

Is Clothing Probative of Attitude or Intent? Implications for Rape and Sexual Harassment Cases

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Introduction

"She asked for it. The way she was dressed with that skirt you could see everything she had. She was advertising for sex."¹ "We felt she was up to no good [by] the way she dressed."² "She was obviously dressed for a good time, but we felt she may have bit off more than she could chew."³ These words were spoken by jurors who reached a unanimous verdict, acquitting a man of charges of kidnapping and sexual assault in a 1989 Florida case.⁴ The jurors were referring to the clothing the alleged victim wore at the time of

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1. *Jury: Woman in Rape Case 'Asked For It'* THE CHICAGO TRIBUNE, North Sports Final Edition, Oct. 6, 1989 [hereinafter *Jury*]. Juror Roy Diamond, who made this statement, has since stated that the words quoted were misinterpreted. *Rape-Add-#—9* UPI, Dec. 14, 1989, available in LEXIS, Nexis Library, UPI Files [hereinafter *Rape-Add-#—9*]. "It meant sex, not rape. People heard it and they just took it for the worst. . . if a woman goes out at 3 a.m. in that kind of a skirt, she is advertising for sex, and she got what she advertised for." *Id.* Diamond further explained that the outfit "was a factor" in the verdict, but not the determining factor. *Id.* Apparently, the defense argued at trial that the complainant was a prostitute, and Diamond explained that the jurors were persuaded at least in part by her clothing that she was. *Id.*

2. *Man Acquitted of Rape in Florida Convicted in Georgia* UNITED PRESS INTERNATIONAL, Mar. 30, 1990 (quoting juror Dean Medeiros) [hereinafter *Man Acquitted*].

3. *Jury, supra* note 1 at 11 (quoting juror Mary Bradshaw).

4. *Id.*

the incident. The clothing consisted of a short, white, lace skirt, a brief top, a leather belt, and no underwear.⁵

These statements reflect the stereotypical belief that women invite their own rapes, sexual assaults, and sexual harassment by the manner in which they dress.⁶ Courts have held that a woman's clothing may signify her *implied consent* to be sexually assaulted or her *implied welcome* of sexual harassment.⁷ Because consent to sex is a defense to rape and welcoming sexual advances is a defense to sexual harassment, courts consider clothing to be probative, and thus relevant, evidence.⁸

The belief that clothing can indicate consent to sexual assault or can invite sexual harassment stems from the empirically proven fact that people infer intent and attitude of others based on their clothes.⁹ Because those inferences are often inaccurate, clothing is not probative or relevant evidence of the intent or attitude of the wearer.¹⁰ In addition, the widespread misinterpretation of clothing strongly suggests that introducing it to show intent or attitude will likely be prejudicial. For these reasons, clothing should be inadmissible in a criminal prosecution if offered to show the complainant's attitude or intent.

Part I of this article discusses the majority view that clothing is a relevant indicator of a victim's attitude or intent and is therefore admissible at trial. Part II presents social science research that shows how clothing is perceived and that those perceptions are often inaccurate. Part III argues that in cases of rape, sexual assault, or sexual harassment, the victim's clothing should be per se inadmissible if introduced to show that the victim consented to or welcomed the sexual advances.

5. *Id.*

6. An April, 1990, survey by the Gannett News Service revealed that almost one in three people in the U.S. believe that the behavior or dress of a rape victim can contribute to attacks. Elizabeth Snead, *Do Women's Clothes Invite Rape?*, USA TODAY, Apr. 19, 1990, at 6D. Most people who hold this view reported they had never personally known a rape victim. *Id.* Men and people over 55 were more likely than others to attribute some blame to the victim. *Id.*

7. See *infra* part I.

8. See *infra* notes 11-57 and accompanying text.

9. See *infra* part II.

10. Evidence is probative if it can help prove or disprove a fact that is of consequence to the litigation. In a rape or sexual harassment case, the victim's attitude or intent may be a material issue of consequence to the litigation. But clothing should not be used as evidence of that attitude or intent because it is not probative. Because clothing has no probative value in showing attitude or intent, it is not relevant. Because it is not relevant to the question of the wearer's attitude or intent, it should be inadmissible in a criminal prosecution if offered for that purpose.

I. Does Clothing Mean Consent?

Courts accept the view that a woman's clothing conveys her attitude or intent when they permit such evidence to be introduced at trial. In rape and sexual assault cases, the defense offers clothing to show the victim "consented." In sexual harassment cases, the defense offers clothing to show the victim "welcomed" the sexual advances.

A. Rape and Sexual Assault

1. Caselaw

Although there is no available data showing how often clothing is introduced in rape or sexual assault cases for the purposes of showing consent, it does occur.¹¹ In a 1978 sexual assault case,¹² the Montana Supreme Court noted that the "defendant testified that the sexual contact was encouraged by the dress and behavior of the prosecutrix,"¹³ a fifteen year old girl who had come to the defendant's home to babysit his children.¹⁴ In 1988, a man convicted of rape in Georgia appealed a trial court's refusal to introduce evidence that "the victim wore sexually suggestive clothing" to show her consent to sexual intercourse.¹⁵

Newspaper reports provide accounts of instances in which the victim's clothing was introduced into evidence. The 1989 Florida case, noted in the introduction, was one striking instance in which post-trial interviews with the jurors were discussed and widely quoted.¹⁶ In that Florida case, the victim's clothing was not only

11. American Civil Liberties Union attorney Charlene Carres testified before the Florida House of Representatives that evidence of a victim's dress is consistently introduced at sexual battery trials. Barbara Fromm, *Sexual Battery: Mixed-Signal Legislation Reveals Need for Further Reform*, 18 FLA. ST. U. L. REV. 579, 587 (1991). There are not, however, any statistics available to show how often a victim's dress is introduced. Because evidence is introduced at the trial court level, and because the transcripts from those courts are not easily accessible, it is not clear how often clothing has been introduced to show consent. Unless the trial court decision to admit the clothing is appealed and an appellate record is created, the information may not be available. Thus, it is difficult to be sure, based solely on appellate court opinions, how often clothing has been introduced to show consent.

12. *Montana v. Smith*, 576 P.2d 1110 (Mont. 1978).

13. *Id.* at 1111.

14. *Id.* at 1110-11.

15. *Ford v. State*, 376 S.E.2d 418, 419 (Ga. Ct. App. 1988). The trial court ruled that the proffered *in camera* evidence was inadmissible under the state rape shield law. *Id.* The Court of Appeals upheld the trial court ruling. *Id.*

16. See, e.g., *Jury Blames Woman's Clothing in Rape Case*, UPI, October 5, 1989, available in LEXIS, Nexis Library, UPI File; *Rape Victim to Blame, Says Jury*, THE DAILY TELEGRAPH, October 6, 1989 at 3; *Jury*, *supra* note 1; *Rape-Add-#—9*, *supra* note 1; *Man Acquitted*, *supra* note 2; *Women Under Assault*, NEWSWEEK, July 16, 1990 at 23.

introduced into evidence, it was a crucial piece of the defense argument.¹⁷

In a 1977 Wisconsin rape case, the judge considered the sixteen year old complainant's clothing and sentenced the convicted fifteen year old defendant to only probation.¹⁸ The judge called for women to "stop teasing" and for a "restoration of modesty in dress."¹⁹ Additionally, the judge stated that "[w]hether women like it or not, they are sex objects. Are we supposed to take an impressionable person 15 or 16 years of age and punish that person severely because they react to it normally?"²⁰

Similarly, at the William Kennedy Smith sexual assault trial, the defense sought to introduce the complainant's bra into evidence.²¹ The bra was made of lace and decorated with artificial pearls.²² The defense argued that this was "the single most important piece of evidence" because "the lack of damage to these items will clearly prove Mr. Smith's innocence."²³ The judge ruled the bra admissible to counter the complainant's testimony that she was tackled, pinned down, and raped.²⁴ Although the bra was not specifically introduced to show consent, the prosecutor nevertheless recognized the implications of showing such prejudicial evidence to the jury.²⁵ The prosecutor unsuccessfully argued that showing the bra to the jury could improperly imply that "someone who buys their underwear at Victoria's Secret cannot be a victim of a sexual battery."²⁶

2. Statutes

Federal and most state statutes do not explicitly address the admissibility of clothing of a rape or sexual assault complainant as evidence. In these jurisdictions, if such evidence were introduced, it would be admitted pursuant to the governing rules of evidence.

Most states adhere to rules similar to the Federal Rules of Evidence. These rules provide that "all relevant evidence is admissi-

17. *Id.*

18. *Rape and Culture: Two Judges Raise the Question of the Victim's Responsibility*, TIME, Sept. 12, 1977, at 41.

19. *Id.*

20. *Id.*

21. Carolyn Pesce, *Delicate Bra is Permitted as Evidence*, USA TODAY, Oct. 31, 1991, at 3A.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

ble"²⁷ and that "evidence which is not relevant is not admissible."²⁸ Thus, to introduce clothing as evidence of consent, the defendant would have to show that the evidence was relevant to the question of consent. The evidence would be considered relevant if it had any probative value, i.e. if it had any likelihood of proving or disproving consent.²⁹ Because clothing conveys messages to observers which are inaccurate reflections of the wearer's *actual* intent, attitudes, and personality characteristics,³⁰ clothing is not relevant to the issue of consent. The popular belief, however, is that clothing *does* accurately reflect attitude and intent.³¹ Because judges are not immune to inaccurate perceptions and because they may adhere to stereotypical beliefs,³² they are likely to find that clothing is probative of consent and thus admit the victim's clothing as evidence pursuant to the rules of evidence.

However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."³³ This rule creates a balancing test for the judge to weigh the probative value of a particular piece of evidence against its prejudicial effect.³⁴ In practice, the rule favors admissibility because it requires the prejudicial effect to "substantially" outweigh

27. FED. R. EVID. 402.

28. *Id.* There is no Constitutional right to admit irrelevant evidence. Fromm, *supra* note 11, at 584.

29. FED. R. EVID. 401.

30. *See*, Jerome S. Bruner, *On Perceptual Readiness*, 64 PSYCHOL. REV. 123 (1957). Bruner discusses misperceptions and how they occur. He suggests that in perceiving other people's characteristics and intentions "on the basis of external signs" (such as clothing) we are especially prone to error. *Id.* at 142. Bruner goes on to say that in this situation it is difficult to check on the accuracy of our perceptions because it is easy for us to distort perceptions to confirm our beliefs and expectations. "If, on the basis of a few cues of personal appearance, for example, one categorizes another person as dishonest, it is extremely difficult in most cases to check for the other cues that one would predict might be associated with instances of this category." *Id.* at 143. *See also* parts I.C. and II of this article.

31. *See* part II.A.

32. Shirley Feldman-Summers & Gayle C. Palmer, *Rape as Viewed by Judges, Prosecutors, and Police Officers*, 7 CRIM. JUST. & BEHAV. 19 (1980). This research was conducted to study the beliefs about rape and rape complainants held by members of the criminal justice system. Judges, prosecutors, and police officers agreed more than social service personnel that rape occurs because "women who are raped dress or behave in a seductive manner," *id.* at 28, and that rape frequency would be reduced by "encouraging women to dress and behave less seductively than is now the case." *Id.* at 30. Additionally, some trial judges (13.3%) in Connecticut think that sexual assaults are caused by provocative dress or actions on the victim's part. CONNECTICUT TASK FORCE ON GENDER, JUSTICE AND THE COURTS, REPORT TO THE CHIEF JUSTICE 77 (Sept. 1991) [hereinafter CONNECTICUT TASK FORCE ON GENDER]. *See also infra* note 114 and accompanying text.

33. FED. R. EVID. 403.

34. Comments to Federal Rules of Evidence 403.

any amount of probative value before the evidence is excluded.³⁵ Again, because judges may adhere to stereotypical beliefs about clothing, they may find clothing's probative value to show consent outweighs any prejudicial effect to the complainant.³⁶ Under these general rules of evidence, judges are likely to admit clothing to show consent.

Georgia, Alabama, and Florida are the only states that have rape shield statutes that specifically address the victim's dress as evidence. Georgia and Alabama include the victim's "mode of dress" under the definition of "past sexual conduct."³⁷ As such, the victim's dress is generally inadmissible in a prosecution for rape.³⁸

Georgia, however, grants an exception to the general rule of inadmissibility. Georgia permits the defense to introduce evidence of the victim's dress if it "supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct."³⁹ This statute expressly permits evidence of clothing to show implied consent, provided that belief is "reasonable." Unfortunately, the statute does not provide an explanation of when such an inference is reasonable and instead leaves that up to the presiding trial court judge for a determination.⁴⁰ This may be problematic because the judge's deliberation and decision may be affected by inaccurate perceptions and beliefs. The effect, then, of the Georgia statute is to expressly provide only one instance in which clothing may be found relevant, to show consent, and in those instances, provide the judge with the discretion to determine when such evidence is "highly material."

35. Minnesota Rules of Evidence 403, Committee Comment 1977.

36. See *supra* note 33.

37. GA. CODE ANN. § 24-2-3 (a) (Michie Supp. 1992); ALA. CODE § 12-21-203(a)(3) (1991).

38. GA. CODE ANN. § 24-2-3 (a) (Michie Supp. 1992); ALA. CODE § 12-21-203 (a)(3)(1991).

39. GA. CODE ANN. § 24-2-3 (b) (Michie Supp. 1992). If the defendant wishes to introduce evidence under this exception, the statute also provides for an *in camera* hearing in which the judge is directed to admit the evidence upon a finding that the evidence "is so highly material that it will substantially support a conclusion that the accused reasonably believed that the complaining witness consented to the conduct complained of and that justice mandates the admission of such evidence." GA. CODE ANN. § 24-2-3 (c)(2)(Michie Supp. 1992) (emphasis added). Thus, the standard for admitting this evidence to show consent is high.

40. Only one case in Georgia has surfaced in which clothing, *inter alia*, was introduced to show consent. See *Ford v. State*, 376 S.E. 2d 418 (Ga. 1988). In *Ford*, the appellate court, without explanation, held that "[the clothing] did not support an inference that at the time the rape occurred, defendant could have reasonably believed the victim consented to intercourse." *Id.* at 419. Without more, this case is not very helpful in interpreting the statute. At best, it can be assumed that the Georgia courts will apply the statute in a strict manner, admitting evidence of clothing only in rare circumstances.

Alabama also provides an exception to its general rule of inadmissibility. Alabama permits evidence of the victim's attire if the court finds that the complainant's "[mode of dress] directly involved the participation of the accused."⁴¹ How a rape victim's "mode of dress" can "directly involve the participation of the accused" is unclear. This statutory provision has not been interpreted by the Alabama courts. By including the complainant's dress as part of her "past sexual conduct" under the rape shield law, Alabama presumably, like Georgia, is attempting to allow such evidence if offered to prove the defendant's "reasonable belief" that the victim consented.⁴² Assuming this interpretation prevails, Alabama's statute, like Georgia's, expressly permits the evidence of clothing if offered to show consent.

Florida is the only other state to address the victim's clothing in its rape shield law. Florida's statute mandates that "evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery shall not be admitted into evidence" in a rape prosecution.⁴³ In other words, Florida prohibits clothing if used to show victim provocation. However, the Florida statute, by not expressly forbidding it, permits the introduction of clothing if it is used to show consent.⁴⁴

No other state presently addresses the admissibility of clothing.⁴⁵ Pursuant to the general rules of relevancy, courts in those states are likely to permit clothing as evidence. Only Florida, Alabama and Georgia forbid such evidence under some circumstances, such as when offered to show victim provocation. However, Georgia and Alabama expressly permit, and Florida implicitly permits, the

41. ALA. CODE § 12-21-203 (1991).

42. This is presumed because other evidence of the complainant's past sexual history, such as actual past sexual relations with the defendant, are deemed relevant by this statute because if the complainant consented on one occasion, either: 1) she is more likely to have consented on a later occasion, or 2) it is "reasonable" for the defendant to believe there was consent on the later occasion. Because the Alabama statute defines the complainant's clothing as part of her past sexual history, it is presumably attempting to treat clothing as it would past sexual relations with the defendant.

43. FLA. STAT. ANN. § 794.022 (3) (1992).

44. Despite this rape shield law, a Florida defense attorney can "still attempt to introduce evidence of a complainant's manner of dress, not to show that the victim incited the attack, but to prove that the victim's manner of dress was part of the total circumstances that led the defendant to believe that the sexual conduct was consensual." Fromm, *supra* note 11, at 589.

45. There is a bill pending before the New York Assembly which would prohibit defense attorneys from introducing evidence that a rape victim wore provocative clothing. *Dressing Down*, THE CHICAGO TRIBUNE, July 12, 1992, (Womanews), at 1. A supporter of the bill, Republican State Senator Michael J. Tully Jr., stated that "[a] person's manner of dress does not give another person license to commit the violent act of rape." *Id.*

introduction of clothing as evidence to show that a victim consented to sexual contact. In any jurisdiction, clothing is therefore likely to be admitted if offered to prove consent to rape or sexual assault.

B. Sexual Harassment

1. Caselaw

In *Meritor Savings Bank v. Vinson*,⁴⁶ a female bank employee brought sexual harassment charges against a bank supervisor.⁴⁷ She alleged that she had sex with her supervisor over forty times at his demand, that he fondled her, that he exposed himself to her, and that he forcibly raped her during her four years working at the bank.⁴⁸ The defendant supervisor denied the charges.⁴⁹ In his defense, the defendant supervisor introduced "voluminous testimony" regarding Vinson's manner of dress to show that she welcomed the alleged advances.⁵⁰

The judge allowed testimony at trial which indicated that Vinson often dressed in revealing clothing, that at least once a bank customer commented on her clothing, and that once Vinson had to be sent home from work because the bank considered her dress inappropriate.⁵¹ The District Court permitted the evidence regarding dress, presumably because it could show whether the sexual attention was welcome.⁵² The Court of Appeals reversed, stating that evidence of Vinson's dress "had no place in this litigation."⁵³

The United States Supreme Court subsequently reversed the Court of Appeals on the issue of introducing clothing.⁵⁴ The Supreme Court held that in deciding "whether respondent by her conduct indicated that the alleged sexual advances were unwelcome," the evidence of Vinson's "sexually provocative" dress was

46. 477 U.S. 57 (1986).

47. *Id.*

48. *Id.* at 60.

49. *Id.* at 61.

50. *Id.* at 63.

51. Brief of Petitioner, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979).

52. *Meritor*, 477 U.S. at 63.

53. *Id.* The dissenting judges, Judge Bork, Judge Scalia and Judge Starr, argued that denying the defendant the opportunity to introduce evidence of the complainant's clothing was tantamount to denying the defendant the right to defend himself. *Vinson v. Taylor*, 760 F.2d 1330, 1331 (D.C. Cir. 1985) (Bork, J., dissenting). The dissent stated that although "hardly determinative, this evidence is relevant to the question of whether any sexual advances by her supervisor were solicited or voluntarily engaged in. Obviously, such evidence must be evaluated critically and in the light of all the other evidence in the case, but it is astonishing that it should be held inadmissible." *Id.*

54. *Meritor*, 477 U.S. at 69.

"obviously" relevant.⁵⁵ The Supreme Court firmly stated that there is no *per se* rule against the admissibility of evidence of the alleged victim's dress.⁵⁶ In fact, *Meritor* has been cited by at least one lower federal court as support for the proposition that "[a] court must consider any provocative speech or dress of the plaintiff in a sexual harassment case."⁵⁷

2. Statutes

There are no federal or state statutes that address clothing as evidence of welcoming sexual advances in a sexual harassment case. When confronted with this evidence, judges must proceed to evaluate the evidence in light of its probative value and prejudicial effect. As demonstrated by the Supreme Court in *Meritor*, judges are likely to adhere to the belief that clothing is probative as to whether the wearer welcomed sexual advances, and thus admit the evidence.

The Women's Legal Defense Fund ("WLDF"), in its amicus curiae brief to the Supreme Court in the *Meritor* case,⁵⁸ made several evidentiary arguments to exclude the clothing evidence.⁵⁹ First, the WLDF argued that the dress evidence was simply irrelevant. "Vinson [did] not claim that she was offended or intimidated by Taylor [her supervisor] or other men employed at the branch wearing tightly fitting shirts and pants. . . . It [was] the environment created by these actions of the supervisor that are at issue here. Vinson's taste in clothes and style of dress are not."⁶⁰ The WLDF went on to acknowledge that despite any authority on the issue one way or the other,

any purported justification of this view [that the evidence is relevant] assumes that evidence of dress . . . can reveal whether a woman is more or less likely to welcome sexual advances from her supervisor. A woman's choice of clothing . . . [is] no more relevant to her claim of sexual harassment than a fraud victim's generosity or extravagance.

The assumption that general aspects of a woman's life and self-presentation are reliable indicia of her response to any particular sexual advances requires believing that a woman who dresses . . . in a particular fashion is more likely to want to have sex with her supervisor than a woman who does not. This

55. *Id.*

56. *Id.*

57. *Jones v. Wesco Investments, Inc.*, 846 F.2d 1154, 1155 n.4 (8th Cir. 1988) (emphasis added).

58. Brief Amicus Curiae of the Women's Legal Defense Fund in support of the Respondent, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979).

59. *Id.* at IV.

60. *Id.* at IV.A. (footnote omitted).

is nothing other than resurrection of the discredited myth that only women who ask for trouble get it. This is an 'archaic and stereotypic notion' of the most pernicious kind.⁶¹

Second, the WLDF argued that the evidence of Vinson's dress was offered in an "inflammatory attempt to impugn her character" and thus was prohibited by Federal Rule of Evidence 404.⁶² Rule 404(a) provides that "evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion."⁶³ The WLDF speculated that defendant sought to introduce the clothing to show that Vinson was sexually active and that "sexually active women would never find sexual advances unwelcome."⁶⁴

Third, the WLDF argued that the evidence of clothing did not go to impeach Vinson's credibility.⁶⁵ Under Federal Rule 404(a)(3), character evidence can be admitted if offered to impeach the credibility of the witness by indicating the witness's truthfulness or untruthfulness.⁶⁶ But the WLDF argued that "none of the evidence offered here has anything to do with truthfulness."⁶⁷

Fourth, the WLDF argued that the clothing is not admissible if offered to show habit.⁶⁸ Federal Rule of Evidence 406 permits evidence of conduct of such "invariable regularity [that] there can be no doubt that this fixed sequence of acts tends strongly to show the occurrence of a given instance."⁶⁹ The WLDF contended that

Even if a plausible argument could be made from the evidence that Vinson was in the habit of wearing revealing clothing, it could prove only that she wore such clothing around Taylor and everyone else who worked at the bank. It is in no way probative of whether Taylor subjected her to sexual harassment, which is the issue in this case.⁷⁰

Fifth, the WLDF asserted that even if the court found the clothing evidence relevant, its prejudicial value outweighs any probative value and thus it should be excluded.⁷¹

The meaning of personal appearance and clothing is very dependent on an individual's person taste, cultural milieu, and views about the appropriateness of the clothing to the context. . . . Even the description of clothing as 'provocative' con-

61. *Id.* (citations omitted).

62. *Id.* at IV.B.

63. FED. R. EVID. 404(a).

64. Brief Amicus Curiae of the WLDF at IV.B., *Meritor* (No. 84-1979).

65. *Id.* at IV.C.

66. FED. R. EVID. 404(a)(3).

67. Brief Amicus Curiae of the WLDF at IV.C., *Meritor* (No. 84-1979).

68. *Id.* at IV.D.

69. *Id.* (quoting 1 Wigmore on Evidence § 92 (3d ed. 1940)).

70. *Id.* at IV.D.

71. *Id.* at IV.E.

tains a complex series of value judgments that interferes with the task of determining 'what actually happened on the particular occasion.'

The complexity of individuals' responses to perceived female provocativeness, combined with the deeply emotional nature of such responses, makes admission of evidence of a plaintiff's clothing a dangerous and unpredictable undertaking. Such evidence has 'an undue tendency to suggest decision on an improper basis, commonly though not necessarily, an emotional one.' Other evidence of a plaintiff's finding sexual advances 'welcome' should not be difficult to produce, if it exists. The virtual certainty of stereotypically based prejudice in response to evidence of dress mandates its exclusion.⁷²

Sixth, the WLDF argued that the evidence of Vinson's dress, if admissible, would be an unwarranted invasion of her privacy.⁷³ The WLDF noted that "even in the criminal context, the use of evidence of a complainant's past sexual behavior is more often harassing and intimidating than genuinely probative" and so it should be excluded.⁷⁴

The WLDF made these many arguments based on the existing Federal Rules of Evidence. This article seeks primarily to focus on the first argument: that the evidence of clothing to show consent in rape or welcomeness in sexual harassment cases is simply irrelevant. But unlike the WLDF's amicus brief, this article presents social science research that shows that the attitudes inferred from clothing are so likely to be inaccurate that clothing is simply not probative nor relevant when used to prove attitude.

C. Clothing as a Probative Means of Communication

Before analyzing the probative value of clothing to indicate consent to, or welcomeness of, sexual advances, it is necessary to first consider the importance and value of clothing as a form of communication in society. Appearance, and clothing in particular, are forms of communication that can convey messages about the wearer. Clothing indicates such things as age, sex, social class, group membership, and occupation.⁷⁵ Clothing, however, is an inexact and more complex form of communication than language. Clothing is an ambiguous form of communication, and it should not

72. *Id.* (citations omitted).

73. *Id.* at IV.F.

74. *Id.*

75. *E.g.*, Leslie L. Davis, *Clothing and Human Behavior: A Review*, 12 HOME EC. RESEARCH J. 325, 326 (1984). The fact that dress reflects personal characteristics has also been explored in the popular press. See, *e.g.*, JOHN T. MOLLOY, *THE WOMAN'S DRESS FOR SUCCESS BOOK* (1989).

be introduced into evidence to indicate consent or welcomeness in the same manner as other forms of communication.

Appearance is a complex form of communication because it depends upon the social context⁷⁶ and the observer for its meaning.⁷⁷ Because appearance is a visual form of communication, an observer must interpret it to assign a meaning. The meaning of clothing can thus vary by observer because different people associate different meanings with the same appearance or article of clothing. Given that not all individuals have the same experiences or knowledge, share the same culture, or view clothing within the same context, the variety of meanings that can be inferred from a particular combination of clothing items is vast.⁷⁸ In the William Kennedy Smith case, for example, the prosecutor realized that the bra could be interpreted in a number of ways.⁷⁹ One person may find the lace bra delicate, glamorous, sophisticated, or feminine. Others may, however, find the bra provocative, sleazy, or racy.⁸⁰ This process of interpreting and assigning a meaning to clothing is rife with ambiguity not only because of its critical dependence upon the observer but also because people will typically associate more than one meaning with a certain appearance.⁸¹ The meaning may also depend upon the interaction of the component parts.⁸² For any meaningful communication to occur between the wearer and the ob-

76. Mary Ann Littrell & Elizabeth Ann Berger, *Perceiver's Occupation and Client's Grooming: Influence on Person Perception*, 4 CLOTHING & TEXTILES RES. J. 48, 53 (1985-86); J.A. Noesjirwan & J.M. Crawford, *Variations in Perceptions of Clothing as a Function of Dress Form and Viewer's Social Community*, 54 PERCEPTUAL & MOTOR SKILLS 155, 162 (1982).

77. Gregory P. Stone, *Appearance and the Self*, in Mary Ellen Roach and Joanne B. Eicher, DRESS, ADORNMENT, AND THE SOCIAL ORDER, 216, 221-222 (1965); see also SUSAN B. KAISER, THE SOCIAL PSYCHOLOGY OF CLOTHING: SYMBOLIC APPEARANCES IN CONTEXT 238 (1990). Literary criticism is another field which focuses upon the person interpreting a stimulus and not the stimulus itself. Reader response theory, for example, holds that the reader as well as the text, are important in the process of reading. See, generally, JONATHAN CULLER, ON DECONSTRUCTION 31-85 (1989).

78. Thus, just as individual readers with different experiences who read *Hamlet* will interpret the text in different ways, individuals will interpret clothing in different ways.

79. See *Pesce*, *supra* note 21, at 3a.

80. It is also interesting that intimate apparel manufacturers market their products based upon at least two different images. Some manufacturers portray women wearing lacy lingerie under conservative business attire. Others concentrate on objectifying the women with the clothing. It is interesting to ask which type of advertising is directed toward men.

81. KAISER, *supra* note 77.

82. *Id.* at 243. For example, in a 1980 study by Gibbins and Schneider, subjects were shown a woman clothed in a 1900 style coat paired with harem pants. *Id.* at 245. Because the pants and coat were incongruent, the subjects determined that the woman would not choose to wear the two together. *Id.* Instead, the subjects decided that the woman must be "basically dressed in the harem outfit" but needed to put "the coat on over it for warmth or from embarrassment." *Id.*

server, the meaning intended should roughly coincide with the meaning interpreted. Unfortunately, that does not always happen.

Another problem with clothing as a form of communication is that it is diffuse, and the wearer cannot readily control who will receive a message from the clothing. Thus, not only will different people interpret the same clothing differently, one's clothing is likely to be interpreted as a message by observers with whom the wearer did not intend to communicate. Commentators refer to this as the "unfocused" nature of clothing as communication in that it is available to all people who can see it.⁸³ A perceiver must draw *his own* conclusions regarding the wearer's attitudes, intent, and reasons for dressing as she did, a process, that for reasons noted previously, is prone to error.⁸⁴

Clothing also differs from language as a form of communication in that the message cannot be changed once the clothing is donned.⁸⁵ With language, one can change a message by changing the topic or tone of the conversation, retracting a statement, or correcting a misinterpreted statement. Appearance, however, is visual, omnipresent, subtle, and not easily altered.⁸⁶ Because of these differences, clothing should not be used to indicate consent or welcomeness in the same way that an explicit verbal statement could be used. Clothing is simply too complex and ambiguous a form of communication to represent the attitude or intent of the wearer. The problem is magnified when we consider that clothing is seen by many people who interpret it in different ways.

II. Clothing and Inaccurate Perceptions

Researchers have conducted extensive empirical research to illustrate how people perceive clothing.⁸⁷ Clothing and other appearance cues are powerful forms of nonverbal communication that people use to infer a variety of types of information about the wearer.⁸⁸ For example, people will make character judgments as to

83. GRANT McCracken, *CULTURE AND CONSUMPTION* 64-65 (1988).

84. *E.g.*, Bruner, *supra* note 30 at 142-43.

85. KAISER, *supra* note 77.

86. *Id.*

87. *E.g.*, Hilda Mayer Buckley & Mary Ellen Roach, *Clothing as a Nonverbal Communicator of Social and Political Attitudes*, 3 *HOME ECON. RES. J.* 94 (1974); Davis, *supra* note 75; Sharron Lennon & Franklin Miller, *Salience of Physical Appearance in Impression Formation*, 13 *HOME ECON. RES. J.* 95 (1984).

88. Mary Lynn Damhorst, *In Search of a Common Thread: Classification of Information Communicated Through Dress*, 8 *CLOTHING & TEXTILES RES. J.* 1, 7 (1990); Lennon & Miller, *supra* note 87 at 102. A classic example of this is the association of eyeglasses with intelligence. Although some intelligent people do wear glasses, many do not. Yet, when individuals are asked to form inferences, they frequently assume that those who wear glasses are more intelligent than those who do not wear

whether the wearer is trustworthy, reliable, or sincere based upon clothing.⁸⁹ Similarly, people will make judgments related to potency such as whether or not a woman is dominant or submissive based upon what clothing she is wearing.⁹⁰ People also use clothing to infer a person's social and political attitudes,⁹¹ to make inferences concerning others' sexual attitudes,⁹² sexual intent,⁹³ and probable sexual behavior.⁹⁴

A. *Clothing Conveys Sexual Interests and Attitudes*

People readily infer a woman's sexual interest and attitudes toward sex on the basis of her clothing. Certain forms of clothing are believed to be signs of, or interest in, types of sexual behavior. People, therefore, may interpret clothing to be a form of consent. In a 1984 study, researchers asked male and female adolescents whether they believed there were certain articles of clothing that indicated sexual interest.⁹⁵ Both males and females believed items of female apparel such as a see-through blouse, low-cut top, tight jeans, and behavior such as not wearing a bra indicated that the young woman wanted to have sex.⁹⁶ Males were more confident than females that see-through blouses, low-cut tops, tight jeans, and not wearing a bra suggested a desire for sex.⁹⁷ Females were less certain of the clothing's meaning.⁹⁸

them. G.R. Thornton, *The Effect of Wearing Glasses Upon Judgments of Personality Traits of Persons Seen Briefly*, 28 J. APPLIED PSYCH. 203 (1944).

89. Soae Paek, *Effect of Garment Style on the Perception of Personal Traits*, 5 CLOTHING & TEXTILES RES. J. 10, 13 (1986).

90. Lynne Richards, Beverly Rollerson, & James Phillips, *Perceptions of Submissiveness: Implications for Victimization*, 125 J. PSYCHOL. 407, 410 (1992).

91. Buckley & Roach, *supra* note 87 at 98.

92. Mathes & Kempfer, *Clothing as a Nonverbal Communicator of Sexual Attitudes and Behavior*, 43 PERCEPTUAL & MOTOR SKILLS 495, 496 (1976); G. Zellman & J. Goldchilds, *Becoming Sexual in Adolescence*, in CHANGING BOUNDARIES: GENDER ROLES AND SEXUAL BEHAVIOR 49-63 (E.R. Allgeier & N.B. McCormick, eds., 1983).

93. Antonia Abbey, Catherine Cozzarelli, Kimberly McLaughlin, & Richard Harnish, *The Effects of Clothing and Sex Dyad Composition on Perception of Sexual Intent: Do Men and Women Evaluate These Cues Differently?* 17 J. APPLIED SOC. PSYCHOL. 108, 123 (1987).

94. Suresh Kanekar & Maharukh Kolsawalla, *Factors Affecting Responsibility Attributed to a Rape Victim*, 113 J. SOC. PSYCHOL. 285 (1981); Roger Terry, *Contextual Similarities in Subjective Probabilities of Rape and Other Events*, 113 J. SOC. PSYCHOL. 293 (1981).

95. Jacqueline D. Goodchilds & Gail L. Zellman, *SEXUAL SIGNALLING AND SEXUAL AGGRESSION IN ADOLESCENT RELATIONSHIPS IN PORNOGRAPHY AND SEXUAL AGGRESSION* 233, 235-36 (Neil M. Malamuth & Edward Donnerstein, eds. 1984).

96. *Id.*

97. *Id.*

98. *Id.*

Researchers investigating sexual attitudes and clothing generally photograph a model in two or three clothing ensembles that vary the degree the clothing is body-revealing. Low cut blouses, slit skirts, and see-through, clinging clothing is body revealing while blouses buttoned to the neck, skirts without slits, and boots tend to be body concealing. People used the terms provocative,⁹⁹ sexy,¹⁰⁰ and seductive¹⁰¹ to describe the revealing clothing. When asked to make general inferences concerning the characteristics of the women in the photographs, subjects indicated women wearing body-revealing clothing were sexier, more seductive and more promiscuous than women wearing body-concealing clothing.¹⁰² This research further demonstrates that a woman wearing clothing labelled as sexually provocative is perceived as more sexually appealing and more attractive than a conservatively dressed woman.¹⁰³ Research subjects also viewed a woman in clothing labelled sexually provocative differently than a woman in non-provocative clothing with respect to age of first sexual intercourse, sexual teasing, extent of sexual activity, use of sex for personal gain, and faithfulness in marriage.¹⁰⁴ These studies demonstrate

99. LaCinda Lewis & Kim Johnson, *Effect of Dress, Cosmetics, Sex of Subject, and Casual Inference on Attribution of Victim Responsibility*, 8 CLOTHING & TEXTILES RES. J. 22, 23-24 (1989); Kanekar & Kolsawalla, *supra* note 94; James Scroggs, *Penalties for Rape as a Function of Victim Provocativeness, Damage, and Resistance*, 6 J. APPLIED. SOC. PSYCHOL. 360 (1976); Delwin D. Cahoon & Ed M. Edmonds, *Estimates of Opposite-Sex First Impressions Related to Females' Clothing Style*, 65 PERCEPTUAL & MOTOR SKILLS 406, 406 (1987).

100. Ed M. Edmonds & Delwin M. Cahoon, *Attitudes Concerning Crimes Related to Clothing Worn by Female Victims*, 24 BULL. PSYCHONOMIC SOC'Y 444, 445 (1986).

101. Roger Terry & Suzanne Doerge, *Dress, Posture and Setting as Additive Factors in Subjective Probabilities of Rape*, 48 PERCEPTUAL & MOTOR SKILLS 903, 904 (1979); Terry, *supra* note 94 at 122.

102. Abbey, Cozzarelli, McLaughlin & Harnish, *supra* note 93.

103. Cahoon & Edmonds, *supra* note 99 at 406. The fact that body revealing clothing leads perceivers to believe a woman is attractive does present a dilemma for women. They may choose to dress attractively and accept the other stereotypes that go with that look. Or, they may dress more conservatively and accept the decrease in perceived attractiveness.

104. Delwin Cahoon & Ed Edmonds, *Male-Female Estimates of Opposite Sex First Impressions Concerning Females' Clothing Styles* 27 BULL. PSYCHONOMIC SOC'Y 280, 280-81 (1989); Cahoon & Edmonds, *supra* note 99 at 406. In this research project, undergraduate males and females were shown a slide of either a female in concealing clothing (conservative dress) or in revealing clothing (sexy dress). *Id.* at 406. Subjects were then asked to indicate their impression of the female and to estimate opinions of the opposite sex. *Id.* The sexy model was viewed as likely to be raped or robbed. *Id.* Males and females tended to agree in their ratings although there was a tendency for the men to rate the model more positively than women. *Id.* When asked to predict the opinions of the opposite sex, differences were found. *Id.* Women assumed the men would view the sexy model more negatively than the men did. *Id.* Men were asked to indicate the likelihood that they would rape the sexy model if they could do so with impunity. *Id.* While 38.8% of the male subjects indicated they would rape the sexy model, women predicted that 61.6% of the men would rape her.

that people readily infer a woman's sexual interest and attitudes toward sex on the basis of her clothing.

B Clothing is Related to Inferences Concerning Sexual Assault and Responsibility for Sexual Assault

Not only do people believe clothing is useful for forming inferences about a woman's sexual interest and attitude, they also believe that women wearing specific types of clothing are likely targets for sexual assault.¹⁰⁵ In general, people indicate that a woman dressed in sexy clothing is more likely to provoke an attack and more likely to be raped than a woman wearing nonsexy clothing.¹⁰⁶ Both males and females indicate that women wearing clothing generally described as provocative, or clothing ensembles with low necklines or short skirts, or garments that are tight, see-through or clinging are likely to become assault victims.¹⁰⁷ In one study, subjects indicated that 39% of the total female population dressed in a manner likely to provoke a sexual assault.¹⁰⁸ Both men and women indicated that if a man could rape a woman without fear of being caught, the man would more likely rape a woman wearing sexy clothes than a woman wearing nonsexy clothes.¹⁰⁹

Not only is a woman's clothing believed to affect the chances that she will be sexually assaulted, social science research also shows that a woman's clothing may be the source of blame or responsibility attributed to a victim of a sexual assault.¹¹⁰ Importantly, general social science research on sexual assault victims

Id. Seven percent of the men indicated they would rape the conservatively dressed model. *Id.*

105. Patti Mazelan, *Stereotypes and Perceptions of Victims of Rape*, 5 VICTIMOLOGY 121 (1982); Edmonds & Cahoon, *supra* note 100 at 445; Cahoon & Edmonds, *supra* note 99 at 406; Terry & Doerge, *supra* note 101 at 905. Researchers asked subjects whether they thought there is a type of woman who was more likely than others to be raped and then asked subjects to describe this woman. In this research, 86% of the subjects indicated that there is such a woman. Mazelan, *supra* note 105 at 127. One image mentioned was that of the rape victim as being a prostitute, tart or slut or women who, in general, were permissive with loose morals. *Id.* The other prominent image was that of the rape victim as the young, attractive flirt who was unaware of her effect on men. *Id.* When asked to indicate the type of clothing that would provoke a rape, the most frequently mentioned items were see-through, revealing, and sexy clothes. *Id.* Other descriptions commonly mentioned were low necklines, short skirts, tight and clinging clothes. *Id.* at 128.

106. Edmonds & Cahoon, *supra* note 100 at 445; Cahoon & Edmonds, *supra* note 104 at 281.

107. Cahoon & Edmonds, *supra* note 99 at 406; Mazelan, *supra* note 105; Terry & Doerge, *supra* note 101 at 906; Terry, *supra* note 94.

108. Mazelan, *supra* note 105, at 128.

109. Cahoon & Edmonds, *supra* note 104.

110. Edmonds & Cahoon, *supra* note 100 at 445; Kanekar & Kolsawalla, *supra* note 94; Lewis & Johnson, *supra* note 99 at 25; A. Daniel Yarmey, *Older and*

shows differences in attitudes between the sexes just as the research on clothing showed differences. Men were more likely than women to attribute responsibility, blame, and fault to the victim or were more likely to say the woman consented to or welcomed the attention.¹¹¹ In studies that specifically focus on the victim's clothing, however, both men and women assign more responsibility or a higher likelihood of rape when the victim is dressed in body-revealing clothing as compared to body-concealing clothing.¹¹² In other instances, however, as compared to women, men assign more responsibility to the victim when she is dressed in body-revealing clothing instead of body-concealing clothing.¹¹³ Thus, in research that specifically manipulates the clothing of the victim, there is no clear cut pattern of sex differences in attributions of blame, responsibility, or guilt even though men generally attribute more responsibility and blame to victims than women. This may mean that women and men may be equally biased as to clothing. On the other hand, further research which manipulates the clothing of the victim may yet reveal sex differences in attribution of blame, guilt, and responsibility.

Although the prevalence of the belief that clothing can provoke assault is unknown, research shows that U.S. psychiatrists and judges view apparel as a precipitating variable in sex crimes.¹¹⁴ Researchers have surveyed judges, prosecuting attor-

Younger Adults' Attributions of Responsibility Toward Rape Victims and Rapists, 17 CANADIAN J. BEHAV. SCI. 327, 331 (1985).

111. Eugene Borgida & Phyllis White, *Social Perception of Rape Victims*, 2 LAW & HUMAN BEHAV. 339 (1978); Lawrence G. Calhoun, James W. Selby, Arnie Cann, & Theodore Keller, *The Effects of Victim Physical Attractiveness and Sex of Respondent on Social Reactions to Victims of Rape*, 17 BRITISH J. SOC. CLIN. PSYCHOL. 191 (1978); Sheila R. Deitz, Madeleine Littman, & Brenda Bentley, *Attribution of Responsibility for Rape: The Influence of Observer Empathy, Victim Resistance, and Victim Attractiveness*, 10 SEX ROLES 261 (1984); Hubert S. Feild, *Attitudes Toward Rape: A Comparative Analysis of Police, Rapists, Crisis Counselors, and Citizens*, 36 J. PERSONALITY & SOC. PSYCHOL. 156 (1978); Eugenia P. Gerdes, Eric J. Dammann, & Kenneth E. Heilig, *Perceptions of Rape Victims and Assaultants: Effects of Physical Attractiveness, Acquaintance, and Subject Gender*, 19 SEX ROLES 141 (1988); Kevin D. McCaul, Lois G. Veltum, Vivian Boyechko, & Jacqueline J. Crawford, *Understanding Attributions of Victim Blame for Rape: Sex, Violence, and Foreseeability*, 20 J. APPLIED SOC. PSYCHOL. 1 (1990).

112. Edmonds & Cahoon, *supra* note 100, at 445; Terry & Doerge, *supra* note 101, at 905; Yarmey, *supra* note 110, at 331.

113. Lewis & Johnson, *supra* note 99, at 26.

114. Donna Vali & Nicholas Rizzo, *Apparel as One Factor in Sex Crimes Against Young Females: Professional Opinions of U.S. Psychiatrists*, 35 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 167 (1991). The data compiled from this study represent the percent of psychiatrists who agreed with the opinion. The opinions included: female attire that appears to the male to invite direct sexual attention tends to increase the risk of sex crimes (63%); parents of young females who wish to minimize the risk of sex crime should consider what the girls' attire may be signalling as

neys, police officers, and rape crisis counselors to determine their attitudes concerning the causes of rape and their opinions concerning how to reduce the number of rapes.¹¹⁵ Judges, prosecutors, and police officers were significantly more likely than counselors from rape crisis centers to indicate that rape victims behave or dress in a seductive manner.¹¹⁶ Furthermore, judges, prosecutors, and police officers were significantly more likely than counselors from rape crisis centers to think that rape frequency could be reduced by encouraging women to dress and behave less seductively.¹¹⁷ In interviews with 114 convicted rapists, researchers found that 13% of the rapists tried to justify their actions and denigrate their victims by invoking the stereotype that women instigate or precipitate rape by the way they dress.¹¹⁸

Another study assessed attitudes toward rape held by police, convicted rapists, rape crisis counselors, and citizens.¹¹⁹ The study further assessed the subjects' attitudes toward rape in light of their race and gender.¹²⁰ In this study, rapists, police, and citizens were more likely than rape crisis counselors to endorse the idea that victims precipitate rape through their appearance or behavior.¹²¹ In

interpreted by males (88%); parents may unintentionally encourage molestation when they attire young girls so that they appear to males to invite direct sexual attention (75%); some styles of clothing worn by preteen girls which might attract consideration of a potential sex criminal are swim suits with high-cut legs, short skirts, see-through dresses, short shorts, and bikinis (77%); a female would be realistic to remember that from a male's viewpoint short skirts may give promise of possible intimate views and sometimes could make her a target for vulgar comments or sex crimes (84%); "provocation" by revealing clothing under some circumstances is perceived by young males as uncaring or unfair teasing by females, leading to resentment (85%); in human females, there is an innate tendency toward sexual display, direct or indirect, in the presence of males (61%). *Id.* at 171-73.

The Connecticut Task Force on Gender, Justice and the Courts recently surveyed Connecticut judges. The survey results indicated that 13.3% of the responding judges agreed that "sexual assaults are precipitated by provocative dress or actions on the victim's part." CONNECTICUT TASK FORCE ON GENDER, *supra* note 32, at 77.

115. Feldman-Summers & Palmer, *supra* note 32.

116. *Id.* at 28.

117. *Id.* at 30. Other research supports these findings. See Diane Scully & Joseph Marolla, *Convicted Rapists' Vocabulary of Motive: Excuses and Justifications*, 31 SOC. PROBS. 530 (1984).

118. *Id.* at 536.

119. HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW (1980).

120. *Id.*

121. *Id.* at 52. The data compiled from this study represents the percentage of respondents in each of the four groups that agreed with certain statements, reflecting their attitudes toward rape. 37% of the citizens, 50% of the rapists, 23% of the police officers, and 75% of the rape crisis counselors believed that "in forcible rape, the victim never causes the crime." *Id.* 34% of the citizens, 50% of the rapists, 45% of the police officers, and 25% of the rape crisis counselors believed that "a woman should be responsible for preventing her own rape." 66% of the citizens, 65% of the rapists, 78% of the police officers, and 10% of the rape crisis counselors believed that

other words, rape victims are often seen by members of the criminal justice system, by convicted rapists, and by citizens as responsible for selecting clothing that "precipitates" their rapes. That members of the criminal justice system hold the same attitude as rapists regarding the extent to which the rape victim's clothing might play a part in the rape is problematic in itself and sends an ominous signal to rape victims. And if clothing can convey consent in a rape or sexual assault case, it is an easy step for the judicial system to conclude that it can also convey welcomeness in sexual harassment cases, an attitude evidenced in *Meritor*.¹²²

C. *Inferred Personality Traits and Attitudes are Often Inaccurate*

The conventional beliefs regarding a woman's sexual attitude or intent demonstrated here are based on inferences drawn from clothing. People routinely infer general personality traits, attitudes, and probable behavior of others from clothing and various other indicators. Such inferences, however, are often inaccurate¹²³ and are prone to bias.¹²⁴ Unfortunately, it is very difficult to reduce bias even when people are motivated or instructed to make accurate judgments, as when a judge issues limiting instructions to a jury. People tend not to eliminate or account for bias.¹²⁵

Like inferences of general attitude and general intent, inferences of sexual attitudes and sexual intent formed on the basis of dress are often inaccurate¹²⁶ and prone to bias.¹²⁷ For example,

"women provoke rape by their appearance or behavior." *Id.* 11% of the citizens, 10% of the rapists, 19% of the police officers and 1% of the rape crisis counselors agreed that "in most cases when a woman was raped, she was asking for it." *Id.*

122. See *supra* notes 46-57 and accompanying text.

123. Steven L. Neuberg, *The Goal of Forming Accurate Impressions During Social Interactions: Attenuating the Impact of Negative Expectancies*, 56 J. PERSONALITY & SOCIAL PSYCHOL. 374 (1989); See DAVID J. SCHNEIDER, A.H. HASTORF & P.C. ELLSWORTH, *PERSON PERCEPTION* (1979).

124. *E.g.*, Bruner, *supra* note 30 at 143; Lee J. Cronbach, *Processes Affecting Scores on "Understanding of Others" and "Assumed Similarity"* 52 PSYCHOL. BULL. 177 (1955).

125. B. Fischhoff, *Perceived Informativeness of Facts*, 3 J. EXPERIMENTAL PSYCHOL.: HUMAN PERCEPTION & PERFORMANCE 349 (1977); for a review, see B. Fischhoff, *Debiasing*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 422 (D. Kahneman, P. Slovic, & A. Tversky, eds. 1982). For example, in Fischhoff's 1977 research, the nature of a possible bias in judgments was carefully explained to study participants, and the study participants were encouraged to avoid it. Nevertheless, these instructions did not reduce participants' errors in judgment. *Id.* Practitioners also report that jurors often disregard the jury instructions given by a judge. Conference on Shifting Perspectives on the Crime of Acquaintance Rape, Prosecutor Perspective Panel, University of Minnesota Law School (October 30-31, 1992) [hereinafter Conference on Shifting Perspectives].

126. *E.g.*, Mathes & Kempher, *supra* note 92 at 498.

researchers have found that many items of clothing generally thought to be a reflection of sexual attitudes do not relate to the actual sexual attitudes of the wearer.¹²⁸

Some of this inaccuracy may be attributed to general sex-based differences in interpretation. Researchers have found that males generally interpret social situations and appearances in more sexual terms than do women.¹²⁹ For example, men tend to misperceive women's friendliness as a sign of sexual interest.¹³⁰ Furthermore, when asked to observe a male and female interacting, male observers perceived both of them as more seductive and more promiscuous than did female observers.¹³¹ In addition, male observers inferred more "sexiness" in a woman's behavior than did female observers.¹³²

Another explanation for the inaccuracy in inferences people draw from clothing can be related to the concept of "belief in the just world."¹³³ Melvin Lerner, who coined the term, stated:

for their own security, if for no other reason, people want to believe they live in a just world where people get what they de-

127. *Id.* at 498.

128. Research by Mathes and Kempfer indicates that people believed several items and styles of women's clothing to be indicative of liberal sexual attitudes and behavior but were not in actuality indicative of liberal sexual attitudes and behavior. These items included: cutoffs, hip-hugger pants, hoop earrings, tops exposing midriffs, workshirts, t-shirts, blue jeans, hot pants, halter tops, sundresses, sandals, going barefoot, and going braless. However, two of these items (cutoffs and tops exposing midriffs) were moderately correlated with an expressed sexual attitude (premarital sexual relations), and three of these items (tops exposing midriffs, workshirts, and going braless) were moderately correlated with an expressed sexual behavior (reported number of sexual partners). Mathes & Kempfer, *supra* note 92 at 497.

129. Antonia Abbey, *Sex Differences in Attributions for Friendly Behavior: Do Males Misperceive Females' Friendliness?* 42 J. PERSONALITY & SOC. PSYCHOL. 830 (1982); Antonia Abbey & Christian Melby, *The Effects of Nonverbal Cues on Gender Differences in Perceptions of Sexual Intent*, 15 SEX ROLES 283 (1986); Frank Saal, Catherine Johnson & Nancy Weber, *Friendly or Sexy? It May Depend On Who You Ask*, 13 PSYCHOL. WOMEN Q. 263 (1989). See also, MOLLOY, *supra* note 75, at 185 ("Never . . . wear anything sexy to the office. If you wear something sexy to the office, it is not your brain you are selling."). Molloy's language about "selling" is also interesting in the context of prostitution. See *infra* notes 140-142.

130. Abbey, *supra* note 129.

131. Saal, Johnson & Weber, *supra* note 129, at 267.

132. *Id.* at 268.

133. Melvin J. Lerner, *Desire for Justice and Reactions to Victims*, in ALTRUISM AND HELPING BEHAVIOR: SOME SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES 205 (J. Macaulay & L. Berkowitz, eds, 1970). In explaining the concept of the just world, Lerner states: "We want to believe we live in a world where people get what they deserve or, rather, deserve what they get. We want to believe good comes to good people and serious suffering comes only to bad people." *Id.* at 207; See Melvin J. Lerner & Carolyn H. Simmons, *Observer's Reaction to the "Innocent Victim": Compassion or Rejection?* 4 J. PERSONALITY & SOC. PSYCHOL. 203 (1966); McCaul, Veltum, Boyechko, & Crawford, *supra* note 111.

serve. Any evidence of undeserved suffering threatens this belief. The observer then will attempt to reestablish justice. One way of accomplishing this is by . . . persuading himself that the victim deserved to suffer, after all. In our culture, and probably many others, suffering is seen as deserved if the person behaved poorly or if he is inherently "bad," or undesirable. It is also reasonable to conjecture that most observers would prefer to attribute suffering to something the victim did rather than to his personal worth. The assumption here is that attaching responsibility to behavior provides us with the greater security—we can do something to avoid such a fate.¹³⁴

In a just world, bad things do not happen to good people.¹³⁵ However, if a bad thing such as rape happens to a good person, others may be motivated to try to find rational causes for such a senseless event. When rational causes cannot be found, people may convince themselves that no injustice occurred and that the victim deserved her fate. Such an attribution is much less disturbing to other women who are potential victims of sexual assault.

According to this line of reasoning, women, to a greater extent than men, will blame female victims because they do not want to believe that they too can be raped. These women would like to believe that had the victim behaved differently, the event would not have happened. To escape from the fact that violent sexual assault is a threat to all women,¹³⁶ women may chose strategies such as blaming the victim on the basis of her manner of dress or the fact that she was out late at night. This perspective attributes fault to the victim and makes her a direct cause of her own sexual assault. By distancing themselves from the victim and attributing the event to causes over which the victim has control, female jurors can rationalize that a similar event will not happen to them. Because they are not like the victim, i.e., they do not wear similar clothing or would not walk home alone at night, they consider themselves safe. If, on the contrary, women accepted that the world is an unjust place, female jurors would have to accept that they too are at risk for rape or sexual harassment, regardless of their behavior. Accord-

134. Lerner, *supra* note 133.

135. This concern has led to a literature of coping books. See, e.g., HAROLD KUSHNER, *WHEN BAD THINGS HAPPEN TO GOOD PEOPLE* (1989).

136. The FBI estimates that a woman is raped somewhere in the U.S. every six minutes. Sylvia Arguet, Billie Beach, Maria Birkas, Margaret Fitzsimmons, Virginia Keeny, Anne Richardson, & Lucinda Smith, *Honoring a Rape Victim as More Than a Statistic*, L.A. TIMES, April 29, 1992, at 7B. The National Victim Center, in a recent study, reported that rape is even more common than the FBI estimates. The National Victim Center estimates that there 1,871 rapes a day. *Id.* The number of rapes reported annually in the U.S. is five times that of West Germany, France, or the United Kingdom, and 10 times that of Mexico, Greece, or Japan. *Id.* There is no national clearinghouse for rape statistics. *Id.*

ing to this view, female jurors might be expected to attribute more blame and responsibility to the women who are victims of sexual assault than male jurors.

Although legal practitioners report that women are harsher and less sensitive jurors than men,¹³⁷ the actual extent of this occurrence is an open question. For example, in jury simulation experiments, males are more biased than females in inferences regarding the victim.¹³⁸ However, other studies have found few or no differences in judgments of the victim as a function of the sex of the research subject.¹³⁹

One can also hypothesize that current societal beliefs about clothing as an indicator of consent or welcomeness stem from stereotypes associated with prostitution.¹⁴⁰ In prosecutions for prostitution, certain circumstantial evidence is routinely introduced in order to draw the conclusion that an individual is a prostitute.¹⁴¹

137. Conference on Shifting Perspectives, *supra* note 125.

138. Borgida & White, *supra* note 111 (male jurors were more likely than female jurors to infer the victim's consent to the sexual act); Calhoun, Selby, Cann, & Keller, *supra* note 111; Deitz, Littman, & Bentley, *supra* note 111; Bill Thornton & Richard M. Ryckman, *The Influence of a Rape Victim's Physical Attractiveness on Observers' Attributions of Responsibility*, 36 HUMAN RELATIONS 549 (1983).

139. Edmonds & Calhoun, *supra* note 100 at 446; Terry & Doerge, *supra* note 101, at 905; Bill Thornton, Richard M. Ryckman, Gayle Kirchner, Jacqueline Jacobs, Linda Kaczor & Robert H. Kuehnle, *Reaction to Self-Attributed Victim Responsibility: A Comparative Analysis of Rape Crisis Counselors and Lay Observers*, 18 J. APPLIED SOC. PSYCHOL. 409, 417 (1988); Yarmey, *supra* note 110 at 123.

140. Historians have documented how cosmetics and fashion have affected women's lives. See e.g., LOIS BANNER, AMERICAN BEAUTY (1983). Prostitutes were the trend setters, being the first to wear gaudy colors, heavy cosmetics and short skirts. *Id.* at 75. Initially this manner of dress was considered by observers to be a mode of advertising to potential customers. *Id.* But eventually the dress of prostitutes was considered fashionable and so any visible distinction between prostitutes and non-prostitutes was lost. *Id.* However, the stereotype that wearing clothing that attracts attention to oneself indicates one is a prostitute had developed. Thus people still tend to categorize others based on this stereotype.

The natural process of stereotyping involves making associations and then exaggerating differences between groups and minimizing differences within groups. See generally Eleanor Rosch, *On the Internal Structure of Perceptual and Semantic Categories*, in COGNITIVE DEVELOPMENT AND THE ACQUISITION OF LANGUAGE 111 (T.M. Moore, ed. 1973); K. KOFFKA, PRINCIPLES IN GESTALT PSYCHOLOGY (1935); W. KOHLER, GESTALT PSYCHOLOGY (1929); Patricia W. Linville & Edward E. Jones, *Polarized Appraisals of Outgroup Members*, 38 J. PERSONALITY & SOC. PSYCHOL. 689, 701 (1980). Stereotypes are problematic in that they often are inaccurate and can persevere in spite of disconfirming evidence. Madeline E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model*, 5 RES. ORGANIZATIONAL BEHAV. 269, 273 (1983); Bruner, *supra* note 30. Stereotypes regarding the connection between dress and prostitution exist and lead people to believe that a certain appearance indicates an interest in, or advertisement for, sex. Because this stereotype is likely to be inaccurate, exaggerated, or oversimplified, reliance on it can be problematic because its probative value is so low.

141. For example, courts often consider: loitering in an area known for prostitution, approaching only males who pass by, and the general attire of the individuals

The dress of the defendant is one such piece of evidence despite the fact that clothing is not an element of the crime.¹⁴²

Regardless of the exact cause, social science research shows that inferences drawn from external indicators such as clothing are prone to inaccuracy and bias. Given this tendency, it is alarming that clothing may be introduced into evidence precisely for the purpose of relying on those often inaccurate and biased inferences.

III. The Need For A Per Se Rule of Inadmissibility

Evidence of a rape or sexual harassment victim's clothing if offered to show consent or welcomeness in a rape, sexual assault, or sexual harassment case, should be *per se* inadmissible.¹⁴³ An underlying problem with the use of clothing to show consent or welcomeness is its inherent ambiguity as a means of communication. Clothing cannot be equated to language as a form of communication because of its dependence upon the observer and the context and because of its ambiguous and unfocused nature.¹⁴⁴ Despite this underlying dilemma, people will still make inferences regarding a person based on the person's clothing.¹⁴⁵ Because social science research shows that such judgments and inferences are likely to be inaccurate, introducing clothing is problematic.¹⁴⁶ Therefore, a victim's clothing should not be used to infer consent or welcomeness because clothing is not an accurate indicator of the wearer's attitudes, intent, or personality characteristics.

Not only are inferences drawn from clothing often inaccurate, but social science research also shows they are prone to bias as a

believed to be engaged in prostitution. See *New York v. Koss*, 580 N.Y.S.2d 629 (1992).

142. According to MINN. STAT. § 609.321 subd. 9 (1991), "prostitution means engaging in or offering or agreeing to engage for hire in sexual penetration or sexual contact." *Id.*

In *People v. Nicole Little*, Criminal Court, Part BTP-2, the police officer, in support of his arrest of an alleged prostitute, stated that "he is familiar with the general attire and deportment of individuals involved in prostitution-related activity" and based on that familiarity, believed the defendant was so engaged. *Prostitution Loitering Charge is Dismissed for Insufficient Facts*, NEW YORK LAW JOURNAL, July 30, 1992, at 21.

143. Of course, clothing is admissible as evidence under most circumstances to show stains of blood, grass, dirt, semen or perhaps to show tears, rips or evidence of forceful disrobement. See, e.g., *Villafranco v. State*, 313 S.E.2d 469 (Ga. 1984) (clothing introduced as evidence of forceful rape on an embankment). In each of these circumstances, clothing is admitted into evidence as it would be in any other trial. In fact, Virginia's criminal code specifically states that evidence of a rape victim's dress is admissible to show force and resistance. VA. CODE ANN. 18-2-61 (Michie 1991).

144. See *supra* notes 75-86 and accompanying text.

145. See *supra* notes 87-122 and accompanying text.

146. See *supra* notes 123-128 and accompanying text.

function of sex of the observer.¹⁴⁷ Since men tend to interpret women's behavior in more sexual terms than women do, it can be expected that male jurors, judges, and prosecutors will also read more sexuality into the behavior of female sexual assault and sexual harassment victims than will female jurors, judges, and attorneys. Thus it is likely that males in the court system will accept the evidence of the victim's clothing as a sign of consent where none was intended. Female jurors, judges, and attorneys, however, may not act as a check on the system. Social science research indicates that they do not always accurately evaluate the relevancy of a victim's clothing introduced to show consent because females also draw biased pictures of a victim, albeit for different reasons.¹⁴⁸

Most courts, when faced with the issue of whether to accept evidence of clothing to show consent or welcomeness, must balance the probative value against the prejudicial effect. This process is unacceptable given the fact that judges are as likely as any other individuals to subscribe to societal stereotypes and to make inaccurate inferences from the victim's clothing regarding consent or welcomeness. Furthermore, instructing the jury to disregard the victim's clothing as a safeguard is unacceptable because research shows that simply instructing people to strive for accuracy has no effect on making their inferences more accurate.¹⁴⁹ Even the plaintiff's or prosecuting attorney may not protect the plaintiff or complainant by objecting to the introduction of the evidence of the victim's clothing because they too may subscribe to the stereotypes and make inaccurate inferences. Because no other safeguards exist in the system, it is imperative that states establish a *per se* rule of inadmissibility regarding the introduction of the victim's clothing as evidence of her consent or welcomeness of sexual assault, rape, or sexual harassment.

Conclusion

Defendants who seek to introduce evidence of a victim's clothing do so to support their allegations that the victim contributed to her victimization. Because general societal attitudes are reflected in jurors, they are likely to believe and act on the belief that a woman can contribute to her victimization by the way she dresses. Because such inferences have been shown to be inaccurate and because jurors are likely to make them, the law needs to prevent that evidence from reaching the jury. By keeping the evidence from the

147. See *supra* notes 129-132 and accompanying text.

148. See *supra* notes 133-139 and accompanying text.

149. See *supra* note 125 and accompanying text.

jury, the law will assure that the jury does not make the inaccurate inferences and assumptions about a victim's manner of dress that people are likely to make.

