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PROTECTING PLAINTIFFS' SEXUAL PASTS: COPING WITH PRECONCEPTIONS THROUGH DISCRETION

*Jane H. Aiken**

INTRODUCTION

We expect judges to demonstrate judicial temperament when deciding cases. We rely on the judge, the gatekeeper of the evidence, to keep improper evidence out of the hearing of the jury. Yet, we should not expect that judges are free of cultural beliefs that affect everyone. Legislators create rules of evidence to streamline trials, give guidance to litigants on what they can expect to encounter when presenting a case, assist in ensuring that litigants offer competent evidence upon which fact finders can rely, and serve community goals. Legislators also design rules of evidence to cure cultural preconceptions that give undue probative value to materials that we choose not to find relevant for social policy reasons. Rules barring the admission of these types of materials ensure that judges and juries will not indulge their biases. The clearer the rule, the more likely the bias will be overcome. In the federal courts, one of the primary rules of evidence designed to remedy the problem of undue probative value in the admission of evidence is Rule 412, the so-called "Rape Shield Rule."[1]

In 1994, Congress made significant changes to the rules, including clarifying the criminal rule and extending it to civil actions.[2] Litigants had long awaited the extension of Rule 412 to civil actions. Plaintiffs in actions premised on sexual misconduct had noted that the same concerns that give rise to the need for rape shield legislation in criminal cases also arise in civil cases. Indeed, given the disparity in resources between a typical plaintiff and a typical defendant in a sexual harassment case, plaintiffs' need for protection may be even greater than that of victims of sexual assault testifying in criminal cases.

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[1] FED. R. EVID. 412.

[2] FED. R. EVID. 412 advisory committee's notes.

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Corporate defendants' access to seemingly unlimited resources to probe a plaintiff's background for evidence of her sexual past, often would dissuade her from proceeding with her claim. In this regard, extending the rule to protect plaintiffs made good sense.

Unfortunately, use of the word "extension," which implies that Congress simply added the words "and civil actions" to the criminal rule, is misleading. Instead, Congress drafted a special rule for civil cases. Unlike the criminal rule, this civil rule does not absolutely preclude the admission of a plaintiff's past sexual conduct or predisposition except in particular circumstances.[3] Instead, it leaves to judges the duty of balancing whether the probative value of the proffered evidence substantially outweighs the prejudice to a party or the harm to the victim.[4]

In the last eight years since this new civil rule has been in place, courts have applied it in an unpredictable manner; evidence of a victim's sexual past is admitted in some cases but not in others even when the proffered evidence is substantially similar. Congress' choice to use a rule that depends on judicial discretion for enforcement leaves open many avenues for the importation of evidence that defeats the very purpose of the rule. The purpose of Rule 412 is to prevent juries from placing excess probative value on matters that should not affect their decisions—namely, a victim's or plaintiff's sexual history. However, the remedy selected on the civil side—charging judges with assessing probative value—may be just as troubling. What makes Congress sure that judges can make that determination without allowing themselves to be biased by their own cultural preconceptions?

Another point of concern is that, currently, civil defendants have virtually unrestricted access to a plaintiff's sexual past during the discovery stage of the litigation. Rule 412 is a rule of evidence, not a rule of discovery.[5] Yet, in theory, its presence could have some effect on the assessment of what might be relevant evidence pursuant to Federal Rule of Civil Procedure 26.[6] However, because Rule 412 makes an admissibility determination a mere guess, only in the most egregious cases would such evidence not be discoverable. As is clear

[3] *Compare* FED. R. EVID. 412(b)(1) (specifying when sexual history evidence is admissible in criminal trials), *with* FED. R. EVID. 412(b)(2) (providing for a more relaxed standard for the admission of sexual history evidence).

[4] *Id.*

[5] FED. R. EVID. 412 advisory committee's notes.

[6] *Id.*

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from the legislative history of Rule 412, civil defendants use the threat of such discovery to intimidate plaintiffs into dropping their cases.

Part I of this Article traces the development of the civil application of Rule 412. Part II analyzes the inconsistencies within the cases decided under the new civil rule and links those inconsistencies to the language of the rule. It identifies the trends within the cases about what constitutes probative value for purposes of the rule and how courts assess prejudice. The Article concludes that rules of evidence designed to remedy bias of fact finders should not be cast as discretionary. Many of the problems that arise in the interpretation of Rule 412 could be solved, if the civil application of Rule 412 were as specific and nondiscretionary as the criminal rule. Therefore, in Part III, the Article proposes a rule designed to offer such specificity.

I. THE DEVELOPMENT OF RULE 412

When Congress revised Rule 412 to include civil suits, it was working with a rule that had been in place since 1978.[7] Congress adopted the original Rule 412, or Federal Rape Shield Law, not through the usual rule-making process, but through a separate piece of legislation, popularly known as the "Privacy Protection for Rape Victims Act of 1978."[8] The Rule was applicable only to victims of rape or attempted rape in criminal proceedings.[9] It reflected congressional consensus that, in most instances, evidence of a rape victim's prior sexual history is irrelevant to a determination of whether a rape has occurred.[10] Rape shield laws are also grounded in important considerations of

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[7] Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 (1978).

[8] *Id.*

[9] *Id.*

[10] Saying that such evidence is irrelevant may be too strong in light of the fact that the relevance threshold of Rule 401 is extremely low: Does this piece of evidence make the fact of consequence more or less probable than without the evidence? At least in the case in which the question is "did the woman consent to the sexual act," the fact that the alleged victim has had a number of sexual partners may shed some light on whether she voluntarily had sex on this occasion. The argument that rape is a crime of violence, not of sex, ignores popular notions about rape victims. The issue is not why the rape occurred but *whether* it occurred. The court or jury is being asked to determine which account is more credible, the defendant's or the complainant's. The evidence of the complainant's prior sexual history cuts for and against her. The fact that she has had many instances of sex in the past may make it somewhat more likely that she had sex on this occasion. Likewise, the fact that she had sex on prior occasions and did not call it rape and now is calling it rape suggests that she is being truthful on this occasion. Because the evidence cuts both ways, the question then becomes whether admission of the evidence is more prejudicial than probative. Because juries may not treat a sexually active woman with as much respect as a woman who is not sexually active, or whom they have no information about, exclusion of this marginally relevant evidence is proper.

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extrinsic social policy. Congressional debate focused on the then common practice of allowing the victim's character to be offered in evidence by the defendant under Rule 404(a)(2).[11] This practice shifted the inquiry from the guilt or innocence of the accused to the supposed morality of the victim. Congress concluded that the practice had resulted in various negative social effects, such as humiliating the victim, deterring rape victims from reporting the crime, and expending valuable judicial resources on collateral matters.[12]

Rule 412, as adopted by Congress in 1978, limited the admissibility of a victim's sexual past in criminal trials for rape and attempted rape, and provided a procedure by which a judge could determine admissibility prior to trial. Some commentators criticized the rule as cumbersome and confusing.[13] In 1988, Congress amended the rule to expand its coverage to criminal prosecutions for any sexual offense, including, but not limited to, rape.[14] Critics continued to raise concerns about difficulties in applying the rule, as well as significant constitutional issues. In response to many of the concerns about Rule 412, Congress, in 1993, considered amending the rule through legislation (again avoiding the usual rule-making process). Due to the sense of immediacy in Congress, the Advisory Committee on Criminal Rules of the Judicial Conference, in consultation with the Advisory Committee on Civil Rules, drafted amendments to Rule 412. After an expedited period of review, the committees submitted the amended rule to the Supreme Court.[15]

In addition to addressing chronic problems with the criminal application of Rule 412, the Advisory Committee recommended that the rule be expanded to apply to civil actions.[16] At that time, evidence of the plaintiff's prior sexual history was routinely admitted in civil cases involving sexual misconduct. Plaintiffs were asked about past experiences, including questioning about former rapes, child abuse, mastectomies, abortions, venereal disease, whether they had sex with animals, or whether they watched X-rated movies.[17] Their

[11] 124 CONG. REC. 34, 912-13 (1978).

[12] *Id.*

[13] *See, e.g.*, Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 883-93 (1986).

[14] Pub. L. No. 100-690, §7046, 102 Stat. 4181, 4400 (1988).

[15] 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5381.1, at 159-60 (Supp. 1997).

[16] This may have been an effort to head off a more drastic congressional amendment then under consideration.

[17] Ellen E. Schultz & Junda Woo, *The Bedroom Ploy: Plaintiffs' Sex Lives Are Being Laid Bare in Harassment Cases—Defense Lawyers Use Tactic To Counteract Litigants as Suits Get More Costly—What Evidence Is Irrelevant?*, WALL ST. J., Sept. 19, 1994, at A1.

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sexual fantasies were fodder for courtroom testimony and extensive discovery.[18] Because the original Rape Shield Rule only applied in a criminal context, it did not prohibit the defendant from implying that the victim had invited his attention or that she did not deserve protection.[19] Consequently, plaintiffs often dropped their suits in order to avoid probing inquiries and innuendo about their sex lives. Essentially, these civil defendants urged judges and juries to engage in the same logical inferences that Congress found so troubling in a criminal context.[20] If the inference is improper in the criminal context, it is difficult to justify allowing it in the civil context. Congress recognized this as a significant deterrent to the effective implementation of Title VII and to the reduction of violence against women. The Advisory Committee described the reason for the extension of Rule 412 to civil matters as "obvious," noting that:

> The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief.[21]

It appeared to be a small change to extend the protection provided to victims in criminal cases to plaintiffs in civil cases. However, as discussed below, although consistent in theory with its criminal counterpart, this "small" change would substantially limit what had become a traditional defense used in sexual harassment cases. The Advisory Committee notes to the 1994 amendment states:

> The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process. Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except

[18] *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 68-69 (1986).

[19] FED. R. EVID. 412 (1978).

[20] In the worst cases, jurors appeared to believe that women who violated rigid norms about appropriate sexual conduct did not deserve to recover even if a violation could be proven. *See, e.g.*, Linda J. Kreiger & Cindi Fox, *Evidentiary Issues in Sexual Harassment Litigation*, 1 BERKELEY WOMEN'S L.J. 115 (1995); Susan Klein, Comment, *A Survey of Evidence and Discovery Rules in Civil Sexual Harassment Suits with Special Emphasis on California Law*, 11 INDUS. REL. L.J. 540 (1989).

[21] FED. R. EVID. 412(a) advisory committee's notes (revised rule 1994).

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> in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.[22]

The Judicial Conference opposed the rule's extension to civil cases. When offered the Advisory Committee's recommended changes, the Supreme Court accepted the changes to the criminal aspect of the rule but rejected its civil application. In a letter to the Chair of the Judicial Conference, Justice Rehnquist explained that several Justices believed the amendment would violate the Rules Enabling Act because it could substantially alter a defense in workplace sexual harassment cases.[23] Therefore, the Supreme Court transmitted the rule to Congress as a rule for criminal sexual misconduct cases, not for civil cases.[24] The revised rule became law effective December 1, 1994, pursuant to the rule-making authority of the Supreme Court.[25]

Congress, however, was not satisfied with the deletion. In its view, ruling this evidence inadmissible would further the Congressional goal to crack down on sexual misconduct, taking away the unnecessary invasions of privacy that inhibit victims from reporting the crime of rape and prosecuting sexual harassment claims. Congress proceeded to pass the civil component of the rule, which was deleted by the Supreme Court, as a part of the Violent Crime Control and Law Enforcement Act of 1994, which took effect on December 1, 1994.[26] Although adopted through two separate rule-making processes, finally revised Rule 412, as ultimately enacted, is identical to the version originally proposed by the Advisory Committee.[27]

Revised Rule 412 bars the admission of evidence of an alleged victim's past sexual behavior or sexual predisposition, subject to exceptions provided in the rule, in cases in which there is alleged sexual misconduct. Typical tort

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[22] *Id.*

[23] THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES, TRANSMITTING AN AMENDMENT TO THE FED. R. EVID. AS ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2076, H.R. DOC. NO. 103-250 (1994) ("LETTER FROM CHIEF JUSTICE"). The federal judiciary has concurrent jurisdiction over court procedure because Congress delegated that authority through the Rules Enabling Act. 28 U.S.C. § 2072 (1994). That act also precludes the Court from promulgating rules that modify substantive law. *Id. See also* Rules of Decision Act, 28 U.S.C. § 1652 (1994). Of course Congress is not limited in its ability to change substantive law.

[24] Proposed Amendments to Federal Rules of Evidence, Order from the Supreme Court (Apr. 29, 1994). The Supreme Court had stated in *Meritor Savings Bank v. Vinson* that an alleged victim's sexually provocative speech or dress was relevant to determine if alleged sexually harassing behavior was welcome. 477 U.S. 57, 68-69 (1986). The proposed rule arguably would make such evidence presumptively inadmissible because it constitutes evidence of "sexual predisposition." *See infra* notes 44-47 and accompanying text.

[25] 28 U.S.C. § 2072 (1994).

[26] Pub. L. 103-322, § 40141, 108 Stat. 1796, 1918-19 (codified at 42 U.S.C. § 2074 (1994)).

[27] WRIGHT & GRAHAM, *supra* note 15, § 5381.1.

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actions arising out of sexual misconduct include claims of assault, battery, intentional infliction of emotional distress, false imprisonment, seduction, sexual harassment, transmission of sexually transmitted disease, and negligent entrustment or supervision. This misconduct need not constitute a criminal offense but can be civilly actionable. The rule overrides any other rule that may make such evidence admissible.

The rule applies only to evidence of sexual conduct or predisposition of alleged victims of sexual misconduct.[28] It appears that the rule does not prohibit the use of this kind of evidence to impugn the credibility of a witness or party in a vast array of actions.[29] Also, the Advisory Committee notes do not offer any definition of how broad a meaning should be given to the words "alleged victim of sexual misconduct."[30] It is clear that the phrase at least extends to witnesses who were victims of other alleged sexual misconduct when they testify in cases involving alleged sexual misconduct.[31]

The defense tactics that motivated the extension of Rule 412 to civil actions can be problematic throughout the litigation process in sexual misconduct cases. A classic defense strategy in these cases propounds interrogatories and deposition questions that require the plaintiff to disclose intimate details of her personal life.[32] This often causes a plaintiff to reconsider whether she wants to

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[28] The term is confusing because the terms sex and gender are often conflated. Apparently, the drafters intended sexual misconduct to be grounded in sexuality rather than pure gender.

[29] This is a common defense tactic to encourage plaintiffs to withdraw their claims in a wide variety of cases that are not premised upon sexual misconduct. In those cases, Rule 412 would not stand as a bar. *See* Schultz & Woo, *supra* note 17, at A1. The only limit on the use of such evidence in other cases, like those that involve race discrimination or run-of-the-mill tort claims, is Rule 401 or Rule 403 objections, suggesting that such evidence is irrelevant or more prejudicial than probative.

[30] If there is a credibility issue to be resolved on issues that may affect whether Rule 412 applies, that decision is left to the jury. The amendment to Rule 412 specifically requires that issues of conditional facts are to be left to the jury. *See* United States v. Platero, 72 F.3d 806, 813 (1995).

[31] Charles Alan Wright and Kenneth W. Graham discuss this problem in their treatise. They offer several examples of fact patterns in which the lack of definition may pose problems:

> Is the spouse of a rape victim also a "victim of alleged sexual misconduct" by virtue of the financial and psychological stress imposed by the crime? Is the sexual partner of the victim a victim if the defendant infected the victim with a sexually transmitted disease that spread to the partner? How about the owner of a motel who is sued for failing to protect the patron-victim against rape and who loses business as a result of unfavorable publicity? Is the person falsely accused of sexual misconduct a victim of sexual misconduct?

WRIGHT & GRAHAM, *supra* note 15, § 5384.1.

[32] *See* Klein, *supra* note 20, at 546. Such tactics are used in other claims besides sex discrimination claims. The *Wall Street Journal* described a federal civil case in New York where a female office worker settled a race-bias case before trial. "Her lawyer says she backed off when she learned that her husband would be questioned about his impotence—something the defense had learned from her gynecology records."

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proceed with the action.[33] Because Rule 412 governs the admissibility of evidence *at trial*, it does not directly govern a party's behavior during the discovery process.[34] This creates a tremendous gap in the rule because many more victims will go through the discovery process than will go to trial. Furthermore, the abuses may be more intrusive at the discovery stage because discovery occurs without the presence of a judge.

The drafters were aware that the same concerns at trial existed during the discovery process and urged that such wholesale investigations into plaintiffs' sexual activities and predisposition be curbed throughout the litigation. The Advisory Committee notes urge judges to make liberal use of Rule 26(c) protective orders, to ensure that defense counsel do not undermine the intent of Rule 412 through the discovery process.[35] Some judges have taken this guidance to heart:

> The logic behind the note is self-evident: one of the purposes of Fed. R. Evid. 412 was to reduce the inhibition women felt about pressing complaints concerning sex harassment because of the shame and embarrassment of opening the door to an inquiry into the victim's sexual history. This shame and embarrassment, inhibiting them from invoking the legal remedies available to them by laws such as the D.C. Human Rights Act, exists equally at the discovery stage as at trial and is not relieved by knowledge that the information is merely sealed from public viewing.[36]

Arguably, discovery of sexual history or predisposition should only be allowed when it is likely to lead to admissible evidence; that is when the proponent of the evidence can show that the probative value of the evidence to be discovered substantially outweighs the risk of harm to the victim, or prejudice to any party.[37] Thus, federal courts have considerable power, should

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Schultz & Woo, *supra* note 17, at A1. Rule 412 would do nothing to assist this plaintiff. Unless the case is based on sexual misconduct, the strictures of Rule 412 do not apply.

[33] Kreiger & Fox, *supra* note 20, at 117.

[34] Wright and Graham note that: "Revised Rule 412 does nothing about the most serious forms of abuse in civil cases; that is, discovery into intimate details of the plaintiff's sexual history, by defendants bent on harassing her into dropping her suit." WRIGHT & GRAHAM, *supra* note 15, § 5393.1 (footnote omitted).

[35] The Advisory Committee notes to revised Rule 412 state that "[c]ourts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery." FED. R. EVID. 412 advisory committee's notes (revised rule). Unfortunately, the burden remains on the plaintiff to show good cause for a protective order against abusive discovery at a time in which the relevance rules are relaxed. *See* FED. R. CIV. P. 26(c).

[36] Howard v. Historic Tours of America, 177 F.R.D. 48, 51 (D.D.C. 1997).

[37] The Advisory Committee notes state:

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they choose to exercise it, to grant protective orders to limit this line of defense. There has already been considerable case law supporting the applicability of Rule 412 to discovery.[38] These cases recognize that Rule 412 is a rule of admissibility but point to the Advisory Committee notes to support a closer scrutiny of discovery requests and more permissive grants of protective orders.[39] However, the judicial discretion that protected the plaintiffs in these cases can just as easily be used to harm them. Moreover, at the discovery stage, the plaintiff must invoke the protections of Rule 412 through a motion for a protective order.[40] If the plaintiff does not move for such protection, apparently no bar exists to seeking the information, as long as the defense has a good faith belief that such information could lead to admissible evidence.[41] Furthermore, the vagueness of 412(b)'s balancing test contributes to the inability of courts to know whether such discovery will lead to admissible evidence.

The most significant change in Rule 412 is in the range of evidence excluded, subject to the exceptions of Rule 412(b)(2). The Rule excludes evidence of the victim's "sexual behavior."[42] Courts have broadly defined "sexual behavior" as not merely sexual intercourse but conduct, which implies sexual contact, or even conduct of the mind such as dreams and fantasies.[43] The Rule also excludes evidence of the victim's "sexual predisposition."[44] The

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> The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by FED. R. CIV. P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to FED. R. CIV. P. 26(c) to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery .... Confidentiality orders should be presumptively granted as well.

FED. R. EVID. 412(c) advisory committee's notes (revised rule).

[38] *See, e.g.*, P.J. Herchenroeder v. Johns Hopkins Univ. Applied Physics Lab., 171 F.R.D. 179 (1997); Holt v. Welch Allyn, Inc., 1997 WL 210420 (N.D.N.Y. Apr. 15, 1997); Barta v. City and County of Honolulu, 169 F.R.D. 132 (1996); Stalnaker v. Kmart Corp., 1996 WL 397563 (D. Kan. July 11, 1996); Sanchez v. Zabihi, 166 F.R.D. 500, (D.N.M. 1996); Ramirez v. Nabil's Inc., 1995 WL 609415 (D. Kan. Oct. 5, 1995); Alberts v. Wickes Lumber Co., 1995 WL 117886 (N.D. Ill. Mar. 15, 1995); Burger v. Litton Indus., Inc., 1995 WL 476712 (S.D.N.Y. Aug. 10, 1995).

[39] *See supra* note 38.

[40] At trial, the defense bears the burden of meeting the notice requirements and demonstrating the admissibility of the evidence. FED. R. EVID. 412(c).

[41] FED. R. CIV. P. 26.

[42] FED. R. EVID. 412(a)(1).

[43] *Id.*

[44] FED. R. EVID. 412(a)(2).

term "sexual predisposition" provides even broader coverage in that it prohibits evidence that may obliquely imply a disposition on the part of the alleged victim regarding such matters as dress, speech, or lifestyle.[45] Rule 412 prohibits attempts to insinuate sexual activity of the victim through the use of coded references that invoke sexual stereotyping. Rule 412 bars general evidence of sexual background that may prove either that the victim was "promiscuous" for the inference that she was accustomed to this kind of conduct and has no reason to complain,[46] or that she was "virginal" and thus hypersensitive to such conduct.[47]

Rather than articulating particular exceptions to these general rules of inadmissibility, the civil application leaves this to the discretion of the court through the use of a balancing test.[48] Moreover, the civil provision's balancing test differs from the traditional "probative value" versus "unfair prejudice" balance reflected in Rule 403.[49] The burden of raising a Rule 403 objection rests with the opponent of the evidence. Rule 412 requires the proponent to demonstrate that the probative value of the proffered evidence substantially outweighs the prejudice.[50] In addition to the typical prejudice evaluation, Rule 412's balancing test adds another factor for a court to consider when determining admissibility—"the danger of harm to any victim."[51] The Advisory Committee notes offer some insight into what the rule means when it uses the term "harm," pointing to the rule's "objectives of shielding the alleged

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[45] *Id.*

[46] *See* Mitchell v. Hutchings, 116 F.R.D. 481, 484-85 (Utah 1987).

[47] *See* Jennings v. D.H.L. Airlines, 101 F.R.D. 549 (D.C. Ill. 1984) (rejecting the defendant's attempt to present evidence that the plaintiff was hypersensitive).

[48] FED. R. EVID. 412(b)(2).

[49] FED. R. EVID. 403.

[50] The procedural requirements of Rule 412 offer courts another avenue for coping with the lack of substantive guidance provided by the Rule. In *Sheffield v. Hilltop Sand and Gravel Co., Inc.*, the court candidly stated that it "need not reach the issue of whether the proffered evidence . . . is admissible under Rule 412. While such evidence might be relevant for the reasons advanced by the defendant, the Court chooses instead to sanction the defendant for its callous disregard of the procedural safeguards articulated in Rule 412(c)." 895 F. Supp. 105, 109 (E.D. Va. 1995).

Similarly, in *Socks-Brunot v. Hirschvogel Inc.*, the court said it "is convinced that the evidence described above should not have been admitted, even in the absence of objection by the plaintiff." 184 F.R.D. 113, 123 n.7 (S.D. Ohio 1999). In a footnote the court explained:

> Because Rule 412 imposes an affirmative obligation on the defendant to move, *in camera*, to admit the evidence covered by the Rule, any failure of plaintiff to object does not mean that the error is waived or that defendant had no obligation to comply. Further, plaintiff made a general and continuous objection to matters within the purview of Rule 412.

Id. at n.7.

[51] FED. R. EVID. 412(b)(2).

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victim from potential embarrassment and safeguarding the victim against stereotypical thinking."[52] The Advisory Committee reasoned that this aspect of the rule is grounded in the "strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim."[53]

Rule 412 requires the court to assess both the "danger of harm to any victim and of unfair prejudice to any party."[54] Assessing prejudice to a party is a fairly common task required of courts. Essentially, the court considers whether the evidence will sway a jury to make decisions based on improper inferences, will confuse the issues, or will result in a waste of time. Evidence of the victim's dress and conversations may cause the proceedings to digress in matters of little probative value. More significantly, such evidence may play into the stereotypical notions that Congress wanted to remove from the fact-finding process. Allowing evidence designed to invoke such stereotypes might lead to an improper inference or confusion of the issues.

The inclusion of "harm to [the] victim"[55] as a part of this balancing test provides the key to effective implementation of amended Rule 412. This additional requirement forces the court to focus on the impact of evidence on the victim. If the proponent of the evidence can demonstrate that the proposed evidence is otherwise admissible under the rules and its probative value substantially outweighs the harm to any victim and unfair prejudice to any party, then the evidence may be admissible. By requiring that the evidence be "otherwise admissible," the evidence must also meet the strictures of Rule 404, which precludes the use of evidence as inference of character to prove conduct in conformity with that character.[56]

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[52] FED. R. EVID. 412 advisory committee's notes. This is an extraordinary goal for the rules of evidence. To some degree, all assessments of relevance depend upon determinations that may be based on certain assumptions or stereotypes about how and why people behave. Here Congress has identified a particular stereotype for special treatment due to findings that such stereotypical thinking has hampered the ability of the justice system to rid society of crimes of violence against women and incidences of sexual harassment.

[53] *Id.* The Advisory Committee stated the following as the justification for the changes in Rule 412:

> The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

FED. R. EVID. 412 advisory committee's notes (revised rule).

[54] FED. R. EVID. 412(b)(2).

[55] *Id.*

[56] FED. R. EVID. 404(a).

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II. EVALUATING APPROPRIATE WEIGHT WHEN PROBATIVE VALUE IS WEIGHTED BY PRECONCEPTIONS

Congress may pass the rule, but judges apply it. The Supreme Court's resistance to the civil application of Rule 412 appears to have foreshadowed its limited application. Congress specifically designed the rule to affect the assessment of probative value. Through its adoption of Rule 412, Congress sought to use the rules of evidence to limit the effects of rape myths that permeate the fact-finding process. These myths include the idea that a victim must have precipitated the sexual misconduct; that women assume the risk of being targeted by engaging in certain behaviors; and the idea that it is the woman's job to be the gatekeeper of sex, and therefore are somehow responsible when things go awry. These ideas, widely shared by men and women who have traditional notions of gender roles, are sometimes relied on as a way of explaining why some women are victimized and others are not. Such evidence may be intuitively appealing, but only because it relies on stereotypes that are often unexamined and never identified as biased or false.[57] Although evidence of a victim's past sexual history meets the low relevance threshold of Rule 401,[58] Rule 412 is intended to combat these sexual myths and stereotypical cultural beliefs. For the Rule to work, judges must be willing

[57] David Bryden and Roger Park contend that evolving sexual mores do not justify the exclusion of prior sexual history evidence; rather, they merely establish a new benchmark for what constitutes normal sexual behavior. David Bryden & Roger Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 569 (1994). Bryden and Park argue that changing sexual mores do nothing to dispel the relevance logic that women who have a large number of casual sexual partners are statistically more likely to consent than are women of average sexual habits and that such evidence can be useful in determining whether rape has occurred. *Id.* They note that "it is misleading to assert that 'just because she consented to one man doesn't mean she consented to another.' This truism confuses relevance with conclusiveness.'" *Id.* (footnote omitted).

[58] Some commentators argue that such evidence meets the relevance threshold through the operation of fundamentally sexist beliefs that include the belief that sexual entreaties at work are acceptable. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 828-29 (1991). Estrich comments on the Supreme Court's conclusion that provocative dress is obviously relevant when determining welcomeness in sexual harassment cases:

> What is "sexually provocative" dress? Does the Court mean that women who wear short skirts intend to invite sexual advances? That tight sweaters may justly be pled as provocation for otherwise offensive conduct? That men are legally entitled to treat women whose clothes fit snugly with less respect than women whose clothes fit loosely? By accepting the notion of "sexually provocative" clothing, the Court effectively denies women the right to dress as they wish. Women who wear short skirts, take pride in their bodies, dress for themselves, go out directly from work, wear hand-me-down clothes, have gained weight lately, or even are trying to be attractive to their husbands and boyfriends are all, under the Court's view, presumed to welcome advances by any man on the job.

Id. at 828-29.

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and able to stand back from their own beliefs to determine if they are engaging in these stereotypical ideas in assigning the evidence probative value and in assessing prejudice and harm. Analytically, this means that judges must be willing to assess probative value without relying on traditional inferences about how past sexual activity or lifestyle indicates a present willingness or eagerness to engage in sexual activity.[59] In essence, Congress is trying to use a rule of evidence to tell judges that an alleged victim's prior sexual history, offered to show that she acted in conformity with that prior conduct, should be given low or no probative value. As discussed below, however, implementing Congress' plan has proved to be quite a challenge.[60]

The Rule has not foreclosed compelling arguments of relevance. Indeed, in a typical sexual harassment case, a defendant could use several theories to establish relevance without offending Rule 412. For example, evidence of behavior of the alleged victim directed toward the alleged perpetrator may be relevant to welcomeness.[61] Such evidence may also be relevant to an assessment of whether the environment was subjectively abusive,[62] or an assessment of the plaintiff's claim of injury.[63] Two issues that have raised particularly

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[59] Defendants have asserted a number of relevance theories in an effort to get around the forbidden logic. These theories have included assertions that such evidence is offered to give background to sexual comments made on the job; to show that the plaintiff concocted her story based on her own sexual practices; to show that if the events had occurred, the plaintiff would have confided in this lover; to show that her emotional distress was unreasonable; and to show that the plaintiff's emotional distress was caused by preexisting conditions. *See* Schultz & Woo, *supra* note 17, at A1.

[60] In an article in the sexual harassment litigation manual put out by ALI-ABA and the Practicing Law Institute, it was suggested that defendants "[t]ake thorough discovery of the plaintiff's past behavior, activities, problems, and emotional distress." Nancy L. Abell et al., *Recent Developments in Sexual Harassment Litigation, in* ROBERT B. FITZPATRICK, AMERICAN LAW INSTITUTE—AMERICAN BAR ASSOCIATION, SEXUAL HARASSMENT LITIGATION: PLAINTIFFS' AND DEFENDANTS' STRATEGIES 96 (1995). These authors identify the following relevance logic:

> a. Careful exploration of the plaintiff's past behavior and experience may show a pattern of misperceiving or exaggerating events, or of sending signals inviting sexual overtures.
>
> b. Plaintiffs who overstate the magnitude of emotional distress caused by the harassment in comparison to the magnitude caused by prior trauma may undermine their credibility.

Id.

[61] That is to say if the requirement of showing that the conduct was unwelcome survives the adoption of the Rule. *See infra* notes 64-99 and accompanying text.

[62] In *Harris v. Forklift Systems, Inc.*, the Supreme Court held that the plaintiff need not prove psychological injury in order to prove a sexually hostile work environment. 510 U.S. 17, 21 (1993). *Harris* suggests that the proper inquiry is both an assessment of whether a reasonable person would have been offended by the harassment and whether the plaintiff was subjectively injured by the workplace behavior. *Id.* at 23.

[63] In *Robinson v. Jacksonville Shipyards, Inc.*, the defendants sought discovery from the plaintiffs on a hypersensitivity theory; that is, that this plaintiff was hypersensitive to pornography as compared to the

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difficult balancing problems are: (1) evidence offered to show "welcomeness;" and (2) evidence offered to show that the damages, which the plaintiff claims were caused by the harassment, were, in fact, caused by other sexual events that involved the plaintiff. Although arguably having legitimate probative value, both categories of evidence open the door to the use of plaintiffs' sexual pasts for impermissible purposes. Distinguishing when such theories of relevance cross that line is difficult and needs further refinement.

A. *"Welcomeness"*

"The gravaman of any sexual harassment claim is that the alleged sexual advances are unwelcome."[64] The Equal Employment Opportunity Commission ("EEOC") argued for this standard out of a concern that sexual harassment claims not become "a tool by which one party to a consensual sexual relationship may punish the other."[65] Consequently, "welcomeness" has become a central defense to claims of sexual harassment. However, defendants frequently offer evidence of a plaintiff's sexual past to suggest that she welcomed the sexual approach or innuendo on a particular occasion. This type of evidence clearly falls within the scope of sexual behavior or predisposition as defined by Rule 412. Thus, this kind of evidence should be subject to Rule 412's balancing test.

Yet, courts have resisted precluding inquiry into sexual pasts when the relevance theory asserted is "welcomeness."[66] Such resistance was foreshadowed by the Supreme Court. Indeed, concern about circumscribing the use of certain types of evidence of welcomeness—evidence that the Supreme Court had previously deemed "obviously relevant"—was precisely what

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"reasonable woman." 118 F.R.D. 525, 530 (M.D. Fla. 1988). Consequently, they requested a mental examination to show that her subjective reactions were unreasonable. *Id.* The court denied the request, stating that the requirement of showing that the plaintiff was affected by the environment merely required a showing that she was "at least as affected as the reasonable person under like circumstances." *Id.* at 529. Thus, it made no difference to her claim if she suffered more intensely than others might have. *Robinson* was decided before the Civil Rights Act of 1991 in which plaintiffs were allowed to make claims for damages. The Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071. A damage claim asserting emotional distress would probably increase the probative value of prior sexual history evidence. Certainly, a claim that the sexual harassment affected the alleged victim's personal sex life would make this kind of evidence extremely probative. *See, e.g.*, Alberts v. Wickes Lumber Co., 1995 WL 117886 (N.D. Ill. 1995).

[64] Meritor Savings Bank v. Vinson, 477 U.S. 57, 68 (1986).

[65] Brief for the EEOC as Amicus Curiae in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), *quoted in* Ann C. Juliano, Note, *Did She Ask for It?: The Unwelcome Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558, 1575 (1992).

[66] *But see* Carr. v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007 (7th Cir. 1994) (suggesting that "welcome" sexual harassment is an oxymoron).

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prompted the Court to reject the civil application of Rule 412.[67] As Chief Justice Rehnquist put it in his letter of transmittal to Congress: "[s]ome Justices expressed concern that the proposed amendment [to extend Rule 412 to civil cases] might encroach on the rights of some defendants."[68] In particular, he noted that the change would impair a potential defense recognized in the Court's decisions in *Meritor Savings Bank v. Vinson*, "which held that evidence of an alleged victim's sexually provocative speech or dress may be relevant in workplace harassment cases."[69]

In 1974, *Meritor* plaintiff, Mechelle Vinson, met Sidney Taylor, a vice president of what is now Meritor Savings Bank, and inquired about a job.[70] Mr. Taylor, the branch manager, gave her an application and hired her the next day. Ms. Vinson started as a teller-trainee with Taylor as her supervisor. Over the four years in which she worked at the branch, she was consistently promoted until she was the assistant branch manager.[71] Then, Ms. Vinson was fired for allegedly taking too much sick leave.[72] Ms. Vinson notified her employer that she was forced to leave her job because of constant sexual harassment over the prior two years. She also filed an EEOC complaint and a lawsuit alleging sexual harassment. The defendants, Sydney Taylor and Meritor Savings Bank, denied that there had been any sexual activity between Mr. Taylor and Ms. Vinson. They claimed that there had been no quid pro quo harassment, and that there had been no notice of harassment to the bank, nor authorization of such harassment (thus absolving the bank of liability).[73]

During the eleven-day trial, Ms. Vinson described several specific incidents of sexual harassment, including being forced to have sex with Mr. Taylor at the bank during banking hours.[74] She estimated that these assaults occurred forty to fifty times, all against her will, and some of which resulted in physical injury.[75] Ms. Vinson testified that Taylor fondled her breasts and buttocks on the job, sometimes in the presence of coworkers.[76]

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[67] WRIGHT & GRAHAM, *supra* note 15, § 5381.1.
[68] LETTER FROM CHIEF JUSTICE, *supra* note 23.
[69] *Id.*
[70] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 59 (1986).
[71] *Id.* at 59-60.
[72] *Id.* at 60.
[73] *Id.* at 61, 70.
[74] *Id.* at 60.
[75] *Id.*
[76] She alleged other acts as well. *See id.*

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The defendants introduced, at trial, numerous pieces of evidence concerning Ms. Vinson's dress and personal behavior at work. This evidence included testimony by a female coworker that Ms. Vinson wore clothes sufficiently revealing to provoke customer comments regarding the way she looked.[77] Elicited testimony indicated that Ms. Vinson was "very open about her sexuality."[78] One example of this openness included a reported conversation in which Ms. Vinson described a doctor's visit to remove her IUD.[79] Another piece of evidence included testimony that she told coworkers about a recurring fantasy in which her deceased grandfather came back as a younger man and engaged in sex with Ms. Vinson for an extended time.[80] The Court of Appeals held the trial court's admission of this evidence was in error.[81] However, the Supreme Court overruled that decision, holding the evidence admissible as relevant to "welcomeness."[82]

Many commentators have criticized the *Meritor* position that a plaintiff's dress, speech, and lifestyle should be taken into consideration when evaluating whether workplace sexual harassment was "welcome."[83] Like evidence of consent in criminal prosecutions for rape, this evidence shifts the focus away from the offender's actions and firmly places it on the victim's behavior and character. The concept of "welcomeness" suggests that no matter how egregious the alleged perpetrator's behavior is, the behavior can be excused if he can suggest that the woman might have been receptive to it.[84]

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[77] Trial Transcript at 14, *Meritor* (No. 84-1979) (Jan. 30, 1980).

[78] *Id.* at 38, 43.

[79] *Id.* at 12.

[80] *Id.* at 23, 43, 61. The defendants offered more evidence along these lines such as testimony that Ms. Vinson had said that she had a sexual association with drinking milk and that she desired another woman at the branch to have intercourse with her. *Id.* at 11, 80-81.

[81] Vinson v. Taylor, 753 F.2d 141, 146 n.36 (D.C. Cir. 1985.)

[82] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68-69 (1986).

[83] *See, e.g.*, Estrich, *supra* note 58, at 826-34; Susan D. Ross, *Proving Sexual Harassment: The Hurdles*, 65 S. CAL. L. REV. 1451 (1992); Joan S. Weiner, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621, 652-53 (1997); Christina A. Bull, Comment, *The Implications of Admitting Evidence of a Sexual Harassment Plaintiff's Speech and Dress in the Aftermath of* Meritor Savings Bank v. Vinson, 41 U.C.L.A. L. REV. 117, 149-51 (1993).

[84] Susan Estrich, in her 1991 article, *Sex at Work*, noted that in both quid pro quo and hostile environment cases, additional requirements exist to prove that the behavior was harassment, thus rendering the welcomeness requirement superfluous. Estrich, *supra* note 58, at 831. In a quid pro quo suit, it makes no sense to say that conditioning a job benefit upon submission to sexual acts would ever be welcome. Can there ever be true consent so as to make the case unactionable when a supervisor says sleep with me or you are fired? The analysis becomes more complicated when dealing with a claim of hostile environment. The elements of a hostile workplace claim require a showing that the sex-based harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment. Courts have consistently held that this must first be evaluated from an objective viewpoint. If the environment is not objectively

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The challenge for courts after the 1994 amendment is to determine the extent to which Rule 412 altered *Meritor's* approval of evidence of "welcomeness." One reading of Congress' action, in the face of the Supreme Court's concern, is that by legislative fiat "welcomeness" is no longer an issue in sexual harassment cases.[85] Alternatively, even if revised Rule 412 does not completely rule out the defense of welcomeness, the rule arguably creates new limits on the admissibility of evidence of an alleged victim's past sexual behavior or predisposition to show welcomeness. Revised Rule 412 now requires courts to measure the probative value of the evidence against the harm it might inflict upon the victim and any possible unfair prejudice to a party, and to exclude the evidence if the probative value does not substantially outweigh the other considerations.[86] Thus, evidence offered to prove welcomeness is no

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hostile, then there is not a cause of action. If the objective prong is met, then the plaintiff must show that she experienced it as hostile. As Professor Estrich notes:

> Thus the welcomeness inquiry is either utterly gratuitous or gratuitously punitive. It is gratuitous when the environment is not proven objectively to be hostile, because the unwelcome environment that is not objectively hostile does not give rise to liability in any event. It is gratuitously punitive if the environment is found objectively hostile, for in that case the employer can nonetheless escape the burden of addressing the issue, by portraying this particular woman as so base as to be unworthy of respect or decency, and by arguing that she thus welcomed, through her conduct, an environment which a reasonable woman would have perceived as hostile.

Id. at 833 (internal quotes omitted).

[85] For a detailed discussion of the possible changes that the adoption of amended Rule 412 may have had on the defense of welcomeness, see Jacqueline H. Sloan, *Extending Rape Shield Protection to Sexual Harassment Actions: New Federal Rule of Evidence 412 Undermines* Meritor Savings Bank v. Vinson, 25 SW. U. L. REV. 363, 389-401 (1996). *See also* WRIGHT & GRAHAM, *supra* note 15, § 5385.1 (Supp. 2001). Wright and Graham state:

> The [*Vinson*] opinion conceded that consent is not a defense but argues that the evidence is relevant to the ultimate fact of whether or not particular sexual advances from the plaintiff's boss were unwelcome to her. The Court does not state the major premise that supports that relevance logic. That logic has not seemed obvious to some commentators. If the enactment of Rule 412 does not explicitly reject that logic, at least it requires courts to enunciate the logic more carefully and to consider the prejudice of stereotypical thinking when engaging in the balancing mandated by Revised Rule 412(b)(2).

Id. (internal footnotes and quotations omitted).

[86] Prior to the adoption of the Rule, such evidence—provided it was not deemed inadmissible as pure character evidence under Rule 404—was merely evaluated under the traditional Rule 403 balancing test, which differs substantially from amended Rule 412. Rule 403 placed the burden on the opponent of the evidence to object, while Rule 412 places that burden squarely on the proponent. Rule 403's test required the opponent to show that the prejudice outweighed the probative value, thus creating a presumption of admissibility. Rule 412's balancing test requires that the proponent show that the probative value substantially outweighs the prejudice, thus creating a presumption against admissibility. Finally, Rule 403 only required an evaluation of unfair prejudice, while Rule 412 now requires the court to assess the potential for harm and embarrassment to

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longer "obviously relevant."[87] The requirement that courts assess the probative value, the potential harm to the victim, and the prejudice to any party identified before the evidence is admitted, necessitates the courts to engage in a process of weighing evidence that they had not been previously required to do.

Nevertheless, some courts continue to admit sexual character evidence without reference to Rule 412. For example, in both *Scusa v. Nestle U.S.A. Co., Inc.* and *Hocevar v. Purdue Frederick Co.*, the Eighth Circuit found that the plaintiff's use of sexually inflammatory words in the workplace precluded her claim of unwelcomeness without any discussion of the applicability of Rule 412.[88]

Courts applying Rule 412 come to very different conclusions about admissibility even when faced with remarkably similar evidence in cases dealing with similar claims. In *Rodriguez-Hernandez v. Miranda-Velez*, the trial court considered evidence offered by the defendant that the plaintiff was sexually insatiable, had engaged in multiple affairs with married men, was a lesbian, and was suffering from a sexually transmitted disease.[89] The defendants claimed that the reason they fired the plaintiff was because she had an affair with a married man which distracted her from her work.[90] The First Circuit affirmed the district court's decision to exclude the evidence concerning the plaintiff's moral character or promiscuity but to allow the defendants to introduce evidence directly related to their theory that the plaintiff's relationship distracted her from work as well as any evidence of her allegedly flirtatious behavior toward Miranda-Velez.[91] In *Barta v. City and County of Honolulu*,[92] the defendants sought to depose the plaintiff's roommate and coworker about their personal knowledge regarding rumors of the sexual conversations and activities of the plaintiff.[93] The plaintiff had sued for sexual harassment, assault, battery, false imprisonment, infliction of

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the victim, thus adding weight to the possibility of inadmissibility. *Compare* FED. R. EVID. 403, *with* FED. R. EVID. 412.

[87] *Meritor*, 477 U.S. at 69.

[88] Hocevar v. Purdue Frederick Company, 223 F.3d 721, 736 (8th Cir. 2000); Scusa v. Nestle U.S.A. Company Inc., 181 F.3d 958, 966 (8th Cir. 1999). By contrast, in *Socks-Brunot v. Hirschvogel Inc.*, the court noted that evidence indicating the use of profanity by the plaintiff elicited from virtually every witness presented violated Rule 412 even though the plaintiff failed to object. 184 F.R.D. 113, 122-23 (S.D. Ohio 1999).

[89] 132 F.3d 848, 855-856 (1st Cir. 1998).

[90] *Id.* at 856.

[91] *Id.*

[92] 169 F.R.D. 132 (D. Haw. 1996).

[93] *Id.* at 134.

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emotional distress, retaliation, and racial and sexual employment discrimination.[94] The court found that Rule 412 should inform the discovery process.[95] The court then proceeded to limit the discovery to evidence of sexual conduct of the plaintiff on-duty, at the workplace, and with the named defendants, precluding all evidence of her sexual activity off-duty, outside of the workplace with nondefendants.[96] This ruling, although reasonable on its face, still opens the door to a great deal of evidence, some of which was not relevant to any of her claims or legitimate defenses.

The breadth of this type of ruling is demonstrated in *Howard v. Historic Tours of America,*[97] where the court, like in *Barta*, faced a discovery dispute regarding evidence of the plaintiff's past sexual activity in a sexual harassment claim.[98] The defendants sought to discover the plaintiffs' sexual or personal relationships with coworkers other than the defendants on the theory that this was relevant to welcomeness.[99] The *Howard* court, however, rejected this inquiry as a violation of Rule 412, noting that such discovery would be relevant only if the defendants knew of the affairs.[100] But even if there were such previous knowledge, the court still dismissed the relevance of this type of discovery:

> Such proof has probative force only if the proposition that their knowledge that she engaged in such behavior made it more reasonable for them to conclude that she would welcome their sexual advances becomes easier to accept than it would be without the proof . . . . To so conclude one would have to say that knowledge of a woman's engaging in a consensual relationship with a co-worker makes reasonable the perception that she welcomed other sexual advances at her place of employment. But, that perception would be reasonable only if it fairly could be said that a man who learns of a woman's affair is justified in believing that she will be as willing to have a sexual relationship with him as she was to have one with her lover. While such a perception might have been justified, in men's minds, in Victorian England and Wharton's "Age of Innocence" in America, when men discriminated between the women they married

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[94] *Id.* at 133.
[95] *Id.* at 135.
[96] *Id.* at 135-36.
[97] 177 F.R.D. 48 (D.D.C. 1997).
[98] *Id.* at 49-50.
[99] *Id.* at 51.
[100] *Id.*

> and the women they slept with, it has nothing to do with America in 1997.[101]

The court then concluded:

> Since a man cannot seriously contend in 1997 that any woman who has a sexual relationship with her co-worker is morally degraded, justifying his conclusion that she will not resist him, he is reduced to arguing that because a woman took one co-worker as a lover he is justified in his belief that she will accept him and welcome his sexual advances. That, in all but his imagination, is non sequitur.[102]

B. Prior Sexual History Offered To Reduce or Negate Damages

The 1991 Civil Rights Act established a plaintiff's right to sue for damages in sexual harassment claims.[103] In addition to the front and back pay claims that plaintiffs traditionally included in their Title VII suits, the 1991 Civil Rights Act allows plaintiffs to request damages for the distress that the perpetrator's behavior caused them.[104] More often than not, these damages appear in the form of emotional distress claims.[105] Adding claims of emotional distress to a sexual harassment suit opens up new grounds of relevancy for evidence of the plaintiff's sexual history. For example, defendants frequently offer plaintiff's psychiatric and sexual history to challenge whether the alleged acts of the harasser caused the injury, or to try to suggest that the plaintiff was already emotionally disturbed and therefore should not be compensated.

Courts often experience difficulty in determining when evidence of a plaintiff's sexual history is relevant in the context of emotional distress claims. For example, in a tort action for wrongful transmission of a sexually

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[101] *Id.* at 52.

[102] *Id.*

[103] 42 U.S.C. § 1981a (1994).

[104] 42 U.S.C. § 1981a(b)(3). The House of Representatives Committee on Education and Labor recognized that "[v]ictims of intentional discrimination often endure terrible humiliation, pain and suffering, psychological harm and related medical problems which in turn cause victims of discrimination to suffer out-of-pocket medical expenses and other economic losses as a result of the discrimination." H.R. REP. NO. 102-40(I), at 66 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 604. *See also* Faragher v. City of Boca Raton, 524 U.S. 775, 804 n.4 (1998) ("With the amendments enacted by the Civil Rights Act of 1991, Congress expanded the monetary relief available under Title VII to include compensatory and punitive damages . . . .").

[105] *See, e.g.*, Daggitt v. United Food and Commercial Workers Int'l Union, Local 304(A), 245 F.3d 981 (8th Cir. 2001); Cadena v. Pacesetter Corp., 224 F.3d 1203 (10th Cir. 2000); Bailey v. Runyon, 220 F.3d 879 (8th Cir. 2000); BARBARA LINDEMAN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 351-52 (1992); Patricia Crull, *The Impact of Sexual Harassment on the Job: A Profile of the Experience of 92 Women*, *in* 4 WORKING WOMEN'S INSTITUTE RESEARCH SERIES REPORT No. 3 (1979).

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transmitted disease, the trial court allowed testimony about the plaintiff's breast augmentation surgery, her past sexual activity, and her employment as a nude dancer.[106] On appeal, the Eleventh Circuit held that a relevance objection did not preserve the objection to the breast augmentation.[107] The court further held that the prior sexual activity was directly relevant to causation for transmission of genital herpes,[108] and that evidence of her nude dancing both before and after contracting the disease was probative of her claim that she "felt dirty."[109]

The courts' rulings on these three pieces of evidence illustrate courts' confusion regarding when Rule 412 should bar admission. The ruling on the prior sexual activity made perfect sense. This evidence was directly relevant to causation of a sexually transmitted disease. Therefore, the evidence had high probative value with little unfair prejudice or harm to the victim, provided causation is at issue. However, the court fails to address the most obvious violation of amended Rule 412—evidence of the breast augmentation. Faced with a simple relevance objection, it is still difficult to imagine what relevance logic[110] the court employed to determine this evidence admissible other than the impermissible invitation to a jury to write the plaintiff off as promiscuous.[111] Defendants argued that the nude dancing evidence negated her claim that she "felt dirty" and therefore was relevant to that issue.[112] Certainly, the fact that it is offered along with the breast augmentation testimony, which would clearly violate Rule 412, should cause the court to analyze its purported relevance carefully.

Congress intended Rule 412 to keep the factfinder from knowing that the plaintiff engaged in a profession that many people connect with sexual promiscuity without having any actual evidence of promiscuity.[113] Despite legislative intent, the Eleventh Circuit's analysis did not treat the nude dancing as offensive. The defendant's relevance logic went something like this:

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[106] Judd v. Rodman, 105 F.3d 1339, 1341-42 (11th Cir. 1997).

[107] *Id.* at 1342.

[108] *Id.* at 1343.

[109] *Id.* (internal quotes omitted).

[110] *See supra* note 58.

[111] It is unclear what the court meant when it determined that a relevance objection did not preserve this issue for appeal. Rule 412 is a relevance rule. Moreover, other courts have been far more aggressive in dealing with Rule 412 violations. *See supra* note 50.

[112] *Judd*, 105 F.3d at 1343.

[113] The Advisory Committee's notes state that "this amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the fact finder." FED. R. EVID. 412 advisory committee's notes.

because the plaintiff can continue in her profession as a nude dancer, it is more likely that she does not feel dirty than without the evidence. Perhaps the court has engaged in more offensive logic: because Ms. Judd engages in nude dancing, she has a less credible claim to "feeling dirty" than without the evidence. Both kinds of relevance logic rely on the now impermissible inference that one can use lifestyle evidence to extrapolate sexual behavior and belief. If we truly neutralize the sexually coded profession of nude dancer by substituting "bank teller," for example, the court's decision makes no sense. Her employment as a bank teller before and after the event would offer us no insight into whether her claim that she "felt dirty" was genuine.

The *Judd* case demonstrates a significant loophole in the Rule 412 shield, as well as the judiciary's apparent discomfort with the strictures of revised Rule 412. Once a plaintiff proves sexual harassment, then damages are determined by assessing the injury of the individual victim.[114] The Civil Rights Act of 1991 authorizes a claim for emotional distress.[115] The bulk of the money damages for these cases are likely claims of compensation for the mental distress that such sexual misconduct caused.[116] Emotional distress claims provide a "legitimate" ground for defendants to seek information about the plaintiff's sexual history arguing that her sexual history may have caused her current distress rather than the sexually harassing work conditions.[117] New case law generated after the implementation of amended Rule 412 suggests that if the plaintiff asserts a claim for mental or emotional damages, then her sexual history and predisposition are more likely to be discoverable and perhaps even admissible at trial.[118]

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[114] *See* Bottomly v. Leucadia Nat'l, 163 F.R.D. 617, 620 (D. Utah 1995).

[115] 42 U.S.C. § 1981a (1994).

[116] *See* Ben Bursten, *Psychiatric Injury in Women's Workplaces*, 14 BULL. AM. ACAD. OF PSYCHIATRY & L. 245, 247 (1986); Peggy Crull, *Stress Effects of Sexual Harassment on the Job: Implications for Counseling*, 52 AM. J. ORTHOPSYCHIATRY 539, 541 (1982).

[117] The *Wall Street Journal* describes a sex discrimination case brought by a Pulitzer Prize winning journalist against the newspaper at which she worked. Schultz & Woo, *supra* note 17, at A1. The Journal asserted that she was not paid commensurate with the male reporters and was denied a promotion because she complained of her treatment. *Id.* She also asserted damages for emotional distress. *Id.* The defendants discovered hundreds of pages about the plaintiff's sexual and emotional life, including her gynecological records from college. *Id.* They asked a free-lance photographer whom she had dated how often they had had sex. *Id.* They asked her therapists about her early sexual experiences, her sexual practices, and whether she was promiscuous. *Id.* She was asked in deposition whether she hated men and whether she had a "victim mentality" because she had been raped as a teenager. *Id.*

[118] *See, e.g.*, Alberts v. Wickes Lumber Co., 1995 WL 117886 (N.D. Ill. Mar. 15, 1995); Ramirez v. Nabil's, Inc., 1995 WL 609415, *1 (D. Kan. Oct. 5, 1995); *Bottomly*, 163 F.R.D. at 620-21.

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When exercising their discretion in the use of the Rule 412 balancing test, courts weigh unfair prejudice and potential harm to the victim. The Advisory Committee notes state that the reason for including "harm to the victim" is to "require the court to consider the legitimate privacy interests of the alleged victim."[119] Yet, courts have taken a very limited view of privacy interests when balancing the intrusion against the probative value of sexual history in the context of damage claims. In essence, courts suggest that by bringing the sexual harassment claim, the plaintiff opened the door to this kind of evidence and therefore it is not a *legitimate* privacy interest.[120] If a claim for emotional damages can open the door to this kind of evidence, then the old disincentives to bring the cases reemerge. The stereotypes that make juries blame the victim will once again infect the fact-finding process. Thus, courts give the plaintiff a Hobson's choice: if she wants to ensure that her sexual past and lifestyle would not be presentable at trial, she will have to forego a large portion of her claim for damages.[121]

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[119] FED. R. EVID. 412(b)(4) advisory committee's notes.

[120] *See, e.g.*, Gretzinger v. Univ. of Hawaii, 1198 WL 403357 (9th Cir. 1998) (upholding the trial court's admission of evidence of plaintiff's sexual orientation and past affair); Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620 (D. Kan. 1999) (requiring plaintiff to submit to psychological examination inquiring into her sexual history); Ratts v. Bd. of County Comm'rs, 189 F.R.D. 448 (D. Kan. 1999) (allowing deposition of plaintiff regarding sexual history).

[121] Even when a plaintiff attempts to dismiss claims for emotional distress in order to preclude this type of evidence, she may be thwarted. In *McCleland v. Montgomery Ward & Co., Inc.*, the plaintiffs sued for damages caused by a sexually harassing work environment. 1995 WL 571324, *1 (N.D. Ill. Sept. 25, 1995). The defendants sought to introduce evidence of the plaintiffs' childhood sexual abuse. *Id.* The plaintiffs asserted that this evidence was no longer relevant because they had dismissed the claims of damages for aggravation of their preexisting mental or psychological conditions or medical bills incurred as a result of their hospitalization. *Id.* The court found that such evidence was still relevant to their claim for damages for humiliation, embarrassment, and emotional and physical suffering. *Id.* at *2. Ironically, after determining that the evidence showing the plaintiffs' prior sexual abuse was more probative than prejudicial, the *McLeland* court refused to admit plaintiffs' evidence that the defendant had sexually harassed another employee, finding such evidence more prejudicial than probative. *Id.* at *3.

The *Wall Street Journal* also reported the case of Margaret Jensvold who made the decision not to assert emotional distress when she sued the National Institute of Mental Health alleging sex discrimination. Schultz & Woo, *supra* note 17, at A1. Nevertheless, the court allowed the defense to call her psychiatrist to testify about her past problems with men. *Id.* One of her witnesses was impeached by evidence that she was a member of a lesbian organization, while another witness was asked about *her* relationships with men, her past divorce, and the name and address of her therapist. *Id.* A pure sex discrimination claim does not constitute sexual misconduct. Therefore, Rule 412 would not stand as a bar to this kind of evidence in a pure sex discrimination case.

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III. A PROPOSED RULE

The problems enumerated above in ensuring a fair and consistent application of Rule 412 are the result of the Rule's reliance on judicial discretion. Courts interpret and apply law through the lens of their own experiences. Given nothing else to work with, it is likely that their lens will be as tainted by cultural biases as any other. If, instead, the civil rule mirrored the criminal rule—which outlines specific times in which evidence of a victim's sexual past could be introduced at trial—we might avoid much of the confusion that Rule 412's civil provision has engendered. Such a rule might look like the following:

> Retain 412(a)'s language indicating that such evidence is generally inadmissible. Strike Rule 412(b)(2) and replace with the following:
>
> (2) In a civil case, the following evidence is admissible, if otherwise admissible under these rules:
>
> (A) evidence of specific instances of sexual behavior by the alleged victim with respect to the alleged perpetrator; and
>
> (B) evidence of specific instances of sexual behavior by the alleged victim after an in camera showing by the proponent that such sexual conduct was the actual cause of the severe and emotionally devastating harm alleged in plaintiff's complaint.

Subsection A is designed to indicate what evidence would be admissible to prove the defense of "welcomeness." Currently, the potency of Rule 412 relies on judicial discretion. As we have seen, however, what one court deems a non sequitur, another finds a legitimate line of inquiry—the probative value of which substantially outweighs its prejudicial effect. Admissibility depends on a balancing test administered by judges. Yet, the Supreme Court has already expressed its view that Rule 412 should not extend to civil cases.[122] Congress ignored this judicial input and adopted the Rule. Nonetheless, judges are not immune from the very views that prompted Congress to amend Rule 412 in the first place.[123] A judge may deem a piece of evidence highly probative in that it

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[122] *See supra* note 23.

[123] Wright and Graham criticize the extension of the Rule. They offer the following comparison between its civil and criminal application when applying the sexual "predisposition" portion of the rule:

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tends to confirm traditional notions about how women behave and therefore is, according to that logic, a good predictor of the alleged victim's behavior on a specific occasion.[124] In *Meritor*, the Supreme Court glibly described the evidence of Vinson's dress and sexual fantasies as "obviously relevant."[125] Once that relevance logic is adopted, the probative value of such evidence will always be regarded as considerable, and the harm to the victim will always be minimized. On the other hand, if the court follows the congressional mandate that assigning such probative value is impermissible, despite its intuitive appeal, then the harm to the victim will likely be judged significant. In either event, judicial discretion will be entitled to great deference upon appeal. Currently, the effectiveness of Rule 412 in the civil setting depends mostly upon the judge assigned the case.[126] This means that alleged victims of sexual misconduct will receive less protection than Congress intended.[127] Thus, subsection A of this proposed rule attempts to clarify the circumstances under which such evidence may have compelling relevance. It adopts the approach of many courts that reject evidence of a woman's voluntary sexual activity in the workplace as indicating welcomeness to the defendant's particular attentions.[128] Rather, the evidence will only be admissible if the defendant can show that such sexual behavior was directed toward him.

> It is preposterous to suppose that a person who wears a tank top and no brassiere is asking to be raped and exclusion of such evidence in criminal cases has been advocated in this Treatise. But transfer this definition to a civil action for sexual harassment. Is it unreasonable for the defendant to suppose that a woman who dresses to expose her breasts or a man who wears jeans so tight you can count the pimples on his buttocks is inviting others to look at these portions of their anatomy even though others, including the plaintiff, consider such a gaze sexual harassment?

WRIGHT & GRAHAM, *supra* note 15, § 5382.1 (internal quotations and footnotes omitted). This comparison fails to recognize what constitutes sexual harassment and minimizes the plaintiff's burden of proof.

[124] Stereotypical reactions tend to operate without any consideration of the power imbalance that explains some behavior. Instead of analyzing reactions in context, the fact finder may slot them away in a category that fits their preordained expectations of how women behave. *See, e.g.*, Reichman v. Bureau of Affirmative Action, 536 F. Supp. 1149, 1177 (M.D. Pa. 1982).

[125] 477 U.S. 57, 69 (1986).

[126] Wright and Graham note:

> The expansion of the Rule to civil cases is less an expansion of protection to the victim than it is an expansion of the discretion of the trial judge. This might be fine for those, whether plaintiffs or defendants, who expect to be the beneficiaries of the trial judge's evidentiary largesse. But those who are at the moment on the politically less powerful side of the equation may find the protection of the Rule somewhat illusory.

WRIGHT & GRAHAM, *supra* note 15, § 5382.1 (internal footnotes omitted).

[127] *See* Bull, *supra* note 83, at 147-49 (demonstrating a judicial bias against plaintiffs).

[128] *See, e.g.*, Howard v. Historic Tours, 177 F.R.D. 48, 52 ("There is such a gross disproportion between their voluntary sexual behavior and what they claim to have been subjected to that no reasonable jury could

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Subsection B recognizes that sexual conduct by the plaintiff may be relevant to determine if the defendant actually caused the injury that plaintiff claims. Nevertheless, a claim for psychological damages should not eviscerate Rule 412's protection in sexual misconduct cases. Courts that take this tactic may be overvaluing the past sexual history in assessing damage causation. The plaintiff need not prove that the harasser's conduct is the sole cause of her injury.[129] Rather she need only show that such damage was substantially caused by defendant's conduct. This means that if the plaintiff can show that her present and relevant condition was substantially caused by the defendant's conduct, then the probative value of the defendant's excess information about the plaintiff's sexual history or predisposition becomes considerably less relevant.[130] The proposed rule attempts to provide guidance regarding when this sexual conduct evidence would likely be offered for its relevance rather than its harassment value. The proposed rule places the burden on the proponent of the evidence to show that the evidence it seeks to offer refers to actual causation. It is appropriate to place that burden on the proponent of the evidence because Rule 412 creates a general presumption against the admissibility of sexual conduct or predisposition evidence.

This portion of the rule is likely to be the most difficult because rebutting a claim of emotional distress damages has been the primary probative value that defendants' assert in the current balancing test. Nevertheless, some support for requiring a more specific showing can be found in other areas dealing with impositions on alleged victims.[131] In cases in which a defendant seeks to compel a plaintiff to submit to an independent medical exam pursuant to Rule 35(a), courts have required the defendant to show good cause for such an exam.[132] In *Fox v. Gates Corp.*, the District Court of Colorado held that when

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possibly find that they welcomed what they were subjected to, unless one is ready to concede the illogical—that a woman who engages in voluntary sexual behavior with one co-worker welcomes the sexual behavior of other co-workers no matter how reprehensible and gross it is.").

[129] Proof of emotional distress damages is often difficult. A plaintiff must suffer harm from emotional distress, and the harm must be manifested by symptoms and often confirmed by an expert's testimony. However, the distress must also be reasonably foreseeable, meaning the plaintiff must prove that the defendant knew or should have known of the special factors affecting the plaintiff and his response to the circumstances of the case. *See* Pichowicz v. Hoyt, 2000 U.S. Dist. LEXIS 2221, at *6 (D.N.H. Feb. 11, 2000). Thus the reasonability of the distress is to be determined by the fact finder and the plaintiff bears the burden of persuasion. *Id.* at 6.

[130] Bottomly v. Leucadia Nat'l, 163 F.R.D. 617, 620 (D. Utah 1995).

[131] *See* Beth S. Frank, *Protecting the Privacy of Sexual Harassment Plaintiffs: The Psychotherapist-Patient Privilege and Recovery of Emotional Distress Damages Under the Civil Rights Act of 1991*, 79 WASH. U. L.Q. 639 (2001).

[132] FED. R. CIV. P. 35(a).

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a plaintiff makes a claim for emotional distress damages, the defendant must show good cause and give notice to the plaintiff before it would grant defendant's request for an independent psychiatric evaluation.[133] In granting such a motion, the court must determine if the defendant has made an affirmative showing that the plaintiff placed her mental condition in controversy.[134] Factors courts use in deciding whether to require a plaintiff to submit to an independent medical exam include: plaintiff asserts a specific claim for negligent or intentional emotional distress damages; plaintiff alleges a specific mental or psychiatric disorder; plaintiff claims unusually severe emotional distress; plaintiff offers expert testimony in support of her emotional distress claim; and plaintiff concedes her mental condition is in controversy.[135] The court in *Fox* denied the defendant's motion because the plaintiff made only a "garden variety" claim for emotional damages resulting from the defendant's refusal to hire her.[136] Moreover, the plaintiff said that she did not plan to introduce expert testimony in support of her claim. This, coupled with the fact that the plaintiff did not meet any of the above factors, led the court to deny the defendant's motion to compel the plaintiff to submit to an independent medical exam.[137] These factors, used to interpret Rule 35(a), give support for establishing a similar burden in the 412 context.

CONCLUSION

Rules of evidence designed to correct societal views that are thought to overvalue certain kinds of evidence should not be framed so that the judge must assess probative value in making the determination. We should not assume that the judiciary is free of the cultural preconceptions and biases that motivate the rule. The circularity of Rule 412's civil application has created inconsistent and unpredictable case law. The resulting inability to predict what evidence will be admissible has exacerbated the problem of discovery abuse. Courts are unable to predict what will and will not be admissible because a balancing test is inherently fact-dependent. Thus, they understandably err on the side of requiring disclosure. It makes sense to draw upon the twenty-five years of experience enjoyed by the criminal version of Rule 412 and craft a rule that delineates the general prohibition against such evidence but articulates

133 179 F.R.D. 303, 307 (D. Co. 1988).
134 *Id.*
135 *Id.*
136 *Id.* at 307-08.
137 *Id.* at 308.

the particular exceptions. As a result, one could anticipate that the evidence would be used not as a tool for dissuading victims of sexual misconduct but because such evidence is necessary for a fair consideration of the claims.

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