{31} But for reasons identified in this article, it is very probable indeed that turn-of-the-century gender and sexuality norms influenced leading federal appellate decisions on design patents, depriving them of substantive power in litigation by 1930.\textsuperscript{32} While these decisions are just one “move in a complicated dance of interpretation engaged in by people acting in many different times and contexts, from many different positions of authority and influence,”\textsuperscript{33} they were, as I will show, a pivotal part of the dance surrounding the rights available in works of decorative design under U.S. law.

\textsuperscript{28} See discussion ZERUBAVEL, supra note 16, at 64 et seq.

\textsuperscript{29} See CYNTHIA EAGLE RUSSETT, SEXUAL SCIENCE: THE VICTORIAN CONSTRUCTION OF WOMANHOOD 1 (1989).

\textsuperscript{30} For example, many of the factors identified as causal by Du Mont, see generally supra note 7, likely played some role in the path of design-patent doctrine. However, Du Mont’s methodological approach largely treats the law as a culturally closed-off system; the extrinsic factors he does identify as potentially influencing the behavior of key actors are conventionally political and economic in nature. Here, by contrast, I examine the broader sociocultural context informing the complex cognitive dynamics at work in judicial “interpretation” of statutory language and courts’ proffered reasoning for their rulings. My methodology is thus akin to that of ROSEN, supra note 8, at 12 (“to consider the styles of legal reasoning or the structure of cultural assumptions built into many legal concepts is to offer both a window into the larger culture and, no less importantly, to gain an often undervalued window into legal processes themselves”); perhaps unsurprisingly, the conclusions I reach differ markedly from those reached by Du Mont.

\textsuperscript{31} C.G. Bateman, Method and Metaphysics: A Legal Historian’s Canon, 23 J. JURIS. 255, 278 n.90 (2014) (citing S.R. ELTON, THE PRACTICE OF HISTORY 87 (1967)). See also Samaha, supra note 10, at 111 (“[A] law-and-society perspective has an attenuated relationship to law as it is conventionally understood. What it gains in practical relevance is partly offset by what it loses in simplicity, tractability, and connection with ordinary ideas about law. As with legal textualism, this loss is beneficial for some purposes. [One] should investigate the relationship between legal institutions and the rest of society, partly because of the difficulty in establishing causation.”).

\textsuperscript{32} I speak of design patents’ lack of substantive power because even after their evisceration, they retained some procedural value. Some parties sought them to obtain federal subject-matter jurisdiction to litigate unfair-competition claims. See discussion Colman, Part 2, supra note 6.

\textsuperscript{33} Gordon, supra note 20, at 210.
I. CONGRESS’S 1842 CREATION
OF DESIGN-PATENT PROTECTION, TO PROMOTE
“THE PROGRESS OF THE DECORATIVE ARTS”

In the early decades of the nineteenth century, most industrial objects in the United States were valued primarily for their “functional” characteristics. The iron stove provides a helpful example. As historian Howell John Harris explains, “Stoves began to evolve from the traditional types in the early 1800s and particularly after the end of the War of 1812.” While “[a] trickle of stove patents turned into a steady stream in the 1830s,” the bulk of “inventors, designers, and makers concentrat[ed] their efforts on increasing stoves’ usefulness as heating and particularly as cooking devices.”

Given this early focus on “utility,” Harris notes, “patent drawings, particularly for cooking stoves, were generally unadorned or displayed a few applied decorative motifs on otherwise plain surfaces.” This began to change in the 1830s. In 1835, for example, the New York Mechanics’ Institute first provided an official commendation to stove makers “for their ‘beautiful’ or ‘very handsome’ or ‘very neat’ products, as well as for their serviceability.” At roughly the same time, the New York stove industry saw its first independent industrial-design firms, which soon cropped up in other cities.

Design-patent protection would follow soon thereafter. Once the United States, like England, could claim its own contingent of tradesmen whose livelihood depended entirely on the appearance of consumer objects, Congress unsurprisingly found itself in receipt of pleas for the creation of intellectual-property protection better suited to decorative objects than conventional utility patents or copyright.

Stove manufacturer Jordan L. Mott led the charge for design protection, authoring and submitting to the Senate in 1841 a document entitled “Petition of a Number of Manufacturers and Mechanics of the United States, Praying

34. See Howell John Harris, “The Stove Trade Needs Change Continually”: Designing the First Mass-Market Consumer Durable, ca. 1810–1930, 43 WINTERTHUR PORTFOLIO 365, 366 (2009) (calling stoves “an industry where design was critically important,” making it “unusually dependent on the patent system—at first just for ‘improvements’ but after 1842, when the law began to permit it, for designs, too”). For an example of an early ornamented stove for which a design patent was obtained, see id. at 376 (Figure 11), reproduced as Figure 1, below.
35. Id. at 368.
36. Id.
37. Id.
38. Id. at 370 (internal footnote omitted).
39. Id. at 371.
40. See Ellen Marie Snyder, Victory over Nature: Victorian Cast-Iron Seating Furniture, 20 WINTERTHUR PORTFOLIO 221, 223 (1985) (“By midcentury, American ironmaking assumed the technological capabilities the British had acquired years before, and American manufacturing grew rapidly.”). See also Du Mont & Janis, supra note 4, at 854–55 (“By the early 1800s, an active debate in England about expanding the Act culminated in a radical new design protection system beginning in 1839 [later] used as a model for American law.”) (internal citations omitted).
the Adoption of Measures to Secure to Them Their Rights in Patterns and Designs.

The coalition’s petition was concerned primarily with “new designs for manufactures in metals,” but it also noted that its arguments about free riding and progress applied with equal force to “designs or patterns for woven or other fabrics, and of ornaments on any articles of manufacture.”

The petitioners thus requested of Congress “the passage of an act, by which the rights of proprietors of new designs and patterns may be protected from piracy,” so that “the manufacturers and mechanics of the United States may be enabled fully to compete with those of any other country”—that is, so the “articles manufactured by them would equal others in beauty.” Congress obliged: the lobbying efforts of Mott and his coalition, facilitated and transformed by a series of political tactics and twists, eventually yielded the enactment of the first American design patent law, in 1842.

Figure 1. Decorative Stove Design, U.S. Patent No. D40 (Jul. 25, 1846).

42. S. Doc. No. 154 (1841).
43. Id.
44. Id.
45. Du Mont & Janis, supra note 4, at 856 et seq.
The few commentators to study this topic have offered differing explanations of both the reasons for the bill’s passage and legislators’ codification of design-patent protection within the existing utility-patent regime. But all would likely agree that mainstream American legal rhetoric in the years after the enactment of design-patent law described these new rights as a vehicle for “promoting the progress of the decorative arts.” Indeed, the Supreme Court would recite this orthodoxy in its first ruling, in 1871, on design-patent law:

The acts of Congress which authorize the grant of patents for designs were plainly intended to give encouragement to the decorative arts. They contemplate not so much utility as appearance, and that, not an abstract impression, or picture, but an aspect given to those objects mentioned in the acts . . . . The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public. It therefore proposes to secure for a limited time to the ingenious producer of those appearances the advantages flowing from them.

The picture would soon grow complicated, however, for the decades after Congress passed its 1842 design-patent law saw the growth of a host of (largely negative) connotations surrounding “decoration” and “ornament,” whose creators could claim exclusive rights in their work primarily or solely through design-patent protection. This dramatic semiotic evolution in the minds of the politically dominant segments of American society would have surprisingly far-reaching effects.

II. SEX-ROLE ANXIETY AND MATERIAL CULTURE IN THE NINETEENTH-CENTURY UNITED STATES

The nineteenth century was a time of unusually rapid cultural change for urban communities on the East Coast of the United States. Middle- and upper-class white Anglo-Americans in the mid-nineteenth century were char-

47. Compare Du Mont & Janis, supra note 4, at 847, with Hudson, supra note 41, at 383.
48. See id. at 845 (“The most venerable comments—those of the Supreme Court in 1870 in Gorham Co. v. White—assert . . . that the design patent provisions ‘were plainly intended to give encouragement to the decorative arts,’ a reference to the Constitution’s intellectual property clause, with a slight adaptation for designs.”).
49. Gorham Mfg. Co. v. White, 81 U.S. 511, 524–25 (1871). See also Glen Raven Knitting Mills v. Sanson Hosiery Mills, 189 F.2d 845, 850 (4th Cir. 1951) (“Gorham Co. v. White . . . sets forth the salient features of the statute and the purpose which it was designed to serve; but the court was concerned with the infringement and not the validity of the patent in suit.”).
50. When I speak of “Anglo-American culture” or “American society” in this piece, I am using such terms to refer to “the largely middle- and upper-class members of the public who held certain characteristic ideas and tried to govern their lives by them.” LOUISE L. STEVENSON, THE VICTORIAN HOMEFRONT: AMERICAN THOUGHT & CULTURE, 1860–1880, xxviii (Cornell Univ. Press 2001) (1991).
characterized by, among other qualities, their “cherish[ing of] a belief in the separate spheres of femininity and masculinity that amounted almost to religious faith.”52 The stakes of keeping the categories of male and female separate struck many as very high, indeed,53 and would only rise as the turn of the century approached.54

As the decades passed, nineteenth-century Americans’ notions of the “feminine” grew ever more strongly associated with “mutability of identity, distractability, [and] a continuous search for the new and fashionable,” all of which purportedly illustrated the “instability, unreliability, compulsiveness, and superficiality” of the female sex.55 The archetypal man of comparable social station, by contrast,56 was often imagined and represented as honest (in both behavior and appearance57), industrious,58 and restrained in consump-

52. Id. at 150. Accord ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 211–12 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1972) (1840) ("[A]mericans admit that as nature has appointed such wide differences between the physical and moral constitution of man and woman, her manifest design was to give a distinct employment to their various faculties. . . . In no country has such constant care been taken as in America to trace two clearly distinct lines of action for the two sexes and to make them keep pace one with the other, but in two pathways that are always different. American women never manage the outward concerns of the family or conduct a business or take a part in political life; nor are they, on the other hand, ever compelled to perform the rough labor of the fields or to make any of those laborious efforts which demand the exertion of physical strength.").

53. See BRAM DIJKSTRA, IDOLS OF PERVERTSY 64 (1986).

54. See SHOWALTER, supra note 51, at 4 ("[P]anic in the face of supposed ‘sexual anarchy’ was typical of the fin de siècle. In periods of cultural insecurity, when there are fears or regression and degeneration, the longing for strict border controls around the definition of gender, as well as race, class, and nationality, becomes especially intense."). In nineteenth-century Anglo-American culture, just as today, notions of race were inextricably linked with ideas about gender. See discussion CELIA ROBERTS, MESSENGERS OF SEX: HORMONES, BIOMEDICINE AND FEMINISM 118–19 (2007) ("Numerous historians have suggested that [Victorian] understandings of the sexes as opposite and/or complementary were intertwined with discourses on racial differences."). These discourses are always difficult to untangle, let alone in a single piece of IP scholarship. See Sally Markowitz, Pelvic Politics: Sexual Dimorphism and Racial Difference, 26 SIGNS: J. WOMEN, CULTURE & SOC’Y 389, 389 (2001) ("[T]he logic of the race/sex/gender connection in the modern West is so tangled and opaque that even the best-intentioned analysis is likely to come up short."). However, I do briefly discuss race and nationality. See infra notes 90–96.

55. See LIZ CONOR, THE SPECTACULAR MODERN WOMAN: FEMININE VISIBILITY IN THE 1920s 27 (2004); see also id. ("[M]odern feminine visibility harbored meanings of artifice superficiality, standardization, and mechanization: Mack’s Modern Girl is ‘made up,’ with dress and cosmetics, to represent the image of modern femininity . . . . [T]he very process of her imaging, as mass-produced, recalled another epistemic relation [besides that of image and reality], that between representation, illusion, and the feminine.").

56. See SHOWALTER, supra note 51, at 25 ("Contrast was the essence of the matrimonial relation: feminine weakness contrasted with masculine strength: masculine egotism with feminine self-devotion."). (emphasis added) (citation omitted); ALAN SINFIELD, THE WILDE CENTURY: EFFEMINACY, OSCAR WILDE, AND THE QUEER MOMENT 149–50 (1994) ("Of course, sexual relations cannot be isolated from the social hierarchies in which they are embedded . . . .").

57. See CHRISTOPHER BREWARD, THE CULTURE OF FASHION 176 (1995) (highlighting 1860s social commentary objecting to “sartorial affectations” and, indeed, “any sort of adopted style or manner,” on the basis that “[a] man’s bearing should be a natural expression of his own mind and body” (quoting BRUCE HALEY, THE HEALTHY BODY AND VICTORIAN CULTURE 206 (1978)). See also id. at 173 (emphasizing, through nineteenth-century illustrations, that “[m]en’s dress of the 1830s and ‘40s allowed for a fair degree of self-expression, especially in terms of pattern and cut.”

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Design and Deviance: Patent as Symbol, Rhetoric as Metric

tion.59 The web of associations surrounding the central axis of “manly” sobriety/candor and “feminine” frivolity/artifice gradually grew more elaborate and emphatic; by the turn of the century, fashionable women were widely assumed to be dishonest, lascivious, idle, and/or depraved.60 To combat this trend, the “moral” woman was repeatedly instructed to devote her entire existence to family and the home in which that family resided, an imagined “haven” from the perceived immorality of urban life.61

The expanding scope and vigor of stigmatized characteristics of the woman of fashionable tastes and habits can be attributed in part to what many perceived as her challenge to the comfortable foundation of the male/female duality on which much of Anglo-American culture was imagined to rest.62 While the causes for this phenomenon are complex, it is clear reactionaries were motivated in part by a challenge to cultural infrastructure by a confluence of events and developments, including women’s large-scale entry into the realms of higher education, the workforce, the political sphere, and the realm of public consumption.63 As the decades of the second half of the nineteenth century passed, “[t]he sexual borderline between the masculine and feminine [increasingly] represented the dangerous vanishing point of sexual difference.”64 The onslaught of destabilizing cultural changes65 “engendered a fierce response in social purity campaigns, a renewed sense of public moral concern,

while “[t]he 1860s present the archetypal image of nineteenth century masculinity: dark, dour, and domineering”).

58. See id. at 176 (highlighting same 1860s social commentary distinguishing virtuous man from “that lounging semi-swaggering, confoundedly lackadaisical manner which [some] have adopted in compliment . . . to the real swell, and the man of fashion”) (quoting HALEY, supra note 57, at 206).

59. See id. at 175 (highlighting 1859 social commentary making “muscular Christian exhortations to celibacy and self-denial”).

60. DUKSTRA, supra note 53, at 64.

61. RICHARD SENNITT, THE FALL OF PUBLIC MAN 19–20 (1974) (“[P]eople put more emphasis on protecting themselves from [large-scale social changes]. The family became one of these shields. During the 19th Century the family came to appear less and less the center of a particular, nonpublic region, more an idealized refuge, a world all its own, with higher moral value than the public realm. The bourgeois family was idealized as life wherein order and authority were unchallenged, security of material existence could be a concomitant of real marital love, and the transactions between members of the family would brook no outside scrutiny. As the family became a refuge from the terrors of society, it gradually became also a moral yardstick . . . .”).

62. See SHOWALTER, supra note 51, at 8–9 (“The nineteenth century had cherished a belief in the separate spheres of femininity and masculinity that amount almost to religious faith . . . . What was most alarming to the fin de siècle was that sexuality and sexual roles might no longer be contained within the neat and permanent borderlines of gender categories.”).


64. SHOWALTER, supra note 51, at 8.

65. RUSSETT, supra note 29, at 7–9 (“By the third quarter of the century women were laying claim to rights and opportunities previously reserved for men. The lead in the agitation for women’s rights gathering momentum in the last third of the nineteenth century was taken in America . . . . [Working women], like the female doctors and suffragists and the New Women of all persuasions, contributed to the perceived threat to the established social order . . . . This so-called ‘revolt of women’ challenged not only the curtailment of women’s civil liberties but also the Victorian code of propriety that mandated female innocence in such matters.”).
and demands, often successful, for restrictive legislation and censorship.”

Increasingly, gender roles were “publicly, even spectacularly, encoded and enforced” (including in the courtroom). No aspect of behavior, human endeavor, or material object, no matter how seemingly “trivial” or semiotically blank, was immune from the increasingly intensive sex-norm-policing that took place in the urban United States of the late nineteenth century. The advent of the American Industrial Revolution meant there were far more designed objects, at far more affordable prices, than ever before. Over the course of the nineteenth century, the large-scale technological and labor developments facilitated the acquisition, by the American “middle class,” of an ever-wider variety of consumer objects for purely aesthetic and pleasurable ends.

66. Showalter, supra note 51, at 5.
67. Id. (quoting Richard Dellamora, Masculine Desire 194 (1990); see also Hollis Clayson, Painted Love: Prostitution in French Art of the Impressionist Era 58 (1991) (“Self-admiration and sexual allure were closely connected in the latter half of the nineteenth century because dress had come to distinguish gender in more exaggerated ways.”)).
68. State supreme courts’ rulings on marriage promises are instructive. See Boigneres v. Boulon, 54 Cal. 146, 147 (1880) (mistress sued over repudiated marriage promise, but “such promise [of sexual] surrender on the part of the woman is not sufficient consideration for a promise of marriage, because immoral, illegal, and against public policy.”); cf. Kurtz v. Frank, 76 Ind. 594, 598 (1881) (“It does not appear that the illicit intercourse entered into the consideration of the marriage contract, but [rather that] the appellant, having agreed to marry the appellee at a time then in the future, obtained the intercourse upon an assurance that, if pregnancy resulted, the contract already made should be performed at once.”).
69. Chris Fowler, From Identity and Material Culture to Personhood and Materiality, in MARY C. BEAUDRY & DAN HICKS, THE OXFORD HANDBOOK OF MATERIAL CULTURE STUDIES 352, 359–60 (2010) (“Identities are produced out of the ongoing interactions between people and things, not just different groups of people . . . . [T]he ability to consider this mutual constitution of people and things, materials and cultures, is a prerequisite for any sophisticated analysis of material culture and identity. At the same time, the co-emergence of material worlds and types of identities needs to be placed in the context of social and political interactions.”).
70. See generally WILLIAM LEACH, LAND OF DESIRE (1993).
71. See SCHLERETH, supra note 51, at 121 (describing the late nineteenth-century American “compulsion to purchase, accumulate, and display possessions”); COLIN SPENCER, HOMOSEXUALITY IN HISTORY 194, 194–95 (1995) (“The beginnings of the Industrial Revolution meant a little more money for the lower classes [and] the beginnings of a new social obsession . . . . By the eighteenth century [in England—and the mid-nineteenth century in the United States] almost everyone had a money income and was prepared to spend it. A huge increase in small rural factories producing non-essential goods occurred at this time. . . .”); STEVENSON, supra note 50, at xxi (“[T]he Victorian social world of the 1860s and 1870s was, by and large, the world of the middle class. Still, being Victorian was a matter of values and beliefs; belonging to the middle class had more to do with economic position. People could be Victorian without belonging to the middle class, or they could belong to the middle class without being Victorian.”) Nevertheless, the members of the group under examination “all shared one vocabulary and one set of key assumptions about life,” even as historical evidence reveals “different ways that different Victorians drew upon and used them.”). To be sure, not everyone was able to partake in this new bounty. See Susan Porter Benson, Living on the Margin: Working Class Marriages and Family Survival Strategies in the United States, 1919–1941, in THE SEX OF THINGS: GENDER AND CONSUMPTION IN HISTORICAL PERSPECTIVE, supra note 13, at 212 (noting that many “American working-class families remained on the margins of the emerging world of consumptions because their incomes were neither large enough nor steady enough to allow the wide range of discretionary spending usually associated with mass consumption”). Further, as Benson recounts, the gendered divisions that pervaded middle-class mores and imagination were often absent—or complicated—in
This included an explosion in the availability of fashionable apparel, which proved to be one of the most powerful tools for ensuring compliance with gender roles and associated notions of morality. For one thing, dress was the most immediate, visually recognizable, nonbiological demarcation between the sexes. But dress was also strongly linked with myriad normative notions about gender, for women could only engage in certain public activities to the extent their attire did not make it impractical to do so. Fashionable apparel design thus carried with it multifaceted political and moral notions of women’s “proper” role and place.

Many commentators of the time period wrote tracts making clear that fashionable dress, as the most marked component of personal presentation, carried increasingly strong normative overtones about the proper roles and characteristics of women. “Social reformers” announced that female vanity—closely linked in the popular imagination with artifice, imitation, excess-worked-class culture. See generally id. I acknowledge this plurality of experiences during the relevant time period, even as I focus on the middle-class ideology that proved influential in the worldviews and self-policing of public figures.


73. See ANNE HOLLANDER, SEX AND SUITS 136 (1994) (“Only men’s clothing, with suits being the last version, expressed the idea of a man’s body as a visibly working, self-aware and unified instrument.”); SHOWALTER, supra note 51, at 24 (“It was an easier explanation [for nineteenth-century Anglo-American men] to see women’s desire for emancipation as a form of unbalance in the reproductive system and mind that to take it seriously; and the argument was doubly useful because it also showed how dangerous to the public would be ‘the incorporation of these instabilities into the structures of political life.’”); STEVENSON, supra note 50, at 15 (discussing activities and spaces that were “safe” for middle-class women in the mid-nineteenth century).

Some scholars have gone so far as to argue that “fashion and, for that matter, . . . the clothing code of the West generally, [constitutes] a principle means, as much actual as symbolic by which the institutions of patriarchy have managed over the centuries to oppress women and to relegate them to inferior social status.” FRED DAVIS, FASHION, CULTURE, AND IDENTITY 81 (1994).

74. See generally CHRISTINE STANSSELL, CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789–1860 (rev. ed. 1987). Working-class men in early 1800s New York City, for example, could engage in various activities, from working outside the home to drinking at pubs, that—if undertaken by women, could easily suggest a “determination to serve herself at the expense of others,” or worse. Id. at 80. Perhaps the most innocuous meaning of such behavior was that the offending women were “bad housekeepers who disregarded men’s domestic needs,” thereby breaching “the customary deference due to men.” Id. See also SENNETT, supra note 61, at 176–83.

75. See, e.g., THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS 110 (Dover 1994) (1899) (“It grates painfully on our nerves to contemplate the necessity of any well-bred woman’s earning a livelihood by useful work. It is not ‘woman’s sphere.’ Her sphere is within the household, which she should ‘beautify,’ and of which she should be the chief ornament.”). See also CLAYSON, supra note 67, at 79 (noting that 1880s Impressionist paintings frequently “display[ed] female sexuality a something of a threat, and [located] this threat specifically in the realm of modern fashion”).

sive consumption, moral decay, and even prostitution—unless discouraged, would ultimately lead women to opt out of bearing children.\textsuperscript{77}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{image.png}
\caption{“P. Pry,” that is, W. Heath, “The Fashion Behind but not Behind the Fashion” (1829)}
\end{figure}

\textsuperscript{77} See CLAYSON, supra note 67, at 60 (“A decent woman for whom shopping was an obsession rather than a simple devoir was in danger of falling from the path of respectability and manageability, whereas the deviant woman who dressed to the nines was ipso facto immoral and could also inflict societal damage by infecting the lady with an uncontrollable taste for extravagant clothes.”); DIJKSTRA, supra note 53, at 94 (on paintings of “nasty women, with nonexistent children gnawing like an evil conscious at their uselessly voluptuous breasts” portrayed as “mere empty shells of what they might have been had they not forsaken the sacred duties of motherhood to pursue their lascivious private pleasures.”); RIBEIRO, supra note 76, at 127–28 (the “perfect lady” was praised as displaying “refinement and gentility,” while women “showing off in public in unsuitably expensive and luxurious dress” were denounced as “vulgar”—displaying what commentators of the time decried as “indulgence in personal luxury in women [to] injurious effect on the moral tone, [that is] the first symptom, if not the cause, of a relaxation in virtue.”).
THE FAST SMOKING GIRL OF THE PERIOD.

Figure 3. “The Fast Smoking Girl of the Period” (1867)\textsuperscript{78}

\textsuperscript{78} See Ribeiro, supra note 76, at 138–43 (image and its caption provided as an example of “fast” girl, a figure depicted “frequently in journalism of the late 1860s” by those professing concern about the purported risk of women abandoning family and virtue for the “world of men”).
The pursuit of overtly “materialistic” interests by women struck many as presenting a “central contradiction” between woman-as-insatiable-consumer and “the transcendental innocence of the model wife and mother.” This trope gained newfound momentum in the United States in the late 1830s and exerted an increasingly powerful grip on the popular consciousness. To illustrate, the November 1861 issue of a leading women’s magazine, Godey’s Lady’s Book drew an explicit connection between female fashionability and dangers to the health of both mothers and children:

We have before warned our readers against the “most pernicious practice,” the dire effects of which are so forcibly presented [earlier in the magazine]; but so prevalent is this evil, and such is the bending power of fashion, that the subject cannot be too often or too strongly urged upon the attention of mothers. The above remarks are as applicable to every part of our country as to the city of Paris, for from Paris we receive our fashions, and with Paris we must suffer the dreadful consequences of following the senseless requisitions of vanity and folly in preference to the plain dictates of reason, physiology, and common sense. Mothers can never expect health for themselves and their children until they make the laws of health their guide, instead of the decrees of fashion; until they study physiology and hygiene more, and French fashion-plates less.

Thus, attacks on the “immodesty” of fashionable dress increasingly gave way to allegations of “moral degeneracy in women of all ages who copy the fashionable ideal, the woman of the demi-monde.” Whereas “[i]n the time of crinoline” the fashionable woman had “sacrificed decency,” by 1870 (“the times of trains”), the same woman now “sacrifice[d] cleanliness” through her “false and fatal brilliancy.” By the last decades of the nineteenth century, fashionable design in women’s dress had accrued myriad negative associations in middle-class American culture.

80. Jno. Stainback Wilson, Health Department, Godey’s Lady’s Book, Nov. 1861, at 444.
81. See supra note 76, at 135 (quoting E. Lynn Linton, The Fast Smoking Girl of the Period 4 (1868)).
82. See id. at 135, 138 (quoting Linton, supra note 81, at 4; E. Lynn Linton, The Girl of the Period 313 (rev. ed. 1883)).
83. The symbolic power of fashion was due, in part, to the explosion of popularity in the latter half of the nineteenth century, of the (pseudo-)scientific practice alternately referred to as “phrenology,” “ethology,” or “physiognomy,” which purported to make legible to the careful
These stigmas bespoke far more than mere misogyny; they evinced a general anxiety among large segments of nineteenth-century American society concerning the blurring of traditionally imagined gender roles. Thus, it should come as little surprise that the visual policing described above was a two-way street: even as a desire for fashionable dress was increasingly stigmatized a moral failing of women, would-be “respectable” men displaying an affinity for decoration in their appearance were charged with ever-greater failings. In a cultural shift described as “The Great Masculine Renunciation,” the second and third decades of the nineteenth century saw “the last gasp of the male peacock before the ensuing triumph of middle-class sobriety in dress which is still, to a large extent, with us today.” Individuals purportedly failed in their role as men by falling prey to the vices typically associated with “the weaker sex.”

Historian Kate Haulman elaborates on these new beliefs:

[Men in dominant social positions] projected [fashion’s] morally questionable elements onto women and other feminized figures such as fops and the French. Ideally, attire established gender identity and the distinction between male and female. But sometimes a fashion confused those designations, either by failing to be appropriately masculine or feminine enough for its wearer, who (according to detractors) mimicked the effect therby failing to be appropriately masculine or feminine enough for its wearer, who (according to detractors) mimicked the effect and usurped the prerogatives of the other gender, or by bespeaking an excess of feminine traits such as vanity . . . .

observer of physical appearance an individual’s temperament, moral fiber, motivations and desires, and other aspects of (the relatively new concept of) “personality.” See Sennett, supra note 61, at 171; id. at 167 (“As people’s personalities came to be seen in their appearances, facts of class and sex thus became matters of real anxiety . . . . A man might or might not be what his clothes proclaimed, but the proclamation was [purportedly] clear.”). See also Mary Douglas & Baron Isherwood, The World of Goods: Towards An Anthropology of Consumption xxiv (Routledge 2001) (1979).

84. See Showalter, supra note 51, at 3–9.
85. See Breward, supra note 57, at 170–71 (“[A] discourse of separate spheres, whilst constructing display and dress as innately feminine pursuits, enforced a model of masculinity in which overt interest in clothing and appearance automatically implied a tendency toward unmanliness and effeminacy.”).
86. The term “The Great Masculine Renunciation,” while subsequently critiqued, modified, and discredited by certain cultural theorists and historians of dress and visual culture, is widely believed to have been coined by J.C. Flügel, The Psychology of Clothes 111 et seq. (1930) (section on “The Great Masculine Renunciation and Its Causes” in ch. VII).
87. Ribeiro, supra note 76, at 122.
88. See Veblen, supra note 75, at 112 (“There are of course also free men, and not a few of them, who, in their blind zeal for faultlessly reputable attire, transgress the theoretical line between man’s and woman’s dress, to the extent of arraying themselves in apparel that is obviously designed to vex the mortal frame; but everyone recognizes without hesitation that such apparel for men is a departure from the normal. We are in the habit of saying that such dress is ‘effeminate’ . . . .”); Elizabeth Wilson, Adorned in Dreams: Fashion and Modernity 179 (I.B. Tauris 2013) (“Before 1960s, ‘only tarts or homosexuals wore clothes which reflected what they were.’”)(quoting George Melly, Revolt into Style: The Pop Arts in Britain (1972)).
89. Haulman, supra note 72, at 627. See Ribeiro, supra note 76, at 125 (“[From the 1830s onward in Anglo-American culture,] the merest hint of femininity in a man’s wardrobe was regarded with deep visceral aversion.” Among the upper and middle classes, the only acceptable touch of colour was the waistcoat until the 1860s; from then onwards even that was abandoned and men wore a dark three-piece suit on most occasions, except for evening wear when a white
Failure “to be appropriately masculine,” by the mid-nineteenth century, meant more than vulnerability to social ridicule. (As explained below, however, “effeminacy” was not decisively linked with identity-based conceptions of “homosexuality” until the final years of the 1800s.) Through a complex matrix of political, economic, and scientific developments, normative Anglo-American masculinity had come to carry with it a particular set of values and priorities—one undergirded, by the latter half of the nineteenth century, by the often-intermingled theories of “utilitarianism” and “evolutionary science.”

American economist Thorstein Veblen captured a key aspect of the new middle-class orthodoxy with his philosophy of an “ideal world [that had] no place for the irrational or the non-utilitarian” in which “the stylistic oddities of fashion were manifestly futile.” Writer and public intellectual H.G. Wells explicitly linked fashionable trimmings to the female sex, “backward” civilizations, and failures of intellectual development, declaring: “Women, disarmed of their distinctive barbaric adornments, the feathers, beads, lace, and trimmings [would be able share in] the counsels and intellectual development of men.”

English psychologist J.C. Flügel would later reflect that it was “perhaps no mere chance that a period of unexampled scientific progress should have followed the abandonment of ornamental clothing on the part of men at the beginning of the last century.” Less measured nineteenth-century com-

waistcoat was de rigueur.” (quoting QUENTIN BELL, ON HUMAN FINERY 143 (rev. ed. 1976)). Although this passage specifically concerns dress codes in London, the same trends and themes can be traced in American cities like Boston and New York, except where otherwise noted. See, e.g., id. at 182 n.11 (noting that English novelist William Thackeray’s Vanity Fair “mocks the false decorum of ‘the truly refined English or American female’”).

90. See discussion infra at text accompanying notes 145–49; accord RIBEIRO, supra note 76, at 125–26 (noting, based on 1847 text The Natural History of the Gent, that men dressed in bright colors, “load cravats and tie-pins, and bright yellow kid gloves over which are worn lots of rings”—though likely to be described as “effeminate” even at that time—were infamous for “star[ing] at women bathers” and “accost[ing] respectable women in the street”).

91. RUSSETT, supra note 29. See also THOMAS HODGSKIN, POPULAR POLITICAL ECONOMY: FOUR LECTURES DELIVERED AT THE LONDON MECHANICS’ INSTITUTION 240–41 (1827) (emphasis added).

92. WILSON, supra note 88, at 52–53.


94. FLUGEL, supra note 86, at 118. Social theorist Georg Simmel’s 1904 condemnation of fashionable individuals is telling: “The fact that the demi-monde is so frequently a pioneer in matters of fashion is due to its peculiarly uprooted form of life. The pariah existence to which society condemns the demi-monde produces an open or latent hatred against [social rules and law, which takes] aesthetic expression in the striving for ever new forms of appearance.” GEORG SIMMEL, FASHION, in GEORG SIMMEL: ON INDIVIDUALITY AND SOCIAL FORMS 311 (Daniel N. Levine ed., 1971). See also ADOLF LOOS, ORNAMENT AND CRIME, in PROGRAMS AND MANIFESTOES ON 20TH-CENTURY ARCHITECTURE 24 (Ulrich Conrads ed., Michael Bullock Trans., 1970) (“Ab-

sence of ornament has brought the other arts to unsuspected heights. Beethoven’s symphonies would never have been written by a man who had to walk about in silk, satin, and lace.”) As the Loos excerpt illustrates, “fashion” was positioned in opposition to legitimate and valuable cultural innovation. Cf. Edward Sapir, Fashion, in ENCYCLOPEDIA OF THE SOCIAL SCIENCES 6, 139 (Edwin R. A. Seligman ed., 1931) (asserting that a short-lived fashion is likely to have “something unexpected, irresponsible or bizarre about it,” and predicting that “[a]ny fashion which sins against one’s sense of style and one’s feeling for the historical continuity of style is likely to be
mentators casually extrapolated Darwinian ideas about the survival of particular species to the fate of society at large, explicitly blaming “effeminacy” for “the decline and fall of states.” Even Teddy Roosevelt opined: “There is no place in the world for nations who have become enervated by the soft and easy life, or who have lost their fibre of vigorous hardness and masculinity.”

By the turn of the twentieth century, mainstream middle-class ideology in the United States held that the sort of people who invested time and money in fashionable dress were by and large “idle, parasitical, artificial, vicious, and frivolous.” (At the same time, women who discarded dresses in favor of outfits made up of a “jacket and skirt based on the male suit” found that their new, ostensibly more “natural” and “useful” apparel was immediately decried as “unbecoming and unseemly . . . , as any imitation of man’s attire must be for a woman.” Virtue, apparently, was the exclusive province of men.)

Thus, fashionable dress was an enormously important symbolic medium at the fin de siècle; however, it was by no means alone in its gendered, socio-political resonance. A wide variety of designed objects, especially “accessories” displaying increasingly “rich trimming,” carried powerful symbolic connotations about one’s true character and appropriate role in American so-

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95. Ribeiro, supra note 76, at 126. Accord Showalter, supra note 61, at 4 (sexual difference was one of the “threatened borders of the fin de siècle,” and “fears of degeneration and collapse” meant that “England was often compared [unfavorably] to decadent Greece and Rome”). See Roberts, supra note 54, at 118–19 (“[Historian Nancy Leys Stepan argues that the nineteenth-century focus on binary sexual difference and racial difference was partially enabled by an analogy between sexual difference and racial difference, whereby supposed deficiencies were found in both [white] women and non-European people of both sexes. The analogy between sex and race . . . was supported by evolutionary discourse in which [white] women’s inferior position in relation to [white] men was explained by their retention of features of ‘primitive races.’”).


97. Kucha, supra note 96, at 148 (citing Barbara Taylor, Eve and the New Jerusalem: Socialism and Feminism in the Nineteenth Century 3–5 (1983)). See also Burrows & Wallace, supra note 96, at 1151 (highlighting direct connection between the New York theater world’s “public sensuality” and “commercialization of sex” and popular—even national—trends concerning women’s “choice of clothes, jewelry, and millinery”).

98. See Victorian Fashions and Costumes, supra note 80, at vii (“All accessories—gloves, handkerchiefs, hair ornaments, jewelry, aprons, shoes and stockings—provided surfaces to be decorated. None escaped the love of rich trimming.”).
Such designed objects ranged from handkerchiefs to parlor furniture, all of which were increasingly gender-coded and scrutinized for gender conformity as the century wore on.

“Decorative” furnishings for the home, in particular, proved powerfully complementary to fashionable dress in the surveillance of gender norms through aesthetics. As the nineteenth century progressed, increasing...

99. See DOUGLAS & ISHERWOOD, supra note 83, at xxiv (noting that “goods are like flags” in that they “work as communicators” among the members of industrialized societies); GILLES LIPOVETSKY, THE EMPIRE OF FASHION: DRESSING MODERN DEMOCRACY 203 (Catherine Porter trans. 1994) (“Like objects and mass culture, major discourses about meaning are caught up in the irrepressible logic of novelty, carried away by a turbulence that may not be absolutely identical to fashion in the narrow sense but is nevertheless analogous in principle.”).

100. See, e.g., SCHLERETH, supra note 51, at 122 (“Men and women knew where to sit, since parlor furniture was gender distinctive. Gentlemen’s chairs were throne like, higher than lady’s chairs and with arms. Ladies chairs lacked arms (in part to accommodate their full skirts) and were designed to reinforce the era’s postural requirements for women—to sit upright, away from the chair back, with one’s hands folded in one’s lap.”). See Victoria de Grazia, Changing Cultural Regimes, in THE SEX OF THINGS: GENDER AND CONSUMPTION IN HISTORICAL PERSPECTIVE, supra note 13, at 11, 15 (throughout the nineteenth century, objects “defined as irrational [or] superfluous” were increasingly “identified with the female population”). See also CLAYSON, supra note 67, at 64 (“An ordinary woman’s lively interest in shopping and clothing provoked worries of [a particular] sort. It was believed that women were vulnerable to a form of psychological distress known as the delirium of consumption, an exclusively female affliction.”). It is important to note that the relationship of the gender-coding of objects and the purported evaluation of the morality of a member of either sex was, and is, more complex than simply checking off a series of boxes for gender-matching. See discussion Abigail Solomon-Godeau, The Other Side of Venus, The Visual Economy of Feminine Display, in THE SEX OF THINGS: GENDER AND CONSUMPTION IN HISTORICAL PERSPECTIVE, supra note 13, at 113–14, 145 n.3 (“In using the term ‘femininity,’ I am referring to a social and psychosexual concept, which I largely dissociate from its ostensible referent—biological women. I take ‘femininity’ and ‘masculinity,’ to be historically shifting and mobile models and roles, forged on the level of the symbolic, which collectively represent a culture’s gender ideology. The antifoundationalist, anti-essentialist, social constructivist position taken here has now a substantial bibliography.”). These complexities are suggested by an illuminating mid-nineteenth-century account of the decline in the social legitimacy of lace, in which a female writer traced the fall of the material to its declining popularity among men. See MRS. BURY PALLISTER, A HISTORY OF LACE 8, 9 (rev. ed. 1869) (“Nor does the occupation [of creating lace] appear to have been solely confined to females . . . . [I]n the frontispieces of some early pattern books of the sixteenth century, men are represented working at frames, and these books are stated to have been written ‘for the profit of men, as well as of women.’ . . . Till a very late date we have ample record of the esteem in which this art was held . . . From the middle of the [eighteenth] century, or, rather, apparently from the French Revolution, the more artistic style of needlework and embroidery fell into decadence. The simplicity of male costume rendered it a less necessary adjunct to female, or indeed, male education; for it seems strange, but two of the greatest generals of the Republic, Hoche and Moreau, followed the employment of embroidering satin waistcoats long after they had entered the military service.”). Additional complexities, a full discussion of which is not possible given the space constraints of this article, arise from the effect of the elision of the symbolic logic of the public and private spheres on the communicative codes of the objects of material culture. See SENNETT, supra note 61, at 180 (from approximately the mid-1860s onward, the “struggle for order in the family process was generated by the same rules of cognition which made people see the workings of [American] society in personal terms.”). Cf. RIBEIRO, supra note 76, at 133 (before the 1860s, criticism of the “immodesty” of unconventional women’s dress tended to be leveled “mainly on the grounds that it was worn in public”).

101. Historian Louise Stevenson explains the evolution of ideas about the proper decoration of the Victorian home parlor in the United States after the Civil War, when “the production of
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numbers of Anglo-American individuals and families had sufficient disposable income to spend money on so-called “nonessential” objects. Historian Thomas Schlereth notes that in “an economy of expanding consumer choice, home furnishings”—like fashionable dress—“came and went as never before.” This new dynamics can be observed in the appearance of the typical Anglo-American middle-class parlor, a “densely draped, ornamented, and furnished space that symbolized the Victorian compulsion to accumulate and display possessions.”

Figure 4. Robert Slingsby, Domestic Interior (1889)


103. SCHLERETH, supra note 51, at 260, 261 (“Church membership and attendance increased steadily from 1870 to 1920 . . . . American Protestants, led by the Methodists, Baptists, Presbyterians, and the Disciples of Christ, acted as a semiofficial American religious establishment—a fairly unified coalition . . . . Together they formed . . . a ‘righteous empire’ of local congregations and evangelical agencies.”); see also PALLISTER, supra note 100, at 292 (noting apparent inconsistency between the erstwhile popularity of lace and “Puritan simplicity”).

104. Id. at 121.
It was primarily women who “curated these collections [of home goods], as well as other parlor artifacts.” Middle-class men, by contrast, were generally expected to show “restraint”—if not a complete lack of interest—in these components of the domestic sphere. Designed objects were thus well positioned to serve as another important locus for the convergence of “political, economic, religious, social, and aesthetic ideologies” in the late nineteenth century.

As lavish decoration in dress, personal accessories, and objects decorating home interiors became available to larger swaths of American society, the variety and volume of objections to “ostentatious display” grew correspondingly. By the final decades of the nineteenth century, middle- and upper-class white Americans displaying an affinity for the “ornamental” were vulnerable to accusations of immorality—whether because of the purportedly self-glorifying, frivolous, or “effeminate” nature of such ornament, or (by the 1890s, for reasons discussed below) through an emergent symbolic association with so-called sexual “deviants.”

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105. SCHLERETH, supra note 51, at 119.
106. BEDERMAN, supra note 63, at 13. One such specimen is provided in Figure 4. Note not only the differences in dress among the family members in this 1889 photograph, but also the father’s distinct—and quite possibly affected—lack of interest in his physical surroundings.
107. KUCHTA, supra note 96, at 4. See also SENNETT, supra note 61, at 166–67 (“[In the latter half of the Nineteenth Century,] inanimate objects which surrounded [a] person could in their details be suggestive in such a way that the human being using or seeing them felt personally compromised. Some readers may remember the piano-leg covers in their grandfather’s homes, or the dining-room table-leg covers; it was considered improper for the legs of anything to show . . . . All appearances have personal meanings: if you believe that little gestures with the eyes may involuntarily betray feeling of sexual license, it becomes equally rational to feel that the exposed legs of a piano are provocative . . . . [This type of] cultural change, leading to the covering of piano legs, has its roots in the very notion that all appearances speak, that human meanings are immanent in all phenomena.”).
108. The greater the proximity of decorative objects to the body, the closer the apparent correlation between these objects’ intended consumers and the aesthetics of the feminine and the domestic; the cultural connotations varied accordingly in their power. See Foltyn, supra note 76, at 323. (“According to [JOHN BERGER, WAYS OF SEEING 50–51 (1972)], a long tradition exists of painting woman looking at herself in a mirror, joining the spectators of herself. The mirror is a symbol of the beautiful woman’s vanity, of her conniving in treating herself as ‘first and foremost, a sight.’”)
109. WILSON, supra note 88, at 123 (“The dress of the nineteenth-century virgin on the marriage market had . . . . to convey family status as well as personal desirability . . . . This ideology extended beyond dress to the home in which the woman reigned. Appearance became more and more mixed up with identity. It was the beginnings of the idea of the Self as a Work of Art, the ‘personality’ as something that extended to dress, scent and surroundings, all of which made an essential contribution to the formation of ‘self’—at least for women.”).
110. See SCHLERETH, supra note 51, at 121.
111. See CLAYSON, supra note 67, at 79 (“Not every shopper was improper but a marked enthusiasm for shopping—synonymous with vanity—on the part of an otherwise respectable woman suggested a dubious character and an exaggerated and unhealthy concern for her own personal appearance, which in turn suggested her attempt at sexual attractiveness.”).
112. See SENNETT, supra note 61, at 190 (“The physical appearance of women emancipating themselves from sexual roles and the physical appearance of women trying to make themselves more sexual led to the same end: they appeared to others to be engaging in illicit activity.”). See also id. (“In the 1890s makeup was being mass-produced and discreetly advertised in women’s
III. AESTHETICISM, OSCAR WILDE, AND THE POPULAR ELISION OF DECORATIVE DESIGN AND “DEVIAN’T” SEXUALITY

The declarations and endeavors of the so-called “New Woman,” who enjoyed education, occupational skills, and disposable income for aesthetic novelties from fashionable dress to parlor curiosities, provoked anxiety among a large swath of late-nineteenth-century American society—especially men.\(^{113}\) In the 1890s, dramatic, unanticipated developments in the realm of gender and sexuality further contributed to the perception among many that the fundamental structure of society—which, of course, largely corresponded with “the system of patriarchy”—was “under attack.”\(^{114}\)

The final twenty years of the nineteenth century witnessed the emerging scientific and popular awareness of the “homosexual,” or “invert.”\(^{115}\) With unprecedented clarity, beginning in the 1880s,\(^{116}\) the notion of “effeminacy” became increasingly linked with an innately “deviant” sexuality among certain men.\(^{117}\) The scientific “discovery” of homosexuality supplanted the popular

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113. See BEDERMAN, supra note 63, at 13–14; SHOWALTER, supra note 51, at 8–11.
114. See SPENCER, supra note 71, at 196 (“Sodomites were reviled [in part because they] struck at the new driving force within society which brought comfort and security to the masses and helped them to rise above thousands of years of abject poverty. The sodomite could not procreate in his sexual act and his sterility also affected his role in the new consumer society.”).
115. See George Chauncey, Jr., From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance, 58–59 Salmagundi 114, 114 (1982) (discussing the emergence of the term “homosexual”); Cohen, supra note 72, at 108 (“In Sigmund Freud’s 1905 Three Essays on the Theory of Sexuality, he highlights what he perceives as the problems with earlier sexological discussions of male inversion produced by Ulrichs and Krafft-Ebing which (like John Addington Symonds) he lumps together as roughly asserting that ‘male inverts [possess] a feminine brain in a masculine body’. . . .”); Kevin Floyd, Making History: Marxism, Queer Theory, and Contradiction in the Future of American Studies, 40 CULTURAL CRITIQUE [THE FUTURE OF AMERICAN STUDIES] 167, 174 (Autumn 1998) (“The trope of gender ‘inversion,’ which registered increasing and unmistakable contradictions in sexual ideology in the residual terms of the Victorian logic of gender, emerged relatively early in [the previously described] process. This trope took the form, for example, of the widespread assumption that men who love other men are in some fundamental (e.g., biological or spiritual) sense feminized objects . . . .”).
116. See SHOWALTER, supra note 51, at 14 (“The concept of homosexuality began to take shape in the 1880s in the work of John Addington Symonds. Richard von Krafft-Ebing and in the research of Victorian sexologists such as Havelock Ellis.”). See also Laura Doan & Chris Waters, Introduction to Part II, Homosexualities, in SEXOLOGY UNCENSORED: THE DOCUMENTS OF SEXUAL SCIENCE 41–42 (Lucy Bland & Laura Doan, eds., 1998) (“The early work of sexologists gradually began to familiarize the European and North American public with the existence of a new species of being variously labeled the Uring, Uranian, intermediate type, invert or homosexual . . . . By the time the sensational trials of Oscar Wilde took place in 1895, male homosexuality was extensively debated, and its various manifestations and etiology subject to intensive scrutiny.”). See also Cohen, supra note 72, at 86 (noting “first psychoanalytic theorization of male homosexuality” in Freud’s publications of 1905).
117. See Doan & Waters, supra note 116, at 41 (“In the late nineteenth century a series of distinct ‘scientific,’ clinical and discursive practices established a new taxonomy of ‘deviant’ sexual behaviour predicated upon the presumed existence of a normative heterosexuality. ‘Sexual
understanding of “sodomy” as an episodic moral failing \(^ {118}\) with the notion of a “pathology, even a disease” that warped the “degenerate’s” body and mind.\(^ {119}\)

A pressing question, of course, was how to ascertain whether someone was an “invert.” Given this terminology, it is unsurprising that it “was widely assumed that a man who felt sexual desire for another man must be in some way female and that the signs of his femininity could be detected.”\(^ {120}\) Such reasoning opened the door to even more intense scrutiny of individuals’ aesthetic choices than had occurred earlier in the century—which meant that everything from one’s dress to one’s style of writing was potential evidence of the “hotchpotch of moral, mental, and physical traits” that lurked behind the (more or less effective) “disguises” employed by the male homosexual.\(^ {121}\)

The most readily available suspects among men\(^ {122}\) were the fashion- and design-obsessed figures of the “dandy” and the “Aesthete.”\(^ {123}\) Each had long been linked in the Anglo-American imagination with “effeminacy,”\(^ {124}\) and inversion’ was initially the umbrella term for any activity that deviated from this norm; however, by the early twentieth century, the phrase became synonymous with homosexuality. . . .”\(^ {125}\)

118. See Sinfield, supra note 56, at 99 (previously, morality and law had targeted not a certain type of person but a certain type of sexual act).


121. Id. at 45. See also Magnus Hirschfeld, Transvestites, in Sexology Uncensored: The Documents of Sexual Science, supra note 116, at 97, 99 (excerpt of Hirshfeld’s 1910 essay showing how adoption of feminine accoutrements had become pathologized by “scientists” and other “intellectuals” by the early twentieth century).

122. While this article focuses primarily on male homosexuality, a separate literature and conventional wisdom developed concerning his female counterpart. Notably, the “New Woman” was often accused not only of “degeneracy,” but of lesbianism as well. Angus McLaren, The Trials of Masculinity 32 (1997). For many, the male homosexual and the New Woman were effectively “mirrors” of each other. See Franz Meier, Oscar Wilde and the Myth of the Femme Fatale in Fin-de-Siècle Culture, in The Importance of Reinventing Oscar: Versions of Wilde During the Last 100 Years 117, 119 (Uwe Böker et al. eds., 2002).


124. See Sinfield, supra note 56, at 25–26 (“Effeminacy is founded in misogyny. Certain manners and behaviors are stigmatized by associating them with ‘the feminine’—which is perceived as weak, ineffectual and unsuited for the world of affairs. The terms were set by Aristotle...”)

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even with potential acts of “sodomy,” but had not been widely associated with homosexuality as a more permanent and dangerous biological phenomenon. However, when scientific discourse on “sexual inversion” made its way into the popular American consciousness in the 1880s, the dandy, the aesthete, and the homosexual would effectively merge—due in no small part to the personas of famous individuals displaying traits supposedly common to each category.

Such individuals could be readily found among the leaders of the well-known 1880s art-appreciation advocacy movement known as “Aestheticism.” Because the figures associated with Aestheticism constitute a crucial link in the connotative cluster stigmatizing design (and, by association, design patents), it is necessary to discuss the ideology and its proponents in some detail. The overarching tenet of Aestheticism was “art for art’s sake,” the significance of which was to emphasize[] the autonomous value of art and regards preoccupations with morality, utility, realism and didacticism as irrelevant or inimical to artistic quality . . . . [The movement’s] paintings therefore aimed at a decorative effect through composition and harmonious colour and frequently through the depiction of richly patterned surfaces and luxurious objects.

The movement’s leaders were essentially self-appointed experts who disparaged what they considered to be insufficient appreciation among the public of the visual arrangement and effect of the elements of dress, interior design, and art. Aesthetes urged the Anglo-American public to make such decisions based solely on aesthetic considerations—a view that struck many as unorthodox, if not radical. After all, most middle- and upper-middle-class Americans in East Coast cities had selected the objects decorating their parlors with objects “that depended on [recent] technological developments, . . . express[ing] their sense of beauty and comfort in the styles of past times and places.” Indeed, widespread social norms had for decades dictated that “objects on the parlor table,” whatever their style, were appropriate only to the

and gender is pinioned by the fears and excitements that gather around the allegedly inappropriate distribution of gender categories.”).

125. See SINFIELD, supra note 56 at 27 (“Up to the time of the Wilde trials—far later than is widely supposed—it is unsafe to interpret effeminacy as defining of, or a signal of, same-sex passion.”) Consider this description of the sort of men who favored the use of cologne, published in 1830: “A man that is wrapped up in perfumes is surely a pitiable creature. This fashion which was once disgustingly prevalent, is now confined, in a great measure, to persons of vulgar and mean habits, who are not only heedless of their religious obligations, but ignorant of the customs of good society. Still, however, the folly is not wholly banished from even the better informed classes of mankind; and it is a hideous cruelty, that a gentleman of moderate fortune will keep in his desk, for the purpose of perfuming note-paper, a vial of perfume, the price of which would pay the house-rent of a poor peasant, in our provinces for a whole year.” THE AUTHOR OF “THE COLLEGIANS,” & C. [i.e., GERALD GRIFFIN], TALES ILLUSTRATIVE OF THE FIVE SENSES THEIR MECHANISM, USES AND GOVERNMENT, WITH MORAL AND EXPLANATORY INTRODUCTIONS 209 (London, Edward Bull, 1830). Among the many flaws listed, a penchant for “unnatural” acts is (tellingly) absent in this early era.


127. See STEVENSON, supra note 50, at 4.
extent they “reflected the seriousness Victorians brought to their entertainments.”\textsuperscript{128} As “many advice book authors cautioned,” parlors not conforming to conventional morality might “degenerate into scenes of ‘cheap and vulgar’ display.”\textsuperscript{129} Parlor decoration was appropriate only “if it had a serious purpose” and did not evoke a “period known for its immorality.”\textsuperscript{130}

However, Aestheticism and other forces were beginning to change the status quo, as “changes in thought and the material world were beginning to dilute the emulsifying power of seriousness”; by the 1880s, ideological and commercial publications alike “showed readers how they could disavow the popular taste” through reflective approaches to their acquisition of material possessions.\textsuperscript{131} English designer and early Aesthete Charles Eastlake, for example, received substantial notoriety for his widely circulated tracts calling for the public “to develop the artistic sense” in various ways.\textsuperscript{132} He recommended “that people look for quality objects in all lands,” as the “display of an Indian ginger jar or a Japanese fan could educate the eye by showing ‘good design and skilful workmanship’.”\textsuperscript{133}

Such exoticism carried many negative associations for many middle- and upper-middle-class Americans of the time period.\textsuperscript{134} But perhaps more difficult for these individuals to accept was Eastlake’s dictate that the public concern itself “with aestheticism [rather] than with Victorian-style seriousness.”\textsuperscript{135} Eastlake “never mentioned serious purpose” because “to him, an appreciation of art was good in itself.”\textsuperscript{136} And the Aesthetes’ conception of “art” was broad, indeed: “The term ‘art’ was self-consciously prefixed to ranges of furniture, pottery, and other household goods influenced by Aesthetic ideals, blurring distinctions between the fine arts and decorative arts”; “furniture, carpets, wall

\begin{enumerate}
\item 128. \textit{Id.} at 13.
\item 129. \textit{Id.} at 4.
\item 130. \textit{Id.} at 5, 7.
\item 131. \textit{Id.} at 25, 26.
\item 132. \textit{Id.} at 26.
\item 133. \textit{See} discussion SCHLERETH, \textit{supra} note 51, at 123.
\item 134. STEVENSON, \textit{supra} note 50, at 26 (reciting one critic’s denouncing of homes he described as “shrines cluttered with French and German miracles of ugliness.”). The reference to “French and German” ugliness is notable for various reasons. More “exotic,” non-Western objects and design motifs typically found their way to the United States through countries like France and Germany, as did much pornography of the day. \textit{See id.} at 15 (“No U.S. trade catalog offered suggestive or sexually teasing stereographs, but they were available on the street—most often imported from France and Germany for clandestine purpose.”). This dovetails with other stigmatized aspects of continental culture. \textit{See, e.g.,} PALLISTER, \textit{supra} note 100, at 375–76 (“The entry of all foreign laces [into England] was excluded by law. ‘400,000 [pounds] have been sent out of the country during the last year,’ writes the ‘Edinburgh Advertiser’ of 1764, ‘to support our exiled countrymen in France, where they learn nothing but folly and extravagance.’”). Popular condemnation of foreign people and customs would take a sinister turn in the decades to come, as the U.S. economy and political landscape experienced turbulence that many sought to blame on immigration, \textit{see} BEDERMAN, \textit{supra} note 63, at 13, and public discourse on “nationalism” and “statecraft” became increasingly intertwined with xenophobic strains of eugenic thought. \textit{See} Carolyn Burdett, \textit{Introduction to Part VI, Eugenics, in SEXOLOGY UNCENSORED: THE DOCUMENTS OF SEXUAL SCIENCE}, \textit{supra} note 116, at 165, 165–67.
\item 135. STEVENSON, \textit{supra} note 50, at 26–27.
\item 136. \textit{Id.} at 26–27.
\end{enumerate}
coverings, pictures, and decorative items [should be] placed deliberately to enshrine the ‘cult of beauty.’”137

Oscar Wilde was often described as “the supreme aesthete.”138 He would become associated on both sides of the Atlantic with (initially) a distinct philosophy on dress and design and (subsequently) a scandalous sexual deviance that would indelibly stamp the “decorative arts” with the stigma of “moral decay,” “degeneracy,” and “perversion.” Wilde achieved great fame in the United States during his 140-stop North American lecture tour in 1882, advertised as a campaign for the promotion of Aestheticism.139 The popular perception of his mission is reflected in the headlines of articles announcing his arrival in major East Coast cities, which include “The Aesthetic Bard” (Philadelphia Inquirer), “The Science of the Beautiful” (New York World), and “The Aesthetic Apostle” (Boston Globe).140

This journalistic coverage of Wilde’s American speaking tour reveals widespread discussion—and even controversy—concerning the “supreme aesthete’s” unconventionally colorful and dramatic manner of dress and taste in décor.141 As social theorist Richard Sennett recounts: “When people commented on Oscar Wilde’s tastes in scarves and cravats, in the years before his homosexuality trial, they were wont to acknowledge his individuality and at the same time to remark that such tastes were a clear definition of how the ordinary gentleman ought not to appear.”142

139. Roy Morris, Jr., Declaring His Genius: Oscar Wilde in North America 2–3 (2013) (describing Wilde’s existing fame throughout North America when the celebrity writer arrived for his 140-lecture speaking tour in 1882, as well as their new “vision of [Wilde’s] intentionally affected preciosity in satin knee breeches. . ..”); Oscar Wilde in America: The Interviews 86 (Matthew Hofer & Gary Scharnhorst eds., 2010).
140. See Oscar Wilde in America: The Interviews, supra note 139, at 22, 31, 47.
141. See id. at 83, 88.
142. Sennett, supra note 61, at 191.
Figure 5. Napoleon Sarony, *Oscar Wilde* (1882) [cropped for fit]
To be sure, Eastlake and Wilde were not the only “Aesthetes,” nor were all Aesthetes from across the Atlantic. One prominent American-born Aesthete, for example, was Edward “Ned” Warren, the younger brother of prominent Boston lawyer Samuel Warren (whose firm partner was future Supreme Court Justice Louis Brandeis.) The Warren family’s biographer writes: “The 1870s and 1880s were a time when ‘aestheticism’ was an issue for everyone, and one that affected more than one’s experience of art and beauty. [In the United States, Ned Warren] was a figure in the aesthetic movement, indeed deserves to be considered one of its key examples.”

The biographer goes on to assert, notably, that Ned Warren “illustrates a philistine cliché of the times, that Catholicism, aestheticism, paganism, and homosexuality were interdependent.”

Aesthetes like Wilde and Warren were the target of jokes (and their sexual proclivities the subject of speculation) even before Wilde was tried and convicted of “gross indecency” in England in the mid-1890s. As art historians Pat Kirkham and Amy Ogata have recounted, even before the trials, the press had often “lampooned [Aesthetes] for an excessive and effeminate concern with taste and home decoration, self-absorption at the expense of wider issues, and associations with decadence.”

### Notes


144. Id. at 49. See also id. at 72 (“[While at Harvard, Ned’s] chief desire was to get into the Porcellian Club, because Sam [his brother, the law-firm partner of future Supreme Court Justice Louis Brandeis] had done so; but Ned was an unlikely candidate because of his eccentricities. . . . (‘Ned was known for his neckties.’”).

145. Thomas Prasch, Clashing Greeks and Victorian Culture Wars: Euripides vs. Aristophanes in Late-Victorian Discourse, 54 VICTORIAN STUDIES 464, 467 (2012) (“[I]n 1894, before Wilde’s arrest and trials, he was at the height of his fame . . . . [T]he homosexual ‘panic’ . . . was already beginning to operate before Wilde’s arrests . . . with male homosexuality firmly coalescing into an image of the decadent aristocrat . . . .”) (emphasis added); accord Rosy Aindow, Dress and Identity in British Literary Culture, 1870–1914, 60 (2010) (“Where men do appear in [elaborate] fashions in the late nineteenth century, they are critiqued for being effeminate.”) Wilde was technically charged only with “indecency,” carrying a two-year prison sentence (perhaps because of problems obtaining proof of “sodomy,” which carried a penalty of lifetime imprisonment.) However, the widespread understanding that he had effectively been accused of homosexual conduct is reflected in commentary both during and after the trial. See, e.g., Charles Grolleau, The Trial of Oscar Wilde 13–14 (1906) (“Oscar Wilde, bon vivant, man of letters, arbiter of literary fashion, stood at the bar of public opinion, a wretch guilty of crimes against which the body recoils and the mind revolts.”).

146. Kirkham & Ogata, supra note 137, at 429–31. See also Wilson, supra note 88, at 6 (“To [act] fashionably is both to stand out and to merge with the crowd, to lay claim to the exclusive and to follow the herd . . . . [D]espite its apparent irrationality, fashion cements social solidarity and imposes group norms, while deviations in dress are usually experienced as shocking and disturbing.”).
Not until Wilde’s 1895 internationally followed trials, however, did “male homosexuality firmly coalesce[e] into an image of the decadent aristocrat . . . .”147 It was through the Wilde trials that the “homosexual undercurrent of the Aesthetic Movement was cruelly exposed.”148 This linking of Wilde’s professional, artistic, and sexual undertakings was a major driving force in the formation, in the middle-class-centered Anglo-American consciousness, of a perceived “nexus of effeminacy, leisure, idleness, immorality, luxury, insouci- ance, decadence and aestheticism.”149

Men’s aesthetic affinities and their sexual proclivities were henceforth linked in the public imagination. With surprising speed and rhetorical vigor, the values held dear by the Aestheticism movement—in broad strokes, an appreciation of the beauty of everyday design—were rebuked.150 One commentator, publishing in 1906 a cautionary tale-cum-amateur psychological analysis of Wilde, drew an explicit connection between the playwright’s penchant for the unusual in apparel and decoration, his vanity, and his “wretched” sexuality.151 Wilde’s love of novelty served as a metaphor for his popularly imagined physical, moral, and spiritual “disease.”152 His “pin[ing] for strange pas-

147. Prasch, supra note 145, at 467.
148. See ROBB, supra note 120, at 36.
149. SINFIELD, supra note 51, at 3.
150. See Kirkham & Ogata, supra note 137, at 429–31 (appreciation of design “lost much of its fashionability in the mid-1890s with the sensationalist media coverage of Wilde’s trial for gross indecency, in which he was found guilty”).
151. GROLLEAU, supra note 145, at xii.
152. See id. at 5.
sions, new sensations” purportedly reflected the “whole awful truth”—that “[p]erverted passions consumed the fire of his being.”

Even before Wilde’s prosecution in 1895, few city-dwelling adults on the East Coast of the United States had been unfamiliar with “the supreme aesthete’s” tastes, artistic philosophies, and flamboyant persona. After 1895, large segments of the American public quite easily “mapped” Wilde’s “depravity” of body and spirit onto the aesthetic and types of designed objects already associated with him. As Regenia Gagnier writes:

In Wilde’s trials in 1895, his perceived position as both spokesperson for art and example of sexual deviant resulted in a remarkable elision in the public domain of art and sexuality and thus in the creation of a new category of aestheticism . . . . As his works were given equal time with his sexual practices during the trials, aestheticism came to represent a distinct and private realm of art and sexuality . . . . Thus aestheticism came to mean the irrational in both productive (art) and reproductive (sexuality) realms: an indication of the art world’s divorce from middle-class life.

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153. Id. at 5.
Rumour had been busy with the name of Oscar Wilde for a long time before the whole awful truth became known . . . . But even those who were still proud to rank him among their friends did know not how far he had wilfully drawn himself into the web of disgrace. Much that seemed strange and unaccountable was attributed to his well-known love of pose. Men shrugged their shoulders and declared that ‘Wilde meant no harm.’ . . . Men of such parts could not be judged by ordinary standards.

Id. at 6–7.

154. See Prasch, supra note 145, at 467.

155. See RUSSETT, supra note 29, at 5–6, 7 (“Finding ‘manifestations of a universal law’ had become ‘the intellectual pastime of the nineteenth century.’ Reformers and conservatives alike searched for a new foundation for social and political action in the face of the weakening of religious belief and the growth of social unrest . . . . Anatomists, physiologists, and psychologists grew increasingly concerned to classify individuals according to types with sharply differing constitutions and aptitudes.”). See also McCLAREN, supra note 122, at 29–31 (discussing turn-of-the-century public paranoia concerning the figure of the male homosexual as “both the cause and effect of the growing fear of the male ‘other’”).

156. See generally GROLLEAU, supra note 145 (retroactively “feminizing” the artistic creations of Oscar Wilde in book providing inaccurate and incomplete account of the trial it purports to recount); cf. Loos, supra note 94, at 22 (“[O]rnament is no longer a natural product of our culture, so that it is a phenomenon either of backwardness or degeneration . . . . [T]he modern ornamentalist is a straggler or a pathological phenomenon.”).

In this manner, the prevailing connotative cluster surrounding ornament and decoration, championed by Aestheticism and Wilde in particular, decisively expanded in mid-1890s America to include “moral decay” and “perversion.” Both perceived homosexuals and the activities and objects associated.

158. See SHOWALTER, supra note 51, at 150 (quoting letter from Romain Rolland to Richard Strauss) (“Oscar Wilde’s Salome is not worthy of you. Wilde’s Salome and all who surround her, save only that brute of a Jochanan, are unhealthy, unclean, hysterical or alcoholic, oozing with a perfumed and mundane corruption. . . .”); Ruth Robbins, “A Very Curious Construction”: Masculinity and the Poetry of A. E. Housman and Oscar Wilde, in CULTURAL POLITICS AT THE FIN DE SIÈCLE 137, 146 (Sally Ledger & Scott McCracken eds., 1995) (“Wilde did dare to speak the name of sexual pleasure [in his works], and got away with it until the point where the word and the deed were ‘proved’ by a court of law to be intimately connected.”) (internal citations omitted).

159. DOUGLAS & ISHERWOOD, supra note 83, at xxiv (“Social life is a matter of alignments, for and against, and for signaling alignments goods are like flags . . . . It turns out that everything depends on how the people are organized, the whole community being the signal box.”)
ated with them were henceforth subjected to aesthetic surveillance and legal consequences. Any man who, like Wilde, evinced an appreciation for “phatic” forms of beauty—especially decoration, adornment, and ornamentation, especially in dress, items of home décor, and related objects and materials—might be condemned and persecuted as a “deviant.”

160. See Robbins, supra note 158, at 137 (“Wilde’s trial may be understood as the end of an era”). See also ROBB, supra note 120, at 39 (“[Conventional notions about homosexuality] have little to tell us about the Victorian age. They belong, not to the fenced 19th century, but to the more openly repressive age that began with the death of Oscar Wilde in 1900.”); see also Robbins, supra note 158, at 138 (“The fear of an ending aroused by the term fin de siècle is intimately related to notions of multiplicity; above all the fear that the anarchy of multiple interpretations will replace the safety of one view of the world. The events of 1895 were of crucial importance here. Wilde’s downfall dramatized the conflict between those who were prepared to live at the margins, to live simultaneously several different versions of life, and those who wished to use the full ideological weight of church and state to enforce nineteenth-century sexual norms.”).

162. See Yvette Greslé, Strategies of Veiling Same-Sex Desire and Its Public Consumption: Aubrey Beardsley’s Illustration of Oscar Wilde’s 1894 Salome, 70 DE ARTE 22, 35 (“[T]he modern ornamentalist is a straggler or a pathological phenomenon.”).

163. See Robbins, supra note 158, at 143 (explaining that “for Wilde, ‘all art is essentially useless’”—and that based on the mores of the time, “an effeminate use of language would be one which preferred the phatic to the functional.”).

164. SINFIELD, supra note 56, at 41.


166. See LOOS, supra note 94, at 22 (“[T]he modern ornamentalist is a straggler or a pathological phenomenon.”).

167. See ELIZABETH E. GUFFEY, RETRO: THE CULTURE OF REVIVAL 34 (2006) (“In Britain, the [flowery Art Nouveau] style was increasingly associated with aestheticism and particularly with Oscar Wilde, who had been imprisoned for homosexuality in 1895. ‘Pillow, L’Art Nouveau at South Kensington,’ an article published in 1901 in the Architectural Review, dubbed the style a ‘fantastic malady.’ Interviewed in a Magazine of Art article in 1904, architect Charles Voysey identified Art Nouveau with ‘a debauch of sensuous feeling,’ calling the style ‘distinctly unhealthy and revolting.’ By 1930 the American historian Lewis Mumford recalled Art Nouveau as dominated by a ‘meaningless stylistic exuberance.’ When John Betjeman surveyed the style in the same year he admitted that it had produced ‘many a hideous little side table, many a sickly front door.’”); see also Greslé, supra note 162, at 34 (“It is significant that, at the time of Wilde’s trials, [famous Art Nouveau illustrator Aubrey] Beardsley and Wilde were conflated in the popular imagination . . .”); TREASURY OF ART NOUVEAU DESIGN & ORNAMENT (Dover 1980) (Illustrations selected by Carol Belanger Grafton) (“Ornament is the essence of Art Nouveau,” which “concent-
treated on the ornamental and decorative potential of the flowing line in painting, printing, wallpaper, and [other] applied arts. Hundreds of thousands of carefully wrought designs embellished books, bookplates, furniture, and appliances.” (quoted from the publisher’s description on the back cover). While the associations among Wilde, Aestheticism, and ornament gave rise to rapid changes in the normative contours of Anglo-American masculinity, they did not immediately affect the output of the designed domestic goods, which were purchased primarily by women, a group far less vulnerable to the sexuality-focused scrutiny of the post-1895 era. Further, one would not expect to see Art Nouveau’s stigma exerting a strong influence outside the realm of the “decorative arts”—for example, in material covered by copyright law, as opposed to design-patent law—as “the impact of Art Nouveau on the fine arts was ambiguous and often only peripheral.” Alastair Duncan, *Art Nouveau* 79 (1994). This is because Art Nouveau “was largely a way of designing, rather than painting per se, and was therefore more readily expressed by plastic treatment” than on flat surfaces like canvas. *Id.*
Figure 9. Closing Scene at the Old Bailey: Trial of Oscar Wilde (1895)
In short, by the turn of the twentieth century, ornament, appearance, aesthetics, morality, gender, sexuality, health, and social order had grown inextricably intertwined in the cultural imagination of the politically dominant segments of American society. At that point, it struck many members of society as appropriate, if not imperative, for the law to step in—and it did, employing various tools to acknowledge and endorse values aligned with this newly crystallized connotative cluster. Among those tools, we will see, was design-patent doctrine, as litigation over decorative and ornamental design provided both a cognitive lens and a public platform for judges to implement prevailing social norms through their adjudication of disputes over material carrying enormous symbolic power.168

IV. FEDERAL JUDGES AND GENDERED NOTIONS OF MORALITY

Judges, no less than laypeople, are susceptible to the conceptual structures and social norms governing most aspects of our day-to-day reasoning and behavior.169 Indeed, the members of the judiciary preserve their institutional legitimacy in part by implementing prevailing norms and values through their rulings.170 As Cass Sunstein explains, judicial decisions invariably reflect biases mediating the interpretation and application of legal “rules”:

168. See De Grazia, supra note 13, at 4 (“[T]he period in question witnessed] the transformation of goods from being relatively static symbols around which hierarchies were ordered to being more directly constitutive of class, social status, and personal identity . . . . [G]ender roles have inflected this dynamic of change and have been significantly inflected by it.”); Robbins, supra note 158, at 137 (“[W]hen addressing] cultural boundaries and their enforcement in binary oppositions [at the fin de siècle] masculinity [is an appropriate] focus, because masculinity’s dominant ideological position means that the boundaries which define it are most in need of policing.”). See also De Grazia, supra note 13, at 9 (“[T]here has long been] a bias in Anglo-American studies that consumption is generally construed as individual rather than social, to the neglect of the numerous ways in which ruling institutions define practices and standards of consumption [as when] they define appropriate standards of consumption with statistics and property laws . . . . Indeed, it could be said that the state, in the process of allocating resources, legitimating property, and defining social obligations, establishes the very notion of private as opposed to public consumption. By the same token, the state is central to the activity of gendering consumption.”).

169. See WINTER, supra note 23; Hutchinson & Cohen, supra note 18, at 21–22. To be sure, there are certain widespread conventions in the American legal system that could potentially preclude a “perfect mapping” of social and cultural circumstances onto judicial behavior—the institutional practice of stare decisis being the most obvious example of an intervening-con-deflecting mechanism. However, the real-life impact of such constraints may—and, as shown below, do—vary wildly. See Jeremy Waldron, Stare Decisis and the Rule of Law: A Layered Approach, 111 Mich. L. Rev. 1, 2, 12 (2012) (“How much uncertainty [remains despite the convention of stare decisis—how much damage does] it do to the basis of predictability—is a matter of degree and depends on all sorts of surrounding circumstances . . . .”).

170. See discussion MARY DOUGLAS, HOW INSTITUTIONS THINK 46 (1986) (theorizing behavior of “legitimating individuals” within institutions, including “judges,” based on view that “most established institutions, if challenged, are able to rest their claims to legitimacy on their fit with the nature of the universe.”).
We might be tempted to suppose that people can avoid expressive concerns entirely and that it is possible to assess law solely on the basis of consequences—that an open-ended, ‘all things considered’ inquiry into consequences is a feasible way of evaluating legal rules. But this is not actually possible. The effects of any legal rule can be described in an infinite number of ways. Any particular characterization or accounting of consequences will rest not on some depiction of the brute facts; instead it will be mediated by a set of (often tacit) norms determining how to describe or conceive of consequences.  

One way legal actors give effect to prevailing social norms is through the symbolic, metaphorical treatment of the subject matter in the disputes before them. Such symbolism is effectuated through—and can be reconstructed through an examination of—word choice, thematic focus, and other rhetorical techniques. Thus, as an affinity for design, particularly fashion(able) design, grew increasingly feminized and morally stigmatized in the mid-to-late nineteenth century, federal-court judges in major cities on the East Coast of the United States would take note and modify their personal and professional conduct accordingly.

No white adult male of turn-of-the-century America was immune from the pressures exerted by the gendered connotative clusters discussed above; however, federal judges were under particular—and particularly visible—pressure to endorse and implement this value system. The educated and moneyed, especially in major East Coast cities like Boston and New York, were those most likely to be appointed to prestigious judgeships on the Supreme Court and the

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172. See discussion LAKOFF & JOHNSON, supra note 24, at 115–16 (“[M]etaphor pervades our normal conceptual system. Because so many of the concepts that are important to use are either abstract or not clearly delineated in our experience (the emotions, ideas, time, etc.), we need to get a grasp on them by means of other concepts that we understand in clearer terms (spatial orientations, objects, etc.) This need leads to metaphorical definitions in our conceptual system [and indeed, metaphor plays an ‘extensive role’] in the way we function, the way we conceptualize our experience, and the way we speak. Most of [the relevant] evidence comes from language—from the meanings of words and phrases and from the way humans make sense of their experiences . . . . [Thus, hints of the existence of such general metaphors may be given in the secondary or tertiary senses of other words . . . . Language thus provides] data that can lead to general principles of understanding . . . . The principal issue for such an account of definition is what gets defined and what does the defining?”).
173. See Austin Sarat et al., Introduction: On the Origins and Prospects of the Humanistic Study of Law, in LAW AND THE HUMANITIES: AN INTRODUCTION 1, 4 (Austin Sarat et al. eds., 2010) (“Law is a language and language matters. [It is] a rhetorical practice—not just in the sense of an art of persuasion, but of a disciplined, textured, self-directed habit of reading, speaking and above all, writing, that has at its root a critical understanding of the links among language, consciousness, and power . . . . [In short, what we say matters and is indissociably bound up with the forms in which we say it.”).
174. See, e.g., Lawrence Baum, Case Selection and Decisionmaking in the U.S. Supreme Court, 27 Law & Soc’y Rev. 443, 446 (1993) (“[S]cholars have shown a strong relationship between the policy positions justices take in cases and external evidence of their preferences.”) (internal citations omitted).
then newly formed federal circuit courts of appeals. These same individuals’ education and financial success rendered them more vulnerable to charges of “deviance” from championed middle-class values—including, but not limited to, normative sexual practices—in part because of the strong class component of turn-of-the-century conceptions of masculinity.

Judges’ emphatic implementation of prevailing social norms both affirmed and perpetuated—or at least, conveyed that the performer was the sort of man who would make decisions most likely to perpetuate—prevailing social norms and values, simultaneously maximizing the likelihood that the ruling(s) in question would preserve or even bolster the institutional legitimacy and apparent moral integrity of the federal judiciary. While one might initially write off patents—and specifically, design patents—as an area of law in which gendered social norms and notions of sexual morality are unlikely to play a substantial role, a close study of federal appellate decisions will reveal the contrary.

Design patents, like “utility” patents, were and are an exclusively federal matter, making the Supreme Court the (theoretical) court of last resort on questions of design-patent doctrine. Until roughly the turn of the century, the Court did play that role—until it effectively abdicated it to the Second Circuit, as discussed below. Thus, it makes sense to start with a portrait of the Justices

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175. See Lawrence M. Friedman, A History of American Law 306 et seq. (3d ed. 2004) (noting that U.S. legal profession at the turn of the twentieth century was “stratified more by social class and training than along geographical lines”).

176. See Chauncey, supra note 119, at 60.

177. McClaren, supra note 122, at 29 (noting popular perception that much of the purported “erosion of the natural gender boundaries was attributed to the ‘decadence’ of the upper classes”).

178. See Sinfield, supra note 56, at 63 (“[T]he more precarious the actuality, the more assertive the ideology; manliness was always fragile. ‘Its existence,’ William Acton wrote in 1857, ‘seems necessary to give a man that consciousness of his dignity, of his character as head and ruler, and of his importance, which is absolutely essential to the well-being of the family, and through it, society itself.’ With so much hanging upon it, manliness was continually at issue.”) (internal footnote omitted).

179. This dynamic is especially pronounced in late nineteenth-century Supreme Court decisions in which judges implicitly claimed the moral high ground through the vilification of legislatures as immoral or derelict or both in their duties to the public. See, e.g., Boston Beer Co. v. State of Massachusetts, 97 U.S. 25, 33 (1877) (“Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects.”); Boyd v. Alabama, 94 U.S. 645, 650 (1876) (Field, J.) (no legislative body can “restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals”).

180. See discussion Charles Goodwin & Marjorie Harness Goodwin, Seeing as Situated Activity: Formulating Planes, in Cognition and Communication at Work 61, 90 (Yrjo Engeström & David Middleton eds., 1996) (“The mundane routine work of large organizations as strategic a site as rituals in traditional societies for the anthropological analysis of culture.”) (internal citations omitted.); Kuchta, supra note 96, at 9 (“Studying masculinity in political culture . . . means looking at the ways in which political legitimacy [has been] defined in part by issues of character—by the personal integrity and manliness of those claiming a place in the political arena.”).
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who laid the foundational precedent of design-patent jurisprudence. Legal historian Lawrence Friedman paints the following picture of the judges on the Supreme Court—similar in demographic respects and ideological inclinations to most federal judges:

What sort of men sat on [the Supreme] Court? And the answer is: middle-aged men, fairly conservative; churchgoing men who believed in traditional values and clean living; honorable men, according to their lights, men who worried about the fate of their country, and who were frightened of the tidal waves of social change that they saw washing over the United States.  

As Friedman recounts, when Justices at the turn-of-the-century upheld progressive economic legislation, it was where such laws “stood for decency and traditional values,” including “family values, domesticity, and motherhood,” and where such legislation represented a bulwark “against decay” and “vice.” When the Court upheld a women’s labor law in its 1908 decision in Muller v. Oregon, for example, the Justices reasoned—based in large part on their reliance on “widespread and long-continued belief” and “judicial cognizance of all matters of general knowledge,” that “woman has always been dependent on man,” and that “healthy mothers are essential to vigorous offspring, the physical wellbeing of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.”

Such statements were far more normative than descriptive; the Supreme Court in Muller was in fact painting a picture of a society that was rapidly disappearing. Their stubbornly retrograde view of “the public good” was that of Justices who were, in Friedman’s words, “terrified of radical winds blowing in from across the Atlantic.” The members of the Court were a “soundly upper middle class” group, and “[w]hat they feared the most, it seems, was excess.”

The Justices of the Supreme Court were not anomalous in this respect. Muller reflects an ideology “representative of [that held by judges] in both the state and federal courts that positioned the legal rights of individuals as a bar-

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182. Id. at 22.
183. 208 U.S. 412 (1908). (These quotations are taken from various parts of Muller.)
184. See Friedman, 20th Century, supra note 181, at 23. Judicial fear and stigmatizing of the “foreign” has been a recurring theme in American jurisprudence. For the notion of “falsity” associated with the Orient, see W.A. Sheaffer Pen Co. v. Worth Featherweight Pen Co., 41 F.2d 820, 821 (S.D.N.Y. 1930) (Woolsey, J.) (referring to knockoff of popular pen as a “Chinese copy”). Consider also the 2003 Supreme Court case of Lawrence v. Texas, 539 U.S. 558, in which a majority of the Court struck down as unconstitutional a Texas “sodomy” prohibition insofar as it purported to regulate the private sexual conduct of consenting adults. Justice Scalia dissented vehemently, arguing (perhaps unaware of the longue durée of the relevant themes in Anglo-American cultural history) that the Court “should not impose foreign moods, fads, or fashions on Americans.” Id. at 598 (internal citation omitted).
185. See Friedman, 20th Century, supra note 181, at 23. This fear likely stemmed in part from the traditional association between class, ornament, and decadence. See discussion supra Part II.
rier to efforts by state and federal government to promote the public good.” 186
And, importantly, the degree of federal courts’ “say” over the “public good” was broader than ever before, 187 encompassing the regulation of sexuality. 188
(Indeed, even in the patent arena, federal judges saw no substantive or jurisdictional obstacle to deciding cases in a manner that promoted “the morals, health, or good order of society.” 189) Friedman sums up the landscape by explaining that American federal judges of the turn-of-the-century “simply reacted [to the cases before them] in the way that respectable, moderate conservatives of their day would naturally react.” 190

This included policing the law, through their decisions, for the preservation of the “clean and wholesome,” for any “motive dominating the legislature than the purpose to [serve] the public health or welfare,” and for anything that would “pervert . . . the natural outcome of a dominant opinion” or otherwise controvert “traditions of our people and law.” 191 In many cases, it was simply “self-evident”—and not only to Supreme Court Justices 192—that particular outcomes in disputes raising “moral” questions followed from “the nature of things.” 193

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187. See id. at 148-50 (developments in post-Civil War era reflected widespread “notion that the federal courts could intervene” in a broader range of cases than ever before). Cf. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, 1 (1977) (“What dramatically distinguished nineteenth century law from its eighteenth century counterpart from the extent to which common law judges came to play a central role in directing the source of social change.”); id. at 2 (“It was as clear to laymen as it was to lawyers that the nature of American institutions, whether economic, social, or political, was largely to be determined by the judges. In such a period, questions of private law were seen and considered as questions of social policy. Indeed, judges gradually began to shape common law doctrine with an increasing awareness that the impact of a decision extended far beyond the case before them [and] . . . . were led to frame general doctrines based on a conscious consideration of social and economic policies.”)

188. See generally JESSICA R. PILEY, POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI (2015) (arguing that the Court’s upholding of the Mann Act reinforced traditional conservative views of sex such as chastity before marriage for women and faithfulness for husbands and fathers).

189. See Nat’l Automatic Device v. Lloyd, 40 F. 89, 89–90 (N.D. Ill. 1889) (“[T]he machine in question is only used for gambling purposes. The law of the United States only authorizes the issue of a patent for a new and useful invention, and in an early case on that subject (Bedford v. Hurl, 1 Mason, 302) it was held that the word ‘useful,’ as used in this statute, means such an invention as may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals, health, or good order of society, and the principle thus enunciated has been uniformly applied ever since.” (emphasis added)); Scott & Williams v. Aristos Hosivery Co., 7 F.2d 1003, 1004 (2d Cir. 1925) (IP rights not enforced because product deemed deceptive).

190. See FRIEDMAN, 20TH CENTURY, supra note 181, at 24.


192. See, e.g., People v. Abbot, 19 Wend. 192, 196 (N.Y. Sup. Ct. 1838) (Cowen, J.) (“[N]o court can overrule the law of human nature, which declares that one who has already started on the road of prostitution, would be less reluctant to pursue her way, than another who yet remains at her home of innocence and looks upon such a career with horror.”)

193. Coppage v. Kansas, 236 U.S. 1, 17 (1914) (emphasis added). Even Justice Holmes, in his 1918 critique of those he disparaged as “naïve” proponents of “natural law,” carved out certain
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Thus, male judges of the time, making use of the substantial moral discretion they possessed in shaping the law, 194 could—and did—distance themselves from design patents, and by extension, design, thereby confirming 195 their own normatively desirable identity 196 and helping to avoid (real or imagined) scrutiny in an era of growing suspicion about the sexuality of—potentially—any man. 197

Leading decisions in turn-of-the-century design-patent cases reveal that the sociocultural dynamics described above played a significant role in judicial thinking and behavior. While not the only (or even the most direct or effective) means of “performing” prevailing gender and sexuality norms, opinions issued in design-patent disputes issued by leading federal judges between roughly

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194. See, e.g., Champion v. Ames, 188 U.S. 321 (1903) (shaping Commerce Clause doctrine based in part on the purported moral damage inflicted by gambling); Rosen v. United States, 161 U.S. 29 (1896) (reflecting outcome consistent with majority’s hostility toward “obscene” material); Holy Trinity Church v. United States, 143 U.S. 457 (1892) (giving effect to Court’s strong religious impulses, in contravention of plain language of statute in question).

195. See Robbins, supra note 158, at 141–42 (“How does a man write in such a way as to ensure that his audience is in no doubt about his ‘manliness’? There is no precise formula, but the choices of form and matter, the how and the what in writing, and the context in which the writing takes place, provide some clues. They must be chosen in order to reflect the expected virtues of masculinity, now [as of the fin de siècle] being defined not as adult qualities, but in opposition to femininity.”).

196. See Kuchta, supra note 96, at 7 (“Manners and material culture gave shape to ideological processes; material signs formed and informed systems of power, rather than standing outside them in some exterior symbolic realm. . . . Thus while ideas of masculine character were constructed by changing political ideologies, political ideologies in turn were constructed around changing notions of character.”).

197. As historian George Chauncey recounts: “A sympathetic and unusually well informed doctor writing in 1918 confirmed the validity of such concerns, noting that in respectable society, ‘the accusation of perversity [homosexuality] . . . means ruin.’” Chauncey, supra note 119, at 385 n.29 (quoting E.S. Shepherd, Contribution to the Study of Intermediary, 14 Am. J. UROLOGY & SEXOLOGY 242 (1918)). This stigma certainly applied long before 1918, as illustrated by numerous primary sources collected by Chauncey. See id. at 44. Whether the nature of such “ruin” was legal (as in the case of Oscar Wilde) or merely “social” mattered little, for the result was the same: loss of status and power in mainstream society. Those deemed homosexual effectively “forfeit[ed] their privileged status as men.” Id. at 58; 59. Further, being married did not shield one from scrutiny; Oscar Wilde himself was widely known married and even fathered multiple children, as did many homosexuals of the era. See Cohen, supra note 72, at 94–96.
1870 and 1930 made increasing use of symbolic, allegorical, lexical, and other techniques to visibly endorse the values of the politically dominant segments of American society. Judges could thereby—whether consciously or not—contribute to a desirable construction of others’ perceptions of them and simultaneously rule in a manner that would ostensibly promote a specific vision of “public order,” the “public interest,” and “the good of the community.”

In Part 2 of this series, I will engage in a close reading of influential judicial decisions on issues of critical importance to design-patent law—particularly, in appeals decided by the judges of the Second Circuit, who sat in the American design capital of New York City, and whose rhetoric and manipulation of design-patent doctrine strongly influenced the direction of the law in other circuit courts when they eventually came to rule on the same or similar issues. As my examination will reveal, these judges implemented social norms concerning design, along with judicial concerns about personal and institutional legitimacy, in a manner that strongly influenced both doctrine and outcomes, and gradually eliminated design patents as a viable tool for advancing claims of intellectual property infringement.

198. JERRY D. MOORE, VISIONS OF CULTURE: AN INTRODUCTION TO ANTHROPOLOGICAL THEORIES AND THEORISTS 285 (4th ed. 2012) ("[C]ulture is symbolic and meaningful, symbolic systems provide guidelines for action, and the action is often directed to central contradictions of social life . . . . Rituals are a class of symbolic systems.").

199. See GARY WATT, DRESS, LAW, AND NAKED TRUTH: A CULTURAL STUDY OF FASHION AND FORM 5 (2013) ("[W]ithin civil society, dress and adornment mediate between the bare human individual and the social group in a way that parallels law’s function as a mediator between the individual and society. It is therefore plausible to argue that dress is not merely an image of law’s functions of social communication and social regulation, but that it might occupy a cultural locus identical with law, so that dress becomes not merely correspondent with law but potentially cooperative and competitive with law.")

200. See Sarat et al., supra note 173, at 4 ("[W]hat we say matters and is indissociably bound up with the forms in which we say it.").

201. See MARY DOUGLAS, PURITY AND DANGER 123 (rev. ed. Routledge 2002) (1966) ("Some powers are exerted on behalf of the social structure; they protect society from malefactors against whom their danger is directed. Their use must be approved by all good men . . . . [W]here the social system explicitly recognizes positions of authority, those holding such positions are endowed with explicit spiritual power, controlled, conscious, external and approved—powers to bless or curse.")

202. See MOORE, supra note 198, at 288 ("Most importantly, key scenarios are not invariant codes because they are employed by social actors who—sometimes in a calculated fashion, other times unthinkingly—may emphasize some cultural schemes, downplay others, or actively modify the key scenarios. This entire dynamic realm comprises practice.") (emphasis added) (internal citations omitted).

203. See CHAUNCEY, supra note 119, at 100 ("[N]ormal’ men began to define their difference from queers on the basis of their renunciation of any sentiments or behavior that might be marked as homosexual.")

204. The word “order” was rich in semantic content during the relevant time period, linked to notions of both efficiency and morality. See, e.g., Kenyon v. People, 26 N.Y. 203, 209 (1863) ("The character of the house [as a brothel] could not be shown by general reputation. That a house is disorderly, is to be proven by particular facts.") (emphasis added).

205. FRIEDMAN, 20TH CENTURY, supra note 181, at 17.

206. Id. at 24.

207. Colman, Part 2, supra note 6.