

STOP WORRYING ABOUT WHAT TO WEAR TO COURT. IT
PROBABLY DOESN'T MATTER.

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I. INTRODUCTION

In the early 2000s, I coached a moot court team that was participating in a competition in New York. One of the female competitors in this competition came out of her round visibly upset. She claimed that one of the competition judges, who was a trial court judge from the local area, critiqued her for wearing a pants suit. She recounted that he told her if any woman showed up in his court with a pantsuit on, he would send her home to change. In the early 2010's during an inter-school moot court competition, I witnessed a practicing attorney tell a female competitor that the light blue shirt she was wearing as part of her suit ensemble was too "bright," and she should not wear that in the future. I have talked to countless professors who give their students advice on what to wear in court. I have heard them say that only dark colored suits should be worn with no embellishments—such as pin stripes or plaid checks. I have heard students in the hallways balk at advice from their summer employers who told them that they could not wear bowties or jewelry, and pantyhose should always be worn with a skirt. Students will get in on the fashion critique game as well. I have received countless reflection papers from judicial externs who dislike the dress of attorneys who argue before their judges because they see the dress as "too casual" or "too loud." The students often claim that anything other than a plain dark suit distracts from the attorney's message and makes the attorney appear unprofessional. Even textbooks give students advice on dress. Several

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trial-advocacy books direct students to dress in a manner that is “conservative,”¹ not in the political sense of the word, of course, but as a term the traditional uniform attorneys are known to don—dark colored suits, well-pressed and well-groomed.

Most of this fashion advice appears to be based on the idea that an attorney’s choice of clothing can distract from the message the attorney is trying to convey² or can convey messages about the competency of the attorney.³ If the clothing is something eye-catching or something unexpected by jurors or judges listening to an attorney try a case, the jurors or judges may focus on the clothing instead of the message.⁴ Additionally, if the clothing does not fit the norms of what should be worn to court, jurors may see the attorney as incompetent and, therefore, doubt the trustworthiness of the attorney’s message.⁵

The theoretical framework surrounding the concept of “cross dressing”⁶ supports the notion that attorney dress can affect the attorney’s message. In *Cross Dressing and the Criminal*, Professor Bennett Capers argued that all dress that does not conform to societal norms is a form of “cross dressing.”⁷ Capers noted that dress communicates a multitude of non-verbal information about a person, including sex, age, class, occupation, and personality.⁸ And when that non-verbal information

1. V. HALE STARR & MARK McCORMICK, JURY SELECTION 27-22 (4th ed. 2009).

2. See TIMOTHY PERRIN ET. AL., THE ART AND SCIENCE OF TRIAL ADVOCACY 19 (2003) (“Trials are not the time for ostentatious attire or expensive jewelry. The goal is to blend in, not stand out.”); see also, MARILYN J. BERGER ET. AL, TRIAL ADVOCACY, PLANNING, ANALYSIS, AND STRATEGY 21 (2d ed. 2008) (“Generally, you want a neat and professional appearance, one that does not include distracting clothes or accessories.”).

3. E.g., STARR & McCORMICK, *supra* note 1, at 27-20 (citing C.J. Scherbaum & D.H. Shepherd, *Dressing for Success: The Effects of Color and Layering on the Perceptions of Women in Business*, 16 SEX ROLES 391, 399 (1987) (a study in which participants found women and men wearing jackets to be more competent)).

4. JANINE WARSAW, WOMEN TRIAL LAWYERS: HOW THEY SUCCEED IN PRACTICE AND IN THE COURTROOM 5 (1987) (“If the focus of the courtroom is on the lawyer’s clothes, or the lawyer’s jewelry, or the lawyer’s briefcase or the personality and histrionics of the lawyer, then the focus has been lost.”); see also LISA L. DECARO & LEONARD MATHEO, THE LAYER’S WINNING EDGE: EXCEPTIONAL COURTROOM PERFORMANCE 191 (2004) (“Don’t wear anything that attracts more attention than your argument.”).

5. PERRIN, *supra* note 2, at 19 (“Advocates communicate something by how they dress, and they should use even that as an opportunity to build their credibility with the jury.”).

6. See I. Bennet Capers, *Cross Dressing and the Criminal*, 20 YALE J.L. & HUMANS. 1, 4 (2008) (explaining that cross dressing refers to the cognitive dissonance that follows when normative expectations concerning dress fail to reflect reality.).

7. *Id.* at 4.

8. *Id.* at 6. Capers noted, “For thousands of years human beings have communicated with one another first in the language of dress. Long before I am near enough to talk to you on the street, in a meeting, or at a party, you announce your sex, age and class to me through what you are wearing—and very possibly give me important information (or misinformation) as to your occupation, origin, personality, opinions, tastes, sexual desires, and current mood. I may not be able to put what I observe into words, but I register the information unconsciously; and you

conflicts with what we discover is true about a person, it can cause viewers to question their general notions of societal order.⁹ If attorney clothing causes jurors to experience an existential crisis regarding deeply held beliefs about societal order, jurors can be distracted from the message the attorney is trying to communicate.¹⁰ However, as Capers argued, there could be benefits to dressing in a manner that defies expectations. If an attorney is looking to have the jury question its implicit bias about witnesses or the defendant, defying societal norms in the dress the attorney chooses can goad jurors into questioning their instinctual beliefs about witnesses, defendants, and other courtroom operators in a manner that may benefit the case.¹¹

Trial technique is not the only oratory tradition where novices are directed on the clothing they should wear. Business schools counsel students to wear “conservative” clothing and to not dress “flashy” when making presentations,¹² and student teachers are told that they should wear “conservative” outfits while teaching.¹³ Like advice given to students on trial attire, advice for students of these other oratory traditions seems to be based on the concept that attire can affect a listener’s

simultaneously do the same for me. By the time we meet and converse we have already spoken to each other in an older and more universal tongue.” *Id.*

9. *Id.* at 15. To support this point, Capers quotes BARBARA A. BABCOCK, *Introduction to THE REVERSIBLE WORLD: SYMBOLIC INVERSION IN ART AND SOCIETY* 29 (Barbara A. Babcock ed., 1979): “Clown or trickster or transvestite never demands that we reject totally the orders of our sociocultural worlds; but neither do these figures simply provide us with a cautionary note as to what would happen should the “real” world turn into a perpetual circus or festival. . . . Rather, they remind us of the arbitrary condition of imposing an order on our environment and experience, even while they enable us to see certain features of that order more clearly simply because they have turned inside out.”

10. *Id.* at 16. (“[C]ross dressing challenges the assumed binary relation between ‘men’ and ‘women,’ destabilizes the very terms ‘man’ and ‘woman,’ and in doing so, renders visible their very constructedness. It disrupts the assumption that gender is natural, that gender inevitably follows sex, that gender is anything other than performance.”).

11. *Id.* at 25. Capers implores readers to “imagine a cross dressing instruction that would direct decision makers to actually examine their biases and either determine that their biases are appropriate, or inappropriate. Some individuals, faced with the realization that they would not acquit a defendant where there was proof that he kidnapped a complainant from a parking lot, and repeatedly penetrated her over the course of five hours, had the complainant been, say, a mother of two dressed modestly, would examine their biases and nonetheless conclude, wrongly or rightly, that their biases are fine. These individuals would conclude that dress *should* matter, and that the complainant’s dress, and hence status, is probative of her consent. Other individuals, however, engaging in the same cross dressing exercise, would conclude that their biases about dress and status are inappropriate, and would choose to override their biases and reexamine their decision. In short, such imaginative acts of cross dressing can mean the difference between a just verdict or an unjust one.” *Id.*

12. Laura Stack, *Supercompetent Speaking: Proper Presentation Attire*, TRAINING MAG. (Feb. 14, 2013), <https://trainingmag.com/content/supercompetent-speaking-proper-presentation-attire/>; Elizabeth Layne, *What to Wear for a Presentation*, CHRON., <https://smallbusiness.chron.com/wear-presentation-35897.html>.

13. David Racine, *Student Teaching Outfits: What to Wear* (Jan. 28, 2019), <https://schools.magoosh.com/schools-blog/student-teaching-outfits-what-to-wear>.

estimation of the speaker's credibility and clothing can be distracting if it is flashy or out of the norm.¹⁴

Notions of correct dress may seem trivial, but dress choices can have serious, even criminal, consequences.¹⁵ Europe has a long history of sumptuary laws that proscribed the dress various classes and races of people were allowed to wear,¹⁶ and America perpetuated some of these laws.¹⁷ Slave codes in the Antebellum South required slaves to wear certain clothing.¹⁸ And until the 1980s, the City of St. Louis was charging male performers who impersonated females with a statute that outlawed “dress not belonging to his or her sex.”¹⁹

Perhaps the history of dress and its consequences are why so much advice is given to law students about dress.²⁰ But despite the sea of advice available to law students regarding courtroom dress—some welcomed and some not—there is surprisingly little empirical study of how an attorney's dress affects juror perceptions. And what empirical evidence is out there is arguably obsolete because fashion trends have changed and the concept of societal norms differs from what was studied.²¹ One

14. Nick Morgan, *What Should a Speaker Wear*, FORBES ONLINE (July 18, 2011), <https://www.forbes.com/sites/nickmorgan/2011/07/18/what-should-a-speaker-wear/?sh=70db98d948a57/18/2011> (“Bottom line? This may surprise you: *you don't want anyone to notice [your clothing]*. Consciously, that is. It's like the stage set for a play—if the audience starts to pay attention to that, it means the show is in trouble. Instead, you want your audience to pay attention to the speech.”).

15. Capers, *supra* note 6, at 6–11.

16. In 1597, Queen Elizabeth issued a proclamation that “proscribed not so much what people could wear, as what they could not, depending on their rank and station. Thus, the order proclaimed that ‘none shall wear cloth of gold, silver tissue, silk of purple color . . . except . . . earls and above that rank and Knights of the Garter in their purple mantles.’ An accompanying edict applied to women: ‘none shall wear any cloth in silver in kirtles only . . . except knights' wives and all above that rank.’ The proclamation continued with other dress prohibitions, from materials for headdresses, netherstocks, jerkins, hose, and doublets, depending on whether one was an earl or count or gentleman or had an annual income of 500 marks or more, or fell in some station in between.” *Id.* at 7.

17. *See id.* at 8–9.

18. *Id.* at 8 (“South Carolina's slave code, for example, mandated that slaves could only wear ‘negro cloth, duffelds, coarse kearsies, osnabrigs, blue linen, checked linen or coarse garlix or calicoes, checked cottons, or scotch plaids, not exceeding ten shillings per yard for the said checked cottons, scotch plaids, garlix or calico.’ It was not enough that their skin marked them subordinate in the eyes of whites; their clothing had to mark them as subordinate as well.”).

19. *D.C. v. City of St. Louis*, 795 F.2d 652, 652 (8th Cir. 1986). The *D.C.* court found the cross-dressing ordinance to be unconstitutional because it outlawed “indecent or lewd [] behavior,” which the court determined was unconstitutionally vague. *Id.* at 654. The specific language in the ordinance of “dress not belonging to his or her sex” was not challenged on appeal to the Eighth Circuit. *See id.* at 652–55.

20. *See, e.g., A Law Student's 3-Tiered Guide to Dressing the Part*, L. SCH. TOOLBOX (Aug. 8, 2013), <https://lawschooltoolbox.com/a-law-students-3-tiered-guide-to-dressing-the-part/#:~:text=Business%20casual%20attire%20generally%20includes%3A%20slacks%2C%20a%20nice,by%20wearing%20a%20suit%20in%20a%20legal%20context>.

21. A study from 1984, for example, looked at female neckwear choices, a style that is no

person's description of dress that conveys competency and does not distract can differ significantly over a decade of time.²²

In order to fill the gap in empirical research, I ran a study designed to assess whether differences in attorney clothing affect juror perceptions of the attorney as well as acquisition and recall of content presented by the attorney.²³ Participants were shown one of two three-minute videos of an attorney giving an opening argument.²⁴ The attorney recited the exact same opening argument in both videos.²⁵ However, in one video, the attorney wore what would currently be described as "conservative" clothing and in the other the attorney wore a "less conservative" outfit.²⁶ Participants only watched one version of the video and then were asked to recall content from the opening through a series of written questions.²⁷ Subjects were also asked to rate the performance of the attorney by answering another set of written questions.²⁸ Additionally, as subjects watched the video, their eyes were tracked with eye-tracking software to see where their visual attention was pulled as the attorney spoke.²⁹ The results of the study were mixed.³⁰ No evidence was found that the attorney's dress affected jurors' ability to acquire or recall the underlying content regarding the underlying facts of the case presented in the opening statement.³¹ However, there were some findings that indicate dress may affect the affinity jurors felt for the attorney, which might affect content acquisition or retention over the long length of a trial.³²

In order to detail this research, the rest of this Article will be divided into three parts. Part II details the existing scholarship on clothing and its effects on viewers. Part III details the study, and Part IV discusses the outcomes of the study and make suggestions for further research.

longer in vogue. Charlene Lind et. al., *A Woman Can Dress to Win in Court*, AM. BAR ASS'N J. 92-95 (1984).

22. *Id.* The necktie study, for instance, indicated that the interest in neckties stemmed from the relative novelty of female lawyers in the mid-80s and their desire to reap the credibility male attorneys receive from wearing neckties with suits. *Id.* As the novelty of female lawyers in the courtroom has passed, so too has the fashion of female neckties. *See id.*

23. *See* discussion *infra* Part II.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *See* discussion *infra* Part II.

30. *See* discussion *infra* Part III.

31. *Id.*

32. *Id.*

II. EXISTING SCHOLARSHIP ON CLOTHING AND ITS EFFECTS ON VIEWERS

A. *Empirical Studies*

Fashion choices may seem trivial to lawyers who have spent many years studying how to craft brilliant arguments, but studies show that clothing communicates messages to a viewer.³³ A viewer uses fashion as a cue to the qualities of the person wearing the clothes.³⁴ “[W]hether intended, unconscious, or imagined,” these cues cause viewers to create impressions about the clothes wearer before the person even opens his or her mouth.³⁵ Indeed, studies show that the greatest amount of information conveyed by fashion is “potency,” which encompasses a viewer’s estimation of the speaker’s competency and intelligence, attributes that attorneys generally strive to convey to jurors.³⁶ Certainly, other aspects of a lawyer’s performance can change those first impressions of a viewer, but the time it takes for those impressions to be corrected is time lost in conveying the message the attorney wants to convey, especially when addressing a jury.³⁷

33. See, e.g., Sharron Lennin et al., *In Search of A Common Thread Revisited: What Content Does Fashion Communicate?*, 6:2 INT’L J. FASHION DESIGN TECH. & EDUC. 170, 171 (2014). This study was a meta-analysis of other studies that had looked at information communicated to an observer about an individual based on what the individual was wearing. *Id.* Researchers used a coding system to look through 115 research articles to identify the information communicated by fashion to participants in those studies. *Id.*

34. *Id.* at 171 (“This is not to suggest that the meanings attached to the cues are accurate or that the meanings do not change over time but simply to say that people do attach meanings to certain cues.”).

35. *Id.* The authors cite the following studies as proof that observers make impressions of people simply based on the clothing the person is wearing: Andrew J. Elliot et al., *Women’s Use of Red Clothing as A Sexual Signal in Intersexual Interaction*, 49 J. EXPERIMENTAL SOC. PSYCH., 599, 599–602 (2013) (finding observers create impressions about a woman’s sexuality based on the clothing she wears); Beth Montemurro & Meghan M. Gillen, *How Clothes Make the Woman Immoral: Impressions Given off by Sexualized Clothing*, 31(3) CLOTHING & TEXTILES RSCH. J. 167, 167–81 (2013) (finding observers create impressions about whether someone drank, smoked, or used profanity based on clothing); Heesu Chung et al., *Doctor’s Attire Influences Perceived Empathy in the Patient-Doctor Relationship*, 89 PATIENT EDUC. & COUNSELING 387, 387–91 (2012) (discovering that patients created impressions of whether a doctor would be empathetic based on what the doctor was wearing). Lennin, *supra* note 33, at 172.

36. Lennin, *supra* note 33, at 174. The researchers in this study identified a little over thirty-five percent of the information communicated by fashion as “potency” information, defined as inferences of power (both social and physical), competence, and intelligence. *Id.* at 174.

37. The authors point out that a theoretical framework called the “self-fulfilling prophecy” may explain how first impressions develop into whole pictures of a person. *Id.* at 176 (“First, similar to the impression formation process, ideas, and expectancies regarding the target (of perception) are inferred by the perceiver. These expectancies may be the result of static (e.g. height and ethnicity) or dynamic cues (e.g. facial expressions and clothing items) that are presented by the target. Second, the perceiver behaves towards the target as if his or her expectancies are true. Third, the target reads the perceiver’s behaviour towards him/her and

In 1982, a study concluded that jurors “don’t care very much about the color of a lawyer’s clothes.”³⁸ The authors of the study stated they chose to study lawyers because they are “in a highly exposed and vulnerable position, constantly under scrutiny” when they present cases to jurors in court.³⁹ This study chose suit color as the variable to test juror perception, and the study was conducted on prospective jurors who were summoned to court as part of a jury pool in Los Angeles County.⁴⁰ About 1000 potential jurors were shown pictures of an attorney dressed in similarly cut suits of various colors—blue, brown, tan, gray and plaid.⁴¹ The potential jurors were then given a questionnaire that asked them to rank various attributes of each attorney, including whether the attorney was believable, competent, intelligent, reliable, aggressive and sincere.⁴² The plaid coat was rated inferior to the other coats, but among the other colors, there was no statistically significant difference between the colors on any of the attributes.⁴³ Therefore, the study concluded that color did not affect juror perception of attorneys.⁴⁴

A 1984 study focused on clothing choices for female attorneys.⁴⁵ The study asked 100 former jurors to look at still photographs of a female attorney wearing various kinds of neck attire—different colored scarves, bows, and ties.⁴⁶ The study also showed jurors a picture of the same attorney without any neck attire.⁴⁷ Participants were then asked questions about their perception of the attorney in various photographs.⁴⁸ This

behaves accordingly. Fourth, the perceiver observes the target’s behaviour as evidence for the accuracy of his or her initial expectancies.”).

38. Donald E. Vinson, *For Lawyers Brown Might Be Better*, 68 AM. BAR ASS’N J. 97, 99 (1982). This Article notes that the importance of dress may be debated, as well as what dress is appropriate in certain situations, but those outstanding questions do not diminish the importance of studying dress for professionals, like lawyers, “whose professional success depends in part on the clothes they wear.” *Id.* at 97.

39. *Id.*

40. *Id.* at 98. The author noted that the jurors represented “a cross-section of the community in sex, age, income, and race.” *Id.*

41. Vinson, *supra* note 38, at 98. Technically, the plaid was on a sports coat, rather than a suit jacket, but the author noted the sports coat was a similar cut to the suit coats. *Id.*

42. *Id.* at 97.

43. *Id.* On a scale of 1 to 5, 5 representing the best rating, the various suit colors all averaged a ranking within 3.66–3.81. *Id.* The sports coat averaged a 1.83. *Id.*

44. Vinson, *supra* note 38, at 98. The author concluded that color, alone, didn’t seem to have any effect on jurors whatsoever. *Id.* at 99. The author suggests that means that “[f]eeling good about oneself is a more important factor in deciding what to wear than decisions based on color.” *Id.*

45. See Lind, *supra* note 21, at 92.

46. The authors of this study chose neckwear because they noted that women lawyers at the time did not know whether neckwear was a necessary component of a female suit in the courtroom because male attorneys generally wore a three-piece suit to court. *Id.*

47. *Id.* at 94.

48. *Id.*

study did not report any statistical analysis conducted on the participants' responses, but the study found that participants rated the attorneys as more knowledgeable, capable, confident, trustworthy, reliable, confident, professional, and efficient when some kind of neck attire was worn.⁴⁹

In contrast to the suit jacket and neckwear studies that focused on one article of clothing, a newer study looked at a multitude of clothing options to see how they may affect juror perceptions of lawyers.⁵⁰ In this study, 201 participants were approached in public settings in the UK and asked to participate in the study.⁵¹ They were shown pictures of two attorneys—one male and one female—in various outfits, ranging from jeans and a t-shirt to a formal, dark suit.⁵² The authors of the study found that there was a statistically significant preference expressed among study participants for the lawyers in dark suit attire.⁵³ Attorneys of both genders were rated as more capable and easier to talk to when wearing the dark suit.⁵⁴ And both genders were rated as friendlier in a suit than in jeans and a t-shirt.⁵⁵ The authors of this study noted the limitations of a study based on still photographs.⁵⁶ In particular, there are many aspects that go into an assessment of a lawyer beyond what the lawyer is wearing that were not measured with this particular study—like a lawyer's voice and facial expressions.⁵⁷

Notably, no studies were found regarding clothing and non-gendered attorney individuals. This is, obviously, an area ripe for research.

49. The authors did note that the blouse was tailored for this study, suggesting that neckwear may not be as desirable with other types of shirts. *Id.* at 94.

50. Adrian Furnham et al., *What to Wear? The Influence of Attire on the Perceived Professionalism of Dentists and Lawyers*, 43 J. APPLIED SOC. PSYCH. 1838 (2014).

51. Of the participants, 91 were male and 110 were female. *Id.* at 1840.

52. *Id.* at 1841, 1842. Pictures of each outfit are available in the article and evidence that the looks range from extremely casual to formal business attire. *Id.*

53. *Id.* at 1845. This was the most “conservative” of all of the outfits tested in this study. *See id.* at 1847.

54. Notably, the pictures of the male attorney ranked higher in both of these categories than the female attorney. Furnham et al., *supra* note 50, at 1845–46.

55. Additionally, the male attorney in the dark suit was rated more capable and friendlier than the female attorney in the dark suit. *Id.*

56. The authors also noted that there might be unintentional variables going on when using two different models for the clothing. *Id.* at 1848. For instance, participants may be more or less attracted to the two different models, which could affect the results. *See id.*

57. *Id.* The study concluded by recommending that “[f]uture studies may well consider using video stimuli rather than photographs or even live models to see to what extent clothes alone effect impressions and how long they last when supplemented by other data.” Furnham et al., *supra* note 50, at 1848.

B. *Trial Advocacy Textbook Recommendations*

Only a few instructional texts have waded into the waters of clothing recommendations for students of trial advocacy. Most of these texts recommend that attorneys avoid wearing clothing that distract from the message the attorney is trying to communicate by either stealing the focus of listeners⁵⁸ or by communicating that the attorney is not credible.⁵⁹ Some texts are specific in their recommendations, directing attorneys to wear dark suits, shined shoes, and white or blue shirts.⁶⁰ Some even go so far as to recommend women wear dresses instead of pants much like the New York judge recommended at the beginning of this Article.⁶¹ But probably the most extensive treatment of how dress affects courtrooms can be found in Hale Starr and Mark McCormick's *Jury Selection*.⁶² This routinely updated loose-leaf tome devotes a whole chapter to "Nonverbal Communication: Appearance."⁶³ The chapter notes that attorneys tend to wear "conservative" outfits to court⁶⁴ and suggests that "medium blue" or "navy blue" suits have the most positive reactions from the average juror based on research conducted by one of the authors compiled with research from another author.⁶⁵ But the authors counsel against the usual white shirt for men because it is "indicative of those who do not work with their hands and . . . [is the type of shirt worn by] 'someone who gives

58. "If the focus of the courtroom is on the lawyer's clothes, or the lawyer's jewelry, or the lawyer's briefcase or the personality or histrionics of the lawyer, then the focus has been lost." WARSAW, *supra* note 4, at 5–6; *see also* DECARO & MATHEO, *supra* note 4, at 191 ("If jurors are busy admiring (or coveting) that rock on your finger, they are not listening to what you have to say.").

59. "[T]he lawyer gains credibility by dressing and acting like someone worthy of trust. Trials are also not the time for ostentatious attire or expensive jewelry." Perrin, *supra* note 2, at 19.

60. BERGER, *supra* note 2, at 21 (noting that a "traditional trial uniform is a dark suit (navy blue, charcoal, grey), white or blue shirt, tame tie, shined shoes, and dark socks.").

61. *Id.* ("For women trial lawyers, dress is slightly more challenging. For example, if jurors in the jurisdiction are likely to be older, some suggest that a dress may be more appropriate than slacks.")

62. STARR & MCCORMICK, *supra* note 1.

63. *Id.* at 27-0–27-38.

64. *Id.* at 27-22 ("'Conservative' is generally the mode of dress recommended by most lawyers or their wardrobe consultants for parties, witnesses, and lawyers.").

65. The authors include detailed charts such as a chart that offers recommendation regarding various suit color choices for both male and female attorneys, even noting suits that show the best on television and ones that help attorneys establish authority. *Id.* at 27-24–27-25. They note that these charts were compiled from research one of the authors conducted and from CHERYL HAMILTON ET AL., COMMUNICATING FOR RESULTS 44–45 (1982). STARR & MCCORMICK, *supra* note 1, at 27-24–27-25. The authors also note that even though navy blue suits are usually the best choice for an attorney to wear in court, there were some aspects of blue suits that did affect jurors in a negative way. *Id.* For example, the authors note that attorneys that "come on strong" who were dressed in blue suits elicited negative reactions from jurors. *Id.*

me orders,” which may make jurors think the attorney is not like them.⁶⁶ Instead, Starr and McCormick suggest a soft color, like beige or grey or sky blue, because those colors are viewed as “equally elegant and intelligent but indicative of someone willing to work hard.”⁶⁷ Additionally, the authors suggest “personality ties” that “offer[] insights into the personality of the wearer.”⁶⁸ The authors note that ties garner a lot of attention so the attorney should be very careful about what personality he or she puts forth with such a tie.⁶⁹

Despite Starr and McCormick’s specific recommendations for male attorney attire, the authors are bereft of recommendations for women. The authors note that “no matter how a woman dresses, someone will be critical”⁷⁰ and warn that wearing something that is not comfortable for a female attorney will make the attorney “feel as if [she is] masquerading and the jurors will sense it.”⁷¹ Ultimately, the authors note this disparate treatment means that female attorneys may struggle with knowing what to wear that will convey their message best.⁷² No references were found in any of the textbooks regarding transgender or non-binary or attorneys and dress.

Because there is a paucity of empirical evidence on the subject of dress and how it affects jurors, new lawyers may get a myriad of advice on how to dress for the courtroom as is evidenced from the advice, or lack thereof, in textbooks. And although it may seem like a trivial matter, dress is one of the few aspects of the courtroom that is completely in the control of the attorney, so any advantage that can be gained from it is an easy advantage to capitalize on and worth investigation.⁷³

66. *Id.* at 27-22.

67. *See supra* text accompanying note 65.

68. The authors suggest “[p]ersonality’ ties tend to be a big hit with the jury,” but it isn’t clear if this recommendation is based on any research. STARR & MCCORMICK, *supra* note 1, at 27-22.

69. The authors cite several popular media articles that have referenced the colors of the ties worn by attorneys in court for this proposition. *Id.*

70. *Id.* at 27-28. The authors base this claim on research conducted by one of the authors. *Id.*

71. *Id.* at 27-38. *But see* DECARO & MATTHEO, *supra* note 4, at 190 (“But what makes you most comfortable may not be appropriate for the venue.”).

72. The authors admit “there are no easy answers” to the question of what a female attorney should wear in court. STARR & MCCORMICK, *supra* note 1, at 27-31.

73. In his article, Capers recounts the struggle he had as a young lawyer in deciding how to dress for court: “Maybe because I am thinking back to my earlier life as a federal prosecutor, those years when, by necessity, theory took a backseat to practice. Back then, before every trial, I would think about what I wanted to wear during jury selection, what I wanted to wear during my opening statement, what I wanted to wear during my summation. Part of me knowing that the outcome of the trial was not unrelated to what my clothes said, to whether I instructed my law enforcement officers to dress in uniform or in plain clothes, to how the defense lawyer instructed the defendant to dress. Race and gender mattered too. Clothes, though, could be changed.” Capers, *supra* note 6, at 12.

III. THE STUDY QUESTION AND DESIGN

The purpose of this study was to fill some of the gaps in the empirical research on attorney clothing and its effects on jurors. Many of the previous studies on the effects of attorney clothing on jurors were based on static pictures of attorneys, which may not capture how jurors react to a talking and moving attorney in court.⁷⁴ Accordingly, it was determined very quickly that this study would be based on a video of an attorney speaking, rather than a static picture. As Starr and McCormick noted, the evidence and advice on female dress is particularly difficult to decipher,⁷⁵ so a female attorney was used for this study to see if some evidence could be discovered of how the dress of female attorneys affects jurors.

As the previously mentioned research shows, the advice and empirical evidence of what clothing is best for an attorney to wear is far from conclusive. Additionally, clothing norms change over time, so determining whether the latest style in clothing affects juror perceptions seems limited in its long-term research value. To account for this effect, the female attorney in this study was dressed in a very conservative all-black dress and a dark grey suit jacket in one version of the video.⁷⁶ In the next video, she wore the same all-black dress, but this time she wore a very loose-fitting wrap that had a colorful, pink, orange, and beige flower print on it.⁷⁷ The difference between the outfits is dramatic. One look is very tailored, and the other is not. One is a muted, mono-chromatic color scheme, and the other is not.



Fig.1



Fig. 2

The dress was the only difference between the attorney's opening statement in each video. The attorney followed a script and moved around the same courtroom in the exact same manner in both videos. She used

74. *See supra* text accompanying note 57.

75. *See supra* text accompanying note 72.

76. *See infra* Figure 1.

77. *See infra* Figure 2.

the same demonstrative aid for both videos as well—a schematic of a roadway where a child was hit by a car while exiting a school bus. The attorney’s hair was styled the same in both videos and she wore no jewelry in either.

The full length of each video was approximately three minutes.⁷⁸ The opening can be divided conceptually into two halves. In the first half, the attorney introduced herself and the parties involved in the underlying facts—the victim and the Defendant. The attorney also gave a brief overview of the underlying facts—that the Defendant hit the victim with his car as she crossed the street behind a school bus. In the second half of the opening, the attorney placed a demonstrative aid on an easel in front of the camera—an enlarged schematic of the intersection where the incident happened. Using the schematic, the attorney describes in further detail where the car, the victim, and the bus were located on the intersection, the actions that led to the victim being struck, and the aftermath of the accident. Each half of the opening takes approximately 1.5 minutes.⁷⁹ Some details of the facts were only mentioned in the first or second half of the opening, and some were mentioned in both halves. Additionally, some details were stated only once in the opening, and some were repeated throughout the opening:

[First half] Good morning, members of the jury. My name is Mary Anderson, and I represent the Plaintiff in this case, Jill McCarthy. And I’d like to tell you a little bit about Jill. She was an active 12-year-old. She was on her school volleyball team. She enjoyed hanging out with her friends and playing with her dog, a chocolate lab, Chai. And she wanted to be a leader on campus. And she was running for class president, but that all changed on September 21, 2018. Because on that day, the Defendant, Ryan Tolson, well, he was driving his BMW 325i north on 39th street. And while the Defendant was driving his BMW, he was busy texting his cousin, Rhianna, and didn’t see Jill cross into the street in front of him. You’ll learn that had the Defendant not been texting, he would have seen the school bus stopped with its flashing lights and signs out. If the Defendant had not been texting, he would have seen Jill get off that bus and had the Defendant not been texting, he would have seen Jill step into the road in front of him. But his texting was more important than Jill’s safety, and the Defendant struck Jill with his car,

78. The first video in which the attorney was conservatively dressed was 2.53 minutes long; the second video in which the attorney was not conservatively dressed was 2.59 minutes long.

79. The demonstrative aid was placed on the easel in the first video with the conservative dress at the 1.34-minute mark of the video; the aid was placed on the easel in the second video with the non-conservative dress at the 1.35-minute mark.

breaking several of her bones, and causing severe internal injuries.

[Second half given after demonstrative aid is placed on easel] Now to best understand where and how this happened, let's look at a diagram. This is the intersection of 39th Street, which runs north and south, and 15th Avenue South, which runs east and west. Now the bus had dropped Jill off at approximately 3:10 pm on September 21, 2018, at this corner. And like all the school buses in the county, when the bus stopped, it put on its flashing lights and those red "STOP" signs that pop out from either side of the bus to let drivers know that kids are getting on or off the bus. Jill was wearing a canary yellow, knee-length dress that day, and so, in her yellow dress, she got off the bus and started to walk behind the bus while it still had its flashing lights and stop signs out and started to cross the road, but as soon as Jill stepped out into this lane, that's where the Defendant hit her with his car. And she didn't just land there. The impact actually threw her over into this area on 39th street about ten feet away. And only then did the Defendant finally stop texting, and stopped driving, and pulled his car out of the road, right about here.

Because the purpose of this study was to assess whether dress affected juror perceptions, study participants had to be eligible to be jurors. Perhaps the most lenient qualifications for jury service are at the federal level, which only requires that jurors be a U.S. citizen and able to read.⁸⁰ Therefore, only people who fit the federal juror criteria of being U.S. citizens and able to read were asked to participate in this study.

Participants were asked to watch one of the three-minute-long videos of the attorney giving the opening. A printout from a random number generator was used to determine whether a participant was to watch the first or second video.⁸¹ During the video, the participant's eyes were tracked using eye-tracking technology.⁸² The eye-tracking technology used in this study consisted of a small box that sat above or below the computer screen where the participant watched the video. The box contained infra-red technology that reflects off the pupils of study

80. 28 U.S.C. § 1865 (2020) (noting that the chief judge of a federal district court can impose more restrictions than the federal statute requires).

81. RANDOM.ORG, <https://www.random.org/> (using a random number generator to create a random list of numbers one and two) (last visited Mar. 20, 2022). The videos were shown in order of the random output from the list generated.

82. See Catherine J. Cameron, *In the Eyes of the Law Student: Determining the Reading Patterns of Law Students with Eye-Tracking Technology*, 45 RUTGERS L. REC. 39, 47–48 (2017), for a detailed discussion on the detailed history and development of eye-tracking software.

participants.⁸³ The reflections tell the box and the software it is linked to on the computer where the participant is looking on the video being played for the participant. The software also allowed the researcher to assign “Areas of Interest” (AOIs) to various parts of the video.⁸⁴ The software then calculated the amount of time participants spent looking at a designated part of the video.⁸⁵

After participants watched the video, they were given a written survey that included questions about details mentioned in the first or the second half of the opening and some that were mentioned in both halves of the opening. Some of the questions involved facts that were mentioned only once in the opening, and some were repeated more than once. After these content-based questions, the participants were asked to indicate whether they found the lawyer to be knowledgeable, interesting, professional, trustworthy, and dressed appropriately.⁸⁶ The participants were then asked demographic questions, including their gender identity, ethnic identity, age, and education.

Twenty-six people participated in the study. Thirteen watched the video with the attorney wearing conservative clothes, and thirteen watched the video with the attorney wearing non-conservative clothes. Based on the demographic data collected, the participants had varied backgrounds. Seventeen participants identified themselves as female, and nine as men. Twenty-one participants identified themselves as “White,” and five indicated other ethnicities. Participants fell into all age ranges and education levels as well. Figure 3 below specifies the demographics of the participants.

83. The eye-tracking technology used for this study was manufactured by Gazepoint Research, Inc.

84. GAZEPOINT ANALYSIS USER MANUAL, GAZEPOINT 8 (rev. 2014), <http://andrewd.ces.clemson.edu/courses/cpsc412/manuals/Gazepoint%20Analysis.pdf>.

85. *Id.* (discussing AOI statistics).

86. *See infra* Figure 4 for the questions asked in the survey.

<u>Category</u>	<u>Number of Participants</u>
Gender	
Men	9
Women	13
Ethnicity	
White	21
Black or African American	2
Hispanic or Latino	1
American Indian or Alaskan	
Native	1
No Response	1
Education	
Less than high school	4
High school diploma	3
Some College	1
Associate degree	1
Bachelor's degree	4
Master's Degree	2
Professional or Doctorate	
Degree	10
Age	
18–24	5
25–34	1
35–44	5
45–54	7
Above 54	8

Fig. 3

IV. THE STUDY RESULTS AND DISCUSSION

A. Results

The answers to the content-based questions of the participants who watched the video with the conservative outfit were compared to those of participants who watched the video of the non-conservative outfit. There was only one question where a statistically significant⁸⁷ difference was detected—participants who viewed the non-conservative outfit remembered the attorney’s name more frequently than the participants who viewed the conservative outfit.⁸⁸ When it came to the preference questions, there were two questions where a statistically significant difference was noted between the two populations.⁸⁹ Participants who watched the non-conservative outfit opening indicated that the attorney was more “interesting” and was not “dressed appropriately” at a higher rate than participants who watched the conservative outfit. Although there were slight differences between the correct amount of comprehension questions on the other questions, none of them were statistically significant.

87. See John Concato & John Hartigan, *P Values: From Suggestion to Superstition*, 64 J. INVESTIGATIVE MED. 1166, 1166 (2016), for a discussion of using clinical investigations to indicate statistical significance.

88. See *infra* Figure 4. It is generally acceptable that a two-tailed p-value less than 0.05 demonstrates statistical significance between two sets of data. Concato & Hartigan, *supra* note 87, at 1170.

89. See *infra* Figure 4.

<u>Question</u>	<u>Two-tailed p-value</u> <u>(< 0.05 = statistically significant)</u>
1. What time did the accident happen?	0.71
2. What was the first name of the lawyer who gave the presentation?	0.01
3. How far was the child victim thrown after she was hit by the Defendant's car?	0.45
4. What was the first name of the child victim that was hit by the Defendant's care in this case?	0.64
5. What color was the dress the child victim wore?	1.0
6. How old was the child victim in this case?	1.0
7. What make was the car the Defendant was driving?	1.0
8. Which direction was the Defendant driving when he struck the child victim?	0.12
9. On what date did this accident occur?	1.0
10. What type of vehicle did the child victim walk behind when she stepped out in front of the Defendant's car?	1.0

Fig. 4

Tests were run on the other demographic data to see if there were other causes for participant acquisition or recall of content. No statistically significant differences were found in the amount of content questions

participants answered correctly between those who identify as different genders or ethnic groups or those with different levels of education. Correlation calculations were completed on the amount of repetition of content in the opening statement, the timing of the content in the opening statement, and the amount of recall of content participants exhibited.⁹⁰ A definitive correlation was found between these factors. The more facts were repeated, the more they were remembered.⁹¹ Additionally, if content was mentioned in both halves of the opening, the content was recalled better than if it was only mentioned in one half of the opening.⁹² If content was mentioned only in the second half of the opening, it was better recalled than content only mentioned in the first half of the opening.⁹³ From these calculations, it appears that as more facts were repeated and the later in time they were repeated, participants were more likely to retain those particular facts.

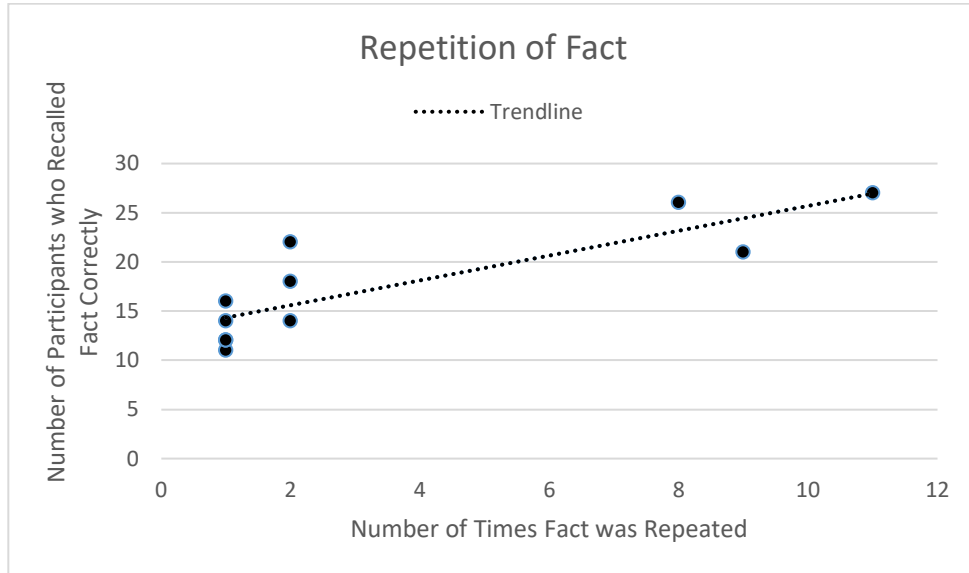


Fig. 7

90. *See infra* Figure 7.

91. *Id.*

92. *Id.*

93. *Id.*

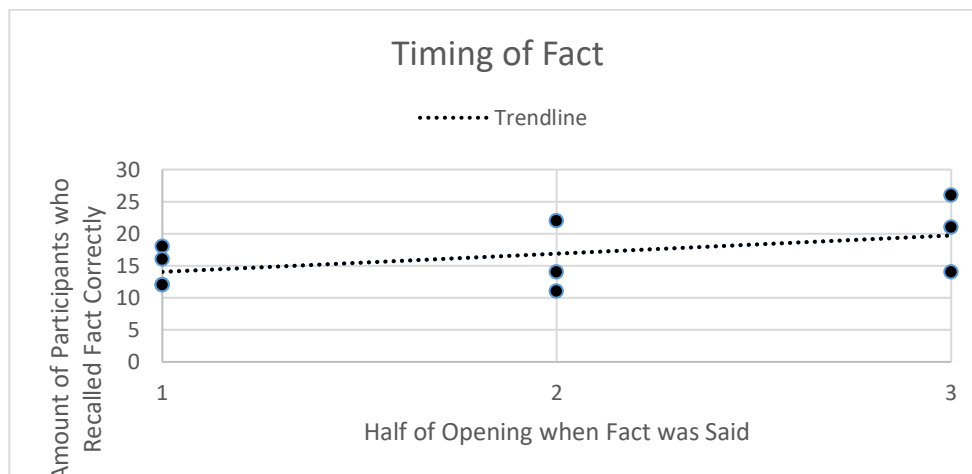


Fig. 8

Statistics were also run by the eye-tracking software. AOI's were set up to track how much time viewers spent looking at the attorney and how much time viewers spent looking at the demonstrative aid.⁹⁴ For the conservative dress video, viewers spent 45.26% of their time watching the attorney and 14.39% looking at the demonstrative aid.⁹⁵ For the non-conservative dress video, viewers spent 39.3% of their time watching the attorney and 9.83% of their time looking at the demonstrative aid.⁹⁶ For both videos, men spent less time watching the board and more time watching the attorney,⁹⁷ but there was no discernible trend when the viewing statistics of other demographics were isolated. Percentage of time spent watching:

94. *See infra* Figure 9.

95. *Id.*

96. *Id.*

97. *Id.*

<u>Video 1 (conservative dress)</u>	<u>Attorney</u>	<u>Schematic</u>
All video 1 viewers (13)	45.26	14.39
Gender		
Men (4)	50.87	11.44
Women (9)	42.59	15.87
Ethnicity		
White (11)	48.08	15.59
Non-white (2)	29.8	8.39
Education		
Less than high school (1)	32.23	13.04
High school diploma (2)	50.45	11.83
Associates degree (1)	53.81	1.26
Bachelor's degree (3)	40.0	19.78
Professional degree (6)	54.72	14.54
<u>Video 2 (non-conservative dress)</u>		
All video 2 viewers (13)	39.3	9.83
Gender		
Men (5)	35.68	5.85
Women (8)	41.7	12.68
Ethnicity		
White (10)	35.85	7.86
Non-white (2)	52.97	19.68
No Ethnicity Reported (1)	17.88	0
Education		
Less than high school (3)	46.8	14.36
High school diploma (1)	22.31	0.11
Some college (1)	59.26	22.91
Bachelor's degree (2)	47.20	13.6
Master's degree (2)	32.48	8.30
Professional degree (4)	30.46	2.70

Fig. 9

B. Discussion

The data from this study present a murky picture that opens possibilities for further study. Participants identified the difference in clothing because a statistically significant number of participants thought the attorney was not “dressed appropriately” in the second, non-conservative dress video. This may have been the reason viewers found the attorney in the non-conservative clothing “interesting” to a significantly different degree than the attorney in the conservative clothing. However, the change in dress did not seem to have an effect on any of the comprehension or on any of the questions except whether watchers remembered the attorney’s name. It seems that this recall of the non-conservatively dressed attorney’s name did not come from watching the attorney to any greater length of time than the attorney in the conservative clothes—indeed, the eye-tracking software indicated that viewers watched the non-conservatively dressed attorney less than the conservatively dressed attorney. Even though the demonstrative aid was looked at less in the non-conservative clothing video, the difference in time did not affect the amount of content participants acquired or recalled. In fact, the main correlation between content acquisition and retention found amongst this data was the amount of repetition of the facts and how late in the presentation the facts were told to the viewer.

Participants who watched the non-conservatively dressed attorney spent less time watching that attorney than the participants watching the conservatively dressed attorney, yet they still managed to answer content questions correctly at the same rate. Further investigation is required to determine the root cause of this discrepancy. There are several reasons this could have happened. For example, the percentage of time participants devoted to watching the conservatively dressed attorney may have been far more than necessary to acquire the information, so the lower percentage of time participants spent watching the non-conservatively dressed attorney may not have impacted overall content acquisition. Alternatively, it is possible that participants learned the facts auditorily instead of by watching the attorney or the demonstrative aid. Additionally, it could be that the participants who watched the non-conservatively dressed attorney received more information in less time because they found that attorney to be more “interesting.” These possibilities would need to be tested in further detail to determine whether one or more of these phenomena is occurring and what that could mean for recommendations regarding attorney dress.

The findings of this study are limited by the fact that the videos were short—only three minutes long. Although this study found that dress did not affect acquisition or recall of the facts presented regarding the underlying case, there was a statistically significant difference in the acquisition and recall of the attorney’s name and a finding that a

statistically significant number of participants found the attorney dressed in non-conservative clothing to be “interesting.” Accordingly, these findings warrant further study to determine whether the participants remembering more facts personal to the attorney might mean that over the length of an entire trial, the viewers may find themselves believing that attorney more than another one. In that sense, it is possible that non-conservative clothing is not as detrimental to trial presentation as previously thought. On the other hand, if viewers are more attuned to what is “interesting” about an attorney and continue to not watch the attorney or demonstrative aids, comprehension could suffer over the long haul of an entire trial. Until that research is done, perhaps trial attorneys and law students should not be chastised if their individual personalities come through with minor non-traditional dress; the “personality ties” suggested by Starr and McCormick may be just the kind of embellishment that can cause jurors to find the attorney “interesting” enough to gain a benefit from the affinity for the attorney evidenced by viewers of the non-conservative attorney video without distracting the viewer so much that they miss content.