

## ASSEMBLY THIRD READING

AB 939 (Cervantes)

As Amended March 18, 2021

2/3 vote

**SUMMARY**

Prohibits the admission of evidence of the manner in which a victim was dressed, when offered by either the prosecution or the defendant on the issue of consent, during the prosecution of specified sex crimes even if the evidence is determined to be relevant outside the presence of the jury and the interests of justice favor its admission.

**Major Provisions****COMMENTS**

*The Need for this Bill:* Evidence offered in a criminal case is generally admissible if it is relevant to any issue in the case. For evidence of the victim's clothing to be admissible in a sexual assault case, as evidence of either consent or lack thereof, the party seeking to introduce the evidence must first make an offer of proof as to how the evidence would be relevant. That offer of proof must take place outside the presence of the jury. Once the offer of proof has been made, the judge must determine that the evidence is, in fact, relevant to the issue of consent, and also that admitting the evidence would be in the interests of justice. The court must also state the reasons for making the determination on the record. Only after making those findings and stating its reasons for the findings, may the court admit the evidence and allow it to be presented to the jury.

Evidence of what a victim was wearing is unlikely to bear any relevance to the issue of whether the victim consented to sexual contact or not. There are few published cases that deal with this issue, probably because attorneys rarely try to admit evidence in this manner. Cases that have addressed the issue indicate that existing law properly excludes inflammatory evidence that is not relevant. For example, in the unpublished case of *People v. Medina*, the court addressed evidence of the victim's "69" t-shirt in a prosecution for lewd and lascivious acts with a minor. (2003 Cal. App. Unpub. LEXIS 12248, 2003 WL 2309701.) The appellate court found that evidence of the "69" t-shirt was properly excluded by the trial court in a hearing outside the presence of the jury, and that it was irrelevant to any issue in the case. (*Id.* at \*29-30.)

Existing law provides judicial discretion to admit evidence if it is relevant in an outlier case. It requires a special hearing to determine the relevance of the evidence, and even upon a finding that the evidence is relevant, the judge must still determine whether admitting the evidence would be in the interests of justice. Existing law is consistent with California's Constitution which requires the admission of relevant evidence in a criminal case. This bill would prohibit the introduction of evidence in all cases, regardless of relevance or whether the interests of justice favor its admission.

*Proposition 8 Truth in Evidence:* In 1982, the California voters passed Proposition 8, also known as the Victim's Bill of Rights. The initiative enacted the "Right to Truth in Evidence," and adopted a constitutional provision pertaining specifically to evidence in criminal proceedings. The provision of the California Constitution prohibits laws that exclude relevant evidence in

criminal cases except upon a two thirds vote by the Legislature. Because this bill would exclude all evidence of a victim's clothing in a sexual assault case when offered on the issue of consent, even when a judge determines that it is relevant and that the interests of justice favor its admission, it has been marked as requiring a two-thirds vote.

### **According to the Author**

According to the author, "Assembly Bill 939 seeks to address the ambiguity in current law to ensure that we do not further traumatize survivors of sexual violence. There are deep negative implications for Rape and Sexual Harassment cases when we make clothing probative of intent. Assembly Bill 939 will prohibit the courts from admitting evidence that deals with the sexual characterization of their clothing if the courts decide that it must be admissible in the 'interest of justice.' We need trauma-informed policies that ensure that we do not victim blame in the pursuit of justice. Current law fails to consider the power imbalance that exists between survivor and perpetrator. When we maintain inadequate policies, we enable violence, silence survivors, and reduce access to justice. Assembly Bill 939 will reinforce and improve court procedures to ensure that we address policy weaknesses and ensure trauma-informed practices."

### **Arguments in Support**

According to the *Fem Dems of Sacramento*: "The only thing that examination of the clothing of sexual assault survivors does is further perpetuate sexist victim blaming, creating a society where perpetrators believe it is the victim's fault and where victims are shamed from reporting the crimes. Dr. David B. Feldman notes on Psychology Today, "[Victim-blaming] marginalizes the survivor, minimizes the criminal act, and makes people less likely to come forward and report what has happened to them.

...

"The [United States] Department of Justice's Bureau of Justice Statistics lists common trends in sexual violence victims. The analysis shows that the likelihood of rape correlates significantly based on age and geographic location of victims, but there is no such correlation for the victim's clothing.

...

"The research concludes that this belief by men, that a woman's appearance can lead to her rape, is a part of the societal logic that can be used by perpetrators to blame their victims and shift focus from the actual criminal act

...

"Other states have precluded this evidence because of the victim blaming implications. In the 1989 case *The State of Florida v. Lord*, the defense was allowed to show the jury that the woman was wearing a tank top and a miniskirt with no underwear. The jury foreman stated that the jury acquitted Lord because they felt that the victim had asked for it, "[w]ith that skirt, you could see everything she had. She was advertising for sex."<sup>6</sup> Subsequently, Florida changed the law to exclude evidence offered to prove that the rape survivor's manner of dress incited the rape.

"Similarly, New Hampshire law states, "The victim's manner of dress at the time of the sexual assault shall not be admitted as evidence in any prosecution under this chapter to infer consent."

**Arguments in Opposition**

According to the *California Attorneys for Criminal Justice*: "In 1982, the California electorate approved the "Victim's Bill of Rights" initiative. One of these most far reaching provision, the 'Right to Truth in Evidence,' created a new evidence code that only applies to criminal matters.

...

"It is against this backdrop that CACJ opposes the proposed bill. Evidence Code Section 1103, as currently enacted, mandates that evidence of the manner in which the victim was dressed at the time of the commission of the shall not be admissible whether offered by either party on the issue of consent unless the evidence has been determined by the court to be both relevant and admissible in the interest of justice

"Thus, Evidence Code Section 1103 currently places a firm limitation on the introduction of the manner in which the victim was dressed. Moreover, Section 1103 requires that the court exercise its discretion and find that the introduction of such evidence be in the interest of justice before such evidence can be admitted. This requirement comports with the provisions of Section 28(d)."

**FISCAL COMMENTS**

Unknown. This bill is keyed non-fiscal by the Legislative Counsel.

**VOTES****ASM PUBLIC SAFETY: 8-0-0**

**YES:** Jones-Sawyer, Lackey, Bauer-Kahan, Quirk, Santiago, Seyarto, Wicks, Lee

**UPDATED**

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