

Sexualized Advocacy: The Ascendant Backlash Against Female Lawyers

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Sex is not just a commodity for pimps, prostitutes, and pornographers. It is an asset deployed daily, though perhaps less visibly, by women in more “mainstream” professions. Lawyers are no exception. In popular film and television, female attorneys sport short skirts and low-cut blouses, and flirt outrageously with a judge or jury in order to promote a client’s interest. For better or worse, hyper-sexualized Hollywood fantasies reflect the reality that sex sells and can be negotiated in the service of female attorneys, whose very presence in the courtroom collides with still-prevailing normative constructs about the proper role of women. The lawyer’s responsibility to “zealously represent” her client creates even more pressure to invoke sexualized stereotypes some feminists consider demeaning to women in order to fulfill professional obligations. If we understand and accept the power of sex appeal to sell cars, cologne, and commercial airline tickets, we can understand why women might use it to sell the theory of a case, the merits of a motion, the innocence of a defendant. In fact, we might question why they would not.

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INTRODUCTION

This Article examines the commodification of sex as it applies to female lawyers. In the fall of 2005, a colleague and I conducted a random, anonymous survey of attorneys and law professors designed to gauge the prevalence of sex appeal as a form of nonverbal communication by female lawyers.¹ The Sex Appeal Survey asked respondents whether they had ever used sex appeal to gain favor with a judge or jury, and whether they thought sexualized advocacy gave them an advantage in the courtroom.² Some questions specifically targeted professional dress code requirements on the presumption that certain

1. Research demonstrates that nonverbal behavior is critical to a lawyer’s ability to create a favorable impression among jurors and that physical appearance, which would include sex appeal, is more influential than verbal expression when it comes to creating a first impression. See Patricia Rockwell & Amy Ebesu Hubbard, *The Effect of Attorneys’ Nonverbal Communication on Perceived Credibility*, 2 J. CREDIBILITY ASSESSMENT & WITNESS PSYCHOL. 1 (1999); see also Mary Stewart Mitchell, *When Actions Speak Louder than Words Between the Sexes*, 26 LAW PRAC. MGMT., July-Aug. 2000, at 57, 58 (“[Fifty-five] percent of the actual perceived message comes from nonverbal behaviors.”).

2. The revised Sex Appeal Survey asked the following questions:

1. If you are female, have you ever used “sex appeal” (clothing, makeup, flirting, hairstyle, etc.) to win over a judge, jury, interviewer, or supervisor?
2. Do you believe this gave you an advantage over other female attorneys who did not do this?
3. Do you believe this gave you an advantage over male attorneys?
4. Would it matter if a judge or juror was male or female?
5. If you are female, were you ever instructed to wear a skirt (rather than pants) to court, an interview, a mock trial tournament?
6. If so, who instructed you and why?
7. Whether you are male or female, have you ever instructed female students to wear skirts for advocacy exercises, oral arguments, interviews, etc.? If so, why?
8. To determine whether broad patterns of behavior across generalized groups can be identified, please state your: Sex:Age:Race:Region of country.
9. Feel free to share any additional comments.

Sex Appeal Survey (on file with author).

modes of attire might be perceived as more sexualized than others.³ For instance, skirt suits can be viewed alternately as prudish or provocative depending on their cut and coverage. For this reason, the Survey sought to discover whether judges, supervising partners, and moot court coaches still subscribed to the conventional prohibition against women's pantsuits, and whether female lawyers differentiate the semiotics of skirts from pants.

The Sex Appeal Survey was first posted on an electronic listserv operated by a group of legal research and writing faculty.⁴ Based on initial responses, the Survey was modified to add an additional question about whether respondents thought the benefits of sexualized advocacy depended on the sex of opposing counsel or that of the presiding judge. The revised Sex Appeal Survey was posted on listservs maintained by three subgroups of the Association of Trial Lawyers of America: the Minority Caucus, Women Trial Lawyers Caucus, and New Lawyers Division. A total of fifty-eight responses were received. Of these, fifty-one were from women and seven were from men. Responses from women were directly relevant to whether and when female lawyers deploy sexualized advocacy. Responses from men gave insight into the perception male practitioners had of the prevalence of sexualized advocacy among female lawyers.⁵ The Survey also prompted a discussion thread on the legal writing listserv that provided additional insight into the practice of female sexualized advocacy.⁶

Most female lawyers who responded to the Sex Appeal Survey reject sexualized advocacy on the presumption that it undermines their credibility in the courtroom and ultimately disadvantages them and their clients. Yet a persistent minority of female lawyers—between one quarter and one half of

3. *Id.*

4. Posting of Tracy McGaugh to Legal Research and Writing Professor Listserv, Lrwprof-L@Listserv.iupui.edu (Nov. 3, 2005) (on file with author).

5. The Survey focused on the ways in which female lawyers manage their appearance with respect to sex appeal in order to create a desired impression with a judge or jury. See Sex Appeal Survey, *supra* note 2. This is not to say that male lawyers do not engage in some form of sexualized advocacy. However, what is considered sexy for men differs significantly from what is considered sexy for women. For instance, age, physical appearance, and body proportion play a significant role in determining what men will consider sexy in a woman. What women consider sexy in a man is influenced less by these biological factors, and more by dimensions of social status and power. In other words, whereas women are sexy if they present themselves in a particular manner, men are sexy by virtue of the position they hold and power they wield within a particular context. See JOHN MARSHALL TOWNSEND, WHAT WOMEN WANT—WHAT MEN WANT: WHY THE SEXES STILL SEE LOVE AND COMMITMENT SO DIFFERENTLY 62-63 (1998); Adrian Furnham et al., *The Role of Body Weight, Waist-to-Hip Ratio, and Breast Size in Judgments of Female Attractiveness*, 39 SEX ROLES 311 (1998). It is unclear whether these considerations remain constant across sexual orientations, however, and whether men's commitment to image management through fashion and clothing changes in relation to their immediate audience. See Hannah Frith & Kate Gleeson, *Clothing and Embodiment: Men Managing Body Image and Appearance*, 5 PSYCHOL. OF MEN & MASCULINITY 40, 45 (2004). Moreover, because sex appeal has a different social significance for women and men, the perception of heightened male sexuality may not have the same impact on trial outcomes as that of heightened female sexuality, though this proposition has yet to be examined empirically.

6. Legal Research and Writing Professor Listserv, *supra* note 4.

female Survey respondents—seems convinced that sexualized advocacy provides them with a competitive edge over other female adversaries and, to a lesser extent, male adversaries. What accounts for such diametrically-opposed perceptions among female lawyers about the value of sexualized advocacy? Looking beyond Survey results, this Article seeks to identify why a significant number of female lawyers embrace sexualized advocacy and the likely impact this phenomenon will have on actual trial outcomes.

This Article proceeds in three Parts. Part I examines survey responses to identify whether and when female attorneys sexualize their appearance in the course of client representation. Though most women deny using sex appeal as a tool of persuasion, a substantial number admit to relying on non-verbal cues that convey a message of sexual attractiveness.⁷ This Part also extrapolates from survey responses the reasons why women either accept or reject sexualized advocacy as a trial technique. Anecdotal accounts suggest that the majority of women view sex appeal as dangerous for lawyers because it promotes an image of unprofessionalism that could ultimately derail a case. However, a fair number of women offer anecdotal support for the presumption that sex appeal promotes positive litigation outcomes in certain circumstances.

Part II seeks to understand more fully why a persistent minority of women continue to rely on sex appeal to pursue professional advancement. It examines how sexuality is promoted as a means of professional achievement in popular culture, by industry consultants, and through sex-positive feminist ideology. It also exposes how these influences promote sexualized advocacy, but at the same time create confusion about appropriate modes of behavior and appearance that make it difficult for women to downplay their sexuality, even in professional contexts.

Part III consults evidence from the social sciences in an attempt to predict how sexualized advocacy is likely to influence individual trial outcomes and the status of female lawyers as a group. Social scientists have studied the impact of attire and physical appearance on the perceptions of women in academia and in the workplace generally, but surprisingly few have directed their inquiry to the perceived competence and ability of female advocates in a courtroom setting.⁸ Moreover, while the impact of gender, dress, and visual appearance on the credibility of victims, witnesses, and party claimants is well

7. This Article aggregates Survey responses to determine when and how respondents on the whole utilize sexualized advocacy. Similar data might be mined for a more nuanced analysis, however. Generational feminists might consider, for example, whether specific cohorts of women differ in their perceptions regarding the use and utility of sexualized advocacy, while critical race theorists might consider whether patterns with respect to sexualized advocacy can be observed among women in different racial categories.

8. See, e.g., Megumi Hosoda et al., *The Effects of Physical Attractiveness on Job-Related Outcomes: A Meta-Analysis of Experimental Studies*, 56 PERSONNEL PSYCHOL. 431 (2003); K. David Roach, *Effects of Graduate Teaching Assistant Attire on Student Learning, Misbehaviors, and Ratings of Instruction*, 45 COMM. Q. 125 (1997).

documented,⁹ these studies have paid scant attention to the impact of sex appeal on the persuasiveness of female lawyers.¹⁰ Section III.A surveys the psychological literature to explain how the process of subconscious categorization triggers stereotypes about women generally. Section III.B considers how sexualized advocacy among female lawyers might influence that process, and how this might in turn affect litigation outcomes.

This Article concludes with a question. It asks why a significant minority of female lawyers remain convinced that sexualized advocacy is a useful trial technique if, as research findings seem to suggest, its implications are more perilous than promising. If sex appeal provokes status anxiety in men, and to some extent women—anxiety that is mediated through adverse judgments and jury verdicts—why is it billed among entertainment producers, industry consultants, social commentators, and even some feminists as an ethically sound and culturally acceptable strategy for professional advancement? The findings set forth in this Article posit that the positive portrayal of sexualized advocacy reflects an ascendant backlash designed to forestall the inevitable advancement of female lawyers.

I. SEX APPEAL AS A TRIAL TECHNIQUE

This Part analyzes fifty-eight responses to the Sex Appeal Survey. It documents the prevalence of sexualized advocacy among survey respondents with attention to the contexts in which sexualized advocacy is deployed. It also identifies the nuances of non-verbal communication, as revealed by survey responses that attempted to distinguish between sex appeal, femininity, and professionalism.

Of the fifty-eight survey responses received, forty female lawyers directly answered the question of whether they utilized sexualized advocacy in the course of their practice: twenty-eight denied ever using sexualized advocacy, while twelve clearly said they had relied on the strategy. The remaining eleven female respondents either declined to indicate whether they used sexualized advocacy, or provided a narrative answer that was unclear or ambiguous. At a minimum, therefore, nearly one-third of female respondents who answered the sex appeal question did rely on sexualized advocacy. Factoring in incomplete

9. See, e.g., Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994); Alinor C. Sterling, *Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women's Clothing in Rape Trials*, 7 YALE J.L. & FEMINISM 87 (1995); see also Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315 (1994).

10. See, e.g., Jansen Voss, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 LAW & PSYCHOL. REV. 301 (2005).

or unclear surveys raises the possibility that nearly half of all female respondents—twenty-three out of fifty-two—engage in the practice.

A. Women Who Reject Sexualized Advocacy

The twenty-eight female lawyers who denied using sex appeal in the course of client advocacy did so for reasons that are both pragmatic and prescriptive. On the whole, their responses imply that sexualized attire and body language show disrespect for the legal system, which could ultimately work to a client's detriment by alienating a judge or jury. "Flirtation and the use of the feminine wilds [sic] . . . really does not have a place in the courtroom," one woman responded, and added that "women who dress in a dignified, stylish and more conservative manner get the most respect from jurors."¹¹ A male participant in the discussion thread seemed to agree that traditional, conservative business attire worn by women connotes appropriate deference to the court. He complained about "[l]ots of mini skirts on women," which he considered unprofessional.¹² The prospect that women might use sex appeal to manipulate trial outcomes prompted one woman to insist that she "[e]mp[hi]tically and absolutely NEVER" does so.¹³

Some respondents distanced themselves from sexualized female attorneys. One respondent witnessed "plenty" of women who engaged in sexualized advocacy, which made her "want not to do that."¹⁴ Another related that her style of non-sexualized advocacy has provoked comments from observers that she did not "flirt."¹⁵ Her survey response did not indicate whether she was being praised for resisting a presumably demeaning litigation strategy, or criticized for having overlooked a painless and acceptable advocacy technique.

A professor of legal research and writing who contributed to the discussion questioned whether feminist discourse overemphasized the degree to which physical appearance and personal style actually affected judicial outcomes, but acknowledged that overt sexuality might compromise a female attorney's persuasive ability relative to her non-sexualized opponents.¹⁶ The professor made express what appeared implicit in the responses of women who did not use sex appeal in the course of client advocacy: that sex and sensuality are perceived as incompatible with competence and capability. In weighing the

11. Sex Appeal Survey, *supra* note 2, at 23a. Some women in other industries also avoid "sexy" clothing in order to maintain credibility with clients. See, e.g., Carol Hymowitz, *Female Executives Use Fashion to Send a Business Message*, WALL ST. J., Sept. 16, 2003, at B1.

12. Sex Appeal Survey, *supra* note 2, at 24d; see also *What to Wear to the Office—Working Women's Fashions*, EBONY, Sept. 1993, at 124 (identifying a trend of working women dressing "more and more provocatively").

13. Sex Appeal Survey, *supra* note 2, at 13a.

14. *Id.* at 17a.

15. *Id.* at 15a.

16. *Id.* at 24g-h.

practical benefit of sex appeal, she cautioned that, “what we are really dealing with is an attorney’s *ethos*—her credibility—as part of persuasive advocacy on behalf of a client.”¹⁷

B. *Women Who Practice Sexualized Advocacy*

Among female Survey respondents, between one quarter and one half either expressly or potentially rely on sexualized advocacy.¹⁸ They use clothing, makeup, and body language to enhance their sexual attractiveness, with an understanding that this will provide them with a competitive advantage in the courtroom.¹⁹ They wear short skirts, low cut blouses, and body-hugging knits to the office and to court. One respondent described using sex appeal in “mild, subtle ways”;²⁰ another said it “can be done tastefully” in a manner that “can come across as being professional with an added sex appeal as a plus.”²¹ Another described a female attorney who sported “tight, form fitting cashmere sweaters” after receiving breast augmentation surgery. Whenever she appeared in court, the respondent stated, “every male attorney within smelling distance” would attend “just to watch her move around.”²²

Rather than employ undifferentiated sexuality throughout the workplace, women who emphasize sex appeal in professional settings manage their appearance according to the context of an interaction and the goal at hand.²³ When seeking information from government and corporate executives during an interview outside of court, one attorney who worked as a legal journalist deliberately exploited stereotypes that sexualized women are unable to “connect the dots.”²⁴ She believed that playing into “these individuals’

17. *Id.* at 24g. Outside of the context of the Sex Appeal Survey, other professional women have commented on the relationship between image management and perceptions of credibility and competence. See, e.g., *What to Wear to the Office—Working Women’s Fashions*, *supra* note 12.

18. Professionals outside of the legal field have identified a trend toward more provocative attire and overt sexuality in recent years among office workers. See, e.g., Wendy Bounds et al., *Fashion: In the Office, It’s Anything Goes—Casual Friday Was One Thing, But This . . .*, WALL ST. J., Aug. 26, 1999, at B1; Hymowitz, *supra* note 11; Ellen Joan Pollock, *Department Gap: In Today’s Workplace, Women Feel Freer to Be, Well, Women*, WALL ST. J., Feb. 7, 2000, at A1; Patricia Sellers, *Women, Sex & Power*, FORTUNE, Aug. 5, 1996, at 42; *What to Wear to the Office—Working Women’s Fashion*, *supra* note 12.

19. The value Western culture places on female physical appearance teaches women that they will benefit more from attractiveness and sex appeal than objective actions or achievements. See SUSAN KAISER, *THE SOCIAL PSYCHOLOGY OF CLOTHING* 89 (1990). This could explain in part why even highly competent female attorneys consider it advantageous to incorporate sex appeal into their advocacy.

20. Sex Appeal Survey, *supra* note 2, at 39a.

21. *Id.* at 40a.

22. *Id.* at 23a.

23. Social scientists contend that the ability to create a favorable impression through physical appearance depends on a number of variables including the intent of the subject presenter, the context of the presentation, the perception or expected reaction of the viewer, and the status differential between subject and viewer. See KAISER, *supra* note 19, at 39-42. This might explain why women perceive a benefit from sexualized advocacy in certain circumstances, but not others.

24. Sex Appeal Survey, *supra* note 2, at 3a.

stereotypes of women caused them to speak more freely in response” to her questions. She nonetheless attempts to downplay her sexual attractiveness in court fearing that it would detract from the merits of her argument.²⁵ Another respondent, though she denied the use of sexualized advocacy, admits to acting “like a stupid little girl” when dealing with medical expert witnesses. Though perhaps not intentionally sexual, this behavior does in fact provoke images of passive vulnerability that correlate with female sexuality.²⁶

The benefits of sexualized advocacy depend, not only on the context of a particular interaction, but also are limited on account of bias favoring male attorneys. Most respondents to the Survey considered pro-male bias in the courtroom an insurmountable obstacle. Accordingly, women who drew attention to sex appeal did so primarily to set themselves apart from other women. One attorney who relied on sex appeal at the beginning of her career, though she was “ashamed to admit” it, did so to achieve a “marginal” advantage over other female lawyers.²⁷ She was not convinced that sex appeal would provide her with the same advantage over men, however, because “the playing field in [her] early years was so stacked against women [that] one would have to go a very, very long way to get any real advantage.”²⁸ Referring to present day practices, another respondent thought that sexualized advocacy “absolutely” provided an advantage over other women, but not over other men. “[T]his profession is a man’s world,” she advised, and a woman must be able to “back up [her] advantage [with] sex appeal tactics” to be considered an asset to a law firm.²⁹ Another respondent echoed that sentiment. “As a woman attorney, I am already at a disadvantage, flirting does not even put me on the same level, much less give me an advantage, unless the subject is extremely easily manipulated.”³⁰ Still another respondent agreed that sexualized advocacy could not compensate for male advantage, though it might “level the playing field.”³¹

Even respondents who did not rely on sexualized advocacy doubted its effectiveness when used by other women as a strategy for overcoming bias favoring male attorneys. “[Q]uite frankly,” one respondent stated, “I don’t think there is anything a female attorney can do to gain an ‘advantage’ over a male attorney . . . it is still a ‘man’s world’ in this profession, unfortunately.”³² In total, only four respondents thought that the use of sex appeal provided

25. *Id.*

26. *Id.* at 4a; see also Cheryl B. Preston, *Baby Spice: Lost Between Feminine and Feminist*, 9 AM. U. J. GENDER SOC. POL’Y & L. 541 (2001) (“The infantilized woman or womanized child [is] the sexy woman infused with the adoring, undemanding child . . .”).

27. Sex Appeal Survey, *supra* note 2, at 2a.

28. *Id.* The respondent indicated that she was born in 1952, but she did not state the years of practice to which she was referring.

29. *Id.* at 40a-b.

30. *Id.* at 41a.

31. *Id.* at 1b.

32. *Id.* at 46a.

women any advantage over male attorneys,³³ and among them, one thought that only certain women could command that advantage.³⁴

Patterns arose in response to the Sex Appeal Survey that made it difficult to gauge with specificity whether and when female lawyers utilize sexualized advocacy. For instance, a number of respondents distinguished between professional attractiveness and sex appeal, but did not clearly define how one concept differed from another. One respondent who “wouldn’t call it sex appeal per se,” believed it “important to look your best when you are in court. That probably means wearing make-up and nice clothes.”³⁵ She then differentiated these tactics from using sex appeal, stating that “short skirts and low-cut tops are unacceptable.”³⁶ Another who described herself as trying to look “professionally attractive” without “trying to use ‘sex appeal’ exactly” assumed that “if [she] looked [her] best . . . [she] would get a more favorable reaction.”³⁷ She thought that “overtly acting sexy would backfire so [she] would probably consciously avoid trying to come across as a sex kitten.” She nonetheless conceded that even “being attractive,” as opposed to “sexy,” could be a “detriment to receiving serious attention” because it forced her to “work harder” than other women at “proving” herself.³⁸ She recalled meeting a group of clients who commented that she was “‘too pretty’ to be an attorney.”³⁹

II. MAINSTREAMING SEXUALITY

Understanding how and when female lawyers deploy sex appeal as a trial strategy does not alone explain why they do so. One respondent to the Sex Appeal Survey attributed positive litigation outcomes to the “well-targeted use of ‘sex appeal.’”⁴⁰ In her response, she also alluded to indirect pressure from a supervisor by referring to a colleague who “dutifully” wore short skirts to argue summary judgment motions.⁴¹ Unnecessary focus on physical appearance may be another factor that subtly coerces professional women into relying on sexualized advocacy. One respondent was told by an older male supervisor that

33. *See id.* at 1a, 4a, 42a, 44a-b.

34. *Id.* at 1a.

35. *Id.* at 31a.

36. *Id.* (“Unfortunately, there is still the belief out there by male judges that men are better attorneys and that they are all just humoring women.”)

37. *Id.* at 34a.

38. *Id.* There is some evidence that attractiveness can trigger biases against women. *See* Diane E. Lewis, *Suit Focuses Attention on Alleged Bias Against Attire, Beauty on the Job*, BOSTON GLOBE, Mar. 27, 2005, at G2 (quoting David B. Wilkins of Harvard Law School who states that “attractive women sometimes are not taken seriously” and are held to a different standard of dress than men). *But see infra* notes 128-133 and accompanying text (discussing evidence that attractive individuals, be they men or women, are perceived as more competent than non-attractive individuals).

39. Sex Appeal Survey, *supra* note 2, at 34a.

40. *Id.* at 1a.

41. *Id.*

her dark stockings were “fetching.”⁴² Though she described the remark as inoffensive, such comments reinforce the imperative of female attractiveness,⁴³ and might be interpreted by some women as encouragement to rely on sex appeal, even if this is not in fact a supervisor’s intent.

The significance of supervisor pressure in encouraging these strategies is difficult to quantify from Survey results, and evidence from the social sciences refutes the supposed causal connection between sexualized advocacy and positive litigation outcomes.⁴⁴ Why, then, are a fair number of female attorneys (both new and experienced practitioners) responding to the allure of sexualized advocacy? The answer seems to lie outside Survey responses. This Part explains how popular culture, industry consultants, “self-help” experts, and “sex-positive” feminists promote and legitimize reliance on sexualized advocacy. It also discusses how conflicting and contradictory advice about professional behavior and attire makes it difficult for women to render sexuality invisible even in the work place.

A. *Representing Women in Popular Culture*

Popular culture unrepentantly endorses the use of sexualized advocacy as a trial technique through its representation of female attorneys.⁴⁵ From the mid-1980s through the 1990s, caricatures of female legal professionals portrayed in blockbuster films and television programming, such as *Presumed Innocent*, *Ally McBeal*, *Legally Blonde*, and *Erin Brockovich*, reoriented professional dress and behavior standards toward a sexualized norm.⁴⁶ Today’s fictitious lawyers are more nuanced. They couple competence with sex appeal in a way that makes the totality of their representation harder to distinguish from actual female lawyers.

Consider the prime-time drama *Boston Legal*, which effectively reduces professional women to the sexualized sidekicks of two lead male characters obsessively preoccupied with bedding clients and colleagues.⁴⁷ The women of *Boston Legal* hype their sexuality to win cases, attract clients, manage

42. *Id.* at 15a.

43. See KAISER, *supra* note 19, at 66.

44. See Part III, *infra*.

45. For a critical analysis of Hollywood cinema and its demonization of culturally transgressive female lawyers, see CYNTHIA LUCIA, *FRAMING FEMALE LAWYERS: WOMEN ON TRIAL IN FILM* (2005).

46. See, e.g., Ann Bartow, *Some Dumb Girl Syndrome: Challenging and Subverting Destructive Stereotypes of Female Attorneys*, 11 WM. & MARY J. WOMEN & L. 221, 247-51 (2005); cf. Carole Shapiro, *Women Lawyers in Celluloid: Why Hollywood Skirts the Truth*, 25 U. TOL. L. REV. 955, 984 (1995) (discussing sexualized female lawyers in movies).

47. On the sexualized representation of female lawyers in *Boston Legal*, see Joy Press, *This is Your Fall Season on Crack*, VILLAGE VOICE, Oct. 19, 2004, at 124; and Alessandra Stanley, *Old-Time Sexism Suffuses New Season*, N.Y. TIMES, Oct. 1, 2004, at E1.

colleagues, and persuade judges.⁴⁸ Two of the three have slept with a male supervisor, and the third is the object of his incessant flirtations. The undercurrent of sexuality girding the female characters' professional roles is established in an early episode in which a beautiful top attorney in the firm successfully lobbies a female associate to seduce an elderly client by telling her "you are hot, nasty hot, men would leave their wives for you hot."⁴⁹ The scene not only promotes sexual manipulation as an appropriate marketing strategy,⁵⁰ it legitimizes the practice by engaging one otherwise competent female lawyer to endorse it to another.

Moreover, the women of *Boston Legal* may be surprisingly convincing role models because they lack the nagging neuroticism and clumsy competence of other legal characters, such as Ally McBeal, whose infamous persona, though dangerous and demeaning to women,⁵¹ could easily be dismissed as a gross departure from anything that remotely resembles a real female lawyer. *Boston Legal* is more pernicious than *Ally McBeal* because its female lawyers display objective talent which makes them appear more authentic and more legitimate in their professional roles. In turn, their sexualized advocacy is harder to dismiss as a harmless theatrical entertainment device.

The ideal of female sexuality propagated in primetime legal dramas mirrors an emerging acceptance of sexualized advocacy among industry consultants. Whether popular culture reflects or influences industry behavior, professional business consultants have begun to reconsider the traditional prohibition against using sexuality as a strategy for career advancement.⁵² Lauren Mackler & Associates, an executive coaching firm in Newton, Massachusetts, advises professional women that "femininity is sensual and should not be hidden," while adding the confusing caveat that women should not dress "seductively," but in a manner "that enhances what you bring to the table as a woman."⁵³ Evangelina Souris, a certified international image consultant from Boston, candidly advises female attorneys that, "[Y]ou shouldn't look sexual. It's not

48. In addition to promoting sexually exploitative images of professional women, *Boston Legal* has been criticized for propagating myths about white privilege, male competence, and economic greed among lawyers. See, e.g., Lesley Smith, *Boston Legal*, POPMATTERS, Nov. 1, 2004, <http://www.popmatters.com/tv/reviews/b/boston-legal-2004.shtml>.

49. Stanley, *supra* note 47.

50. The use of sex and sex appeal as a marketing strategy for lawyers, whether in real life or on television, reflects what is generally accepted in commercial industries as a legitimate business practice. See generally SEX IN ADVERTISING: PERSPECTIVES ON THE EROTIC APPEAL (Tom Reichert & Jacqueline Lambiase eds., 2003); Carolyn A. Lin, *Uses of Sex Appeals in Prime Time Television Commercials*, 38 SEX ROLES 461 (1998); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 23 (2000).

51. See Michele L. Hammers, *Cautionary Tales of Liberation and Female Professionalism: The Case Against Ally McBeal*, 69 W. J. COMM. 167 (2005).

52. Though business customs appear to be trending towards a more relaxed attitude when it comes to sexualized attire, some image consultants continue to instruct women to avoid sexualized clothing. See, e.g., Eric Noe, *Can Sexy Women Climb the Corporate Ladder?*, ABC NEWS, Dec. 2, 2005, <http://abcnews.go.com/Business/print?id=1362956>.

53. Lewis, *supra* note 38.

about sex, unless of course you want to get ahead with your sex. That's a different story."⁵⁴

Agnes Maura, who guides business careers from California, agrees. On account of research findings that link physical attractiveness to professional advancement, Maura advises female clients to maximize "aesthetic appeal" through clothing that complements their body types. When it comes to "sexually allusive" clothing, Maura's advice is contextual. She warns her clients that "overt 'sexiness'" can be distracting, but adds that even this may be beneficial "when you really WANT to distract your audience from the substantive matters." Her advice is to "look the best you can, but keep within the standards of the culture you are dealing with . . . Unless it is to your advantage to distract the opposition!"⁵⁵

In line with representations of women in popular culture and the advice provided by professional image consultants, respondents to the Sex Appeal Survey contextualize sexualized advocacy in a manner that fits the particular circumstances at hand. Rather than utilize sexualized advocacy to compensate for a perceived performance deficiency, these women viewed sexuality as a supplement to otherwise competent representation. Some respondents who downplayed sexuality in the courtroom for fear that it would prime stereotypes about female incompetence exploited that same stereotype when it worked to their advantage in the context of client or witness interviews. If Survey responses are indicative of legal practices generally, it appears that part of the competence of today's female lawyers is measured in knowing when they will benefit from sexualized advocacy and when they will not.

B. Exploiting Workplace Competition

Self-proclaimed experts in female psychology and workplace culture also prime the use of sexualized advocacy in the courtroom by trumpeting a threat of workplace competition and offering contradictory advice to women on how to manage personal appearance in response to that competition. Executive coaching firms and professional commentators portray intra-sex competition among women as the source of active and intentional sabotage.⁵⁶ In recent years, executive coaching workshops have been held to examine "the unspoken and unacknowledged ways" that professional women "sabotage each other by

54. Tony Wright, *What To Wear?*, LAW. WKLY. USA, Sept. 12, 2005.

55. E-mail from Agnes Maura to author (Feb. 8, 2006) (on file with author).

56. Evidence from the social sciences indicates that intra-sex competition is likely to influence a woman's cognitive perception of other women as well as her emotional response towards other women. See *infra* Section III.B and accompanying text. Such internalized responses and perceptions, however, would not necessarily lead to the type of active sabotage self-help authors portray as an epidemic among working women.

using passive-aggressive behaviors, covert competition, and power grabs.”⁵⁷ Business publications advise women “how to watch your back” when “another woman is out to get you.”⁵⁸ Most recently, a flood of self-help books have portrayed the American workplace as a perpetual catfight, where women backbite other women on their way up the corporate ladder.⁵⁹

These experts tell us that, because women suffer from a lack of legitimate workplace authority, they must prove their superiority to other women by aligning themselves more closely with powerful and authoritative men.⁶⁰ Women’s competitiveness, they argue, is consequently expressed more sharply around other women. Leora Tanenbaum, author of *Catfight*, blames extreme workplace competition for making women “resentful,” “catty,” “bitter,” and “cunning.”⁶¹ Pat Heim and Susan Murphy, who co-authored *In the Company of Women*, warn of the female “saboteur,” the “cabal queen,” the “superbitch.”⁶² Judith Briles, in *Woman to Woman 2000*, is even more biting, recounting anecdotes that portray working women as resentful, insecure, paranoid, suspicious, devious, threatened, power-hungry, angry, jealous, insulting, hostile, deceptive, deceitful, uppity, conniving, territorial, unfair, and all around unethical.⁶³ Briles caps that indictment by ascribing to every woman—colleague, mentor, friend, family—even the “Good Christian Martyr”—an “undercurrent of anger, hostility and vindictiveness” that leads them to derail other women’s careers.⁶⁴ This female saboteur is “covert and indirect,” and her anger can “fester quickly for a long time without the victim even being aware of the perpetrator’s hostile feelings.”⁶⁵ The divisive warning Briles hopes to impart to every working woman is that every other woman is the enemy, whether she knows it or not.

57. See, e.g., Executive Coaching and Consulting Associates, *Case History: Women Working Together: Support or Sabotage?*, <http://www.exe-coach.com/supportOrSabotage.htm> (last visited Mar. 21, 2006).

58. Aliza Pilar Sherman, *Under Attack? Think Another Woman Is Out To Get You? Here’s How To Watch Your Back*, *ENTREPRENEUR*, Aug. 2004, at 36.

59. See JUDITH BRILES, *WOMAN TO WOMAN 2000: BECOMING SABOTAGE SAVVY IN THE NEW MILLENNIUM* (1999); PHYLLIS CHESLER, *WOMAN’S INHUMANITY TO WOMAN* (2001); CHERYL DELLASEGA, *MEAN GIRLS GROWN UP: ADULT WOMEN WHO ARE STILL QUEEN BEES, MIDDLE BEES, AND AFRAID-TO-BEES* (2005); LOIS P. FRANKEL, *NICE GIRLS DON’T GET THE CORNER OFFICE: 101 UNCONSCIOUS MISTAKES WOMEN MAKE THAT SABOTAGE THEIR CAREERS* (2004); PAT HEIM & SUSAN A. MURPHY, *IN THE COMPANY OF WOMEN: TURNING WORKPLACE CONFLICT INTO POWERFUL ALLIANCES* (2001); LEORA TANENBAUM, *CATFIGHT* (2002).

60. See DELLASEGA, *supra* note 59, at 81-96; BRILES, *supra* note 59, at 36, 99; TANENBAUM, *supra* note 59, at 176-77, 200.

61. TANENBAUM, *supra* note 59, at 18, 27.

62. HEIM & MURPHY, *supra* note 59, at 235-37.

63. BRILES, *supra* note 59, *passim*.

64. *Id.* at 89, 111.

65. *Id.* at 111; see also HEIM & MURPHY, *supra* note 59, at 29 (“Women have really good memories. We tend to hold grudges for a long time. The game is never over for us, so chip deficits can last a lifetime if they’re not rectified.”).

According to Tanenbaum, this hysteria is what prompts professional women to use “sexual allure to distinguish themselves from their colleagues in the eyes of a male supervisor.”⁶⁶ Tanenbaum refers to a successful magazine editor who admitted that “sexual energy plays a part” in worker interactions: “It’s like we’re competing for the flirtatious attention of our boss, even though none of us wants to date our boss or have sexual relations with him at all.”⁶⁷ The editor wondered whether other workers were smarter, more talented, or cuter than her, adding, “I do think about whether men find me attractive. Just because I’m not trying to get a boyfriend doesn’t mean that I’m immune to the attentions of men or the validation of men.”⁶⁸ Other women spoke to Tanenbaum about similar concerns and workplace strategies.⁶⁹

From these accounts arise a business practice standard that at once conditions professional women to exploit their own sexuality and condones the practice. They create a threshold of behavior that other women would be unwise to disregard in the midst of the relentless female competition that Tanenbaum, Briles, and others purport to expose. As one respondent to the Sex Appeal Survey noted, “generally speaking, most women [rely on sexualized advocacy], so you would be at a disadvantage if you don’t.”⁷⁰ Another woman considered sex appeal “a survival instinct for some women. Because if you don’t step on toes to climb that latter [sic], you will be kissing somebody’s a** who just stepped on yours.”⁷¹ Indeed, Survey responses seem to indicate that women resort to sexualized advocacy to compete with other female lawyers: only four respondents considered sexualized advocacy an effective way to compensate for system-wide bias favoring male attorneys.⁷² The remaining sexualized advocates utilized the strategy to set them apart from other women in a manner designed to elevate their status in the eyes of a male judge or juror.

C. “Sex-Positive” Feminism

Even post-modern feminism factors into the cultural acceptance of sexualized advocacy by celebrating sex appeal in all its forms and functions.⁷³ Here we see a dynamic shift from the conceptualization of power, subordination, and sexual representation that dominated mainstream feminism

66. See TANENBAUM, *supra* note 59, at 220.

67. *Id.* at 220-21.

68. *Id.* at 221.

69. *Id.* (“I will use whatever I have to use, and at times it is the physical nature of being a woman.”)

70. Sex Appeal Survey, *supra* note 2, at 43a.

71. *Id.* at 40b.

72. See *id.* at 4a, 42a, 44a-b.

73. For a brief overview of the evolution of feminist ideology, see JUDITH LORBER, *GENDER INEQUALITY: FEMINIST THEORIES AND POLITICS* (2001); Amanda Lotz, *Communicating Third-Wave Feminism and New Social Movements: Challenges for the Next Century of Feminist Endeavor*, 26 *WOMEN & LANGUAGE* 2 (2003); Helen A. Shugart, *Isn’t It Ironic?: The Intersection of Third-Wave Feminism and Generation X*, 24 *WOMEN’S STUD. IN COMM.* 131 (2001).

throughout the 1970s and 1980s, and which led such luminaries as Catharine MacKinnon, Robin West, Andrea Dworkin, and others to decry the eroticization of female subordination undergirding heterosexual dominance and desire.⁷⁴ Coming into the 1990s, a new wave of feminists redirected the discourse. They agreed with the proposition that sexual subordination and exploitation historically contributed to the oppression of women.⁷⁵ Nonetheless, they adopted a sex-positive ideology to liberate women from what they considered obsessive restraints placed upon their own sexuality.⁷⁶

The deployment of female sexuality in ways that are authentic and self-defined is key to post-feminist liberation.⁷⁷ In *Postmodern Legal Feminism*, Mary Joe Frug exalts the unapologetic hyper-sexuality of superstars like Madonna, who render “indisputable” Frug’s claim that self-objectification can be “radically more autonomous and self-serving” than feminists previously conceived.⁷⁸ Along the same lines, Molly Hite identifies the “transgressive” potential of asserting female desire “in a culture where female sexuality is viewed as so inextricably conjoined with passivity.”⁷⁹ Within this construct, “sexy dressing” has its place. As posited by Duncan Kennedy, agency and self-determination can be expressed through sexual provocation and attire.⁸⁰ He insists that “any given act of dressing can have different meanings for different observers, and different effects on them.”⁸¹ Thus, he is able to simultaneously state both that sexy dressing plays an important role in normalizing patriarchy,⁸² and that it provides the potential for restructuring hierarchy by empowering women to provoke male heterosexual desire while controlling the decision to grant or withhold sex itself.⁸³

74. See, e.g., SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 13-18 (1975); ANDREA DWORKIN, *INTERCOURSE* 128-29 (1987); ANDREA DWORKIN, *THE ROOT CAUSES, IN OUR BLOOD: PROPHECIES AND DISCOURSES ON SEXUAL POLITICS* 104 (1976); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 3-4, 130 (1989); Robin West, *Deconstructing the CLE-FEM Split*, 2 WIS. WOMEN’S L.J. 85, 88-90 (1986).

75. MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* 153 (1992).

76. See *id.* at 152-53. The ideology of sexual liberation is a prominent theme in contemporary popular feminist literature. See generally JANE SEXES IT UP: *TRUE CONFESSIONS OF FEMINIST DESIRE* (Merri Lisa Johnson ed., 2002); *WHORES AND OTHER FEMINISTS* (Jill Nagel ed., 1997); ELIZABETH WURTZEL, *BITCH* (1998); Rebecca Walker, *Lusting for Freedom*, in *LISTEN UP: VOICES FROM THE NEXT FEMINIST GENERATION* 19 (Barbara Findlen ed., 1995).

77. Among some third-wave feminists, for example, prostitution and pornography each provide examples of a chosen behavior that in certain contexts might serve as a “socially subversive reappropriation” of female empowerment that counters the presumption of female sexual subordination. See, e.g., FRUG, *supra* note 75, at 151-53; Elizabeth Bernstein, *What’s Wrong with Prostitution? What’s Right with Sex Work? Comparing Markets in Female Sexual Labor*, 10 HASTINGS WOMEN’S L.J. 91 (1999).

78. FRUG, *supra* note 75, at 133.

79. Molly Hite, *Writing—and Reading—the Body: Female Sexuality and Recent Feminist Fiction*, 14 FEMINIST STUD. 120, 121-22 (1988).

80. See DUNCAN KENNEDY, *SEXY DRESSING, ETC.* (1993); see also Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL’Y. 7, 28-30 (2004).

81. KENNEDY, *supra* note 80, at 187.

82. *Id.* at 162.

83. *Id.* at 201.

A 1992 editorial in *Vogue* magazine brought this liberated concept of sexual autonomy to the masses. *Vogue* stated, “[W]omen have come a long way, from burning bras to flaunting them. If a woman now chooses to look sexy, that is her right.”⁸⁴ More pointed are Professor Susan Bordo’s remarks about reconsidered feminist objectives. She states, “A decade ago, the feminist ideal was to have a great career and a family,” but “[n]ow the ideal is to have a great career and dress like a sex kitten.”⁸⁵ An ever-growing cohort of young feminists in pursuit of sexual emancipation continue to decry mainstream feminism for imposing artificial constraints on female desire and sexual exhibition.⁸⁶ For these women, sexy dressing is an act of liberated defiance.

This sexually empowering feminist philosophy surfaced in response to the Sex Appeal Survey among some female lawyers. Indeed, the very act of sexualized advocacy implicitly rejects the central tenet of mainstream feminism that links female subordination to sexual objectification. Like postmodern feminists, these respondents rely on sex appeal as a means of deconstructing prevailing patriarchies, and to overcome discriminatory bias in the legal profession favoring men. In the tradition of subversive resistance, sexualized lawyers might argue that they have intentionally co-opted and manipulated the appearance-obsessed mechanisms of subordination to dilute their power and significance.

D. Unintentional Sexy Dressing

Female lawyers face enormous pressure to sexualize advocacy. Even women who attempt to resist this pressure receive confusing and sometimes contradictory messages about what types of behavior or attire might give rise to a perception of heightened sexuality. Moreover, visual impressions depend on the perception of the viewer as much as the intent of any particular woman. It may be, therefore, that a fair number of female lawyers practice sexualized advocacy unintentionally because it is so difficult to identify a clear distinction between attire that is sexy and that which is feminine or professional. In some instances, this complexity makes it difficult for women to render sexuality invisible.

Consider career counseling advice given to professional women regarding behavior and appearance. In *Nice Girls Don't Get the Corner Office*, for example, Lois Frankel cautions women to avoid office flirtations, and admonishes those who wear “short skirts, seductive clothing [or] stiletto heels”

84. *Id.* at 167 (quoting Suzy Menkes, *Vogue Point of View: The Cutting Edge*, VOGUE, Jan. 1992, at 103, 110).

85. Leslie Kaufman & Cathy Horyn, *More of Less: Scantier Clothing Catches On*, N.Y. TIMES, June 27, 2000, at B9 (quoting Professor Susan Bordo). See also Sellers, *supra* note 18 (describing women who “exploit” sex in order to advance professionally).

86. See FRUG, *supra* note 75, at 112.

on the job.⁸⁷ She nonetheless acknowledges exceptions to the rule for well-credentialed women whose extraordinary success provides them more freedom to personalize their professional appearance.⁸⁸ Coupled with advice to “dress for the job you want not the job you have,”⁸⁹ Frankel begs the question why younger women would not dress more provocatively if doing so mimics the most successful women in their field.

Moreover, Frankel’s definition of flirting is hardly distinguishable from otherwise innocuous behavior. Frankel identifies one woman whom co-workers described as flirtatious because she “smiled and listened with her head slightly tilted” while talking with a male supervisor.⁹⁰ Frankel goes on to admonish that “knowing glances, whispered conversations and laughing at stupid jokes” do not belong at work.⁹¹ Yet if this behavior is flirtatious, what is not? Frankel adds to the confusion by advising women to “be discriminating about how and when you choose to smile”;⁹² “don’t quit smiling entirely,” but avoid a “large” and “inappropriate smile”; use caution when “tilting your head”;⁹³ avoid “too little” makeup or “too much” makeup.⁹⁴

A 2002 *Wall Street Journal* article described the trend of women who are incorporating sexual attractiveness into their workplace habits. The article defined flirting on the job to include “teasing, bantering, a direct look in the eye,” and labeled as flirtatious a woman who “jokes and makes light-hearted comments in the office, smiles and sometimes uses sarcasm.”⁹⁵ Given these depictions of common human behavior as flirting, advice to avoid such behavior is nearly impossible to follow, and undoubtedly paralyzing for the bulk of professional women.

The ambiguities of body language and behavior drawn out by Frankel and the *Wall Street Journal* apply with equal force to professional clothing. For example, a woman might attempt to feminize her persona to head off criticism that she is “too masculine.”⁹⁶ Yet feminization is typically accomplished

87. FRANKEL, *supra* note 59, at 200.

88. *Id.*; see also KAISER, *supra* note 19, at 367.

89. FRANKEL, *supra* note 59, at 200.

90. *Id.* at 74-75.

91. *Id.*

92. *Id.* at 186-87. There is some evidence that relates smiling to perceptions of power and dominance, but the implications of this perception are unclear. For instance, women who smile frequently are perceived as less dominant, and therefore less authoritative, than women who smile infrequently. Yet a dominant woman who seldom smiles would likely provoke competitive anxiety in men that could trigger hostility or adverse action from them. In this respect, it appears that women are placed at a disadvantage whether they smile or not. See Marianne Schmid Mast & Judith A. Hall, *When is Dominance Related to Smiling? Assigned Dominance, Dominance Preference, Trait Dominance, and Gender as Moderators*, 50 *SEX ROLES* 307 (2004).

93. FRANKEL, *supra* note 59, at 195.

94. *Id.* at 196.

95. Pollock, *supra* note 18.

96. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (discussing a supervisor’s advice that female executive should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”); *Craft v. Metromedia Inc.*, 766 F.2d 1205, 1214 (8th

through body language, speech patterns, and clothing choices that are softer, tighter, and more revealing than what is culturally appropriate for men. In this sense, the accoutrements of femininity can, in certain circumstances, simultaneously evoke heightened female sexuality. Adding to the conundrum, some employers, workers, and advertising consultants expressly conflate femininity with sex appeal.⁹⁷ Thus, a woman who embellishes her sexuality to downplay masculinity sidesteps criticism for being unfeminine, but exposes herself to harassment, hostility, and retaliation for appearing too sexy.⁹⁸

This problem is revealed by the Sex Appeal Survey results that appear to conflate “sexy” attire, “feminine” attire, and purely “professional” attire. One respondent answered a question specifically about sex appeal by acknowledging her use of “feminine clothing” as a professional strategy.⁹⁹ Another recounted being flattered by a male supervisor’s comments about her “fetching” dark stockings and a compliment that she had not lost her “femininity” on the job.¹⁰⁰ A third spoke of deploying sex appeal in a way that “can come across as being professional.”¹⁰¹

Fashion’s indeterminacy also makes it exceedingly difficult for female lawyers to render sexuality invisible. Whatever visual cues are meant to be relayed by a particular style of dress are ultimately filtered through Western cultural conventions that objectify the female body.¹⁰² In other words, sex appeal is a characteristic observers are likely to ascribe to some women, regardless of attire or that aspect of identity a woman herself intends to

Cir. 1985) (discussing employer requirement that female newscaster “purchase more blouses with ‘feminine touches,’ such as bows and ruffles because many of her clothes were ‘too masculine’”); *Stewart v. Houston Lighting & Power Co.*, 998 F. Supp. 746, 799 (S.D. Tex. 1998) (discussing a male co-worker’s preference for female colleagues who “cooked for the crew and acted more feminine” than other female colleagues). Feminization creates a double bind for professional women. On the one hand, feminine women demonstrate conformity to socially construed sex roles which might assuage anxiety from a supervisor or co-worker. At the same time, feminine behavior is not always perceived as consistent with effective managerial or business practices. *See, e.g.*, Laurie A. Rudman & Peter Glick, *Feminized Management and Backlash Toward Agentive Women: The Hidden Costs to Women of a Kinder, Gentler Image of Middle Managers*, 77 J. PERSONALITY & SOC. PSYCHOL. 1004 (1999).

97. *See, e.g.*, *Nievaard v. City of Ann Arbor*, 2005 FED App. 0173N (6th Cir.) (describing comments toward female employee that she was “sexy” and wore clothes that were “too tight,” and supervisor’s advice that she “dress less femininely”); *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1077 (3d Cir. 2004) (quoting plaintiff who stated that wearing makeup “forced her to be feminine and to become ‘dolloed up’ like a sexual object”); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 294-96 (N.D. Tex. 1981) (discussing asserted defense of employer dress codes adopted to further company image of “feminine spirit, fun and sex appeal”). *See also* Lewis, *supra* note 38.

98. *See, e.g.*, *Courtney v. Landair Transport, Inc.*, 227 F.3d 559, 561 (6th Cir. 2000) (citing to record) (recounting how plaintiff was told that she distracted other employees by “showing too much cleavage”); *Powell-Lee v. HCR Manor Care*, 2005 WL 0570318, at *2 (E.D. Mich. 2005) (describing plaintiff’s claim that supervisor responded to her sexual harassment complaint against co-worker by criticizing her for dressing “borderline sexy”).

99. Sex Appeal Survey, *supra* note 2, at 3a.

100. *Id.* at 15a.

101. *Id.* at 40a.

102. *See* Peter Strelan & Duane Hargraves, *Women Who Objectify Other Women: The Vicious Circle of Objectification?*, 52 SEX ROLES 707, 707 (2005).

communicate.¹⁰³ Speaking of the formation of gender identity, Judith Butler states that gender “is a kind of doing, an incessant activity performed in part without one’s knowing and without one’s selling.”¹⁰⁴ As she explains, “the terms that make up one’s own gender are, from the start, outside oneself, beyond oneself in a sociality that has no single author.”¹⁰⁵ The same can be said of sex appeal, which itself constructs and reinforces female gender.

Sexuality is most likely to be unintentionally communicated when a woman misconstrues cultural cues about particular modes of attire.¹⁰⁶ But the very cultural cues that influence visual perception are themselves subject to debate. Consider the duplicity of body language. Though Frankel “understood perfectly” the sexual connotations of a smile and “slightly tilted head,” the woman she described as flirtatious “had no inkling” that she was communicating a sexual message.¹⁰⁷ The same conundrum limits women’s fashion choices. A skirt suit worn to convey conservatism and deference towards the court may communicate sexuality, depending on the perception of a particular judge or juror. This much is revealed by an online discussion participant, and perhaps potential juror, who commented on female attorney dress codes, stating that “a skirt suit is more professional than a pant suit . . . [which] has nothing to do with showing more leg, although that can be an added advantage.”¹⁰⁸

Dominant constructs of female sexuality and the semiotic significance of skirts versus pants also influence how female lawyers are perceived. In 1995, former prosecutor and Court TV analyst Nancy Grace received a motion from opposing counsel to enjoin her from wearing “low-cut” blouses or skirts a specific number of inches above the knee. The motion also sought to enjoin her from bending over with either her back or front side facing the jury.¹⁰⁹ Grace, who insists that she covered herself “from neck to wrist to knee” when in court, considered the motion a “groundless charge that was meant to deflect attention away from the trial.”¹¹⁰ However, it could well have been filed as a good faith, though ill-conceived, attempt to counteract the advantage defense attorneys thought Grace enjoyed from wearing what they considered sexually provocative courtroom attire. The semiotic significance of bare female flesh is

103. This phenomenon of “unintentional signification,” as it is known, occurs because the signals conveyed through non-verbal communication depend on social cognition by the perceiver that takes place regardless of the intent of the sender. See KAISER, *supra* note 19, at 311-15; see also KENNEDY, *supra* note 80, at 176.

104. JUDITH BUTLER, UNDOING GENDER 1 (2004).

105. *Id.*

106. See Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1410 (1992).

107. FRANKEL, *supra* note 59, at 74-75.

108. Posting of Zogby-Blog, <http://www.phillyblog.com/philly/showthread.php?t=735> (Nov. 26, 2003, 17:26 EST).

109. NANCY GRACE, OBJECTION! 164 (2005).

110. *Id.*

so embedded in the cultural psyche that defense counsel might have intuitively sexualized Grace's advocacy simply because they saw her in a skirt.¹¹¹

The Sex Appeal Survey reveals how the ambiguity of skirts complicates the working lives of women. Among Survey respondents, skirt suits remain the preferred legal uniform, despite the practical utility and comfort of pants. Survey respondents described skirts as "expected," "safe," "appropriate," and "proper professional attire,"¹¹² while pant suits struck one respondent as "inappropriately casual" for women.¹¹³ Even those who seemed to consider the disapproval of pants a derivative of outdated stereotypes preferred to wear skirts when working with more conservative male judges and attorneys. As one attorney explained, "[i]t's a matter of waiting for the Old Male Guard to die off."¹¹⁴

One law professor admonishes students to "think long and hard" before wearing pants as a matter of personal comfort or politics "because it would be [a] client's cause [you] could hurt with a reactionary juror."¹¹⁵ Indeed, as late as 2003, female lawyers in the Philadelphia district attorney's office were required to wear skirts.¹¹⁶ Based on results from the Sex Appeal Survey, it appears that some judges, law firms, and law school moot court programs to this day encourage female legal professionals and advocates to appear in skirts,¹¹⁷ as do prestigious members of the judiciary, including recently retired Supreme Court Justice Sandra Day O'Connor.¹¹⁸

The preference for skirts perhaps stems from a perception that they neutralize female sexuality by conveying professional deference to prescriptive and conservative dress codes. That perception is not universal, however.

111. See KENNEDY, *supra* note 80, at 188-89; Klare, *supra* note 106, at 1419.

112. Sex Appeal Survey, *supra* note 2, at 1a, 13a, 19a, 31a, 36a.

113. *Id.* at 20a.

114. *Id.* at 22a. One professor of legal writing recounted that while judging a practice round of oral arguments, students told her that they were instructed by other professors to wear skirts. The respondent told the students that "it had never been [her] experience that skirts win cases." She stated, however, that the students were skeptical of that contention. *Id.* at 16a.

115. *Id.* at 2a; see also Lee Stapleton Milford, *Nonverbal Communication*, 27 LITIG. 32, 34 (2001) ("Appearance . . . and dress are powerful tools, and those who ignore messages they convey do so at their client's peril.")

116. See Shannon P. Duffy, *Pantsuits Coming Out of the Closet?*, LEGAL INTELLIGENCER, Dec. 1, 2003, available at <http://www.law.com/jsp/article.jsp?id=1069801652231>; see also Elaine Porterfield, *Judge Wants Women Attorneys to Wear Skirts in Her Courtroom*, SEATTLE POST-INTELLIGENCER, Sept. 30, 1999, at A1 (discussing 1999 instruction by Superior Court judge that female lawyers appear in skirts).

117. See Sex Appeal Survey, *supra* note 2, at 7a, 20a, 40b, 49a, 51a; see also Elizabeth Sayer, *Why Can't Women Wear Nice Slacks to Oral Argument*, 32 STUDENT LAWYER 12, 12 (2004) (describing how a female law student was advised to change into a skirt suit for a moot court appearance and subsequent conversations in which professionals confirmed this advice).

118. Sex Appeal Survey, *supra* note 2, at 9a. A respondent to the Survey reportedly met Justice O'Connor while she was preparing to lecture at her law school. At the request of several students, the professor asked Justice O'Connor whether women could wear pants to argue in front of the Supreme Court. The respondent wrote that Justice O'Connor looked at her "askance" and told her that "a woman should wear a dark suit (skirt and jacket) and a white blouse." *Id.*

Despite conventional wisdom about the conservatism of skirts, one respondent seems to recognize that observers could more easily sexualize a woman in a skirt suit than a woman in pants.¹¹⁹ She thus instructs women to wear pants instead of skirts to avoid any question that sexualized advocacy might have played a role in their success.¹²⁰

Color choices also complicate the ability of professional women to render sexuality invisible. Consider the symbolic significance of the color red. Because of its association with sin, seduction, and sensuality, red could very well communicate a message of defiance that society will not tolerate from most professional women, whatever the intent behind their decision to appear in red.¹²¹ Indeed, the implied taboo against red is indicated in responses to the Sex Appeal Survey. One respondent recounted the experience of a New Orleans attorney who was ejected from court for wearing open toe shoes and a red dress.¹²² Another told of a judge in Arizona who chastised a female prosecutor for sporting red footwear because, according to the judge, “only whores wear red shoes.”¹²³

But as with other fashion dictates, red too is ambiguous.¹²⁴ One law professor who responded to the Survey uses red to challenge unspoken fashion taboos that persist in promoting patriarchy in the profession. Each year she tells her first year legal writing class about the prosecutor from Arizona. She does so wearing red shoes.¹²⁵ Another harnessed the symbolic significance of red in a power play over opposing counsel. She and a female subordinate wore bright red “power suits” to a negotiation session, hoping to inflict “psychic distress” upon opposing counsel. They did not know at the time that the opposing party was also represented by women who ultimately arrived at the session clad in red suits.¹²⁶ Still another Survey respondent considers red perfectly innocuous, noting that its social significance has diluted over time. “[R]ed is neutral,” she says, “[I]ike black. Only red.”¹²⁷ In the end, such discordant perceptions of body language, fashion dictates and color choices make it nearly impossible for women to effectively navigate sexualized advocacy or render it invisible.

119. See *id.*, at 10a. The sexual symbolism of women’s exposed legs appears to be the rationale behind the prohibition on “split skirts” and dresses “shorter than the finger tips of extended arms” in some jurisdictions that regulate attorney dress codes. See SUPP. LOC. RULES OF THE OR. TRIAL CTS. 15TH JUD. DISTRICT, 3.011; MIDLAND, TEX., LOC. RULES OF PRACTICE, 1.1.

120. See Sex Appeal Survey, *supra* note 2, at 10a.

121. See AMY BUTLER GREENFIELD, *A PERFECT RED: EMPIRE, ESPIONAGE AND THE QUEST FOR THE COLOR OF DESIRE* (2005).

122. See Sex Appeal Survey, *supra* note 2, at 24c.

123. *Id.* at 24a. See also Enric Volante, *Magistrate Reappointed Despite Bad Job Rating*, ARIZ. DAILY STAR, May 17, 2001, at A2.

124. Symbolic associations with a particular style or article of clothing are not stagnant, but can be changed and modified over time through subsequent interactions and deployments. See KAISER, *supra* note 19, at 44.

125. Sex Appeal Survey, *supra* note 2, at 24b.

126. *Id.* at 55a.

127. *Id.* at 24g.

III. THE PITFALLS OF SEXUALIZED ADVOCACY

Knowing when and why female lawyers rely on sex appeal does not help determine whether the supposed benefits of sexualized advocacy are real. In attempting to answer that question, Part III consults the social science literature to gauge precisely how a judge or juror is likely to perceive a highly sexualized female lawyer, and how that perception might influence the outcome in her case. Contrary to the predictions of some Survey respondents, experimental findings seem to indicate that sexualized advocacy would aggravate pre-existing stereotypes that disadvantage individual female lawyers and contribute to the subordination of female attorneys as a group. Section A explains the mechanics of sexual subordination from the perspectives of cognitive and social psychology. Section B identifies how these psychological processes might influence the perception of women who utilize sexualized advocacy, and how that perception could in turn impact trial outcomes.

A. *The Mechanics of Subordination*

Research has demonstrated that physical beauty privileges both male and female workers.¹²⁸ Individuals who are physically attractive, whether male or female, are presumed to be more competent,¹²⁹ more intelligent,¹³⁰ and more persuasive¹³¹ than their less attractive colleagues, and as a result receive comparatively more favorable performance evaluations than their less attractive peers.¹³² The beauty premium for physically attractive workers, including lawyers, leads to greater levels of career success and economic gain.¹³³ However, sex appeal may be different.

Whereas women and men both benefit from physical attractiveness, sex appeal appears to work as a detriment to women in high-power jobs.¹³⁴ In 2005,

128. See Hosoda, *supra* note 8.

129. M.Y. Quereshi & Janet P. Kay, *Physical Attractiveness, Age, and Sex as Determinants of Reactions to Resumes*, 14 SOC. BEHAVIOR & PERSONALITY 103 (1986).

130. Vicki Ritts et al., *Expectations, Impressions, and Judgments of Physically Attractive Students: A Review*, 62 REV. OF EDUC. RESEARCH 413 (1992).

131. Hetal Parekh & Suresh Ka, *The Physical Attractiveness Stereotype in a Consumer-Related Situation*, 134 J. SOC. PSYCHOL. 297 (1994).

132. Hosoda, *supra* note 8.

133. Jeff E. Biddle & Daniel S. Hamermesh, *Beauty, Productivity, and Discrimination: Lawyers' Looks and Lucre*, 16 J. LABOR ECON. 172 (1998). The same appears to be true for other professionals. See Irene Janson Frieze et al., *Attractiveness and Income for Men and Women in Management*, 21 J. APPLIED SOC. PSYCHOL. 1039 (1991). Research suggests that "attractiveness bias" is most acute when competing candidates or workers are otherwise closely matched. It also suggests that bias based on physical beauty has its greatest impact on low and mid-level business managers but may diminish over time as managers become more experienced. See Cynthia M. Marlowe et al., *Gender and Attractiveness Biases in Hiring Decisions: Are More Experienced Managers Less Biased?*, 81 J. APPLIED PSYCHOL. 11 (1996).

134. See Peter Glick et al., *Evaluations of Sexy Women in Low- and High-Status Jobs*, 29 PSYCHOL. OF WOMEN Q. 389 (2005).

researchers from Lawrence University measured observers' reactions to a female business manager dressed in sexually provocative attire. Undergraduate students, both male and female, were asked to evaluate a videotape of a woman posing as a business manager whose appearance alternated between "sexy" and "business-like."¹³⁵ The "business-like" or "neutral" manager wore little makeup, black slacks, a turtleneck, a business jacket, and flat shoes. The "sexy" manager wore makeup, tousled hair, a tight knee-length skirt, a low-cut shirt under a cardigan sweater, and high-heeled shoes.¹³⁶ Experimenters accounted for physical attractiveness in order to specifically measure how female sex appeal influences perception.¹³⁷

The observers' reactions to the hypothetical manager were strongly influenced by her clothing and grooming. Both men and women displayed negative emotions towards the sexualized manager and deemed her to be less competent and intelligent than the more neutral manager.¹³⁸ If the effects of this study can be generalized to the actual workplace,¹³⁹ it has important implications for high-status working women, including female lawyers.

The study conducted by Lawrence University documents the risks of sexy dressing for high-status professional women. Precisely why sexualized professional women are deemed less competent and generate negative emotional reactions from observers nonetheless remains unclear. The study documents the impact of sexual attractiveness on observer perception, but does not explain the reason for that perception. An empirical study might provide the explanation, though one has yet to be conducted. Until then, some predictions about the risks of sexualized advocacy for female lawyers can be drawn from existing cognitive and social psychology literature.

Social science evidence establishes that the plain visibility of women in the legal profession disrupts male hegemony, triggering a motivational response in members of the dominant group to defend their privileged status.¹⁴⁰ That response is likely to manifest itself in the attribution of negative stereotypes to professional women that simultaneously rationalize and reify the superior status of men.¹⁴¹ This is particularly true in circumstances where men are supervised

135. *Id.* at 390-91.

136. *Id.* at 391.

137. *Id.*

138. *Id.* at 394.

139. Social scientists consider measures of stereotypes regarding physical attractiveness among undergraduate students a close indicator of stereotypes that may be evident among business professionals, though smaller effects have been noted in some studies. *Compare* Frieze, *supra* note 133, with Marlowe, *supra* note 133.

140. See THOMAS ECKES & HANNS M. TRAUTNER, THE DEVELOPMENTAL SOCIAL PSYCHOLOGY OF GENDER 218 (2000); Cecilia Ridgeway, *The Social Construction of Status Value: Gender and Other Nominal Characteristics*, 70 SOC. FORCES 367, 371-72 (1991).

141. ECKES & TRAUTNER, *supra* note 140, at 218; Will Kalkhoff & Christopher Barnum, *The Effects of Status-Organizing and Social Identity Processes on Patterns of Social Influence*, 63 SOC. PSYCHOL. Q. 95, 96-97 (2000).

by women or placed in positions subordinate to female colleagues.¹⁴² In male-dominated professional settings, high-status women are perceived as less competent, less rational, less prepared, and less intelligent than their male counterparts.¹⁴³ Sex appeal appears to stimulate this perception.¹⁴⁴

Cognitive psychologists attribute this phenomenon to information processing functions that occur at the level of the subconscious.¹⁴⁵ To avoid system overload, the human mind simplifies the task of receiving, interpreting, encoding, and retrieving infinite amounts of information through a process of categorization.¹⁴⁶ Perceived objects (or people for that matter) are categorized into groups from which broad generalizations can be drawn.¹⁴⁷ This process of categorization provides an operating framework for human interaction that balances our simultaneous drive for individualism on the one hand and emotional connection on the other.¹⁴⁸ It shortcuts the paralyzing task of cognitive differentiation by allowing us to make decisions, pass judgments, and interact with others based on intuitive, self-serving generalities.¹⁴⁹ This process explains the cognitive origins of stereotypes.¹⁵⁰

Stereotypes operate on a social scale to reinforce group hegemony and existing status hierarchies.¹⁵¹ This is because the perception of oppositional categories arising out of the process of subconscious categorization leads to strong “intergroup bias”¹⁵² that results in “intragroup” solidarity and

142. See Jennifer A. Richeson & Nalini Ambady, *Who's In Charge? Effects of Situational Roles on Automatic Gender Bias*, 44 *SEX ROLES* 493, 496 (2001).

143. See VIRGINIA VALIAN, *WHY SO SLOW?: THE ADVANCEMENT OF WOMEN* (1998); see also Cara C. Bauer & Boris B. Baltes, *Reducing the Effects of Gender Stereotypes on Performance Evaluations*, 47 *SEX ROLES* 465, 466 (2002) (“The typical woman is seen as nice but incompetent, the typical man as competent but maybe not so nice.”).

144. See Glick, *supra* note 134, at 394; KAISER, *supra* note 19, at 87.

145. See, e.g., Richard Ashmore, *Sex Stereotypes and Implicit Personality Theory*, in *COGNITIVE PROCESSES IN STEREOTYPING & INTERGROUP BEHAVIOR* 37, 39-41 (David L. Hamilton ed., 1981); Charles W. Perdue et al., *Us and Them: Social Categorization and the Process of Intergroup Bias*, 59 *J. PERSONALITY & SOC. PSYCHOL.* 475 (1990).

146. See SAMUEL L. GAERTNER & JOHN F. DOVIDIO, *REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL* 34 (2000); David A. Wilder, *Perceiving Persons as a Group: Categorization and Intergroup Relations*, in *COGNITIVE PROCESSES IN STEREOTYPING & INTERGROUP BEHAVIOR*, *supra* note 145, at 213-17.

147. For a useful overview of research involving subconscious categorization, see Jennifer Yatskis Dukart, *Geduldig Reborn: Hibbs as a Success (?) of Justice Ruth Bader Ginsburg's Sex-Discrimination Strategy*, 93 *CAL. L. REV.* 541, 568-77 (2005); and Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 *B.U. L. REV.* 155, 185-87 (2005).

148. See DAVID J. SCHNEIDER, *THE PSYCHOLOGY OF STEREOTYPING* 236 (2004); Marilyn B. Brewer, *The Social Self: On Being the Same and Different at the Same Time*, 17 *PERSONALITY & SOC. PSYCHOL. BULL.* 475 (1991).

149. Ashmore, *supra* note 145, at 38-39; Kalkhoff & Barnum, *supra* note 141, at 98.

150. Kalkhoff & Barnum, *supra* note 141, at 98.

151. RUPERT BROWN, *PREJUDICE: ITS SOCIAL PSYCHOLOGY* 2-14 (1995); Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 *B.U. L. REV.* 1089, 1092-93 (2002); Richeson & Ambady, *supra* note 142, at 494.

152. Miles Hewstone et al., *Intergroup Bias*, 53 *ANN. REV. OF PSYCHOL.* 575 (2002). “Intergroup bias refers generally to the systematic tendency to evaluate one's own membership group (the in-group) or its members more favorably than a nonmembership group (the out-group) or its members.” *Id.*

corresponding “outgroup” hostility.¹⁵³ It is through these biases that stereotypes are mediated.¹⁵⁴ Consider the influence of intragroup preferences on five measures relevant to the outcome of judicial trials. First, stereotypes arising from subconscious categorization emerge as self-serving trait assignments.¹⁵⁵ Individuals assigned membership in a group based on random characteristics have been shown to identify members of their own group as more competent, rational and considerate than out-group members who presumptively lacked those positive attributes.¹⁵⁶

Second, group-specific trait assignments distort the objectivity of performance assessments.¹⁵⁷ When asked to evaluate task performance, for example, evaluators will invariably over-value the work produced by members of their group relative to members of an out-group.¹⁵⁸ In-group favoritism has even been shown to skew performance evaluations to such an extent that it renders the evaluation objectively inaccurate.¹⁵⁹ Group membership thus emerges as a performance indicator that privileges in-group members over out-group members whose equal ability is otherwise objectively verifiable.

Third, group membership has been shown to influence the generosity of test subjects, including their willingness to allocate rewards.¹⁶⁰ Psychological experiments reveal that in-group bias trumps considerations of fairness and even mutual gain as motivational indicators of generosity.¹⁶¹

Fourth, stereotypes generated during the process of group categorization result in status-reinforcing “recall bias.”¹⁶² Test subjects more easily recall task failures and behavioral transgressions of outsiders than similar occurrences among members of the preferred group.¹⁶³ Whereas insider failure and nonconformity is likely to be overlooked, outsider deviance shines as a bright

153. See generally SCHNEIDER, *supra* note 148, at 239; Marilyn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH AND BUSINESS ETHICS 161-62 (Messick & Tenbrunsel eds., 1996).

154. Marilyn B. Brewer, *Ingroup Bias in the Minimal Intergroup Situation: A Cognitive-Motivational Analysis*, 86 PSYCHOL. BULL. 307 (1979). For a comprehensive overview of cognitive processes leading to ingroup bias and stereotype attribution, see Linda Hamilton Krieger, *Civil Rights Perestroika*, 86 CAL. L. REV. 1251 (1998).

155. See Kalkhoff & Barnum, *supra* note 141, at 98.

156. See Perdue, *supra* note 145, at 475; Wilder, *supra* note 146, at 228-33.

157. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1192 (1995). See also Bernard M. Bass, *Biases in the Evaluation of One's Own Group, Its Allies and Opponents*, 7 J. CONFLICT RESOL. 16, 18-20 (1963); Robert Blake & Jane Moulton, *Overevaluation of Own Group's Product in Intergroup Competition*, 64 J. ABNORMAL & SOC. PSYCHOL. 237, 238 (1962).

158. See GAERTNER & DOVIDIO, *supra* note 146, at 38; Bauer & Baltes, *supra* note 143, at 466.

159. See Bauer & Baltes, *supra* note 143, at 466.

160. See GAERTNER & DOVIDIO, *supra* note 146, at 40; Erina L. MacGeorge, *Gender Differences in Attributions and Emotions in Helping Contexts*, 48 SEX ROLES 175 (2003).

161. See Michael Billig & Henry Tajfel, *Social Categorization and Similarity in Intergroup Behavior*, 3 EUR. J. SOC. PSYCHOL. 27, 37-48 (1971); Wilder, *supra* note 146, at 213, 230.

162. See Krieger, *supra* note 157, at 1194.

163. John W. Howard & Myron Rothbart, *Social Categorization and Memory for In-Group and Out-Group Behavior*, 38 J. PERSONALITY & SOC. PSYCHOL. 301, 303-06 (1980).

spot on the surface of our memory.¹⁶⁴ Given its potential to overshadow the merits and achievements of outsiders, recall bias is another way that stereotypes might skew the objectivity of performance evaluators.

Finally, stereotypes provide false confirmation about the perceived merit, worth, and intrinsic ability of oppositional groups. This occurs through the phenomenon of “causal attribution,” whereby the mind presumes a causal connection between a presumptively intrinsic stereotype and individual behavior that confirms that stereotype.¹⁶⁵ Consider how test subjects account for behavioral transgressions or task performance among members of their own group versus members of a competing group. Observers invariably cite incompetence, lack of ability, or another presumptively intrinsic characteristic as a reason why outsiders fail to perform an assigned task or violate a behavioral norm. On the other hand, good luck, favoritism, or other situational factors unrelated to intrinsic ability are presumed to account for out-group success and conformity.¹⁶⁶ Test subjects invert this causal relationship when evaluating the performance of members in their own group. Intrinsic merit becomes the presumptive cause of in-group success, whereas systemic defects or some other situational handicap accounts for in-group failure.¹⁶⁷ Causal attribution thus provides a cognitive expedient for confirming the legitimacy of in-group success and out-group failure.

This discussion demonstrates how stereotypes disadvantage out-group members to the benefit of in-group members with regard to self-serving trait assignments, performance evaluations, reward allocations, recall bias, and causal attribution. When pre-established group hierarchies are involved, cognitive processing occurs within the context of power relationships that render stereotypes even more pronounced.¹⁶⁸ Social scientists teach that both social identity and hierarchical positioning influence the strength and perceived legitimacy of group stereotypes.¹⁶⁹ Moreover, though some studies suggest that tokenism increases the salience of outsider identity constructs and the resulting attribution of negative stereotypes, others suggest that stereotypes are most pronounced when dominance is threatened by subordinate group invasion.¹⁷⁰

164. Mark Snyder, *On the Self-Perpetuating Nature of Social Stereotypes*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR, *supra* note 145, at 183, 192.

165. See Krieger, *supra* note 157, at 1197.

166. *Id.*, at 1212-16; Judith A. Howard & Kenneth C. Pike, *Ideological Investment in Cognitive Processing: The Influence of Social Statuses on Attribution*, 49 SOC. PSYCHOL. Q. 154, 155 (1986).

167. See GAERTNER & DOVIDIO, *supra* note 146, at 39; Brewer, *supra* note 153, at 166 (“positive behaviors by an in-group member are more likely to be attributed to the person’s disposition . . . than are those same behaviors when performed by an out-group member, and . . . negative actions by an in-group member are more likely to be attributed to external reasons.”); see also Madeline E. Heilman & Michelle C. Haynes, *No Credit Where Credit Is Due: Attributional Rationalization of Women’s Success in Male-Female Teams*, 90 J. APPLIED PSYCHOL. 905, 906 (2005) (“[P]erception can be easily distorted to conform to prior expectations.”).

168. See Kalkhoff & Barnum, *supra* note 141, at 98.

169. See *id.*

170. See SCHNEIDER, *supra* note 148, at 242; Richeson & Ambady, *supra* note 142, at 494.

These findings are useful in determining what social scientists might predict are the stereotypes sexualized female lawyers will trigger in either a judge or juror, and how those stereotypes might influence litigation outcomes.

B. Gauging the Perception of Sexualized Advocacy

Sex, perhaps the most salient of physical characteristics, marks the binary division that constructs “male” and “female” group identity.¹⁷¹ Consistent with psychological processes, therefore, not only would men attribute subordinating stereotypes to female lawyers because they belong to the larger oppositional category of women, but the truth of those stereotypes would appear unassailable because women occupy a subordinate social status relative to men.¹⁷²

This phenomenon could be anticipated in the courtroom where the salience of sex would likely provoke status anxiety in male judges, lawyers, and jurors who perceive female professional advancement as a legitimate threat to male hegemony. The win-lose, zero-sum consequence of adversarial competition between opposing attorneys in a courtroom would also contribute to the resonance of status-reinforcing stereotypes.¹⁷³ Discriminatory bias against sexualized women would be that much more pronounced because overt sexuality draws attention to the very physical attributes that differentiate women from men.¹⁷⁴ Whatever the social distance between professional women and the archetypal male, sexy women are positioned still further from the masculinized norm.¹⁷⁵

The same hostility towards sexualized women might be observed in a female judge or juror. Indeed, the Lawrence University experiment described previously included female participants asked to judge highly sexualized

171. Research has shown that sex is the most prominent group identifier and surpasses race and age as cues that prompt cognitive processes that lead to group categorization. See Peter Glick & Susan T. Fiske, *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*, 70 J. PERSONALITY & SOC. PSYCHOL. 491, 493 (1996); see also Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior*, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* 79 (Edward E. Jones et al. eds., 1971).

172. See ECKES & TRAUTNER, *supra* note 140, at 218; Kalkhoff & Barnum, *supra* note 141; Ridgeway, *supra* note 140, at 368.

173. GAERTNER & DOVIDIO, *supra* note 146, at 37.

174. Although some men evaluate sexy women as “highly favorable overall,” they are simultaneously likely to ascribe negative stereotypical traits to them. See Glick & Fiske, *supra* note 171, at 509.

175. Women are not perceived as a uniform, undifferentiated category, but are instead stereotyped into three mutually exclusive categories: traditional, careerist, and sexy. Sexy women and traditional women occupy the position furthest from the masculine norm. See T. William Altermatt et al., *Agency and Virtue: Dimensions Underlying Subgroups of Women*, 49 SEX ROLES 631 (2003); Bernd Six & Thomas Eckes, *A Closer Look at the Complex Structure of Gender Stereotypes*, 24 SEX ROLES 57 (1991); Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS. & EMP. POL’Y J. 401, 420-22 (2003).

professional women. As with male observers, female observers reacted negatively towards the sexy professional woman and questioned her competence.¹⁷⁶ This phenomenon of intra-sex bias is complex. First, though women rate other women more favorably than men overall,¹⁷⁷ both men and women subscribe to similar stereotypes of particular subsets of women—including highly sexualized women.¹⁷⁸ Because women are the primary targets of objectification, for example, women, like men, are conditioned to judge other women in terms of their appearance.¹⁷⁹ This focus on appearance naturally renders sex appeal exceedingly influential in the judgments both men and women will make about other women.

Second, existing social hierarchies that subordinate women to men also privilege male power and approval.¹⁸⁰ This creates a dynamic of distrust among women who measure social standing and individual worth in terms of male attention and validation. Sexualized female lawyers threaten the legitimacy of male privilege because they are presumed inferior to men and therefore unworthy of professional status equal to men. They threaten other women because they command attention from men.¹⁸¹ Thus, social hierarchies are reinforced in the cognitive domain through the formation of stereotypes that demean sexually attractive women in the minds of both men and other women. Moreover, oppressive patriarchies that persist in the legal profession render American courtrooms,¹⁸² in the words of one commentator, “especially

176. See *supra* notes 135-138 and accompanying text.

177. Laurie A. Rudman & Stephanie A. Goodwin, *Gender Differences in Automatic In-Group Bias: Why Do Women Like Women More Than Men Like Men?*, 87 J. PERSONALITY & SOC. PSYCHOL. 494 (2004).

178. See Altermatt, *supra* note 175; Ashmore, *supra* note 145, at 39-41; Six & Eckes, *supra* note 175.

179. Strelan & Hargraves, *supra* note 102, at 707.

180. See generally JEAN BAKER MILLER, TOWARD A NEW PSYCHOLOGY OF WOMEN (1976); ANNE WILSON SCHAEF, WOMEN'S REALITY: AN EMERGING FEMALE SYSTEM IN A WHITE MALE SOCIETY (1985).

181. It is for this reason that many trial attorneys presume that female jurors will resent attractive female litigants and perhaps assess their claims skeptically. See Thomas Sannito, *Psychological Courtroom Strategies*, TRIAL DIPL. J., Summer 1981, at 34. Evolutionary biologists would explain intra-sex anxiety among women in terms of competition for mate selection. Under this theory, those possessing desired features, such as enhanced sexuality, have a competitive mating advantage and would provoke jealousy and resentment from those who do not embody that trait. See, e.g., David M. Buss, *Sexual Strategies Theory: Historical Origins and Current Status*, 35 J. SEX RES. 19 (1998). This is not to say that intra-sex competition necessarily results in active sabotage among working women, as some commentators suggest. See *supra* note 56 and accompanying text.

182. See, e.g., Lilia M. Cortina et al., *What's Gender Got to Do With It? Incivility in the Federal Courts*, 27 LAW & SOC. INQUIRY 235 (2002); KAREN CZAPANSKIY & TRICIA D. O'NEILL, THE WOMEN'S BAR ASSOCIATION OF MARYLAND COURTWATCH REPORT 15-18 (1993) (noting that a minority of judges persist in using demeaning behavior towards female attorneys that undermines their authority in court); GUIDELINES FOR PRACTICING GENDER NEUTRAL COURTROOM PROCEDURES: THE SUPREME COURT OF TEXAS GENDER BIAS TASK FORCE 2 (2004) (noting that nine out of ten female law professionals in Texas reported being the target of sex discrimination in the courtroom during the preceding three years, and that women often experience “hostile, demeaning, or condescending treatment from attorneys and sometimes from judges”).

sensitive to the alarms set off by a woman's body."¹⁸³ Consequently, sexualized female attorneys may very well stimulate pre-existing status anxiety in "superior" men and "competitive" women whose subconscious hostility is likely to be mediated through perceptions, inferences, and judgments about female competence.

An evaluation of how stereotypes disadvantage sexualized women in the eyes of both women and men must also take into account how sexism intersects with racism to render sexualized advocacy doubly problematic for women of color.¹⁸⁴ This perspective is critical because of the way race is used to drive a wedge between women of different racial groups for the purpose of maintaining White privilege.¹⁸⁵ Though bias against sexualized women is not confined to women of a particular racial subgroup, the experiences of women cannot be essentialized across racial boundaries.¹⁸⁶ As in the larger society, power constructs operating in the legal profession simultaneously privilege whiteness and maleness, situating women of color at the "bottom of a hierarchy of oppression."¹⁸⁷ Women of color are therefore marginalized from already disadvantaged White women, which further subordinates them to White men.¹⁸⁸ How sexism is experienced by different women is contingent on race because invidious presumptions about female promiscuity and intellectual deficiency are ascribed a racial dimension. Sexism thus intersects with racism to render women of color particularly susceptible to sexualized stereotypes.¹⁸⁹

With these considerations in mind, one could predict how social cognition theory might explain the consequences of oppositional categorization for individual sexualized female attorneys. First, empirical evidence does in fact demonstrate that women occupy a subordinate social status to men.¹⁹⁰ They are

183. See MONA HARRINGTON, *WOMEN LAWYERS: REWRITING THE RULES* 104 (1993).

184. On the importance of conceptualizing social subordination from a perspective of overlapping disadvantage, see Jennifer Nash, *From Lavender to Purple: Privacy, Black Women, and Feminist Legal Theory*, 11 *CARDOZO WOMEN'S L.J.* 303, 310 (2005).

185. See Nancy E. Dowd, *Bringing the Margins to the Center: Comprehensive Strategies for Work/Family Policy*, 73 *U. CIN. L. REV.* 433, 436 (2004). Cheryl Harris speaks to this phenomenon with respect to the experiences of Black and White women specifically. According to Harris, racial patriarchy has historically operated by "subordinating all Black people along lines that were articulated within and through gender, and all women along lines that were articulated within and through race. The result is that racial domination is structured and experienced differently through gender while women's subordination is expressed and experienced differently through race." Cheryl Harris, *Finding Sojourner's Truth: Race, Gender and the Institution of Property*, 18 *CARDOZO L. REV.* 309, 312-13 (1996).

186. On the pitfalls of gender essentialism, see Shelby A.D. Moore, *Battered Women's Syndrome: Selling the Shadow to Support the Substance*, 38 *HOW. L.J.* 297, 337-40 (1995).

187. See, e.g., Bowman et al., *Race and Gender in the Law Review*, 100 *NW. U. L. REV.* 27, 66-67 (2005) (citing Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 589 (1990)).

188. See, e.g., Beth A. Mandel, *The White Fist of the Child Welfare System: Racism, Patriarchy and the Presumptive Removal of Children from Victims of Domestic Violence in Nicholas v. Williams*, 73 *U. CIN. L. REV.* 1131, 1151 (2005). See also Ridgeway, *supra* note 140, at 368-69.

189. See Dowd, *supra* note 185, at 314 n.15 and accompanying text.

190. See Ridgeway, *supra* note 140, at 368.

perceived as less rational, less credible, less competent,¹⁹¹ and less intelligent than men.¹⁹² These perceptions take account of the cultural identification of women with their bodies as opposed to their intellect or some other cognitive ability or emotional trait,¹⁹³ and can be devastating to a female attorney whose persuasiveness in the eyes of a judge or juror depends on perceived competence and rationality. Consistent with the psychological experiments described above, cognitive processes involving categorization and trait attribution place women at an initial disadvantage, making it harder for them to overcome first impressions about perceived incompetence and questionable credibility.¹⁹⁴ The presumption of incompetence is likely to be even more pronounced for highly sexualized female attorneys, and perhaps exceedingly so for sexualized women of color.¹⁹⁵

Second, a female lawyer's "performance" is assessed in terms of competence, capability, and persuasiveness, which social psychologists tell us a male judge or juror might predictably underrate on account of in-group favoritism,¹⁹⁶ and a female judge or juror might underrate on account of inter-group tension.¹⁹⁷ Moreover, a hostile cross-examination or objection overruled might qualify as the type of behavioral transgression or task failure that becomes imprinted in the memory of a judge or juror to a greater degree than similar incidents involving male attorneys.¹⁹⁸ When these episodes occur among highly sexualized women they are most likely to corrupt the objectivity of a presiding judge and derail the direction of jury deliberations. Sex appeal itself might well be seen as a cultural transgression in the mind of a judge or juror wedded to the ideal of deference, conservatism, and conformity in court. In that case, the presumed incompetence arising out of the perceptions created by sexualized female advocacy would become even more visible in the shadow

191. See SCHNEIDER, *supra* note 148, at 242; Janet Rosenberg et al., *Now That We Are Here: Discrimination, Disparagement and Harassment at Work and the Experiences of Women Lawyers*, 7 GENDER & SOC'Y 415 (1993).

192. See Sylvia Beyer, *The Accuracy of Academic Gender Stereotypes*, 40 SEX ROLES 787 (1999).

193. See Barbara Fredrickson & Tomi Ann Roberts, *That Swimsuit Becomes You: Sex Differences in Self-Objectification, Restrained Eating, and Math Performance*, 75 J. PERSONALITY & SOC. PSYCHOL., 269-84 (1997); Strelan & Hargraves, *supra* note 102, at 707.

194. See *supra* notes 140-156 and accompanying text.

195. See HARRINGTON, *supra* note 183, at 100. See also Glick, *supra* note 134.

196. See Bauer & Baltes, *supra* note 143. Women are not only subject to bias when individual performance is appraised, they are also given disproportionately less credit for success when they work on projects jointly with men. See Heilman & Haynes, *supra* note 167, at 905. Thus, a female lawyer's successful performance at trial is likely to be devalued whether she is a lone advocate or part of a trial team.

197. See Strelan & Hargraves, *supra* note 102.

198. See Howard & Rothbart, *supra* note 163, at 303-06; Krieger, *supra* note 157, at 1192 ("Subjects are better able to recall undesirable behavior of outgroup members than similar behavior of ingroup members.").

of the presumptively competent male opponent whose performance is overrated and whose missteps are fast forgotten.¹⁹⁹

Moreover, the built-in bias favoring generosity toward in-group members could subtly influence the judgments or verdict rendered to a female lawyer.²⁰⁰ This is even more likely for sexualized lawyers who are twice removed from the in-group based on self-reinforcing constructs of sex and sexuality. The primacy of group identity over considerations of fairness as a factor that leads to reward allocation may influence the response to legal arguments presented by female lawyers, particularly sexualized female lawyers. This insight may be particularly probative when subjective decisions are involved, as when a jury is asked to award punitive damages.

Finally, one might reasonably posit that sexualized advocacy by female lawyers, whether or not it works to an individual woman's benefit, discredits women as a group.²⁰¹ Consider the consequence of stereotype-reinforcing behavior or the phenomenon of "causal attribution" as described previously.²⁰² Adverse trial outcomes in cases involving a female lawyer will be attributed to the supposed incompetence of women because the circumstance appears to verify that stereotype.²⁰³ But the converse is not true. Positive trial outcomes will not be enough to disprove the stereotype of female incompetence; instead, they will be rationalized as the product of extraordinary situational factors.²⁰⁴ Sex appeal is likely to stand out as the most apparent external indicator and, in this manner, would function simultaneously to explain female failure and rationalize female success as somehow illegitimate and outside the norm.

That sexualized advocacy presents this double-bind for women is apparent from responses to the Sex Appeal Survey as well as mainstream news accounts that attribute success among professional women to "manipulation" and an "unfair" sexual advantage.²⁰⁵ With regard to sexualized lawyers, a favorable trial outcome is likely to be attributed to a strategic hemline, while a loss would be explained as the inevitable consequence of a female attorney who was unprepared, incompetent, or outmatched. Either proposition confirms the permanence of sex stereotypes. On account of causal attribution, therefore, stereotypes ascribed to highly sexualized female lawyers would legitimate and retrench existing status hierarchies that in turn disadvantage women as a group.

199. See Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC. PSYCHOL. 272, 278 (1993); Williams, *supra* note 175, at 410; cf. Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 588-89 (1996) (discussing bias against pregnant women).

200. See GAERTNER & DOVIDIO, *supra* note 146, at 40; Krieger, *supra* note 157, at 1193; MacGeorge, *supra* note 160.

201. See Williams, *supra* note 175, at 420.

202. See *supra* notes 165-167 and accompanying text.

203. See Krieger, *supra* note 157, at 1204-1207.

204. *Id.*

205. See Sex Appeal Survey, *supra* note 2; Pollock, *supra* note 18 (citing a male engineer who objected to professional "flirtation" because "when all things are equal, . . . females have the advantage. If you have an advantage you shouldn't be allowed to use it").

CONCLUSION: BRACING AGAINST THE BACKLASH

Sexualized advocacy is viewed by a persistent and significant minority of female attorneys as a mechanism for professional advancement. In the name of serving client interests while simultaneously advancing individual career goals, the Sex Appeal Survey shows that some female attorneys sexualize their advocacy through subtle verbal and visual cues that they believe will play favorably with a male judge or juror.

Yet the evidence is cautionary. Bias against women actually appears to increase in proportion to female visibility in traditionally male-dominated occupations, and latent sexual hostility towards highly sexualized women could predispose judges and jurors, be they male or female, to discount arguments and claims simply because they are presented by female lawyers. Sexualized advocacy is likely to exacerbate that reaction, damaging not only the credibility and professional prospects of individual female attorneys, but reinforcing suffocating hierarchies that subordinate women as a group.

Herein lies the rub. If the implications of sex appeal are more perilous than promising, and research findings suggest that they are, why is it embraced by some female lawyers with such enthusiasm? Though empirical research appears to discredit the supposed utility of sexualized advocacy, it continues to be billed among industry professionals, entertainment producers, and some feminists as an ethically sound and culturally acceptable strategy for professional advancement. Understandably, some female lawyers take the bait.

In 1991, Susan Faludi warned of the cultural commitment to sexual subordination that surfaces in the form of a concerted "backlash" against women's advancements.²⁰⁶ It is through this lens that sexualized advocacy must be evaluated. In line with Faludi's observations, the call and clamor for sexualized advocacy emerges as part of the meta-narrative of female subordination. It is a familiar, yet played out, strategy for forestalling the professional advancement of women. The trap is nothing new, and might even be conceived as evidence that women have made substantial progress despite the pernicious persistence of patriarchy. Yet, history cautions women to expect strong resistance in the face of change that threatens the status quo. Women's advancement in the legal profession is no exception. Perhaps the lessons of this Article will better brace female lawyers to withstand this ascendant backlash.

206. See SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991).