Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women's Clothing in Rape Trials

Alinor C. Sterling

Follow this and additional works at: http://digitalcommons.law.yale.edu/yjlf

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of Law & Feminism by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Undressing the Victim:
The Intersection of Evidentiary and Semiotic Meanings of Women's Clothing in Rape Trials

Alinor C. Sterling†

INTRODUCTION

I. A SEMIOTIC THEORY OF DRESS
   A. Thinking About Clothing
      1. Character and Costume
      2. The Oppression of the Body
      3. Applying Conflicting Imperatives to Clothing: A Calculated Risk
   B. The Production of Meaning: What is Provocative Dress?
      1. Setting/Deviance Theory: Provocative Dress is Produced by Deviance from One Setting to Another
      2. Trying on the Theory
      3. Provocative Dress and the Question of Agency

II. APPLICATION: PROVOCATIVE DRESS IN THE COURTROOM
   A. Legal Framework for Admissibility of Clothing at a Rape Trial
   B. Framework for Applying the Setting/Deviance Theory
      1. Courtroom as Context
      2. The Consequence of Provocative Dress: Disciplinary Abuse
      3. Difficulties in Applying the Setting/Deviance Theory
         a. Disembodied Clothing
         b. Creation of the Rape Context in the Courtroom Context
   C. Applying the Setting/Deviance Theory to Three Rape Trial Stories
      1. The I.D. Trial
         a. Analysis of Legal Strategy
         b. Setting/Deviance Analysis
      2. William Kennedy Smith Trial
         a. Analysis of Legal Strategy
         b. Setting/Deviance Analysis

† J.D. expected, UCLA School of Law 1995; B.A. 1989, Princeton University. I am grateful to Christine Littleton, Carrie Menkel-Meadow, and Frances Olsen for their support, their warmth, and their insightful criticism. I thank Emily Gould, Randall Bluestone, Heather Mactavish, and the staff of the Yale Journal of Law and Feminism, especially Jody Yetzer, for their help in finishing and polishing this Article. Lastly, I thank Steve Mentz, and Molly, Maury, and Bill Sterling for making a place for me to write and encouraging me to keep writing.

Copyright © 1995 by the Yale Journal of Law and Feminism
3. The Lord Trial
   a. Analysis of Legal Strategy
   b. Setting/Deviance Analysis

III. LIMITING THE ADMISSIBILITY OF VICTIMS’ CLOTHING AT TRIAL: LEGAL RESPONSES
   A. Relevance
      1. Meritor and the Law of Sexual Harassment
      2. Conflict Between Meritor and Rape Shield Policy
   B. Probative Versus Prejudicial Balancing
   C. Rape Shield Statutes that Apply to Clothing: Georgia, Alabama, and Florida
      2. Florida: Banning Evidence that Attire Incited Rape

CONCLUSION

INTRODUCTION

On the night of the alleged rape the woman was wearing a high-necked cocktail dress trimmed with bright colors. She also wore black pantyhose, a lace bra, and panties. After the alleged rape, she went to a friend’s house, where she borrowed a Madonna T-shirt emblazoned with the words, “I think I am a sexual threat.” Months later, when William Kennedy Smith was on trial for rape, each of these articles of clothing came before the jury. The judge refused the defense’s request that the jury see the actual bra and panties, but permitted the jury to view photographs of them. The defense made sure that the tags identifying the undergarments as apparel from Victoria’s Secret appeared in the photographs.

2. Id.
4. The dress and the pantyhose were introduced by the prosecution because the dress bore traces of semen and the pantyhose were torn. See Jury Sees Clothing, supra note 1, at 3A. The defense attorney read the slogan on the Madonna T-shirt to the jury over the prosecution’s objection. Ted Takes Stand, supra note 3, at 1.
6. Id.
On the night of the alleged rape the woman was wearing a mini-skirt and a halter top. She was not wearing underwear. Months later, the jury handled her clothing at trial; after handing down a verdict of not guilty, the jury foreman commented that she had "asked for it."

A peculiar transposition occurs when a crime is alleged. Items from our daily lives become evidence—artifacts in the ritual of trial. In the interest of "recreating facts," attorneys move things from their original context (the lawn of the Kennedy estate, a parking lot) into the courtroom. Items that were present when the crime occurred are admitted into a system of legal signs when they are admitted into the courtroom. Lawyers and judges are adept at naming and locating these items within the system of evidentiary signs. Judges use jury instructions to direct jurors to consider the evidence in accordance with formal legal rules.

Bra and panties, Victoria's Secret tags, mini-skirts, and lack of underwear all may become evidence in rape trials. At the same time, they are signs in a semiotic system of dress. The evidentiary system places the article of clothing in legal categories: relevant, irrelevant, admissible, or inadmissible for the purpose of proving a particular fact at issue. The system of dress also signals meanings: sexy, professional, virginal, chic.

Even when the legal system does not formally acknowledge the semiotic system from which it borrows evidence, the two systems coexist in the courtroom. Relevance, the legal threshold for evidentiary significance, does not necessarily rely on the cultural meaning of an article of clothing. For example, a mini-skirt may be introduced as evidence because it bears traces of blood or semen. In such a case, the skirt's relevance is not that it is a mini-skirt; the skirt is simply a repository of blood or semen. In other scenarios, the clothing's cultural significance is used to support a particular theory, as when a mini-skirt and a lack of underwear are used to argue consent. In both scenarios, however, the mini-skirt retains its reference to the system of dress. Despite the legal irrelevance of the mini-skirt's semiotic meaning in the first example (i.e., that it is a revealing article of women's clothing), the jury still sees a bloodstained mini-skirt, rather than a bloodstained piece of cloth.

11. The Swiss scholar Ferdinand de Saussure conceived of language as a system of arbitrarily assigned signs, and intelligible only in the particular system in which they appear. Semiotic theory applies this idea outside of the language context. *DICK HEBDIGE, SUBCULTURE: THE MEANING OF STYLE* 9-10 (1979).
12. Roland Barthes applied semiotics to contemporary cultural phenomena such as food, popular literature, and fashion. Barthes examined "the normally hidden set of rules, codes and conventions through which meanings particular to certain social groups (i.e., those in power) are rendered universal and 'given' for the whole of society." *Id.* at 9.
13. I use the term "dress" broadly to encompass not only clothing but also makeup and jewelry.
This Article discusses how women's clothing acquires meaning in the context of a rape trial. To understand what clothing means in court, it is crucial to go beyond the rules of evidence to learn the semiotic meaning of dress. Part I describes semiotic theories of dress that change the conventional understanding of clothing's meaning as evidence at trial. Part II applies the theory developed in Part I to actual rape trials. Part III describes the current state of the law as it determines the relevance and admissibility of clothing evidence in such trials and offers alternative paradigms through which to evaluate the admissibility of clothing evidence in rape trials in light of the concerns addressed in the Article.

I. A SEMIOTIC THEORY OF DRESS

The first section of this Article examines semiotic theories of dress that can be used to describe how women's clothing conveys meaning. Women's dress has gendered, political content. The themes of compliance and rebellion, fear and empowerment permeate the meanings of the signs in this system. Women produce a wide variety of meaning through dress as they oscillate between two patriarchal commands: the imperative to be modest or covered and the imperative to be objectified, sexualized, or uncovered. "Provocative" dress is dress that defies contextual norms of modesty. If dress signs are produced in relation to context, it follows that transposing clothing to the courtroom alters its meaning. Transposition to the courtroom distorts the meaning of even relatively modest dress, rendering it provocative in this more conservative setting.

A. Thinking About Clothing

A dress has multiple layers of significance. The dress is gender-specific: it is woman's clothing. If a man wears it, the man is cross-dressing. Thus an article of clothing produces completely different signs when worn by a man or a woman. The man and the woman have different dress codes: the woman wearing the dress conforms to her code; the man wearing the dress transgresses his code.

The dress is a particular size, shape, color, and texture. It describes a norm: it is cut to fit the "average" body. It can also describe the body of its wearer: either it fits the body or it is too big or too small. Its color may suggest a mood; the dress may have a pattern or words on it. The color and the texture may speak about the wealth and the class of the wearer: the opulence of a burgundy silk versus the homeliness of a pink polyester. The dress may refer to an historical time, or an occupation. It may be on a hanger or it may be on a body.
This section of the paper sets forth three ways in which dress is perceived. Each of these ways of perceiving dress is based on assumptions which may contradict one another. By addressing the various ways that we perceive dress, I do not intend to indicate that one is correct, but rather to illustrate that we perceive many meanings, even contradictory meanings, simultaneously.

First, dress is perceived both as a description of the wearer and as the wearer's means of communicating her persona to the viewer. Dress makes a sign that describes the wearer, and the wearer uses dress to make a sign. Our perception thus clouds the question of agency: does the dress use the woman or the woman use the dress? The question of agency arises repeatedly among theorists in this field of study.

The second observation is relatively simple: clothing takes meaning from its relationship to the body. Some feminist theorists assert that patriarchal control of women informs the relationship between clothing, the body, and sexuality. In this view, dress signs in all their complexity merely describe the role of the female body in patriarchy.

The final observation comes not from women as theorists, but from women as wearers of clothing. Women describe the experience of wearing clothes as potentially both self-expressive and oppressive. The same article of clothing may invoke a range of emotions in its wearer. The decision whether to wear an article of clothing may involve a subconscious calculation of risk.

1. Character and Costume

There are two ways of thinking about the signal being sent by a woman in a long chiffon dress. We may think she is a romantic, or we may think she is simply trying to project the image that she is a romantic. In the first way of thinking, we equate the sign we perceive (romantic dress) with the character of the wearer, and we believe that the wearer is a romantic. In this mode of perception clothing is a metaphor for character. Further, here the dress dominates. Because we unquestioningly equate dress with character, the dress makes the sign, and the wearer's agency is obscured.

In the second way of thinking, suspicion disrupts the equation of clothing with character. We see a romantic dress and a wearer who intends to look romantic, but not a romantic woman. We become very aware of the fact that the wearer is making the sign. Thus we remain conscious that we do not know the character of the woman. We are forced into awareness both of the untrustworthiness of the dress sign and of the woman's agency. Dress perceived this way is often called costume.

The classic play *A Streetcar Named Desire*\(^{14}\) illustrates these ideas. In *Streetcar*, Blanche's clothing is both character and costume. Blanche's trunk and the clothes in it house her identity. In this sense her clothing is her psyche and her character. It is when Stanley rifles through Blanche's fake furs and rhinestone tiaras that he first knows—and violates—Blanche.\(^{15}\) Blanche's fanciful clothes enrage Stanley, as do her airs throughout the play. Stanley's act of leaving Blanche's trunk in chaos mirrors the rape scene\(^{16}\) and its results: Stanley disorders Blanche's clothing in the beginning of the play as he disorders her mind at the end.\(^{17}\) In this initial scene, the audience has no reason to believe Blanche uses clothing self-consciously or ironically, and there is no disjunction between her clothing and her character.

Blanche's clothing is also costume. Throughout the play Blanche dresses gaily in order to hide desperation and poverty. The furs and the tiara that come immediately to Stanley's eye do not tell of Blanche's struggle to keep the plantation; rather they conceal it. Blanche's girlish clothes do not describe the tortured state of her psyche; in fact, they deliberately camouflage it.\(^{18}\) Blanche's manipulation of clothing forces the viewer to notice the disjuncture between the dress signs she makes and her inner world.

Observers of clothing accept two conflicting premises. First, clothing reveals the wearer's character. Second, the wearer has a range of expression which includes deceit and irony based on her ability to manipulate the signals she sends. We accept clothing as a metaphor for an individual's inner life, while we accept costume as a sign that deliberately misrepresents the wearer's identity.

2. **The Oppression of the Body**

Clothing covers the body. In so doing, it describes the body. The meaning of dress is articulated through the relationship between bodies clothed and bodies unclothed. Art historian Ann Hollander argues that Western dress replicates the body's form in keeping with the strong Western tradition of figurative art.\(^{19}\) Hollander explains that the primary function of Western dress "is to contribute to the making of the self-conscious individual image, an image linked to all other imaginative and idealized visualizations of the human body."\(^{20}\)

---

15. *Id*. at 33-35.
17. See *id*. at 165-79.
20. *Id*.
Some postmodern feminists, including Susan Bordo and Sandra Lee Bartky, perceive clothing as part of a patriarchal system that regulates the female body.\(^\text{21}\) Their arguments rely in part on Marx's perception of the "‘direct grip’ . . . culture has on our bodies,"\(^\text{22}\) and on Foucault's conception of the body as the site where political power is exercised. Foucault argues that the body internalizes society's rules to such an extent that the body is imprisoned in a minute-by-minute mesh of cultural imperatives.\(^\text{23}\) Postmodern feminists' arguments also draw on their identification of the cult of beauty as a device that paralyzes women.\(^\text{24}\)

Postmodern philosopher and feminist Bordo theorizes that the body is both "a powerful symbolic form, a surface on which the central rules, hierarchies, and even metaphysical commitments of a culture are inscribed," and a "direct locus of social control."\(^\text{25}\) By their efforts to create femininity through appearance women internalize the patriarchal prison. Women's preoccupation with appearance turns them into "docile bodies."\(^\text{26}\) The "discipline and normalization of the female body . . . [is] an amazingly durable and flexible strategy of social control."\(^\text{27}\) Thus for Bordo, clothing, makeup, diet, posture, and surgery are all aspects of a system of rules that map the feminine.\(^\text{28}\)

Bordo schematizes the relationship between women and power; she identifies a system of rules that project from an external patriarchal source of power onto women's bodies and into their minds. Dress is one category of

---

21. See, e.g., Sandra Lee Bartky, Femininity and Domination: Studies in the Phenomenology of Oppression (1990); Susan Bordo, Unbearable Weight: Feminism, Western Culture, and the Body 17 (1993); Judith Butler, Gender Trouble, Feminist Theory, and Psychoanalytic Discourse, in Feminism/Postmodernism 324, 335 (Linda J. Nicholson ed., 1990) ("The redescription of intrapsychic processes in terms of the surface politics of the body implies a corollary redescription of gender as the disciplinary production of the figures of gender fantasy through the play of presence and absence in the body's surface, the construction of the gendered body through a series of exclusions and denials, signifying absences.").

This real, non-corporal soul is not a substance; it is the element in which are articulated the effects of a certain type of power and the reference of a certain type of knowledge, the machinery by which the power relations give rise to a possible corpus of knowledge, and knowledge extends and reinforces the effects of this power. On this reality-reference, various concepts have been constructed and domains of analysis carved out: psyche, subjectivity, personality, consciousness, etc. . . . The soul is the effect and instrument of a political anatomy; the soul is the prison of the body.

Id.
24. See, e.g., Bordo, supra note 21, at 18.
25. Id. at 165. For another similar analysis, see Bartky, supra note 21.
26. Bordo, supra note 21, at 166.
27. Id. Normalization or naturalization is the process by which the ideological structure of our surroundings is made to seem commonsensical. As such it has two overlapping meanings. First, it is the coercive process of shaping an image, a person, or a thought to fit the dominant ideological semiology. At the same time it is the process by which the ideological content of the shape is cloaked in the name of what is commonsensical, natural, and normal. Hebdige, supra note 10, at 12-14.

For a discussion of the philosophical and political thought that underlies this definition of normalization/naturalization, see id.
28. See Bordo, supra note 21, at 165-66.
rules within this scheme. Since Bordo does not ask how compliance with the oppressive rules of dress produces a variety of meanings, her argument might be read to reduce the meaning of dress to oppression. To the extent that Bordo addresses a variety of meanings, she may believe that the variety and subtlety of dress are intended to fascinate women so that women will not rebel.29 As such, there is only perceived variety, as if we perceived jail cells as less restrictive because they were painted colors other than gray. In this argument changes in style are whimsical; their sole purpose is to occupy the inmates.

It is important to understand the factors that determine the appearance of the female body because clothing derives its meaning from its relationship to the body. Bordo’s theory describes the scheme of gender oppression as it affects the body. Accepting that gender oppression is enforced on women’s bodies, this section will address the internal dynamics of this system of oppression: within that system, an internal text encompasses the possibility of both metaphor and deception, allusion and irony.

The German socialist feminist Frigga Haug and a group of German women researched the ongoing production of the sexualized female body, approaching their task through the theory that the female body is the “axis around which sexuality is organized in childhood.”30 Like Bordo, Haug relies on the idea that women internalize a system of rules and then recreate the rules on their own bodies.31 Unlike Bordo, however, Haug deconstructs gender oppression on a rule-by-rule basis. Haug’s group studied the construction of individual experiences and bodies by drawing on women’s memories in a collective, consciousness-raising process.32 One of the narratives drawn from Haug’s research illustrates the complex construction of the appearance of the female body. Entitled “Legs,” the narrative is an adult woman’s memory of her perceptions of her body as a child.

The photo shows my sister, one of my brothers, and me. He and I are sitting “like two young louts,” my mother says. My sister, quite proper, chaste, obedient, sits with her legs closed, carefully placed one beside the other. I still have a clear memory of the moment when the picture was taken—I was barely five years old—and the sense of triumphant defiance when, at the very last moment before the photo was taken, I could no longer be prevented from sitting with my legs spreadeagled, the image of this unseemly behavior captured forever on film. Nowadays I realize that this feeling, this attitude of the body, of

29. Id. at 166.
31. Id. at 198.
32. The women use memories of themselves to describe the socialization of one of their attributes (i.e., hair, body, legs). Haug then describes the group’s reaction to the piece and the insights they had as they worked with the memory. Id. at 39-72.
the legs, cannot so easily be expressed in the way I felt it then, as proof of independence, as a refusal of obedience, as resistance to the way I had been brought up to behave. Language refuses to render what I intend it to. Whatever I say about my legs—that they are spreadeagled, spread apart, not closed—has an aftertaste of something disreputable, something obscene, it is coloured with sexual overtones. If I want to avoid this I have to talk, not of legs, but of a whole person, whom I describe as loutish or boorish . . . and yet I know very well that everything began with my legs.33

The girl in the story gradually becomes more compliant with cultural norms. She struggles to keep her knees touching while guests are present. She fails, she fidgets. Her mother reprimands her. Eventually she learns to cross her legs. Now, she admits, “I cannot perceive women who don’t sit with their legs together as anything but somehow obscene . . . .”34

The narrative exemplifies the rule that women must sit with their legs closed. True, a rule that nominally governs the physical placement of the body is not a clothing rule per se. However, clothing’s function and structure serve such rules. The closed-legs rule is part of a complex scheme that I refer to as the modesty imperative. The girl’s parents impose this regulation on their daughter in the name of propriety. Propriety allows the ordering force of sexuality to remain unnamed and covered in silence as it is by the girl’s knees pressing together.35 Like the pressed-together knees, clothing may serve to cover sexuality.

Sitting “spreadeagled” like the child narrator did violates the modesty imperative. The five year-old experienced sitting with her legs apart as “triumphant rebellion,” but the adult narrator cannot perceive it as “anything but somehow obscene.” To an adult woman, then, violation of the modesty imperative does not signal freedom. The word “spreadeagled” means “to stretch out in the form of an eagle, as for a flogging.”36 Spreadeagled connotes being bound. Defiance of the closed-legs rule both exposes the narrator’s sex and pinions her. “Legs” highlights a fundamental ambiguity of experience in the narrator’s confusion of rebellion and compliance.

Once the narrator opens her legs she complies with another, less visible, rule that I call the objectifying imperative. By this I mean a compulsion to be objectified, completely sexualized, obscene. When the narrator deconstructs the experience, she uncovers the “sexual overtones” that closing her legs was intended to mute. She feels that sitting with her legs open is “obscene.” Andrea Dworkin gives the following insight into the meaning of obscenity:

33. Id. at 75.
34. Id. at 76.
35. Id. at 198.
36. WEBSTER’S NEW WORLD DICTIONARY, supra note 10, at 1298.
"There are two possible derivations of the word obscenity: the discredited one, what is concealed; and the accepted one, filth. . . . Filth is where the sexual organs are and because women are seen primarily as sex, . . . women have to be covered: our naked bodies being obscene.”

The objectifying imperative requires that a woman be reduced to sex in her mind and in the minds of others. An objectified woman is only body, only sex. This imperative demands that centerfolds expose their bodies in pornographic magazines and prostitutes expose their bodies on the street. The objectifying imperative mandates that a woman who defies modesty by opening her legs be “spreadeagled.” She is deprived of the power to shut her legs, both in her own mind and in society’s gaze. She is not allowed to stop being a sexual object.

Returning to the ambiguity of experience that the story describes, the five year-old feels “triumphant defiance” in sitting spreadeagled. In contrast, the narrator’s description of rebellion against the closed-legs rule connotes “something disreputable, something obscene.” Language subverts a child’s moment of triumph into compliance with the objectifying imperative. The adult narrator cannot speak of her legs, particularly of opening them, without invoking sexuality. In order to escape sexualization she has to forsake all description of her body and use words that are masculine in connotation, such as “lout” and “boor.” Language co-opts not only the external sign of her rebellion but also her internal sense of triumph. The adult narrator equates the violation of the modesty imperative with compliance with the objectifying imperative.

Objectification can castigate in two ways. The feeling that one is objectified is certainly a punishment for violating the modesty imperative. What is terrifying about objectification, however, is not the shamefulness of momentary exposure but the compulsion to remain exposed and thus sexualized—and ultimately to become those things completely. In this way the feeling of being objectified is both a punishment for immodesty and an imperative in its own right. Clothing functions both to cover the body and to suggest its uncovering. Clothing’s meaning is created in the interplay between the modesty and the objectifying imperatives: one demanding that the female body be concealed, the other that it be revealed.

---

38. See, e.g., PAULINE RÉAGE, STORY OF O (Sabine d’Estreé trans., Ballantine Books 1973) (1954) (pornographic depiction of how the main character, O, gradually loses herself to her masochistic relationship with her lover). Story of O is a powerful portrayal of a woman’s experience of objectification.
3. Applying Conflicting Imperatives to Clothing: A Calculated Risk

"Legs" describes a girl’s struggle within the system of body regulation. Another narrative in Haug’s book, “The Barmaid’s Tale,” is that of an adult woman examining her experience with clothing.

I have to be spotlessly clean and tidy, of course, otherwise the drinks I prepare by hand have something unappetizing about them. Raising my external attractiveness above this level is risky, but, equally, good for business. The risks begin to become acute if the result of my efforts is overly provocative and sexually stimulating. So for example I have to abstain from mini-skirts, something I don’t find difficult, since I can’t abide them anyway. For work, the most important thing is for my clothes to be comfortable, with no dangling corners that might trail in the washing-up water, or long, elegant chains that might end up taking a bath in the beer glasses. High heels are suicide for eleven hours of standing and running about, besides which I’m not keen on them anyway. I make a point of deciding what I’m going to wear on the basis of how I feel; on warm days, when I generally feel twirly-skippety, well-disposed to the world, talkative, energetic, relaxed and floating, I wear thin, white, loose cotton dresses, let my hair down and go barefoot. When the weather is cooler I feel more serious, more measured, I like to wear boots with sloping clumpety heels, and my preference is for colours of grey and blue, at a pinch turquoise.

Haug identifies the barmaid’s dilemma as the result of both competence and self-confidence. Her ability to manipulate dress signs gives her the sense that she controls her environment. The barmaid chooses modesty only after a long struggle with objectification. She recognizes the need to submit partially to the objectifying imperative, but notes the danger of succumbing to it completely: “raising my external attractiveness above this level is risky . . . .” The risk she fears may be external (as with a forward customer) or internal (in that immodest clothing somehow deprives her of her ability to protect herself). The barmaid’s sense of danger correlates to the stereotype that a woman who exposes herself becomes so much a sexual object that she risks losing both her capacity to articulate “no” to sex and her right to have her refusal respected.

“The Barmaid’s Tale” introduces the questions of how and why women produce dress signs. The barmaid’s description of her experience with clothing

39. HAUG ET AL., supra note 30, at 142-44.
40. Id. at 142-43.
41. Id. at 146.
42. Id.
43. Id. at 142.
involves her calculated weighing of the risks of provocative dressing against her inner desire to feel “twirly-skippety” and her economic need to be attractive to her customers. Her story illustrates that provocative and modest dressing are defined in opposition to one another and that modestly-dressed women depend on provocative dressers to distinguish signs of modesty.

In summary, a variety of demands and experiences take shape under the umbrella of patriarchal coercion. Dress signs have both subjective and objective components. An investigation of the meaning of dress must examine both the wearer’s internal experience and the signs produced. Although the rules that govern women’s bodies may oppress women, it is too simplistic to reduce the signs they make and their experience making them to the internalization of societal oppression. Like the rules governing the body, those governing clothing conflict with one another, creating a system in which compliance with one imperative may be failure to comply with another.

Thus, women’s experience of complying does not correlate directly with feelings of powerlessness or safety. Likewise, women’s rebellion does not necessarily correlate to an experience of empowerment. Individual narratives indicate that women experience an amalgam of rebelliousness, power, and fear when they interpret their experience of dress. Women also seem to perceive a range of possible self-expression through dress; but the modesty and objectifying imperatives subsequently limit the imagined range of meaning by sexualizing the signs that women produce.

B. The Production of Meaning: What is Provocative Dress?

This part of the Article investigates the production of a particular category of signs: those that identify dress as “provocative.” Provocative dress exposes a woman to social risks, such as those to which the barmaid alluded. In order to explore the meaning of dress in the context of a rape trial, it is necessary first to address how the provocative sign is created.

In his essay, entitled *Sexual Abuse, Sexy Dressing, and the Eroticization of Domination,* Duncan Kennedy offers the beginnings of a theory of how provocative dressing is signified. In his essay, entitled *Sexual Abuse, Sexy Dressing, and the Eroticization of Domination,* Duncan Kennedy offers the beginnings of a theory of how provocative dressing is signified. This part of the Article first explains Kennedy’s theory of provocative dressing. It then probes the theory by asking how the theory fits with previously described conceptions of dress and by applying its principles in a commonsense, practical way.

---


45. Haug uses the term “provocative.” HAUG ET AL., supra note 30. Kennedy writes on “sexy dressing.” KENNEDY, supra note 44. Their choice of terminology may reflect a slight difference in their perception of the sign they intend to describe. In my opinion, “sexy” seems to describe deviant dress as playful and ironic, while “provocative” already looks to the social retaliation that deviance elicits. Because of the tendency to confuse sex, sexiness, and sexuality, I use the term “provocative.”
1. Setting/Deviance Theory: Provocative Dress is Produced by Deviance from One Setting to Another

Evaluating the relationship between provocative dress and sexual abuse, Kennedy sketches a theory of how the former is produced. Kennedy argues that American society is permeated with dress codes that "regulate virtually all social space." These codes further determine "the degree of sexiness permitted in each setting . . . ." The sexiness of clothing depends on the setting in which it is worn. Kennedy states:

In American society today there are norms, requirements of more or less sexy dressing (and sexy behavior generally) in some places at some times, as well as a variety of prohibitions of it in other times and places. A very tentative map might look something like this:

**WOMEN'S DRESS**

<table>
<thead>
<tr>
<th>More Sexy</th>
<th>Less Sexy</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FAMILY LIFE</strong></td>
<td></td>
</tr>
<tr>
<td>IN BEDROOM BEFORE SEX</td>
<td>IN KITCHEN WITH KIDS</td>
</tr>
<tr>
<td>DINNER PARTY</td>
<td>FAMILY PICNIC</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>PUBLIC SPACE</strong></td>
<td></td>
</tr>
<tr>
<td>NIGHTTIME</td>
<td>DAYTIME</td>
</tr>
<tr>
<td>NIGHT CLUB</td>
<td>AIRPORT</td>
</tr>
<tr>
<td>BEACH</td>
<td>CHURCH</td>
</tr>
<tr>
<td>HEALTH CLUB</td>
<td>FOLK CONCERT</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>THE WORKPLACE</strong></td>
<td></td>
</tr>
<tr>
<td>SALES WORK</td>
<td>PROFESSIONAL WORK</td>
</tr>
<tr>
<td>STREET PROSTITUTES</td>
<td>HIGH-PRICED CALL GIRLS</td>
</tr>
<tr>
<td>ACTRESSES AND MODELS</td>
<td>WOMEN SCRIPTWRITERS</td>
</tr>
<tr>
<td>ENACTING SEXUALITY</td>
<td></td>
</tr>
</tbody>
</table>

While modest dressing conforms to the dress code of its setting, Kennedy defines provocative dressing as dressing "close to, at, or over the line that separates dress for this setting from dress for a more sexually charged one." Kennedy's setting/deviance theory categorizes dress as provocative where it appears in a setting less sexually charged than the one for which it was

---

46. KENNEDY, supra note 44, at 163.
47. Id.
48. Id.
49. Id. The setting/deviance theory recognizes the importance of context in the production of dress signs. Kennedy's enumeration of contexts could be taken a step further. Kennedy acknowledges that his vantage point is that of a white, straight, middle-class American male. The meanings that he assumes with regard to the sexual charge of various contexts are specific to his vantage point. Adding the perspective of another culture, class, or sexual orientation might alter the ordering of contexts.
intended. Kennedy posits a second mode of provocative dressing which alludes to a subculture that carries a sexual charge. For example, some undergarments suggest the "aristocratic decadence and kinky sexuality" beneath the surface of Queen Victoria's stately veneer in nineteenth-century England—most notably the Victoria's Secret line.

The common thread underlying both of Kennedy's theories is that provocative dress is clothing that deviates from the norm by alluding to a "more sexually charged" context than the one in which it is worn. Thus, the provocative dresser creates the deviance component by transgressing the norm of a particular context. Kennedy's argument does not address exactly what defines the "sexual charge" of a particular space. Intuition supports Kennedy's theory that the bedroom is a more sexually charged atmosphere than the kitchen. Kennedy is right, but he fails to explore why this is so.

In order to fill in the gap in Kennedy's theory and discover how space takes on a sexual charge, I draw on the discussion in Part I. The modesty imperative mandates closed legs and the proper silence that surrounds them. Modesty covers sexuality, both physically and linguistically. The dynamic between modesty and objectification, like the dynamic between clothing and nudity, is a relationship of covering and uncovering. Modesty describes sexuality by concealing it; objectification describes sexuality by exposing it. Sexual meaning is articulated through the dynamic between covering and exposure. Sexual tension arises in the conflict of the imperatives: modesty orders covered that which objectification orders bare. Thus the term "sexier setting" means one in which the opposing norms meet on the provocative side of the scale. A bedroom is a setting that calls for objectification and modesty. In the bedroom, women expose their bodies and engage in sexual acts. By contrast, the modesty imperative reigns unchallenged in a church, and the objectifying imperative is reduced to a shadow of the dominant norm.

2. Trying on the Theory

At this point, a common-sense exploration of Kennedy's setting/deviance analysis may help to develop the application of the theory. I begin with a mental exercise in provocative dressing.

When I dress, I dress to go to a particular place—to school, to work, to go out to dinner. It is easy to imagine myself going through my closet,
Undressing the Victim

thinking about where I am headed. I imagine the context: where will I be, who will be there, what will they wear, what will I be doing? I also think about how I feel and how I want to look to others. I expend a substantial amount of energy on creating the context in my mind; the better I imagine my destination, the more competently I can fit into it—or deviate from it.

In order to evaluate Kennedy's assertion that provocative dressing occurs at the intersection of two distinct (but closely related) contexts, I first examine the professional workplace and the cocktail party. Both contexts require heels, stockings, and probably a skirt. In many ways, the cocktail party is simply the social aspect of professional life. I have no difficulty imagining deviating a little in each direction, so that what I wear to work will be slightly too sexy and what I wear to the cocktail party will be too conservative. Thus, if I imagine dressing in an appropriate manner for a cocktail party at work, it makes me uncomfortable, even in these related contexts.

Another scenario illustrates how rapidly the level of discomfort rises; in this pursuit, I contrast the beach and the office. Playing out the theory in these two settings, I can only conceive of ludicrous results. As the scenario runs, I would dress as if I were going to the beach, and then go to the office. I would not feel sexy; I would feel ridiculous and embarrassed.

The more concrete I make the situation, the more difficult it becomes even to imagine. The scene would entail getting up at 6:30 a.m. on a work day and donning shorts, sandals, and a swimsuit, then imagining the context of the office: who will be there, what will they wear, what will I be doing? My colleagues will be there in suits. I may have to meet a client. Each detail makes my sense of incongruity more acute.

Part of my resistance to violating modesty norms comes from the feeling of risk that the barmaid described. If instead of complying with the norms of one context and alluding to another, I violate the norms altogether, I feel myself in danger. If I come to the office in shorts and a swimsuit, I will probably be asked to leave. My career will suffer as a result of my unprofessional behavior and violation of minimal modesty norms.

My resistance to violating the modesty imperative to any degree illustrates the power of the objectifying imperative. Obscenity—the sexual become grotesque—sets the ceiling for deviance, while modesty sets the floor. Provocative dressing occurs in the territory between the modest and the

52. Kennedy recognizes that there is a carefully delineated border between the sexy and the ridiculous. He defines provocative dressing as the allusion to a more sexualized context; he does not suggest that producing a sign that actually belongs to another context is in itself sexy. Kennedy gives the following empirical description of provocative dress: "[i]n mainstream American culture today, costumes conventionally regarded as sexy in the sense of provocative generally choose exposure over covering, tightness over looseness, brightness (or black) over soft color, transparency over opaqueness, and symbolic shaping of breast, waist, buttocks, and feet over 'natural' lines." KENNEDY, supra note 44, at 162. He then notes that what is sexy is "very much a matter of arbitrary convention. A revealing, tight, bright, transparent, shaped costume that doesn't follow the specific fashions of the moment is likely to be seen as weird or 'gross' rather than sexy." Id. at 162-63. Thus, Kennedy recognizes that style shapes the sexual as much as fixed norms.
objectifying. It stops short of objectification yet invokes the risks associated with objectification. Provocative dress may entertain the wearer and perhaps provides her with some social benefit, while transgression into obscenity is a lose-lose proposition.

Application of the setting/deviance theory to real-life situations yields some important conclusions. The theory accurately identifies the importance of context in an evaluation of the appropriateness of particular dress and highlights the influence of boundaries between different settings. The theory defines provocative dress as a calculated violation of contextual modesty norms. Under this analysis, provocative dress occupies the territory between the modest and the absurd: It is the suggestion of deviance which stops deliberately short of actual deviance.

3. Provocative Dress and the Question of Agency

Bordo, Haug, and Kennedy struggle with the question of agency. The argument that women are not agents in the system of dress posits that women's actions and perceptions are suspect and that what women do and see may simply perpetuate patriarchal control, rather than women's agency.

Bordo and Haug lean toward the position that a complex and all-encompassing system of norms leaves no room for agency. The modesty and objectifying imperatives are patriarchal rules. To the extent that women choose, they choose among rules. The tension that results involves women in a balancing act that constrains their ability to rebel. A foray into rebellion deviates from the modesty norms and thereby approaches objectification; a woman who is totally objectified risks losing her economic stability, social status, and physical safety. A violation of modesty norms both exposes a woman to the dangers of being objectified and foils her rebellion.

Even under such a theory, women retain the capacity to act. In the territory between modesty and objectification, acts that seek to flout gender norms through refusal to be modest are perceived as highly sexualized because of
their proximity to objectification. But even in that realm, women imagine and signal rebellion. This position is seemingly in concert with Kennedy's theory; he views provocative dressing as a rebellious, individualistic project.\textsuperscript{56}

Kennedy argues that "women as a group are not compelled to dress sexily for men."\textsuperscript{57} He supports this argument by reasoning that if women as a group would deviate from the norm toward more provocative dress, their action would simply create another norm. That style of dress would no longer be provocative in that setting, because provocative dress exists, by definition only at the margin of acceptability. Contrary to Kennedy's assertion, the objectifying imperative does compel women to be uncovered and sexualized. They as a group are compelled to dress both modestly and immodestly, and what results is a limited spectrum in which the majority of women lean toward modesty.

Women internalize the modesty and the objectifying imperatives. Women find the signs they make subordinated to their own and others' socialization by these imperatives. Yet the nexus between a woman's internal state, the sign she makes, and societal perception of the sign remains to some extent in her control. Clothing retains the capacity for irony; even strict compliance is nonetheless self-conscious and expressive. Women can manipulate the relationship between costume and character by making dress signs that force the viewer to question whether dress is costume. In this manner, a woman can focus societal attention on the question of agency, and thereby, on the unconscious acceptance of the significance currently attributed to particular dress. While a woman may be trapped and even physically endangered in the territory between the conflicting imperatives, she can still express her dilemma to herself and to those around her. Thus, despite its proximity to objectification, provocative dress may entail an element of rebellion.

\textbf{II. APPLICATION: PROVOCATIVE DRESS IN THE COURTROOM}

Provocative dress signs are produced by combining deviance and sexual charge. Deviance stems from a violation of contextual norms. If the sign produced is provocative, but not objectifying, deviance is a subtle project, alluding to rather than borrowing from other contexts. Sexual charge arises

\textsuperscript{56} The conflict between Bordo's and Kennedy's conceptions of agency is apparent when Kennedy engages Bordo's article "Material Girl" in his discussion of sexy dressing. In the video \textit{Open Your Heart} Madonna plays a dancer in a peep show. For Bordo, Madonna's agency is subverted to support the dominant power structure. See Susan Bordo, "Material Girl": The Effacements of Postmodern Culture, \textit{in THE FEMALE BODY} 106, 127-29 (Laurence Goldstein ed., 1991). For Kennedy, Madonna has a greater degree of agency because her work to some extent subverts the dominant power structure. \textit{KENNEDY, supra} note 44, at 196. Kennedy disagrees with Bordo's understanding of the video; he believes that the video emphasizes not the mainstream of sexual discourse (pornography, abuse) but the margins (masturbation, women's sexual power over men, and female defiance of patriarchy). \textit{Id.} at 196-208.

\textsuperscript{57} \textit{KENNEDY, supra} note 44, at 168.
in the conflict between the two imperatives and sets the norms for particular contexts in the same manner as it does for dress.

The previous discussion of the setting/deviance theory demonstrates the importance of context in the assignment of meaning to clothing signs. Furthermore, it introduces the critical idea that placing clothing that normatively belongs in one context in a context with a different sexual charge alters the meaning of the sign produced. This section explores the way in which the transposition of clothing from the rape scene to the courtroom affects the sign produced. It appears that such transposition distorts the meaning of almost all women's clothing, rendering it provocative or objectifying no matter if it was so intended or perceived in its original setting.

This section will explore both the insights revealed and the problems inherent in applying the setting/deviance theory to women's clothing in the courtroom. To this end, I will review three rape cases in which the victims' clothing played a major role at trial. These rape trials provide practical fora for the application of the setting/deviance theory. In examining the implications of admitting victims' clothing into evidence, it is important to understand the arguments the attorneys made in pursuit of that end. Thus, this section will first summarize the evidentiary law applied in rape trials and then discuss the three rape trials, in an effort to illustrate the difficulties of applying the setting/deviance theory to the courtroom setting.

A. Legal Framework for Admissibility of Clothing at a Rape Trial

Generally speaking, the crime of rape requires the following elements: (1) penetration/intercourse, (2) without the consent of the victim, (3) achieved by the perpetrator by force or certain forms of deceit, (4) where the perpetrator intended to have intercourse with the victim without the victim's consent. The burden rests on the prosecution to prove penetration,

58. The trial stories serve several purposes. They describe a broader spectrum of experience than legal opinions. One of the benefits of using newspaper articles is that unlike a trial record, they are not screened as a trial record is screened. The voices of jurors, attorneys, victim, defendant, and judge are unedited by the rules of evidence that govern the contents of a trial transcript. These voices should mold our understanding of evidentiary rules; the experience of attorneys informs the function and meaning of the legal concept of relevance, and the experience of jurors informs the concept of prejudice.

Newspaper stories have significant drawbacks, however, because they tend to sensationalize. I would prefer to balance the newspaper accounts against court transcripts, but there are almost no reported decisions in this area. The admission of clothing at rape trials is most often resolved by in-court motions and adjudications. If the prosecution loses a motion to exclude clothing evidence, the decision will never be appealed, since the prosecutor has no right to appeal if the defendant is acquitted, and the defendant has no reason to appeal the decision if he loses.

59. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 33.02[A], at 516 (1987).
60. Id.
61. Id. § 33.05, at 523-26.
62. See id. § 33.06, at 526-27. As Dressler notes, this standard varies among jurisdictions. For the broad purposes of this Article, however, I rely on Dressler's broad categorization that "a man is not guilty of rape unless he had a morally blameworthy mental state regarding the actus reus of the offense." Id. § 33.06, at 526.
force, and nonconsent and, further, to satisfy the mens rea component. To this end, proof of force may serve as a proxy for proof of nonconsent. The defense attorney may seek to show consent on the part of the victim or lack of force on the part of the defendant; she may alternatively attempt to show that intercourse did not occur, or that the named defendant was not the perpetrator of the rape. She may negate the mens rea element, by convincing the jury that the defendant honestly and reasonably believed that the victim consented to sex.

As with all evidence, the admissibility of a rape victim's clothing at trial depends on its relevance. Evidence is relevant if it makes a fact at issue more or less likely to have occurred. The relevance determination depends on which facts are at issue. At the rape trial, the prosecution may use clothing evidence to identify the defendant as the rapist, to show force, or to show that the defendant and the victim had intercourse. Torn or bloody clothing suggests a forceful struggle and supports an inference of nonconsent. Clothing stained with blood or semen may identify the defendant as the perpetrator. Clothing bearing traces of semen can be introduced to show penetration or intercourse.

While prosecutors often use clothing evidence to prove penetration, force, and other physical facts at issue in a rape case, defense attorneys may offer the same clothing as proof of the mental states of both the defendant and the

For examples of full statutes, see, e.g., CAL. PENAL CODE § 261 (West Supp. 1995) (listing seven circumstances constituting the crime of rape); N.Y. PENAL LAW § 130.35 (McKinney 1987) (rape is intercourse by force or intercourse with a person incapable of consent); id. at § 130.05 (lack of consent is an element of the crime). Other statutes supplant rape with a sexual assault offense based on MODEL PENAL CODE § 213, which defines the offense as intercourse obtained by force. Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 COLUM. L. REV. 1780, 1784 n.22 (1992); MODEL PENAL CODE § 213 (1992). The Model Penal Code differs from the California and the New York statutes in that it does not state that consent is a defense to rape but rather treats rape as sexual assault. MODEL PENAL CODE § 213, supra. In practice, however, consent still works as a defense in jurisdictions where rape law is based on the Model Penal Code because consent "either negates force or negates the causal connection between the force and the sex." Dripps, supra.

63. See Lisa G. Frohmann, Screening Sexual Assault Cases: Prosecutorial Decisions to File or Reject Rape Complaints 15 (1992) (unpublished Ph.D. dissertation, University of California Los Angeles) (on file with the Yale Journal of Law and Feminism). Frohmann argues that the relationship of the parties affects the perception of consent. A showing of force rebuts such a presumption. Id.

64. The traditional common-law rule that mistake of fact is a defense to a general intent crime is applicable in rape cases. See DRESSLER, supra note 59, §33.06, at 526-27. See, e.g., People v. Mayberry, 542 P.2d 1337 (Cal. 1975). The Mayberry court stated "[i]f a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent necessary for a rape conviction." Mayberry, 542 P.2d 1345.

65. FED. R. EVID. 402 ("Evidence which is not relevant is not admissible.").

66. FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

The relevance of evidence changes over time and as cultural mores change. The rape shield movement represented a demand that the concept of relevance be revised to conform with women's changing lifestyles and sexual practices. For further discussion of this topic, see infra Part III.A.2.


68. See, e.g., id.
victim. For example, the defense may suggest that revealing clothing is relevant to a determination of the reasonableness of the defendant’s belief that the victim consented: if the victim invited the defendant to her house and opened the door wearing a negligee, the defense attorney might argue that her clothing supported the defendant’s reasonable belief that she was consenting to sex.  

The defendant’s attorney may further use clothing to support a defense of actual consent. In the example above, the attorney might argue that the victim’s negligee showed that she did want and consent to sex. However, offering the consent theory may be unpalatable to many judges and defense attorneys because it is so clearly an assault on the victim’s character. Thus, defense attorneys may find a more innocuous formal purpose for introducing the clothing into evidence. For example, if the rape victim lies about what she was wearing, her clothing would be admissible as impeaching evidence. If the clothing is admitted in this way, the defense attorney can ensure not only that the evidence reaches the jury, but that it does so without a substantially limiting instruction from the judge. If the prosecution objects, the judge makes a ruling regarding the admissibility of the evidence. Technically, to survive an objection, the evidence should be relevant. If it is substantially more prejudicial than probative, she may exclude it. If not, it will be presented to the jury.

In practice, these legal arguments are seldom articulated in court. Since clothing evidence is admissible for so many purposes, judges may neglect to restrict the evidence in its presentation to the jury. Prosecutors may contribute to the problem by failing to object to the admission of clothing into evidence when it is introduced for erroneous purposes.

69. For a critique of the reasonable belief defense, see Dana Berliner, Rethinking the Reasonable Belief Defense to Rape, 100 YALE L.J. 2687, 2695 (1991) (arguing that the reasonable belief in consent defense has become a proxy for the formerly required proof of resistance); Sakthi Murthy, Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim’s Sexual History to Show the Defendant’s Mistaken Belief in Consent, 79 CAL. L. REV. 541 (1991) (arguing that the reasonable belief in consent defense is used to some extent to introduce evidence that would otherwise be barred by rape shield statutes). The reasonable person referred to by the standard is traditionally male. Berliner, supra, at 2693. Although in other areas of the law, such as sexual harassment, a few courts have deemed that a reasonable woman standard is appropriate, see, e.g., Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991), such a proposal does not seem appropriate, in the case of the reasonable belief defense. A reasonable belief in consent defense has two components: a subjective, honest belief that there was consent, and an objective determination that a reasonable person would have believed there was consent. Berliner, supra, at 2693. Assuming the defendant is a man, it would seem contradictory to propose that the objective perspective be that of a reasonable woman while the subjective perspective is necessarily that of a man. Thus, Berliner suggests not that courts adopt a reasonable woman standard, but rather that the subjective prong of reasonable, honest belief in consent be revitalized and enforced. Id. at 2706.

70. See infra Part III.A.2. for a discussion of why such arguments are counter to stated legislative policy.

71. FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).
Undressing the Victim

B. Framework for Applying the Setting/Deviance Theory

Applying the setting/deviance theory requires three determinations. The theory first requires a determination of the courtroom’s degree of sexual charge. Second, the theory can be used to predict a particular consequence: in the trial context, we must discern not only what sign clothing produces, but how the sign affects the jury’s perceptions. Third, the theory assumes a wearer in the setting for which the outfit was chosen. In the situation this Article examines, the wearer is in court, most likely wearing conservative clothes, and the clothing in evidence is from the setting where the rape took place. The clothing at issue is therefore not worn at all. The three trial stories serve to illustrate how the setting/deviance theory applies in light of this contextual conflict.

1. Courtroom as Context

The courtroom is a ritual site in our society. As in most professional settings, both men and women go to the courthouse dressed formally, with almost their entire bodies covered. Not only is there a relatively strict dress code, there is also a rigid pattern of behavior, speech, and even physical location in the courtroom. People are identified by where they sit, what they say, and how they say it. The trial is like a church service, funeral, or board meeting, in that it involves ritual practices and requires professional dress. Like these settings, the courtroom is one in which modesty norms dominate.

According to the setting/deviance theory, transposing clothing to a less sexually charged context will produce at least a provocative sign, if not an objectifying one. Because of the courtroom’s ritualistic nature, almost any other setting is more sexually charged. Thus, it is likely that the clothing a woman was wearing at the time of the rape will deviate from courtroom dress norms. Moreover, the trier of fact may see clothes in court that may not have been visible at the time of the rape. The jury may see her underwear in court; thus, not only may the clothing allude to a different context, but it may deviate wildly from courtroom standards. Rather than the provocative sign produced by a woman’s calculated allusion to another setting, the clothing used as evidence is likely to appear grossly out of place and objectifying. Ironically, the fact that the victim herself is wearing modest, demure clothing in court will


73. See Estes v. Texas, 381 U.S. 532, 561 (1965) ("To recognize that disorder can convert a trial into a ritual without meaning is not to pay homage to order as an end in itself. Rather, it recognizes that the courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to 'the integrity of the trial' process." (quoting Craig v. Harney, 331 U.S. 367, 377 (1947) (Warren, C.J., concurring)).
reinforce the perception that the clothing in evidence violates the courtroom norms.

2. The Consequence of Provocative Dress: Disciplinary Abuse

Realizing the importance of context in the semiotics of dress leads to the conclusion that almost any informal women's clothing will appear provocative and perhaps objectifying when it is brought into the courtroom. What, then, are the consequences of producing a provocative or an objectifying sign in court? Catharine MacKinnon recognizes the retaliatory nature of the social reaction to these signs; "[g]ood girls are 'attractive,' bad girls 'provocative.'" The provocative, "bad" girl deserves punishment for her nonconformity. Kennedy recognizes the same phenomenon when he states that "the chances of being victimized are dramatically increased if the woman violates a set of customary norms of female behavior." The social response to a woman who violates norms is "disciplinary abuse"—the punishment of the bad girl.

A woman who is a provocative dresser violates the modesty norm; a woman who deviates so far from modesty as to become objectified forgoes societal protection altogether. Such social biases dictate that she will have scant hope of securing a guilty verdict against her attacker. By deviating from the norms that are imposed allegedly for her protection, an immodest dresser is perceived as having invited disciplinary abuse. These factors increase the chances that the jury will impose its own version of disciplinary abuse on the victim by acquitting the defendant.

After a rape, the victim may experience guilt and shame through a sort of backward logic: rape, after all, is in itself a form of disciplinary abuse, and because she was raped (punished), she must have done something wrong. In addition to this pain, the victim who is perceived to be dressed provocatively

---

74. MacKinnon, supra note 53, at 531 (emphasis added).
75. Kennedy, supra note 44, at 147. I would qualify this statement: first, I accept without being able to prove with statistics, that the incidence of abuse/gender violence increases when a woman violates certain norms. Second, our legal system is much more likely to protect a woman who complies with cultural norms. Kennedy accepts this idea. Id. at 154.
76. Id. at 127. Kennedy begins with the idea that laws prohibit only a portion of what we consider sexual abuse. For example, when construction workers terrify a woman passing on the street, it is unlikely that their conduct will constitute legally recognized harm. Id. at 135. Even when the formal legal system recognizes sexual abuse, the practical legal system fails to enforce the formal definition. Kennedy calls this gap the "tolerated residuum" of abuse. Id. at 137.
77. See infra note 125 and accompanying text for support for the statement that prostitutes have difficulty in vindicating claims of rape.
will confront the added frustration that there is little hope of legal recourse against the rapist.\textsuperscript{78}

Both women who do and do not believe that they caused their rapes may experience feelings of guilt, as if they somehow provoked the sexual abuse.\textsuperscript{79}

The transposition into the courtroom of women's personal lives generally—and their clothing and undergarments specifically—ritualizes and sanctions this assignment of fault. Any but the most modest outfit will appear deviant in court; and any panties or bra surely will inspire objectification.

Extending the setting/deviance theory to the courtroom context reveals that the production of a provocative sign in the courtroom causes rape victims to suffer both in their self-perceptions and in society's perception of them. The impact of these signs further dictates the appropriate amount of punishment for both the rapist and the victim. The theory predicts that the shift of the clothing to the context of the courtroom will shame and discredit the woman, making the jury less likely to convict the rapist.

3. Difficulties in Applying the Setting/Deviance Theory

The application of the setting/deviance theory to clothing worn at the rape scene and later introduced as evidence in the courtroom raises two scenarios. First, as noted above, the objectionable clothing is not worn in the courtroom and its owner is actually in the courtroom wearing something else. Second, the attorneys may attempt to recreate the setting of the rape in the courtroom. Each of these scenarios will be briefly outlined below.

a. Disembodied Clothing

A woman wears a bra on a particular day. On that day she is raped. She hands over the bra and her other clothing to the police, who hold the clothing until the trial. At trial the bra is offered into evidence by the prosecutor or the defense attorney. The court admits the bra. Perhaps the court admits the bra over objections, finding it relevant and more probative than prejudicial. In the course of the trial the bra is shown to the jury. No one wears the bra. Its owner, the victim, is very likely to be conservatively dressed throughout the proceedings.

\textsuperscript{78} Catharine MacKinnon states, "Most women get the message that the law against rape is virtually unenforceable as applied to them . . . . Women, as realists, distinguish between rape and experiences of sexual violation by concluding that they have not 'really' been raped if they have ever seen or dated or slept with or been married to the man, if they were fashionably dressed or not provably virgin, if they are prostitutes . . . ." \textsc{Catharine A. MacKinnon, Toward a Feminist Theory of State} 179 (1989).

\textsuperscript{79} See \textsc{Haug Et Al., supra} note 30, at 75-79. The "Legs" narrative is an example related to this phenomenon. In "Legs," language co-opts an act that the narrator initially experienced as rebellious. The liberation she associated with opening her legs for a photograph was transformed into the experience of objectification.
As noted earlier, clothing shapes, and is intertwined with, perceptions of the body. What does it mean when the garment is disembodied? The assumption that courts seem to make is that because the clothing is not on a body, it becomes sexually neutral and is not perceived as evidence of the victim's character. A contrary possibility is that although the garment's owner is dressed, observers see the bra and perceive it as a sign currently being made by its owner. A third possibility, and the one that seems most likely, is that the jury reacts as if the victim were making two signs at once: the sign of her presently-dressed self and the sign of her body wearing the unsuitable clothing in evidence. Put differently, the jury may perceive both sets of clothing as forthrightly describing character, or, faced with two competing images, the jury may perceive one or both outfits as costume.

b. The Recreation of the Rape Context in the Courtroom

The courtroom is arguably two contexts in one. The jury, the bra, and the bra's owner are all part of the formal ritual of trial. Yet, one goal of the proceeding is to recreate the circumstances of the crime scene's setting. To this end, each lawyer struggles to control the recreation in order to present the story most favorable to his or her side. The prosecutor may defend the integrity of the victim by recreating the setting of the crime and arguing that her clothing was appropriate in that particular setting. If the prosecutor is successful, and if the victim's clothing does in fact conform to the setting, then the setting/deviance theory suggests that the evidentiary clothing should not produce a provocative sign.

C. Applying the Setting/Deviance Theory to Three Rape Trial Stories

The first case is the "I.D. trial," a trial which illustrates the way in which prosecutors package the alleged victim's in-court appearance. The second trial story is the well-known William Kennedy Smith trial, in which the alleged victim's bra was described by defense attorneys as "the most important piece of evidence in [the] case." The third story, the Lord trial, describes a jury's determination that a woman "asked for" the rape on the basis of her attire.

80. See supra Part I.A.2.
81. "I.D." refers to a piece of identification, in this case a fake driver's license that overstated the age of the alleged victim.
83. Man Acquitted, supra note 7.
1. The I.D. Trial

In a rape trial in Nassau County, New York, prosecutor Susan Onorato carefully prepared the alleged victim for trial. She made sure that the college student wore a modest dress, "[m]inimal jewelry," and "[n]o makeup. The idea was to look as virginal as possible." The prosecution argued that the woman was raped on the floor of a bar by two men she had known casually.

On cross-examination, the defense attorney asked how the woman had entered the bar, given that at the time of the alleged crime she was underage. By way of explanation, the alleged victim pulled out a forged driver's license that indicated she was twenty-one. Onorato explained that in the driver's license photo, the victim "had black mascara on her eyes and a kind of slutty look on her face." As the picture was passed among the members of the jury, Onorato sensed that the case was lost. "That picture," she says, "was worth a thousand words." The jury acquitted both defendants.

a. Analysis of Legal Strategy

The fake I.D. reached the jury without a prosecutorial objection: the defense attorney simply asked the alleged victim for it and then showed it to the jury—she did not make an argument for the relevancy of the I.D. From this, it appears that both attorneys assumed that the evidence was relevant. Had its admissibility been challenged, the defense attorney would have had to make a relevance argument along the following lines. First, she could argue the I.D. was relevant to show consent, because the makeup indicates a greater likelihood that the victim had actually consented to sex with the two men on the floor of the bar. Alternatively, she might have argued that had the victim appeared that way on the night of the incident, the defendants could have reasonably believed that she had consented to sex. Of course, both of these arguments are predicated on the assumption that the woman appeared on the night of the alleged rape as she appeared in the picture. Without that nexus, the picture has no bearing on the defendants' perceptions that night: the defendants saw the victim, not the I.D. photo.

The defense attorney might also have attempted to argue that the I.D. is a relevant consideration in evaluating the credibility of the alleged victim, perhaps on a theory that if she lied about her age she might have lied about the rape. Unlike the previous argument, the link between her appearance on

84. Peter Marks & Michele Ingrassia, When the Rapist Is Someone She Knows; Date Rape, NEWSDAY, July 21, 1991, at 4 (quoting Susan Onorato) [hereinafter Date Rape].
85. Id.
86. Id.
87. Id. It is impossible to know whether Onorato was right and the jury acquitted the defendants because of the picture. Any number of factors could have influenced the outcome of the trial. For the purpose of this Article, it is enough to assume that the I.D. was a factor—and perhaps a critical factor as Onorato suggested—in the outcome of the trial.
the night of the rape and her appearance in the picture is not important. However, this argument might run afoul of character evidence rules.

b. **Setting/Deviance Analysis**

The I.D. trial demonstrates that prosecutors pay particular attention to the rape victim's appearance and demeanor in court. In this way, the prosecutor respects court norms by ensuring that the players in the trial observe the strictures of modesty. The prosecutor herself observes these norms by wearing a suit in court. The prosecutor "coaches" the victim to seem "as virginal as possible," not only because she knows that the victim's dress at trial sends a message about her sexuality to the jury, but also because the prosecutor wants the jury to believe that the alleged victim is a modest woman, undeserving of disciplinary abuse.

The case further sheds light on the problem of the disembodied garment and the wearer's intent. Particularly where "slutty" makeup appears on a photo of the alleged victim, there is little question that jurors will treat the makeup as a sign made by the alleged victim. This extrapolation is particularly striking where, as here, there was no showing that the victim looked on the night of the alleged rape as she looked in the I.D. The prosecutor said that the victim looked "slutty" in the picture; the question remains whether the prosecutor's perception of sluttiness was augmented by the context in which she was viewing the photo—the courtroom. This seems likely given that the prosecutor, like the jurors, saw the picture for the first and only time at trial, and made her judgment regarding the picture exclusively in that context.

According to setting/deviance theory, if the victim's makeup was within bar norms and the jurors perceived the victim as producing the sign in the bar, her appearance should not have been perceived as provocative. In this case, however, the prosecutor credits the acquittal to the picture. This seems to indicate that both the jury and the prosecutor interpret appearance evidence in the courtroom context, not in the context of the alleged rape. These observations illuminate the ongoing struggle between the prosecution and the defense for control of imagery. While the defense attorney would want to hand the I.D. to the jury silently, the prosecutor would want to introduce the same evidence by describing the bar in detail, in an effort to mitigate its damaging effect in the courtroom setting.

The victim's credibility is the crux of a rape trial, and the legal and semiotic meanings of the photo clash intensely at this point. The transposition of the picture into the courtroom not only alters the sign the picture makes, but it affects the sign the victim is making in the courtroom as well. Earlier in this Article, I argued that clothing may appear to the viewer as a metaphor

---

88. *Date Rape*, supra note 84, at 4.
for character or as an indicator of deception.\textsuperscript{89} In this case the photo indicates to the jury that the victim's demure appearance at trial is probably a costume. The juxtaposition of the contradictory signs causes the victim's demure look to seem much less like a metaphor for her modest, norm-abiding character, and much more like a costume. The defense attorney is aware of this result, and does everything possible to expose the alleged victim in front of the jury. Not only does she succeed in showing that the demure outfit is a disguise, she succeeds in showing that the victim is the type of person who misrepresents herself, that is, the type of person who might lie about rape.

Both the prosecution and the defense attorney's preparation for trial demonstrate their awareness of jurors' preconceptions that victims are to blame for their rapes.\textsuperscript{90} The I.D. case seems to vindicate both attorneys' assumptions. Moreover, jury verdicts such as this one tell the rape victim that a sexy appearance, even though it may be appropriate in the context of the rape setting, is unacceptable if she wants to invoke society's protection at trial. Trials such as this inform the victim, and all potential victims, of the boundaries of who rape trials really protect.

2. William Kennedy Smith Trial

In the William Kennedy Smith trial, the alleged victim contended that Smith had tackled her from behind and pressed her to the ground. The defense attorney argued that "[t]he single most important piece of evidence in this case is on the bra . . . If what she says was truthful, there would have been specific damage to the bra."\textsuperscript{91} His theory was that because the bra was undamaged, the woman and her story were not credible.\textsuperscript{92} However, a forensic expert at trial testified that she had examined clothing in some five hundred cases, and that she had rarely seen torn or damaged bras in rape cases.\textsuperscript{93}

Over the prosecution's objection, the judge admitted photographs of the victim's blue satin bra and black lace underpants.\textsuperscript{94} Both the panties and the bra were Victoria's Secret brand. Prosecutors objected to the way the photographs were taken, arguing that the underpants were purposely photographed so that their Victoria's Secret tag was clearly displayed, "as if somebody who buys the underwear of Victoria's Secret cannot be a victim of

\textsuperscript{89} See supra Part I.A.1.
\textsuperscript{90} See Frohmann, supra note 63, at 67-68. Frohmann describes a conversation between a prosecutor and a rape victim. The victim was at the beach wearing a bikini and a sweatshirt when she was raped. She mentions the sweatshirt to the prosecutor in order to demonstrate that she was respectably dressed. The prosecutor assures her that she is "entitled to be skimpily dressed on the beach." Once the victim leaves, however, the prosecutor acknowledges that "it helps for the old fogies on the jury to know she was covered up." Id. at 65-66. Thus both victim and prosecutor are aware of the potential for jury prejudice, and present themselves accordingly.
\textsuperscript{91} Undergarments Prove Innocent, supra note 5, at A14.
\textsuperscript{92} Id.
\textsuperscript{93} Jury Sees Clothing, supra note 1, at 3A.
\textsuperscript{94} Undergarments Prove Innocent, supra note 5, at A14.
sexual battery.95 The victim's high-necked cocktail dress was also admitted into evidence and handled by the jury.96

a. Analysis of Legal Strategy

Newspaper accounts about the Smith case identified the evidentiary theory under which the victim's bra and underwear had been admitted. The defense attorney argued that the bra was relevant to the victim's credibility because it suggested inconsistencies in her story. However, the forensic specialist's testimony that very few bras in rape cases are damaged casts substantial doubt on the defense attorney's theory. In the Smith case, the judge held an evidentiary hearing on the bra and panties. The judge limited their admissibility by allowing only photographs of the bra and panties to be shown to the jury.97

The prosecutor objected, believing that the jury would infer that because the alleged victim wore sexy lingerie she had consented to sex with Smith. The prosecutor did not frame her objection in terms of the elements of rape. Rather, she perceived the underwear as putting the alleged victim's case into the category of rape cases that cannot be prosecuted in the legal system. In other words, women such as the alleged victim in this case are proper targets of disciplinary abuse.

b. Setting/Deviance Analysis

The William Kennedy Smith trial is useful in understanding the limitations of the setting/deviance theory because it highlights the gap between what is visible at the time of the alleged rape and what is visible at the time of trial.98 In this case, the alleged victim's conservative dress had covered her sexy underwear at the time of the rape.

Unlike the makeup in the I.D. trial, which appeared on the alleged victim's face (albeit at a time different from that of the alleged rape), the bra and

95. Id.
96. Jury Sees Clothing, supra note 1, at 3A. The dress bore traces of sand which the defense used to cast doubt on the victim's story that she did not sit or lie down on the beach. Id. The dress also bore a trace of semen. Id.
97. This case was filed in 1990, after the Florida legislature amended its rape shield statute to prohibit evidence of dress to show that a victim incited rape. FLA. STAT. ANN. ch. 794.022 (Harrison 1992). For a full analysis of that statute, see infra Part III.C.2.
98. The Smith trial included another piece of clothing evidence that the defendant never saw. Over prosecutors' objection, the judge admitted testimony that, after the alleged rape, the victim wore a Madonna T-shirt that said "I think I am a Sexual Threat." Ted Takes Stand, supra note 3, at 1. The victim had borrowed the T-shirt from her friend. Id. Because Smith never saw the T-shirt on the night of the alleged attack, the defense could only have argued that the T-shirt showed the alleged victim's state of mind. The T-shirt's relevance depends on the shaky inference that rape victims should respond in a particular way to rape, and that putting on the T-shirt was not within this predicted response.
Undressing the Victim

panties were shown to the jury disembodied. The presentation of the bra without a wearer apparently did not reduce the bra's significance as character evidence. Since the bra was not visible to Smith at the time of the alleged rape, the jury should have recognized the bra as a modest signal, like a nightgown worn in a bedroom. Yet both attorneys attributed great significance to the bra.\(^9\)

Apparently, what the jury gleans from the victim's clothing is more important in jurors' determination of her sexual character than her actual appearance to the perpetrator on the night of the rape. In other words, it is not the defendant's perception at the time of the rape, but rather the jury's perception at trial that is the focal point of defense strategy.\(^10\) The defense attorney manages to "undress" the victim at trial, even if the defendant did not undress her before the alleged rape.

3. The Lord Trial

In a much publicized Florida rape case,\(^11\) the jurors who acquitted Stephen Lamar Lord determined that the alleged victim's attire—a mini-skirt, halter top and no underwear—demonstrated that she had "asked for it."\(^12\)

The national media told the following story: Lord was a twenty-six year-old drifter who picked up the victim in a Denny's parking lot at 1:00 a.m.\(^13\) The victim said she was on her way to her mother's house, returning from a night out with some out-of-town friends.\(^14\) She was wearing a white mini-skirt and no underwear. Lord and his attorney described her skirt as "see-through" and "semi-see-through."\(^15\) Another observer described the skirt as "a three-tiered ruffled skirt of eyelet that may have been thigh length."\(^16\) The

---

100. Frohmann notes that prosecutors' concern with dress stems from their anticipation that defense attorneys will question victims at trial. Frohmann, supra note 63, at 66-67. Frohmann excerpts the following cross-examination from a trial where the setting was a disco bar:
   - Defense Attorney: How were you dressed?
   - Victim: Black Shirt.
   - Def.: Didn't that have the back cut out to the waist area? You had no bra on, is that correct?
   - V: Yes.
   - Def.: You indicated the skirt was 3 inches above the knee. Wasn't it made of stretchy material, it fit close to your body?
   - V: Fit close to my leg.
   - Def.: What shoes were you wearing?
   - V: High heels.
   - Def.: No nylons? . . .

Id. at 66, n.8.
101. This trial triggered the amendment of Florida's rape shield statute. See infra Part III.C.2.
102. John A. Nagy, Victim's Clothing Style Inadmissible in Rape Trials, GANNETT NEWS SERVICE, Apr. 5, 1990; see also Man Acquitted, supra note 7.
104. Witt, supra note 8.
105. Rape Guilty Plea, supra note 103.
106. Id.
prosecutor stated, "[s]he was dressed like a typical twenty-two year-old dresses
to go out to a club on a Saturday night."\(^\text{107}\) The clothes were admitted into
evidence and were passed among the jury members.

The victim claimed that Lord had abducted her from the parking lot and
raped her at knife point.\(^\text{108}\) Five hours later when Lord crashed the car, the
victim escaped with a couple who had stopped at the crash site. The couple
saw a knife sitting on the front seat of Lord's car. The victim was taken
directly to a hospital\(^\text{109}\) where she was treated for knife wounds.\(^\text{110}\) At trial,
a woman from Georgia testified to a similar rape by Lord at knife point.\(^\text{111}\)

Lord's lawyer argued that there was no rape because the victim was a
prostitute. According to Lord, the victim had agreed to have sex with him for
one hundred dollars and some cocaine, but then changed her mind.\(^\text{112}\) The
jury of three men and three women acquitted Lord.\(^\text{113}\)

A Miami Herald exposé\(^\text{114}\) carried a different description of the events
at the trial. This story theorized that the jury had acquitted Lord not because
of the victim's clothing, but because she had perjured herself several times at
trial, rendering the jury unable to determine the defendant's guilt beyond a
reasonable doubt.\(^\text{115}\) It also gave credence to Lord's argument that the victim
was a prostitute.\(^\text{116}\) The story pointed out that the defense had shown at trial
that the victim had no apparent income and no job, but did have a fair amount
of money. The defense introduced pay stubs showing that the victim worked
at a massage parlor rumored to be a front for prostitution. However, the victim
had no arrest record for prostitution. The exposé seemed to suggest that if the
victim was a prostitute, she had a motive for falsely alleging rape. Lord had
argued, and the story seemed to agree, that the victim cried rape in order to
avoid arrest.\(^\text{117}\)

\(^{107}\) Id.
\(^{108}\) Id.
\(^{109}\) Id.
\(^{110}\) Witt, supra note 8.
\(^{111}\) Rape Guilty Plea, supra note 103.
\(^{112}\) Man Acquitted, supra note 7.
\(^{113}\) Jurors mentioned that they leaned toward acquittal because of the calm demeanor of the victim.
Rape Guilty Plea, supra note 103. In another twist on the case, the victim was jailed for six days before
trial because she did not appear for a deposition. Although the judge said that he had intended only that
the victim be brought to the courthouse, sheriffs mistakenly incarcerated her. Witt, supra note 8.

Lord was subsequently tried for two rapes in separate trials in Georgia. In one trial he was sentenced
to 20 years. In that case, Lord had told his victim, "It's your fault. You're wearing a skirt." Roger Simon,
Rape: Clothing is Not the Criminal, L.A. TIMES, Feb. 18, 1990, at E2. In the second trial, where the
victim was the woman from Georgia who testified at the Florida trial, Lord pleaded guilty. The judge
sentenced him to life imprisonment. Senate Approves Rape Victim Dress Bill, UPI, May 29, 1990, available
in LEXIS, Nexis Library, UPI file.

integrate the two versions of the story because the facts are so disparate. According to the exposé, the story
became a cause célèbre and major newspapers therefore distorted the facts. Yet the exposé, a sensational
piece, seems equally suspect.
\(^{115}\) Id. at 12.
\(^{116}\) Id. at 13.
\(^{117}\) The victim admitted using cocaine before Lord kidnapped her. The victim's connection to drugs
and the possibility that she accepted drugs for sex placed her in a category of rape victims that the law
The exposé drew out other weaknesses in the prosecutorial evidence introduced at trial. The medical evidence showed that the victim had anal and vaginal intercourse in the dirt, but there were no conclusive signs of violence. The exposé alleged that what the national media had called a knife cut was a small papercut type injury on the victim's finger. The victim had also initially said she had worn underpants and that Lord had ripped them off of her and thrown them away. Later she changed her story, admitting that she was not wearing underpants at all. The exposé conceded that the victim probably was raped, but that her credibility had been so badly undermined at trial that the jury refused to convict.

a. Analysis of Legal Strategy

There were two crucial “pieces” of clothing evidence at the Lord trial: the victim’s skirt and her lack of underwear. It is not clear from the news coverage which attorney introduced the victim’s clothing. Given the facts of the case, however, it is unlikely that the prosecutor had use for the evidence: Lord’s identity and the fact that Lord and the victim had intercourse were not in dispute. The element of force was in dispute, but the mini-skirt was not torn or bloody. “No underwear” evidence can never serve to show force, prove intercourse, or identify the defendant. Thus, it is most likely that the defense introduced the mini-skirt and the lack of underwear into evidence.

There is no indication that the prosecutor objected to the introduction of the clothing evidence. But was that evidence relevant to the issue of consent? Does admitting the evidence condone the inference that a woman who wears revealing clothing is more likely to consent to sex with anyone? Or perhaps the theory would hold that a man who sees a woman in a short, semi-see-through skirt is more likely to reasonably believe that she is consenting to sex. Even assuming the last assertion is valid, the lack of underwear would only be admissible if the defendant could have seen that fact through her skirt.

Lastly, the clothing evidence might be deemed relevant to the argument that the victim was a prostitute. The victim denied the accusation, so a

rarely protects. For a description of prosecutorial and juror reactions to women who trade sex for drugs, see Frohmann, supra note 63, at 70-75.

118. Brecher, supra note 114, at 8.
119. Id. at 9-10.
120. Id. The victim had testified that she had been out with friends, but could not remember any of their last names or where they were staying. She was carrying no money when she got out of her car to go into Denny’s, although she said she was going to buy food. Id. at 9.
121. Two witnesses in addition to the victim saw Lord at the scene of the car crash. The victim’s medical exam also would have provided semen that identified Lord.
122. If he could not see through her skirt, he would have no knowledge that she was bare underneath. If he had no knowledge that she was bare underneath, her bareness could not possibly contribute to his belief in her consent. Whether the skirt was see-through, then, would be an important issue in contesting the admissibility of the skirt on the mistaken belief in consent theory of relevance.
123. Although direct evidence of the victim’s prior sexual history would be barred by the Florida rape shield statute, the defense could still use evidence not restricted by the rape shield statute to argue that the
convincing portrayal of her as a prostitute would also imply that she was impeaching herself. Whether she was a prostitute is also arguably relevant to a claim that she consented or to Lord's reasonable belief that she had.

b. Setting/Deviance Analysis

Lord's acquittal affirms the idea of disciplinary abuse: what else could "she asked for it" mean? "It" is rape; no one seems to think Lord is innocent. Rather, the victim's clothing marked her as deserving of rape. This rape falls within the set of those which will go unpunished because they do not violate societal norms.124

The Lord trial combines two prejudicial clothing issues: the victim might have been a prostitute and she wore no underwear. Prostitutes have very little credibility in rape trials;125 women who give the appearance of being prostitutes to the jury suffer similar problems convincing the jury of their truthfulness. As discussed previously, credibility turns as much on how the victim looks as on who she is.

Jury foreman Roy Diamond's comments indicate that the victim's appearance (as imagined by the jury) provoked outrage in the jury. Diamond stated: "She asked for it. The way she was dressed with that skirt you could see everything she had. She was advertising for sex."126

Diamond's comment eclipses the legal elements of rape—he is not looking for evidence of force, intercourse or consent. His language about "advertising for sex" seems to support the theory that Diamond believed the victim was a prostitute. But he does not focus on the factual determination that she is a prostitute. Rather, the victim's dress shows Diamond that she is a prostitute equivalent—someone who, by her clothing, has entered into a contract with men generally. The victim, dressed as she was, was in the realm of the objectifying imperative. As a juror, Diamond allowed no legal recourse for the victim when Lord invoked that contract.127

\[\text{victim was a prostitute, FLA. STAT. ANN. ch. 794.022 (Harrison 1992).}\]

124. Disciplinary abuse shows up as one of the stereotypes of women that has been used to excuse rape. Historical stereotypes say that a female who sleeps in the nude is looking for sex, even from a rapist who breaks into her house in the middle of the night, and a woman who happens not to be wearing underwear when attacked is perceived not to have been attacked at all. Richard A. Hibey, The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent and Character, 11 AMER. CRIM. L. REV. 309, 310 (1973).

125. Jane Gross reports how prostitute rape prosecutions are stifled in the early stages: victims do not report because they feel they cannot win; police mark prostitutes' complaints unfounded or table them indefinitely; prosecutors hesitate to bring the cases because juries will not convict. Jane Gross, To Some Rape Victims, Justice Is Beyond Reach, N.Y.TIMES, Oct. 12, 1990, at A14. See also Frohmann, supra note 63, at 70-72 (describing prosecutors' perception of unconvictability when rape victims appear to be prostitutes because of the way they look and where they happened to be at the time of the alleged rape). Strong evidence of force is required to overcome extralegal factors such as whether the victim was a prostitute.


127. Diamond's comments, especially the image of "advertising for sex," closely resemble the inference that the Supreme Court makes in *Meritor v. Vincent Savings Bank*, FSB, 477 U.S. 53 (1986),
Diamond's reaction is not unusual.\textsuperscript{128} It is, however, unfounded. Studies show that only four percent of reported rapes involve precipitous behavior by the victim.\textsuperscript{129} Nonetheless, juries may still acquit defendants on the basis of perceived participation on the part of the victim. Juries cling to rape myths. One study has found jurors likely to view the issues at trial in reference to a "just world" where people get what they deserve. Thus, jurors may justify the rape by deciding that a rape victim has brought the rape upon herself through her behavior and thus deserves the disciplinary abuse. This mind-set also protects jurors from acknowledging the random nature of violence and thus their own vulnerability.\textsuperscript{130} One commentator observes that jury verdicts in rape cases "are often examples of outright nullification—the ultimate and extreme exercise of the fact finder's prerogative."\textsuperscript{131}

to treat dress as relevant to the issue of welcomeness of sexual advances. For a discussion of Meritor, see infra Part III.A.1.

Other jurors made similar comments:

Dean Medeiros: "... she was up to no good the way she was dressed." \textit{Man Acquited, supra} note 7.

This comment could mean that Medeiros believed the victim was a prostitute, especially if "no good" means criminal activity. But the comment might also mean that a woman who dresses in a revealing way is subversive, disruptive, or otherwise at odds with the fabric of the community.

Mary Bradshaw: "She was obviously dressed to have a good time." \textit{Id}.

Bradshaw's comment is very disturbing. If she believes the victim is a prostitute, is Bradshaw assuming that prostitutes enjoy having sex for money? Or is she simply subscribing to the interpretation that the victim was out partying? In this case, the victim's clothing must have indicated consent to sex (to having a "good time").

Dean Medeiros: "Basically, we did not believe her story." \textit{Id}.

This comment tells us nothing about the victim's clothing, but it does offer a theme that recurs often in cases where the victim was scantily dressed at the time of the occurrence.

128. In a Gannett News Service poll, 31\% of respondents expressed their belief that "rape victims are often or sometimes partly responsible for the attack because of the way they might act or dress." Gloria Dialectic, \textit{Rape: Under Attack in the Court?}, \textit{ORLANDO SENTINEL TRIB.}, Oct. 28, 1990, at G1. In a Gallup survey questioning more than 1,000 men and women on their attitudes towards date rape, pollsters obtained the following results: 34\% of women and 30\% of men said "a rape victim had to bear her share of the responsibility if she wore revealing or 'provocative' clothes." Robert Shrimsley, \textit{Women Critical of Date Rape Victims}, \textit{DAILY TELEGRAPH}, Feb. 28, 1992, at 7. In a poll of sixth to ninth graders in Rhode Island more than half of the 1,700 children polled agreed that, "if a woman dresses seductively and walks alone at night, she is asking to be raped." Page Smith, \textit{The War Between the Sexes: an Update}, \textit{SAN FRANCISCO CHRON.}, Dec. 15, 1991, at This World 6/Z1. A survey of Virginia state colleges and universities showed that 35\% of male respondents agreed with the statement: "Many women cause their own rape by the way they act and the clothes they wear around men." 15\% of female respondents agreed with this statement. Pressured Into Sex, 15\% of College Women Say, \textit{UPI}, Dec. 11, 1991, available in \textit{LEXIS}, \textit{Nexis Library}, \textit{UPI File}. In a survey of 1,769 psychiatrists, 581 of whom responded, 63\% said that what a female wears can appear to invite direct sexual attention from a male, which tends to increase the risk of sex crimes; 85\% said a man may feel teased and thus vengeful when a woman dresses alluringly; 88\% said parents should consider what their daughters wear to decrease the likelihood that their daughters will be raped. Myriam Marquez, \textit{Clothing-and-rape connection rings a 'wake-up call' for everyone}, \textit{ORLANDO SENTINEL TRIB.}, Nov. 29, 1991, at A18.

129. Kenneth A. Cobb and Nancy R. Schauer, \textit{Michigan's Criminal Sexual Assault Law, in Forcible Rape: The Crime, The Victim, and The Offender} 170, 176-77 (Duncan Chappel et al. eds., 1977). Studies also show that 82\% of rapes are planned or partially planned in advance. Menachem Amir, \textit{Patterns of Forcible Rape} 114-42 (1971). This would tend to indicate that at least in most cases a woman's behavior has little, if anything, to do with the rape.


131. Hibey, supra note 124, at 310.
Our evidentiary system relies on the conceit that lawyers can selectively recreate a crime. Applying the setting/deviance theory to some of the information available about clothing evidence suggests that because of the important role which context plays in the production of dress signs, transposing women's clothing to the courtroom does not in fact recreate the signs that these women produced at the time of their alleged rapes. Rather, it skews the meaning of the sign in a way that shames the alleged victim and diminishes her chances of obtaining a conviction. When her everyday clothes, including her underwear, appear piece by piece before the jury, the alleged victim appears to have violated the modesty imperative. Ironically, the violation is not her own act, but a function of the judicial system. Violating the modesty imperative places the victim in the territory of the objectifying imperative. The objectifying imperative invites society to treat her as deviant and therefore deserving of disciplinary abuse. The punishment is meted out as acquittal of the rapist.

III. LIMITING THE ADMISSIBILITY OF VICTIMS' CLOTHING AT TRIAL: LEGAL RESPONSES

The last section of this Article turns to the legal framework and traditional legal arguments that affect the admissibility of rape victims' clothing at trial. The preceding sections argued that clothing evidence produces a sign that is perceived as defining the victim's character, particularly her sexual character; that transposition from the context of the alleged rape to the courtroom renders the sign provocative; and that the provocative sign produced invokes judgment from jurors, which often leads to acquittal.

The law affords several avenues through which to attack the admissibility of clothing evidence. First, one might argue that clothing evidence is not relevant to determinations of the victim's consent and the defendant's reasonable belief in consent. This argument challenges both the validity of our assumptions about a victim's clothing and the notion that her character had a bearing on whether she was raped. Second, one might concede that clothing is relevant, but argue that it is more prejudicial than probative. To win this argument, one would have to convince the judge that the production of a provocative sign in court generates a punitive backlash by jurors. One difficulty is that judges, as part of society's disciplinary structure, may not be a sympathetic audience for this argument. Third, one could argue that rape shield laws should be extended to apply to clothing. This argument relies on the insight that juries will tend to evaluate clothing in the same suspect way that they previously used information regarding a victim's sexual history.

Very few of the arguments regarding the admissibility of clothing as evidence are expressly addressed by the law. Thus, what follows is a hodgepodge of judiciary and statutory law that might apply to inquiries
regarding relevance, prejudicial impact, and rape shield applicability, as well as an analysis of what part of this collection is useful and what is harmful.

A. Relevance

The evidentiary system draws both on its own rules and on the cultural meaning of dress in its determination of clothing’s relevance. As described in the introduction to this Article, a mini-skirt may be relevant either because it is stained with blood or because it is provocative in nature. Yet the evidentiary system borrows from the broader semiotic system of dress without acknowledging the potency of the sexual signs that dress produces. As a result, dress evidence is accepted as an evidentiary vehicle for tacitly defining a woman's sexual persona.

Meritor Savings Bank v. Vinson, FSB, a sexual harassment case, exemplifies the type of thinking that unquestioningly allows dress to stand as a proxy for women's sexual personae in the courtroom. In Meritor, the Supreme Court held that clothing is “obviously relevant” in showing an alleged victim’s receptiveness to the harasser. This section discusses the Meritor holding and outlines the manner in which its logic was repudiated in rape law reforms of the 1970s. There are many reasons to distinguish rape law from sexual harassment law. Yet the similarities remain: defense attorneys in rape cases encourage the jury to draw the same inferences from a rape victim’s clothing that the Supreme Court drew in Meritor.

1. Meritor and the Law of Sexual Harassment

In Meritor, the victim worked at a bank for four years and brought suit against the man who had hired and supervised her. The victim alleged that the defendant had pressured her to have sex on numerous occasions, that she had sex with him forty or fifty times, and that the defendant had fondled and raped her several times. The defendant denied all of the victim’s allegations. The district court found for the defendant, holding that any sexual relationship between the victim and the defendant was voluntary. The court of appeals reversed and remanded, “surmis[ing] that the district court’s finding of voluntariness might have been based on ‘the voluminous testimony regarding respondent’s dress and personal fantasies,’ testimony that the appeals court believed ‘had no place in this litigation.’”

133. Id. at 69.
134. Id. at 59-60.
135. Id. at 60-61.
136. Id. at 61-62.
137. Id. (quoting Meritor, 753 F.2d at 146 (D.C. Cir. 1985)).
The Supreme Court affirmed, but "for different reasons." The Court held that "the correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." The Court found that the court of appeals had erred in holding that evidence of the victim's "provocative" attire and "publicly expressed sexual fantasies" were not pertinent to the litigation. The Court stated, "To the contrary, such evidence is obviously relevant" to show that a defendant's advances are welcome.

As the setting/deviance theory indicates, by terming the victim's clothing "provocative," the Supreme Court labeled the victim deviant and deserving of punishment. Although the Court did not define "provocative," its statement smacked of a conclusion of law: if she provoked, then she could not have been harassed. This is a staggering assertion of dominant cultural norms. What seems provocative for Justice Rehnquist dressed in his black robe may be fashionable to a young female bank employee. Unconcerned about this potential discrepancy, Rehnquist boldly asserts the predominantly white, predominantly male, legal community's control over the definition of modesty norms in the workplace.

Dress is a generic signal: when a woman wears clothing to work, everyone who sees her observes what she is wearing. However, the Court construed this general signal to indicate welcomeness to a particular person at a particular time. In this regard, one commentator stated,

The Meritor evidence standard promotes reasoning . . . [that] if the plaintiff slept with someone she will sleep with anyone. Under Meritor, any manifestation of sexuality by a woman is open to an interpretation of availability by all men. This construction does not allow women to be selective in their availability to particular men.

The Court determined that if the victim's clothing transgresses the workplace modesty norms, the victim is in the territory of the objectifying imperative and is open to all comers.

138. Id. at 63.
139. Id. at 68.
140. Id. at 69.
141. Id. While the Court's holding is facially consistent with Federal Rule of Evidence 403 which mandates that a court weigh the probative value of evidence against potential prejudice, the emphatic nature of the Court's statement may in fact encourage courts to admit irrelevant evidence. Christina A. Bull, Note, The Implications of Admitting Evidence of a Sexual Harassment Plaintiff's Speech and Dress in the Aftermath of Meritor Savings Bank v. Vinson, 41 UCLA L. REV. 117, 124-25 (1993). Bull notes that lower courts often do not adequately evaluate such evidence for relevance, but rather assume it is relevant in light of Meritor. Id. at 124-25.
142. Id. at 143-44.
2. Conflict Between Meritor and Rape Shield Policy

Several articles have recognized that the logic in Meritor that led the Court to approve of the relevance of dress is exactly the type of logic that the rape shield laws were designed to eliminate. These statutes, passed in the 1970s, sought to turn the focus of a rape trial from the conduct and character of the victim to that of the accused. In lobbying for rape reform, feminists argued that rape law perpetuated stereotypical and denigrating treatment of women's sexuality. They also argued that discriminatory notions about women permeated the administration of rape law. Rape trials had historically focused on the victim's prior sex life, as defense attorneys tried to show that the victim "asked for it." Defense attorneys used evidence of her unchastity, use of contraception, adulterous relationships or illegitimate offspring to support these arguments.

Feminists pointed to the study by Professors Kalven and Zeisel that showed that jurors misused such evidence and penalized women who did not fit the stereotype of the good woman. They further argued that the trauma of trial often deterred victims from reporting rape. Thus reformers sought to encourage reporting of rapes and minimize juror bias by limiting the extent to which the victim goes on trial through restricting the introduction of evidence about a rape victim's sex life. They further asserted that lack of chastity under no circumstances should indicate a greater likelihood that the victim consented to the rape and challenged the admission of evidence concerning the victim's sexual conduct through this argument.

Introducing clothing to show a victim's sexual character closely resembles past uses of evidence of non-chastity. The use of a victim's clothing at trial to show consent, to substantiate a claim of mistaken belief of consent, or to expose her as a liar, is traumatic to the victim. The woman sits in court and

143. See Ann C. Juliano, Note, Did She Ask For It? The "Unwelcome" Requirement in Sexual Harassment Cases, 77 CORNELL L. REV. 1558, 1576-77 (1992) (noting that factors considered in determining whether workplace conduct is unwelcome bear "a striking resemblance" to factors formerly considered in rape cases); see also Grace M. Dodier, Comment, Meritor Savings Bank v. Vinson: Sexual Harassment at Work, 10 HARV. WOMEN'S L.J. 203, 219-21 (1987) (deploring the Court's identification of Vinson's clothing and conversations with co-workers about sex as relevant and arguing that the Court should have analogized this case's treatment to that of date rape).


146. Id. at 793.
147. Id. at 794-95.
148. Id. at 796 (citing H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966)).
149. Id. at 795-96.
150. Id. at 797-98.
151. Id. at 798-801.
watches the jury handle her underwear. She knows, and prosecutorial strategy reinforces, that her clothing may be construed to indicate that “she asked for it.” Thus the use of clothing evidence perpetuates victims’ humiliation at trial by encouraging the jury to focus on the victim’s behavior, instead of focusing on the defendant’s culpability. Like the relationship between prior sexual activity and consent that existed prior to rape shield reforms, the nexus between revealing dress and the likelihood of a woman’s consent is unquestioned today. Such uses of clothing invoke the same concerns that led to rape shield reform.

B. Probative Versus Prejudicial Balancing

If the court applies the policy goals of the rape shield statutes in weighing probative value against prejudicial impact of the evidence, it is unlikely to admit the clothing evidence. On the other hand, the Supreme Court’s Meritor opinion approved a chain of inferences that support the relevance of a victim’s dress for all purposes. Opinions such as Meritor, although originating in other areas of the law, may confirm a judge’s habit of admitting clothing in almost all circumstances. My extensive research on the issue revealed only one opinion that excluded clothing evidence through a probative versus prejudicial balancing test.

In State v. Higley, the defendant raised a Sixth Amendment challenge to the trial court’s limitation of his cross-examination of the victim. The defendant had sought to question the victim on the jacket she wore at the time of the rape, which read, “Liquor in the front, and poker in the back.” The court refused to categorize the jacket as “sexual conduct” although it did find that the jacket might express the victim’s sexual views. However, the court determined that the evidence was properly excluded because it had “little if any probative value.” The decision is indicative of the judge's sensitivity to the jury's likely reaction to the jacket and is consonant with rape shield goals.

Higley does not comment on how to evaluate potential prejudice arising from the introduction of clothing evidence. When the defense introduces such evidence, the issue is not whether it harms the rape victim who, unlike the defendant, has few constitutionally protected interests at stake. Rather the

152. 621 P.2d 1043 (Mont. 1980).
153. Id. at 1050.
154. Id. at 1051. If the court had treated the jacket as sexual conduct, the Montana rape shield statute would have excluded the evidence. See MONT. CODE ANN. § 45-5-511(2) (1993).
155. Higley, 621 P.2d at 1051. The appeal indicates that the jacket was excluded from evidence at the trial level. The Montana Supreme Court affirmed this decision on the grounds that the relevance was so slight that it failed a balancing test. By implication, the jacket was relevant. But on what issue? If the jacket truly expressed the victim’s sexual views, would that support the inference that she would consent to sex with the defendant? Could the defendant read the jacket as an expression of her sexual views which indicated consent?
question is whether the evidence will “arouse the jury’s emotions of prejudice, hostility, or sympathy.”\textsuperscript{155} In the case of clothing, regardless of the theory by which it is introduced, the jury is likely to treat “provocative” clothing as evidence militating for the victim’s consent. The jury may be even more likely to evaluate the victim’s character based on her clothing when rape shield statutes bar evidence of the victim’s sexual history from the courtroom.

C. Rape Shield Statutes that Apply to Clothing: Georgia, Alabama, and Florida

Forty-eight states have passed statutes that limit the admissibility of a rape victim’s past sexual conduct to show her consent to sex;\textsuperscript{157} the remaining two limit such evidence by judicial discretion.\textsuperscript{158} In forty-seven states, however, rape shield protection applies exclusively to “sexual conduct,” “sexual behavior,” or “sexual activity.”\textsuperscript{159} Clothing evidence could fall within the ambit of these statutes, but does not seem to. In those states, the general rules of evidence govern the admission of a victim’s clothing.

This subsection of the Article describes the three rape shield statutes that directly address the issue of clothing. Georgia passed its rape shield statute in 1976, banning evidence of a victim’s “mode of dress” unless the mode of dress directly involves the defendant and supports a defense of mistaken belief in consent.\textsuperscript{160} Alabama’s statute is identical to Georgia’s.\textsuperscript{161} By contrast,

\begin{itemize}
  \item \textsuperscript{155} J. Alexander Tanford & Anthony J. Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. PA. L. REV. 544, 570 (1980).
  \item \textsuperscript{157} Galvin, supra note 144, at 765, app. at 906-07.
  \item \textsuperscript{156} Three states include dress in the meaning of “past sexual conduct” under their rape shield provisions. ALA. CODE § 12-21-203 (1993) (evidence relating to past sexual behavior includes mode of dress and general reputation for promiscuity; such evidence is not admissible unless the sexual behavior directly involved the participation of the defendant); FLA. STAT. ANN. ch. 794.022 (Harrison 1991) (evidence of attire at the time of the rape banned when introduced to show victim incited rape); GA. CODE ANN. § 24-2-3 (Michie 1991) (provision identical to ALA. CODE § 12-21-203).
  \item \textsuperscript{157} By contrast,
\end{itemize}
Florida bans evidence of the victim's manner of dress at the time of the rape when such evidence is offered to show that the victim "incited" the rape. The Florida statute was passed in 1990 in response to the outcome of the Lord trial described in Part II.

Of the three states which have these laws, only Georgia has interpreted the "mode of dress" language in a reported case. Judging from the language of each statute, none of the three fully addresses the potential for prejudice that clothing evidence creates.

1. **Mode of Dress: The Law of Georgia and Alabama**

In Georgia, as in other states, evidence must be relevant and must be more probative than prejudicial. The elements of rape in Georgia include nonconsent, force, and penetration. The Georgia rape shield statute bans "evidence relating to the past sexual behavior of the complaining witness," including the victim's "mode of dress." An exception may be made if the court determines at an in camera hearing either that the past sexual behavior directly involved the accused or that the evidence is so highly material that justice mandates its admission. In either instance, the evidence must support the defense of reasonable belief in consent.

"Mode of dress" seems to imply a general, continuing course of conduct, rather than a specific instance or article of clothing. In *Ford v. State*, the defendant argued that the trial court had erred in refusing to admit evidence that the victim "wore sexually suggestive clothing and acted promiscuously when she frequented night clubs." The Court of Appeals applied section 24-2-3, determining that the victim's clothing did not "involve participation" by the defendant and "did not support an inference that at the time the rape occurred, [the] defendant could have reasonably believed the victim was consenting to intercourse.

How would the Georgia statute treat situations such as those involving the fake I.D., the see-through skirt, and the "no underwear"? Are these individual articles of clothing "mode[s] of dress" within the meaning of the

161. ALA. CODE § 12-21-203.
162. FLA. STAT. ANN. ch. 794.022.
163. GA. CODE ANN. § 24-2-1 (1982) ("Evidence must relate to the question being tried to the jury and bear upon them either directly or indirectly. Irrelevant matter should be excluded.").
165. GA. CODE ANN. § 24-2-3(a) (Supp. 1994).
166. GA. CODE ANN. § 24-2-3 (Supp. 1994) (emphasis added). The rape shield statute was amended in 1989. As originally proposed in 1976, the statute would have required that evidence directly involve the defendant and support a reasonable belief in consent. The legislature however adopted the provision in the disjunctive so that either evidence must directly involve the defendant or evidence must support a reasonable belief in consent. In 1989, the legislature returned to the original 1976 version. See S. Brannan, *Note, Selected 1989 Legislation*, 6 GA. ST. U. L. REV. 245, 245-46 (1989).
168. Id. at 419.
169. Id.
statute? The statute makes an exception to permit admission of clothing that
directly involves the accused and supports his belief in consent.170 The
exception seems to admit clothing worn at a particular time. By implication,
“mode of dress” should encompass specific articles of clothing worn at
particular times, such as the clothing discussed in Part III. However, several
of these articles of clothing would be admissible under exceptions to the
statute. The mini-skirt and visible lack of underwear might be admitted at trial
under the exception for reasonable belief.

The case of Villafranco v. State171 further illustrates the limits of the
statute’s protection. In Villafranco, the victim had several drinks at a bar, after
which time she became angry at her friends and accepted a ride home from
the defendants. The victim testified that the defendants took her off the road
and raped her. The defendants testified that the victim invited them to have
sex with her. Afterwards the defendants drove away, leaving the victim in the
woods.

The prosecution introduced the victim’s jeans, underpants, bra, and
blouse into evidence.172 A co-worker of the victim testified that on the day
of the rape the victim had said that she was not wearing underwear. The co-
worker further testified that the victim had not worn the jeans and blouse to
work on the day of the rape, noting that “she never wore nothing but a skirt
and a blouse or dress, and she’d go around and brag to people about that she
didn’t wear underwear.”173 One defendant had testified that the victim had
not worn underwear at the time of the rape, and the forensic scientist who
examined the victim’s clothes stated that the crotch of the underpants was
cleaner than the jeans and that there was blood on the jeans but not on the
underpants. The expert witness implied that the victim put on underwear only
after the rape.174

The trial court refused to admit the testimony on the ground that the
evidence was banned by the rape shield statute. The Supreme Court reversed,
determining that the defendants’ Sixth Amendment right to confront and
question their accuser was implicated by the proscription on cross-examination.

Like the trials described in Part II, Villafranco is a tangle of half-finished
stories. As in the Lord trial, evidence that the victim wore no underwear at
the time of the alleged rape played a crucial role in the legal outcome of the
trial. Villafranco demonstrates the struggle of the rape victim to comply both
with the cultural imperative to wear underwear and the legal imperative to tell
the truth.

The testimony of the forensic specialist raises the possibility that the
victim went home after the rape, took off the jeans she was raped in, put on

170. GA. CODE ANN. § 24-2-3(b) (Supp. 1994).
171. 313 S.E.2d 469 (Ga. 1984).
172. Id. at 471.
173. Id. at 472.
174. Id. at 474 n.3.
clean underwear, put the jeans back on, and then submitted the jeans and the underwear to prosecutors or to the police. Self-doubt would explain the victim's actions. If she did put on underwear after the rape, she must have decided that she was in the wrong for not wearing underwear, and decided to “cover herself” by lying. Alternatively, a prosecutor or the police might have initiated the lie. Once again, it appears that the victim was compelled by the modesty imperative to conform to the cultural norm of a respectable image.

The Georgia Commission on Gender Bias in the Judicial System found that “[t]he rape shield statute has reduced courtroom inquiry into a victim’s personal lifestyle and prior sexual relationships, but it has not eliminated it entirely, leaving open the ability to attack a witness’s credibility based on highly personal, sometimes embarrassing, and irrelevant information.” That the victim in Villafranco might have been motivated enough to lie about her underwear suggests that the exception may have swallowed the rule.

2. Florida: Banning Evidence that Attire Incited Rape

After the acquittal of Steven Lamar Lord, the Florida legislature passed an amendment to its rape shield provision. The amendment banned “evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery.” The bill

---

175. The victim in the Lord trial behaved similarly. She at first told nurses that she had worn underwear and Lord had ripped them off her; only later did she admit she was not wearing panties. Unlike the Lord case, however, there was no innuendo in Villafranco that the victim was a prostitute.

176. Given that she told her story over and over to police officers, prosecutors, and at trial, the victim’s lie may have enabled her to bring the prosecution as far as she did.


179. The Florida statute reads:

794.022 Rules of Evidence
(1) The testimony of the victim need not be corroborated in a prosecution under s. 794.011 or s. 794.041.
(2) Specific instances of prior consensual sexual activity between the victim and any person other than the offender shall not be admitted into evidence in a prosecution under s. 794.011 or s. 794.041. However, such evidence may be admitted if it is first established to the court in a proceeding in camera that such evidence may prove that the defendant was not the source of semen, pregnancy, injury or disease; or, when consent by the victim is at issue, such evidence may be admitted if it is first established to the court in a proceeding in camera that such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.
(3) Notwithstanding any other provision of law, reputation evidence relating to the victim’s prior sexual conduct or 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 prosecution under s. 794.011 or 794.041.

FLA. STAT. ANN. ch. 794.022 (Harrison 1992) (emphasis added).
passed the House by a strong majority and by a unanimous vote in the Senate.\textsuperscript{180}

Reading the statute in conjunction with the Florida sexual battery statute indicates potential problems, and the new provision has yet to be interpreted in a reported decision.\textsuperscript{181} The statute makes no reference to typical relevance theories, such as consent or credibility. It is not clear what the legal definition of “incited” is. The elements of sexual battery (Florida’s equivalent of rape) as a felony in the second degree include nonconsent, oral, anal, or vaginal penetration, and force.\textsuperscript{182} A victim might incite an attack without consenting to intercourse. Such an incitement does not negate a defendant’s use of force, and nowhere in the statute is “incitement” by the victim a defense. Even if the defense succeeded in showing that a woman’s attire “incited” the battery, under Florida law, the defendant should still be convicted of rape, since the elements of the crime—penetration, force, and nonconsent—are not affected.\textsuperscript{183}

As the Lord case showed, however, “incitement” may serve as a practical defense to rape, if not a legal defense. The language of the Florida provision is more appropriate to the world of actual trial practice than to a coherent legal structure.\textsuperscript{184} One critic of the Florida provision advocates Georgia’s procedure.\textsuperscript{185}

In summary, \textit{Meritor}\textsuperscript{186} exemplifies a poorly chosen theory of relevance for clothing in sexual harassment cases which should not extend to rape cases. If judges recognized the low probative value and the potential for prejudice in the introduction of provocative dress in the courtroom, as the judge did in \textit{State v. Higley},\textsuperscript{187} courts could limit the unfair effects of clothing evidence. Furthermore, the rape-shield statute may serve as a vehicle for an explicit legislative message regarding clothing. As \textit{Villafranco v. State}\textsuperscript{188} indicates, however, even a rape shield statute that has specific provisions regarding dress

\textsuperscript{180} Goldschmidt, \textit{supra} note 178.

\textsuperscript{181} A March 1995 LEXIS search revealed no such reported decisions.

\textsuperscript{182} FLA. STAT. ANN. ch. 794.011 (Harrison 1992).

\textsuperscript{183} In hearings for the amendment, Representative Elaine Gordon stated to the Florida House Criminal Justice Subcommittee on Prosecution and Punishment, "The manner in which a person is dressed has no relevance to whether a crime has been committed." Barbara Fromm, \textit{Sexual Battery: Mixed-Signal Legislation Reveals Need for Further Reform}, 18 FLA. ST. U. L. REV. 579, 587 (1991) (citing Fla. H.R. Comm. on Criminal Justice, Subcomm. on Prosecution and Punishment, tape recording of proceedings (Apr. 5, 1990) (on file with committee)). If the attire were deemed irrelevant, then the Florida statute would be logically redundant because irrelevant evidence is never admissible.

\textsuperscript{184} The language of the Florida statute may also be retrograde in that it indicates a belief that a victim’s clothing may actually provoke or incite an attack. Id. at 588.

\textsuperscript{185} See id. at 579.

\textsuperscript{186} 477 U.S. 57 (1986).

\textsuperscript{187} 621 P.2d 1043, 1050-1051 (Mont. 1980).

\textsuperscript{188} 313 S.E.2d 469, 474 (Ga. 1984).
will not necessarily limit the effect of clothing evidence. Perhaps Villafranco was not a success because of the limited "mode of dress" language of the Georgia statute. Certainly, neither the Georgia nor Florida statute offers a thoughtful and comprehensive framework in which to examine clothing evidence. The Georgia statute at least requires an in camera hearing, creating a forum for the prosecutor to object to clothing evidence. Yet prosecutorial and defense strategies do not seem to have changed. "No underwear" evidence is still significant in the minds of the trial participants. Although it is too soon to tell, it seems that the Florida statute, because it fits so poorly into the legal framework of rape law, will not be very effective.

CONCLUSION

An examination of the intersection of the semiotic system that gives clothing broad cultural meaning with the evidentiary system of the courts yields a wealth of insights and questions. First, studying the production of dress signs gives us a critical vantage point from which to examine the evidentiary system. Identifying the importance of context in the production of meaning enables us to question the evidentiary system's transposition of clothing evidence to the courtroom. Likewise, focusing on the fine line between clothing that creates character and clothing perceived as costume highlights clothing's inappropriate impact on credibility in trials.

The practice of admitting clothing into evidence is one which has gone largely unexamined. This creates a vicious cycle. Because there are virtually no published opinions in this area, there is "nothing" for legal scholars to criticize. It would be useful to document the actual admission and use of clothing evidence at trial. It is difficult to know what reform might be appropriate, but it is clear that more research is needed to understand and dismantle the status quo. Nonetheless, this Article has suggested some methods for lessening the harm done by bringing rape-scene clothing into the courtroom.

Before suggesting methods for reform, I want to summarize the ground that I have covered. The meanings attached to a woman's clothing depend in part on the clothing's conformity to the norms of the context in which it is worn. When clothing violates contextual norms by alluding to the norms of a more sexually charged setting, the clothing appears provocative; going further, the clothing becomes objectifying. The courtroom is a conservative setting, one of low sexual charge. When a rape is alleged, the clothes that the victim wore at the time of the rape are often introduced as evidence at trial. The clothing usually "belongs" to a setting more sexually charged than the courtroom. It will therefore violate courtroom norms, resulting in the undesired provocative or objectifying sign. Even where a woman's external clothing at
the time of a rape conforms to courtroom norms, her underwear surely violates courtroom norms.

Although the victim is not actually wearing the clothing introduced in court, both her sexual character and her credibility may be called into question by such evidence. The provocative or objectifying sign produced by the evidence is attributed to the victim, thus sexualizing and stigmatizing her in the eyes of all those in the court. The provocative or objectifying sign produced by the clothing conflicts with the modest, conforming sign attached to the victim's actual garb at trial. The conflict of these signs operates to weaken the victim's credibility. Marking the victim as provocative or objectified may cause the jury to accept her rape as disciplinary abuse and allow it to go unpunished.

To minimize the harm caused by transposing clothing into court, my theory suggests two solutions. First, if the context of the rape could be recreated in the courtroom, the distortion of signs would be diminished. Such a solution, however, would not help women who had made provocative or objectifying signs in the context of the rape. This solution would protect only those who abide by contextual norms of dress, failing to address the larger problem of disciplinary abuse.

A second solution might be to relax the courtroom norms, so that the incongruity between the dress signs at the time of the rape and those made at the time of trial would diminish. This solution would best protect the victim's credibility, by lessening the discrepancy between the two signs so that her courtroom and her rape-scene personae would not be so incongruous. But like the first, this solution fails to protect victims who violate contextual norms either at the time of the rape or at trial, because it does not address the problem of disciplinary abuse.

Combining theory with legal rules presents further possibilities for substantive reform. If it were possible for a court to distinguish between the evidentiary significance and the broader cultural meaning of clothing, it might be possible to admit clothing for evidentiary purposes while excluding from consideration its broader meaning. Thus a court could determine that a mini-skirt was admissible as a bloody piece of cloth, but prejudicial as a provocative clothing sign. The court could then require that attorneys introduce the evidence in such a manner as to limit the provocative meaning while conveying the significance of the bloody piece of cloth. This might entail cutting a swatch of fabric or taking a picture of the fabric that would not reveal that the piece was a mini-skirt. In addition, the court could order the attorneys not to mention that the fabric was a mini-skirt, or at least not to mention its length or its tight fit, for example.

Limiting cultural significance could be justified on the grounds both that the victim's decision to wear a mini-skirt is not relevant in a rape trial, and that evidence showing the victim wore a mini-skirt would be more prejudicial
than probative. The relevance objection is correct: what the victim was wearing should not matter at all. What a woman wears should almost never be used to demonstrate that she was more or less likely to have consented to sex. Adopting the relevance justification for excluding clothing evidence would be a significant step toward refuting the legal basis for disciplinary abuse in this area. To the extent that rape shield laws represent a legislative determination of the irrelevance of certain evidence, these laws could provide the necessary vehicle for reform. By contrast, accepting the probative versus prejudicial justification affirms disciplinary abuse. It assumes that the evidence is implicitly relevant to the case and damaging to the witness' credibility, without confronting the irrational biases behind this assumption. Such analysis thus fails to critique the legal system's role in distorting clothing signs in court.

In sum, understanding the way that clothing signs are produced gives us conceptual tools both to criticize our evidentiary system and to ameliorate its impact on women who seek protection and vindication in court. By actively pursuing some of the research that I have suggested we will be able to illuminate the problems and offer viable solutions.