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Protecting the Victim: Rape and Sexual Harassment Shields Under Maine and Federal Law

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PROTECTING THE VICTIM: RAPE AND SEXUAL HARASSMENT SHIELDS UNDER MAINE AND FEDERAL LAW

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> It would be a hard rule that would compel a plaintiff to defend every act of his life, as the price of justice.[1]

I. INTRODUCTION

The treatment of rape victims by the legal system is notorious. Under the common law rules of evidence, this treatment included the airing of the victim's sexual history at trial.[2] Is evidence of the sexual history of a rape victim relevant? Is such evidence relevant to a supposed character trait of unchastity, a propensity defined as routine consent to sexual relations?[3] Is the victim's sexual history a general reflection of her character for truthfulness, and thus her credibility as a witness? The common law has historically answered all these questions in the strong affirmative.[4] Victims of sexual crimes were forced to answer intrusive and intensely embarrassing questions, often put forth by the defendant in a manner meant to demean and humiliate. Evidence of the victim's sexual history has been deemed to be relevant to her credibility and to a supposed character trait of unchastity, which was in turn relevant to whether or not she consented to the sexual act in question.[5] Furthermore, defendants utilized the evidence to humiliate and embarrass the victim, contorting the focus of the trial into a judgment upon her sexual history, thereby prejudicing the jury.[6]

The legal system has not been the only agent of the rape victim's mistreatment. Throughout society, the rape victim has been disbelieved, mistrusted, and shamed, often by those with authority who

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1. Gore v. Curtis, 81 Me. 403, 405, 17 A. 314, 315 (1889).

2. *See* Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765-66 (1986).

3. *See id.*

4. *See id.*

5. *See id.* at 787.

6. *See generally* Carol DiBattiste, *Federal and Military Rape Shield Rules: Are They Serving Their Purpose?*, 37 NAVAL L. REV. 123, 127-29 (1980); Katherine Catton, *Evidence Regarding the Prior Sexual History of an Alleged Rape Victim—Its Effect on the Perceived Guilt of the Accused*, 33 U. TORONTO FAC. L. REV. 165, 168-69 (1975); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 12-15 (1977). For purposes of simplicity, the Author will refer to victims as female, while recognizing that victims of sexual crimes can also be male. The complainant will be referred to as the "victim" and the crime charged as an "assault," rather than the "alleged victim" and the "alleged assault." The term "sexual crimes" is meant to cover only the crimes of rape and sexual assault, and lesser related offenses.

should have aided the victim, specifically, police, doctors, and lawyers. Victims have been deterred from reporting

> because of the shame of public exposure, because of that complex double standard that makes a female feel culpable, even responsible, for any act of sexual aggression committed against her . . . and because women have been presented with sufficient evidence to come to the realistic conclusion that their accounts are received with a harsh cynicism that forms the first line of male defense.[7]

Abuses of the victim, both inside and outside of the courtroom, led to a nationwide rape law reform movement in the late 1960s and the 1970s.[8] One important result of this reform movement was the enactment of Federal Rule of Evidence 412,[9] often termed the "rape shield" rule, which limited the admission of the victim's sexual history. Today, forty-nine states have rape shield rules.[10] The rules limit the forms and purposes of admission of evidence of the victim's sexual past.[11] The justifications for the rape shield rules are varied, and include the protection of the victim's right to privacy, the prevention of the misuse and exploitation of the victim's sexual history, and the exclusion of irrelevant evidence. The last of these justifications, the exclusion of irrelevant evidence, probably the most easily defensible and the most compelling, has rarely been asserted; rape shield rules are most often advanced as policy measures.

The rape shield rules have been repeatedly challenged as unconstitutional both on their faces and as applied.[12] The resolution of

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7. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 387 (1975).

8. *See* Galvin, *supra* note 2, at 791.

9. Privacy Protection for Rape Victims Act, Pub. L. No. 95-540, 92 Stat. 2046 (1978) (codified as amended 1988) [hereinafter Privacy Protection for Rape Victims Act].

10. *See* Diane Obritsch, *Utah Adopts Rule of Evidence 412: Prohibiting Public Exposure of a Victim's Sexual Past*, 21 J. CONTEMP. L. 96, 96 (1995).

11. *See* Galvin, *supra* note 2, at 773-76.

12. See *infra* Part III, Section D for a discussion of various cases. *See* United States v. Begay, 937 F.2d 515 (10th Cir. 1991) (upholding exclusion of evidence under federal rape shield statute); United States v. Payne, 944 F.2d 1458 (9th Cir. 1991) (upholding exclusion of child victim's sexual past); United States v. Azure, 845 F.2d 1503 (8th Cir. 1988) (upholding exclusion of victim's sexual history when offered to impeach); United States v. Cardinal, 782 F.2d 34 (6th Cir. 1986) (affirming exclusion of child victim's prior allegations of sexual abuses); Doe v. United States, 666 F.2d 43 (4th Cir. 1981) (overturning the exclusion of the victim's sexual history under federal rape shield rule); Latzer v. Abrams, 602 F. Supp. 1314 (E.D.N.Y. 1985) (finding constitutional error in the trial court's exclusion of evidence precluded by the New York rape shield rule); Logan v. Marshall, 540 F. Supp. 3 (N.D. Ohio 1981) (upholding exclusion of evidence under Ohio rape shield rule); Darrow v. State, 451 So. 2d 394 (Ala. Crim. App. 1984) (holding that the Alabama rape shield statute did not violate equal protection doctrine); People v. Williams, 289 N.W.2d 863 (Mich. Ct. App. 1980) (reversing trial court exclusion of evidence that victim was prostitute); State v. Jalo, 557 P.2d 1359 (Or. Ct. App. 1976) (reversing

these challenges has turned on the justification for the rules. Challengers have argued that the exclusion of evidence of the victim's sexual history eclipses the constitutional rights of the defendant to confront adverse witnesses and to obtain compulsory process, an aspect of which is the defendant's right to present his best defense through the introduction of relevant evidence.[13] Although rape shield rules have been challenged as facially unconstitutional on many occasions, they "have almost [been] universally upheld."[14] In many instances, however, the application of the rules in particular cases has been deemed unconstitutional.[15]

This Comment will discuss the purposes of Federal Rule of Evidence 412 and its counterpart in the State of Maine, Maine Rule of Evidence 412.[16] It will address the implications of the Rule's justifications as policy measures, the validity of the Federal Rule's exception requiring evidence to be admitted if exclusion would violate the constitutional rights of the defendant, and the logic and desirability of applying a rape shield rule to civil cases. Part II of this Comment is a brief historical survey of the notions of the trinity of women, chastity, and rape, which provides the basis for an understanding of why evidence of a victim's sexual history was admissible. Part III analyzes the enactment and application of the Maine Rule and provides a brief comparison of the Maine Rule to the Federal Rule. Part IV of this Comment examines the disagreement between Congress and the Supreme Court regarding the 1994 amendments to the Federal Rule, the major thrust of which was to extend the Rule's application to civil cases, thereby creating a sexual harassment

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trial court exclusion of victim's sexual history when offered as relevant to her motive to fabricate the charge). *See generally* Joel E. Smith, Annotation, *Constitutionality of "Rape Shield" Statutes Restricting Use of Evidence of Victim's Sexual Experiences*, 1 A.L.R. 4th 283 (1980) (outlining cases challenging state and federal rape shield rules). The Supreme Court has never ruled on the general constitutionality of a rape shield rule, *see* Galvin, *supra* note 2, at 772, although the Fourth Circuit Court of Appeals, in *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981), found the exclusion of evidence by the federal rape shield statute to be unconstitutional. The only Supreme Court case to judge the constitutionality of an exclusion under a state rape shield statute was *Michigan v. Lucas*, 500 U.S. 145 (1991), in which the Court decided that the Michigan rape shield law, which allowed the trial court to exclude evidence solely because the notice requirement of the rule had not been met, was not *per se* unconstitutional. The Court held that a state rape shield notice requirement may exclude "evidence of a prior sexual relationship between a rape victim and a criminal defendant" and remain constitutional. *Id.* at 151.

13. *See generally* David Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1255-56 (1985).

14. Galvin, *supra* note 2, at 772. *See* Smith, *supra* note 12, § 6, at 292-300.

15. *See* Smith, *supra* note 12, § 6(b), at 300-01.

16. ME. R. EVID. 412.

shield.[17] The Comment closes with the suggestion that the State of Maine adopt a sexual harassment shield, although in a format substantially different from that of the Federal Rule.

The Author concludes that rape shield rules, even as currently formulated, are valid and worthwhile measures. Nevertheless, a discussion regarding the relevance of the evidence excluded by the rape shield rules would reveal relevance justifications for the Rules ignored by the Rules' drafters. After exploring the application of the Federal Rule to civil cases, the Author proposes that the extension of the Rule to civil matters is just and beneficial. Woven throughout the Comment are the overriding questions of whether evidence of the victim's sexual past is actually relevant to any defense asserted and why these issues are rarely considered in terms of relevance rather than policy and privilege.

II. IMPETUS FOR AND ACCOMPLISHMENT OF THE RAPE LAW REFORM MOVEMENT

A. A Brief Explanation of Societal and Legal Conceptions of Rape

> A woman ought to be quiet, because Adam was formed first and Eve afterwards, and it was not Adam who was led astray but the woman who was led astray and fell into sin. Nevertheless, she will be saved by child-bearing, provided she lives a sensible life and is constant in faith and love and holiness.[18]

1. Society's Historical Conceptions of Rape

In the Victorian era, people believed that sexual intercourse was "an essentially painful encounter for an essentially passive woman."[19] Upon this belief was built a network of "social incentives that will lead women to engage in the procreative act; e.g., a cultural apparatus that esteems motherhood and an economic system that makes female survival dependent upon an alliance with some male."[20] Women were deemed to be property, belonging to their fathers or their husbands.[21] Their chastity was their most honored virtue. Viewed within these societal constructs, "rape meant simply and conclusively the theft of a father's daughter's virginity, a specialized crime that damaged valuable goods before they could reach the matrimonial market."[22] Rape, in addition to being a violent viola-

17. Maine's Criminal and Civil Rules Committee has recently decided to extend Maine Rule of Evidence 412 to civil cases.

18. *Timothy* 2:15 (The New Jerusalem Bible).

19. BROWNMILLER, *supra* note 7, at 316.

20. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5382, at 513 (1980).

21. *See id.*

22. BROWNMILLER, *supra* note 7, at 376.

tion of the female victim, was "a crime against the man who has a property interest in [a woman's] 'chastity' or in her offspring."[23]

Prevalent was a paranoia of false rape claims, which contributed to societal conceptions of rape as well as rape laws.[24] In an oft-quoted statement of the mid 17th-century, Sir Matthew Hale, Lord Chief Justice of the Court of King's Bench, pronounced that rape was an "accu[s]ation ea[s]ily to be made and hard to be proved, and harder to be defended by the party accu[s]ed, tho never [s]o innocent."[25] John Wigmore, a leading scholar on evidence, hypothesized that women were prone to rape fantasies, and contended that any rape victim's claim should be carefully scrutinized.[26] He explained:

> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions.

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23. 23 WRIGHT & GRAHAM, *supra* note 20, § 5382, at 514. The laws of rape also reflected racism and classism. The rape of black female slaves during the era of slavery was common—the legal system condoned these rapes by refusing to recognize them as illegal. *See* Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 118 (1983). One court went so far as to assume that "most young white women are virgins, that most young Black women are not, and that unchaste women are immoral." *Id.* at 121 (referring to Dallas v. State, 79 So. 690, 691 (Fla. 1918)). In fact, "the association of Black women with unchastity meant not only that Black women could not be victims of statutory rape, but also that they would not be recognized as victims of forcible rape." *Id.* Thus the obstacles faced by white victims were magnified for black victims by a legal and societal system that compounded sexist notions of a woman's sexual rights with racist notions of a *black woman's* lack of sexual rights. The Author recognizes that race and class issues permeate societal views of chastity and the consequences of rape, but a thorough discussion of those issues is beyond the scope of this Comment.

24. As of 1974, the Canadian Criminal Code still required a cautionary jury instruction that a rape allegation could be completely false. *See* Barbara Findlay, *The Cultural Context of Rape*, 60 WOMEN LAW. J. 199, 205 (1974).

25. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635, (P.R. Glazebook ed., 1971) (1736). Any female victim's testimony was to be carefully scrutinized with distrust, "based on the cherished male assumption that female persons tend to lie." BROWNMILLER, *supra* note 7, at 369. The fear was extreme, as revealed by the statement of one court that "[t]here is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance. *In such cases the accused is almost defenseless* . . . ." People v. Benson, 6 Cal. 221, 223-24 (Cal. 1856) (emphasis added). One feminist noted:

> Fear of false accusation is not entirely without merit in any criminal case, . . . but the irony, of course, is that while men successfully convinced each other and us that women cry rape with ease and glee, the reality of rape is that victimized women have always been reluctant to report the crime and seek legal justice . . . .

BROWNMILLER, *supra* note 7, at 387.

26. 3A JOHN HENRY WIGMORE, WIGMORE AND EVIDENCE, § 924a, at 736-37 (James H. Chadbourn ed., 1970).

> One form taken by these complexes is that of contriving false charges of sexual offenses by men. *The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim.* On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.[27]

2. *The Effect of Societal Notions on the Substantive and Evidentiary Laws of Rape*

Societal conceptions naturally, if unfairly, shaped the substantive and evidentiary laws of rape.[28] For example, many state rape statutes required the victim to corroborate her claim.[29] The rapes of wives by their husbands were not recognized, lack of consent had to be manifested through vigorous physical resistance, and only the extreme examples of sexual assault were recognized under the legal definitions of rape. Because of the perceived danger of fabricated claims and the "male distrust of female witnesses,"[30] the defendant's cross-examination of the victim was considered especially important in rape trials. The defendant was allowed to delve fully into the

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27. *Id.* at 736 (emphasis added).

28. The traditional elements of rape were: carnal knowledge was obtained by a man of a woman outside of marriage, the act had occurred with force, and the act was against the victim's will. *See* State v. DiPietrantonio, 152 Me. 41, 46, 122 A.2d 414, 417 (1956). The crime of rape has been unique among crimes. Often the victim seemed on trial, special character rules applied, and the victim could be

> referred to as having been despoiled, as if she has in some sense been contaminated by her experience . . . [and] the victim is called the complainant or prosecutrix, as if she only were complaining about her experience and were out to avenge a personal wrong, while other crimes are regarded as crimes against society.

Catton, *supra* note 6, at 165 (quoting Neil Brooks, Address at Women and Law Conference (Sept. 13 & 14, 1974)).

29. *See* BROWNMILLER, *supra* note 7, at 371-72. The common law did not strictly require corroboration; nevertheless, the victim's failure to have complained to others at or near the time of the rape was usually noted to discredit her testimony. *See* TRIAL EVIDENCE: THE CHAMBERLAYNE HANDBOOK § 1133, at 1142 (Leslie J. Tompkins ed., 2d ed. 1936) [hereinafter CHAMBERLAYNE]. Even when a rape statute did not require corroboration, prosecutors were often reluctant to bring rape claims that did not have strong corroborating evidence, because they knew that the strict scrutiny afforded a rape victim's claims might render the victim's testimony insufficient to sustain a conviction. Furthermore, even if the victim did complain to someone at or near the time of the rape, such testimony was only grudgingly admitted: "It is, of course, self-serving, but the fact that she is a female, and naturally reticent as to matters of that kind, plus the necessity of some corroborating circumstance to secure a conviction, have been deemed sufficient reasons for admitting it." *Id.* § 627 at 1144.

30. 23 WRIGHT & GRAHAM, *supra* note 20, § 5382, at 509.

victim's past, including her sexual history,[31] and he was allowed to thoroughly interrogate the victim.[32]

3. *The Common Law Rules of Evidence Regarding the Victim's Sexual History*

Under the common law, character evidence was generally inadmissible.[33] In criminal cases, the victim's character was admissible as an exception to the general bar on character evidence in two instances,[34] one of which was that character evidence was allowed when the defendant was charged with forcible rape.[35] Two rationales existed under the common law for admitting evidence of the victim's sexual past. One rationale was that the victim's sexual history was a relevant character trait. The other justification was that the victim's sexual past was relevant to the credibility of the victim.

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31. *See* DiBattiste, *supra* note 6, at 127.

32. *See* People v. Degnen, 234 P. 129, 138 (Cal. Dist. Ct. App. 1925). A standard defense against rape claims was that the victim was promiscuous. A promiscuous victim was less valuable as a property interest, and was also disesteemed by the jury. *See* 23 WRIGHT & GRAHAM, *supra* note 20, § 5382, at 514-15. Two other standard defenses were that the victim was not a "normal" woman and she chose to have sex, or that the victim was a prostitute, and therefore the crime was not rape but rather theft. *Id.* at 514. All of these were the standard defenses if the defendant admitted that the sexual act had happened, but contended there were extenuating circumstances. The victim's sexual past could be brought in as relevant to any of these defenses. Even when defenses which did not include an admission that the sexual act occurred were asserted, "courts admitted evidence of unchastity [when the defense was] mistaken identity or denial of sexual intercourse." Galvin, *supra* note 2, at 784.

33. Character evidence was generally considered irrelevant. *See* Galvin, *supra* note 2, at 778. The unchastity of the victim in rape cases was an exception. *See id.* at 783. Reasons for the general exclusion of character evidence include the following: there is no concrete definition of character, character evidence allows the jury to make moral judgments about the worth of the person, and such evidence has the ability to delay and confuse the jury with collateral issues. *See id.* at 778-79. When character is admissible, it can theoretically be proven by evidence consisting of testimony as to the person's reputation, testimony of another witness's opinion of that person's character, or evidence of specific actions taken by the person. The Federal Rules of Evidence allow character to be proved by reputation or opinion evidence. *See* FED. R. EVID. 405(b). They also allow proof by specific instances of conduct in cases in which character is an "essential element of a charge, claim, or defense" or on cross-examination. *Id.* In most jurisdictions, proof of the victim's sexual history could be made only by common reputation. *See* CHAMBERLAYNE, *supra* note 29, § 627, at 598. Some jurisdictions, however, allowed proof to be made by detailing specific acts of the victim. *See id.* at 599.

34. *See* Galvin, *supra* note 2, at 782.

35. *See id.* at 783. The other exception to the inadmissibility of character evidence was when a defendant accused of homicide claimed he was acting in self-defense; in that instance, the victim's character for violence was deemed relevant. *See id.* at 782. This exception required the defendant to raise a particular defense, self-defense. *See id.* The rape defendant exception, on the other hand, applied no matter what defense was raised. *See id.* at 783.

In rape cases, the victim's sexual history purportedly revealed whether she had a supposed character trait of unchasteness, which in turn was relevant to the issue of whether she consented. Consent was inferred from evidence of prior unchastity.[36] The rationale was that it was "more probable that an unchaste woman would assent to such an act."[37] A typical jury instruction read:

> "Evidence was received for the purpose of showing that the female person . . . was a woman of unchaste character. A woman of unchaste character can be the victim of a forcible rape but it may be inferred that a woman who has previously consented to sexual intercourse would be more likely to consent again."[38]

The second justification for the admission of the victim's sexual history was that it was relevant to her character trait of truthfulness. In general, the character of a witness was perceived as relevant to her credibility. However, such character evidence was limited to the victim's trait of truthfulness.[39] Nevertheless, some jurisdictions held that the victim's character trait of unchastity was relevant to her trait of truthfulness when the charge was a sexual crime.[40] The law deemed that "promiscuity imports dishonesty," where the female victim was concerned.[41] The reasoning was that:

> "[I]f the victim admits some form of previous sexual conduct it can be inferred that she is a woman of bad moral character. If she is an immoral person, then it can be inferred further that she is a person who would not have conscientious scruples about lying on the witness stand. . . . [I]f a woman consents to sexual intercourse outside of marriage then she is a person who would also lie."[42]

Thus, the general rule regarding character evidence was interpreted expansively in the case of rape victims. Their character of truthfulness, relevant to their credibility, could be proven by the introduction of evidence of their character of unchastity.

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36. *See id.*

37. People v. Collins, 186 N.E.2d 30, 33 (Ill. 1962).

38. Edwinna G. Johnson, Note, *Evidence—Rape Trials—Victim's Prior Sexual History*, 27 BAYLOR L. REV. 362, 368 n.32 (1975) (quoting COMMITTEE ON STANDARD JURY INSTRUCTIONS, CRIMINAL, OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA JURY INSTRUCTIONS, CRIMINAL, § 10.06, at 327 (3d rev. ed. 1970)).

39. *See* Galvin, *supra* note 2, at 787.

40. *See id.*

41. *See* Berger, *supra* note 6, at 16 (citing Brown v. State, 280 So. 2d 177, 179 (Ala. App. 1973)). This inference was not permissible with regard to males, nor was it applicable to female witnesses in any context other than sexual crimes. *See* Galvin, *supra* note 2, at 787.

42. Catton, *supra* note 6, at 166-67 (quoting Neil Brooks, Address at Women and Law Conference (Sept. 13 & 14, 1974)).

B. *Aspects of the Movement to Reform Rape Laws*

1. *Criticisms of Rape Statutes and Common Law Rules*

During the 1970s, the women's movement successfully called for an overhaul of rape laws and rules. Proof was advanced that "suspicion and hostility toward the rape complainant affected not only the legal rules applied to rape but also the discretionary, less visible aspects of the criminal justice system."[43] Victims were revictimized in the courtroom, and disbelieved at the police station and in the doctor's office.[44] Reformists argued that rape laws no longer accurately reflected societal sexual norms, and that the assumptions embodied in the law were no longer valid.[45] The discredited "property value" rationale, which remained embedded in the policies behind the rules, was criticized.[46] The fear of false rape claims, motivational to those creating and upholding rape laws, was decried.[47]

Furthermore, rape was one of the most underreported violent crimes and had a relatively low rate of conviction.[48] As few as two out of every seven rapes were reported.[49] In addition, "once a rape had been reported, there was almost a fifty percent chance that the perpetrator would not be caught."[50] Only sixty percent of adults arrested for rape were charged.[51] Of the sixty percent charged, almost fifty percent were acquitted or had the charge dismissed.[52]

The rules of evidence admitting the victim's sexual history were strongly criticized during the reform movement.[53] Both of the com-

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43. Galvin, *supra* note 2, at 793.

44. *See id.*

45. *See id.* at 798.

46. *See* BROWNMILLER, *supra* note 7, at 379.

47. *See* Galvin, *supra* note 2, at 792-93.

48. *See* Berger, *supra* note 6, at 5-6. Some commentators argued that "[t]he rhetoric used to support the bill was a combination of feminist concern for the fate of the victim in a male-dominated legal system and conservative 'law-and-order' arguments that the existing system permitted criminals to escape by discouraging their victims from reporting the crime." 23 WRIGHT & GRAHAM, *supra* note 20, § 5382, at 493-94 (footnotes omitted).

49. *See* Galvin, *supra* note 2, at 795 n.151. The vigorous and humiliating cross-examination of the victim was often cited as a reason for her failure to come forward or her failure to cooperate with law enforcement, but some scholars were skeptical: "[G]ood evidence of the extent of abuse is difficult to come by." 23 WRIGHT & GRAHAM, *supra* note 20, § 5382, at 496. Furthermore, the Federal Bureau of Investigation reported that "underreporting of rape 'is due primarily to the victims' fear of their assailants and their sense of embarrassment over the incident.'" *Id.* at 499-500 (quoting 1977 FBI, UNIFORM CRIME REP. FOR THE U.S. 14 (1977)).

50. Berger, *supra* note 6, at 6 (citing 1974 FBI, UNIFORM CRIME REP. FOR THE U.S. 24 (1974)).

51. *See id.* (citing 1974 FBI, UNIFORM CRIME REP. FOR THE U.S. 24 (1974)).

52. *See id.* (citing 1974 FBI, UNIFORM CRIME REP. FOR THE U.S. 24 (1974)).

53. Some saw this part of the women's movement to be mainly "symbolic," and have attributed the hindered application of the Rule to this fact, stating that "[i]t is not surprising that some male judges and lawyers find it easy to dismiss such symbol-

mon law justifications for admitting the evidence were challenged.[54] The rationale that chastity was relevant to the victim's consent was contradicted by evidence that engaging in sexual activity before marriage was within the conventional norms of behavior, and not a character flaw.[55] Once prior sexual activity was no longer classified as a character flaw embodied in a trait of unchastity, then "the mere fact that the complainant [had] previously engaged in consensual sexual activity [afforded] no basis for inferring consent on a later occasion."[56] The second rationale, that the evidence was relevant to the victim's character for truthfulness, did not withstand scrutiny either. Empirical research suggested that a woman's sexual history was unrelated to her propensity to lie on the witness stand.[57]

Critics decried the defendant's use of the victim's sexual past as a harassment device during cross-examination of the victim as outrageous and unacceptable.[58] Unnecessarily vicious and humiliating cross-examination "resulted in nothing less than character-assassination in open court."[59] Consequently, rules of evidence were proposed to protect victims from harassment on the stand and to limit the introduction of evidence of the victim's sexual history.[60]

2. *Exposure of Juries' Rationales*

Reformists also criticized the manipulation of juries with evidence of the victim's sexual history. Rape ranked second in crimes in which defendants chose a jury trial over a bench trial.[61] Juries, usually male-dominated, were reluctant to convict; to a rape defendant, "the jury [was] an ally, not an enemy."[62] In addition, jurors misused

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ism with a baffled resentment." 23 WRIGHT & GRAHAM, *supra* note 20, § 5382, at 508.

54. It was suggested that the "changing moral climate in this country simply invalidated the underpinnings of the common-law doctrine, rendering unchastity evidence irrelevant for its stated purposes." Galvin, *supra* note 2, at 798.

55. *See id.* at 798-99.

56. *Id.* at 799.

57. *See* Catton, *supra* note 6, at 167 (citing W. MISCHEL, PERSONALITY AND ASSESSMENT 26 (1968)). Reformists charged that both of the permissible forms of proof of the victim's sexual history were unreliable. Reputation evidence, as compared with other forms of proof, was argued to be "especially unreliable and prejudicial when it relates to sexual matters. . . . [T]he complainant's reputation for 'unchastity' tends to be little more than speculation and exaggeration." Galvin, *supra* note 2, at 801. On the other hand, proof by specific acts could create "unfair prejudice and undue consumption of time in proving a sufficient number of instances." *Id.* at 781.

58. *See* Galvin, *supra* note 2, at 794-95.

59. *Id.* at 794.

60. *See generally id.* at 791-801 (criticizing original Federal Rule of Evidence 412).

61. *See* BROWNMILLER, *supra* note 7, at 373.

62. *Id.* (quoting Judge Lawrence H. Cooke, Address at the meeting of the Association of the Bar of the City of New York (Jan. 16, 1974)).

evidence of the victim's sexual history. When the victim was merely asked questions about her sexual past, even when the allegations were denied or the questions stricken, the jurors' perception of the defendant's guilt waned.[63]

Worse still, in a famous study of jurors, researchers Harry Kalven, Jr., and Hans Zeisel, found that jurors were "rewriting the law of rape."[64] The jury "closely, and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part."[65] The jury felt "not so much that involuntary intercourse under these circumstances is no crime at all, but rather that it does not have the gravity of rape."[66] In cases of "simple rape," the jury convicted only three out of forty-two times.[67] The judge, however, would have convicted twenty-two out of those forty-two times.[68]

3. *The Advent of Reform*

The rape reform efforts were successful in achieving changes in both substantive and evidentiary rules of rape law.[69] Many states removed corroboration as a requirement, sexual assaults were rec-

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63. *See id.* at 374. Jurors often made the unacceptable conclusion that "unchaste" women were not worthy of the protection of the law, whether their claims were believed or not. Researchers found that

> jurors use evidence of the victim's sexual conduct, not on the issues of credibility or consent as the law of evidence requires, but rather to determine whether the victim is a "good" woman deserving of protection or a "bad" woman who by her prior flouting of sexual mores has forfeited her right to protection and is therefore a justifiable target for aggressive male sexual impulses.

23 WRIGHT & GRAHAM, *supra* note 20, § 5382, at 514-15 (footnotes omitted).

64. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 251 (1966).

65. *Id.* at 249. Contributory behavior, for example, might consist of consuming alcohol, voluntarily being alone with a stranger, or spending time with an estranged husband. *See id.* at 250.

66. *Id.* at 251.

67. *See id.* at 253. "Simple rape" is defined as rape without any aggravating factors, which could include extrinsic violence, more than one assailant, or the fact that the victim and the defendant were complete strangers at the time of the rape. *See id.* at 252.

68. *See id.* at 254.

69. *See* Galvin, *supra* note 2, at 768 n.17. At about the same time, the original body of the Federal Rules of Evidence was evolving. Although none of the original Rules, enacted in 1975, affected the common law rules of admissibility of a rape victim's sexual past, the Rules codified a standard of relevance. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Rule 402 states the concept that "[e]vidence which is not relevant is not admissible" without exception. FED. R. EVID. 402. The opposite is not always true, however, because "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." *Id.*

ognized in a broader sense than the specific act of rape, and gender neutral language was employed in sexual assault laws.[70] Furthermore, the requirement that the victim resist was abolished in most states, and sentencing for rape convictions became more flexible because many juries refused to convict because of the stiff sentences for rape convictions.[71] Finally, reform advocates were successful in advocating for rape shield rules; by 1980, almost every state, as well as the federal system, had enacted a rape shield rule.[72]

Rape shield statutes took their form as rules of evidence,[73] applicable in rape and sexual assault criminal cases, limiting the admissibility of evidence of the victim's sexual history.[74] This Comment analyzes the original Federal Rule in Part III. Part IV will discuss Maine's Rule 412. The revised Federal Rule will be evaluated in Part V. Each rape shield rule's primary purpose, articulated mainly in the Advisory Committee's Notes and in court interpretations, is protecting victims from unfair uses of evidence of their sexual history. The poor treatment of victims by law enforcement, the legal system, and society in general easily justified the Rules' protection of rape and sexual assault victims. In this articulation of policy, the probative value of the victim's past sexual behavior was rarely discussed, and the Rules were thus not framed in terms of relevance. This Comment will continue to reflect on the repercussions of justifying rape shields as rules of policy and privilege.

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70. *See* Galvin, *supra* note 2, at 768-70.

71. *See id.* at 768-69.

72. The common law rules of evidence, specifically pertaining to the use of the victim's sexual history, were used in federal courts until 1978, when Federal Rule of Evidence 412 was enacted, rejecting the common law rules and rationales regarding the victim's sexual history. *See supra* Part II, Section A, Subsection 3.

73. Some analysts have questioned how the women's movement was able to "organize a political movement around a technical rule of evidence, even one as indefensible as the common law rule on the use of the sexual history of a rape victim." 23 WRIGHT & GRAHAM, *supra* note 20, § 5382, at 508. Those same analysts had difficulty discerning the motivation of the reformists: "Self-interest, the usual explanation for political movements, is difficult to trace since the feminist movement appears, by and large, to be made up of that class of women who are least likely to become rape victims." *Id.* at 508 n.78.

74. There were four basic types of rape shield rules, termed the Michigan, Texas, California, and federal approaches. *See* Galvin, *supra* note 2, at 773. The Michigan approach, the most restrictive in admitting evidence of the victim's sexual past, prohibited introduction of the evidence subject to highly specific exceptions; twenty-five states now have this type of rule, *see id.*, including Maine. *See id.* at 906 app. tbl. 1. Under the Texas approach, trial courts wielded discretion to admit such evidence based on traditional relevancy evaluations. *See id.* at 774. The California approach separated evidence into one of two categories, depending upon whether it was being offered as substantive evidence, or as relevant to the victim's credibility. *See id.* at 775. Finally, the federal approach excluded evidence of the victim's sexual history with certain exceptions, including a catchall exception for evidence constitutionally required to be admitted. *See id.*

III. THE ORIGINAL FEDERAL RAPE SHIELD RULE

A. *Original Federal Rule of Evidence 412*

1. *The Process of Enactment*

In 1978, the Privacy Protection for Rape Victims Act was enacted by the United States Congress.[75] The Act created Federal Rule of Evidence 412,[76] limiting the admission of the victim's sexual history in rape or sexual assault cases.[77] The Rule had three purposes: to protect rape victims; to encourage reporting of rapes and foster victim cooperation with police and prosecutors; and to serve as a

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75. Privacy Protection for Rape Victims Act, *supra* note 9.

76. The text of the Rule was as follows, in part:

> RULE 412. RAPE CASES; RELEVANCE OF VICTIM'S PAST BEHAVIOR
>
> (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.
>
> (b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—
>
> (1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or
>
> (2) admitted in accordance with subdivision (c) and is evidence of—
>
> (A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
>
> (B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.
>
> . . .
>
> (c)(3) If the court determines on the basis of the hearing described in the paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

Id. Minor amendments were enacted in 1988 which expanded the set of crimes under which Rule 412 was triggered. "Rape" and "assault" were replaced with "sex offense" and "offense under Chapter 109A of Title 18, U.S.C." FED. R. EVID. 412. Chapter 109A of Title 18 includes the crimes of sexual abuse, aggravated sexual abuse, abusive sexual contact, and sexual abuse of a minor or ward. *See* 18 U.S.C. §§ 2241-45 (1994).

77. *See* Privacy Protection for Rape Victims Act, *supra* note 9. The bill had more than one hundred cosponsors, but the principal sponsor was Representative Elizabeth Holtzman (D-NY). *See* 124 CONG. REC. 34,913 (1978).

model for over twenty states which had not yet passed rape shield statutes.[78]

2. *Explanation of the Rule and Its Effect on Common Law*

The Rule created a general bar, with exceptions, to the admission of the sexual history of a rape victim. It applied only to the crimes of rape and assault with intent to commit rape.[79] It excluded all reputation and opinion evidence as proof of the victim's sexual history, but allowed specific acts as proof if they fell into any of three categories: the victim's past sexual behavior with others offered to show that the defendant was not the source of injury or semen; the victim's past sexual behavior with the defendant to show that the victim consented to the alleged assault; and evidence constitutionally required to be admitted.[80] In addition, the Rule created a procedural mechanism for the introduction of any evidence of sexual history, including a motion by the proponent and a hearing in chambers.[81] If the evidence was determined by the judge to be relevant, he or she employed a balancing test to determine if the evidence was admissible, admitting the evidence only if the "probative value of the evidence . . . outweigh[ed] the danger of unfair prejudice."[82]

Thus, Rule 412 overturned the common law rule that the victim's general sexual history was admissible as relevant to her character of truthfulness or to the substantive issue of lack of consent.[83] Moreover, whereas under the common law the only admissible forms of evidence were reputation or opinion evidence, the Rule allowed only specific acts.

Because the Rule was passed by Congress, and was not promulgated by the Supreme Court via the Judicial Conference mechanisms, no Advisory Committee's Note accompanied the Rule.[84]

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78. *See* DiBattiste, *supra* note 6, at 130.

79. *See* Privacy Protection for Rape Victims Act, *supra* note 9.

80. *See id.*

81. *See id.*

82. *Id.*

83. *Id.* Although the Rule admitted the victim's history *with the defendant* as relevant to consent, it did not allow the victim's sexual history *with others* as relevant to the victim's consent with the defendant.

84. The Judicial Conference of the United States has been established to recommend changes and additions to all procedural rules to the Supreme Court. *See* RICHARD H. FIELD, ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 459-60 (6th ed. 1990). In particular, the Advisory Committee on the Rules of Evidence, a subcommittee of the Standing Committee of the Rules of Practice & Procedure, is charged with overseeing necessary changes to the Rules of Evidence. *See id.* at 20-22. The Judicial Conference makes recommendations to the Supreme Court which then promulgates a newer amended rule, if it so chooses. *See id.* at 459-60.

Although debate on the House and Senate floors was minimal,[85] it revealed the rationale and motivation behind the new Rule.[86]

B. *The Rationale Behind the Rule*

The main rationale advanced for the Rule was the protection of the victim's privacy; the Act was subtitled: "An Act to amend the Federal Rules of Evidence to provide for the protection of the privacy of rape victims."[87] The legal system's abuses of the victim provided ample policy justification for the Rule. Representative James Mann (D-SC), speaking in the House of Representatives on October 10, 1978, stated that the purpose of the Rule was to prevent circumstances whereby "[d]efense lawyers were permitted great latitude in bringing out intimate details about a rape victim's life."[88] Such testimony was to be excluded because it served "no real purpose and only [resulted] in embarrassment to the rape victim and unwarranted public intrusion into her private life."[89]

"[T]he principal purpose of this legislation is to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives," noted Representative Mann.[90] The primary sponsor of the legislation, Representative Elizabeth Holtzman (D-NY), urged support for the bill on the basis that it would "protect women from both injustice and indignity," by restricting "the vulnerability of rape victims to such humiliating cross-examination of their past sexual experiences and intimate personal histories."[91] When signing the bill, President Carter stated that the bill was "designed to end the public degradation of rape victims and, by protecting victims from humiliation, to encourage the reporting of rape."[92]

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85. *See* 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 155, at 187 (2d ed. 1994).

86. Representative James Mann (D-SC) and Representative Elizabeth Holtzman (D-NY) repeatedly advocated the Rule as a means of protecting victims' privacy interests and preventing them unnecessary embarrassment and humiliation. *See* 124 CONG. REC. 34,912-13 (1978).

87. Privacy Protection for Rape Victims Act, *supra* note 9.

88. 124 CONG. REC. 34,912 (1978).

89. *Id.*

90. *Id.* at 34,913.

91. *Id.*

92. 23 WRIGHT & GRAHAM, *supra* note 20, § 5382, at 494 (citing 14 WEEKLY COMP. PRES. DOC. 1902 (Oct. 30, 1978)). Note that President Carter recognized the valid relevance arguments that could be made for the Rule, when he stated: "By restricting testimony on the victim's prior sexual behavior to that *genuinely relevant* to the defense, the rape victim's act will prevent a defendant from making the victim's private life the issue in the trial." *Id.* (emphasis added) (citing 14 WEEKLY COMP. PRES. DOC. 1902 (Oct. 30, 1978)).

Congressional supporters of the Rule did not espouse a theory of relevance on the record.[93] They failed to confront the issue of whether evidence of the victim's past sexual behavior was even relevant. Nevertheless, there is a strong argument that the Rule merely excludes irrelevant evidence. Some commentators have argued that the Rule creates a "new analysis of relevance," based on the fact that the Rule changed the common law theories of relevance and "undermined the previously assumed relevance of evidence concerning the victim's chastity."[94] If that is correct, it is not clear that such a result was intended by the Rule's supporters and drafters. The Rule, in its language, its accompanying Advisory Committee's Note, and Congressional debate, is based solely on policy justifications rather than relevance concerns.

C. Constitutional Issues Surrounding Federal Rule of Evidence 412

The necessity of the Rule's "constitutionally required" exception was debated contentiously.[95] Representative Mann noted that the purpose of the clause was "to cover those infrequent instances where, because of an unusual chain of circumstances, the general rule of inadmissibility, if followed, would result in denying the defendant a constitutional right."[96] Behind the textual argument lay a fundamental dissension as to whether the Rule would exclude relevant evidence. Critics of the Rule predicted conflict between the Rule and the Sixth Amendment guarantees of the defendant's rights to compulsory process and to confront the witnesses against him.[97] The defendant's compulsory process right includes the right to present all favorable evidence in defending against the charge, and is satisfied by the calling of witnesses, through subpoena if necessary.[98]

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93. The closest a Congressional supporter came to arguing for the Rule on a relevance basis occurred when Representative Mann indicated that evidence of the victim's past sexual actions "may have at best a tenuous connection" to the crime. 124 CONG. REC. 34,912 (1978).

94. Jacqueline H. Sloan, Comment, *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, 368-69 (1996).

95. Note that if evidence fell under this exception the balancing test was not required. *See* FED. R. EVID. 412, Privacy Protection for Rape Victims Act, *supra* note 9 (amended 1988). One treatise commentator theorized that the "constitutionally required" provision was a victory of the "traditional male view of rape," because it invited "courts to constitutionalize the protections against false accusation." 23 WRIGHT & GRAHAM, *supra* note 20, § 5382, at 530.

96. 124 CONG. REC. 34,912 (1978). No further elaboration was given as to what those circumstances would be.

97. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI.

98. *See* Haxton, *supra* note 13, at 1255.

Nevertheless, the testimony proferred in support of this right "must be *relevant* to the issues in the case."[99] The defendant's right to confront witnesses is usually embodied in the defendant's cross-examination of witnesses. The right allows the defendant to "obtain all the *relevant* facts from the witness . . . and to elicit answers that impeach the witness' credibility."[100]

1. Relevant Constitutional Rights and Precedents

The outcome of the Rule's interaction with a defendant's constitutional rights depends upon the purpose of the Rule and the reason the evidence is being excluded.[101] There are three general reasons to exclude evidence: the evidence is irrelevant; a policy supports the exclusion of the evidence;[102] and the evidence is protected by a privilege.

The exclusion of irrelevant evidence cannot conflict with the defendant's rights of compulsory process or confrontation, because those rights encompass only relevant evidence. There is "no constitutional right to introduce irrelevant evidence."[103] Furthermore, "[e]ven relevant evidence is not constitutionally required to be admitted."[104] Regarding the defendant's confrontation right, the Eighth Circuit, citing Supreme Court precedent, has held that there is no conflict when irrelevant evidence is excluded, because "[t]he Sixth Amendment right to confrontation . . . require[s] only that the accused be permitted to introduce all relevant and admissible evidence."[105] In addition, the trial court has the right under Federal Rule of Evidence 611(a) to impose limits on cross-examination to "protect witnesses from harassment or undue embarrassment."[106]

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99. *Id.* (emphasis added).

100. *Id.* (emphasis added).

101. Most rules of evidence exclude evidence only when offered for a specific purpose. For example, Federal Rule of Evidence 407 excludes evidence that remedial measures were taken after an accident, if offered "to prove negligence or culpable conduct in connection with the event." FED. R. EVID. 407. The Rule does not, however exclude such evidence "when offered for another purpose, such as . . . impeachment." *Id.* Furthermore, Federal Rule of Evidence 408 excludes evidence of compromises or offers to compromise when offered to "prove liability." FED. R. EVID. 408. The Rule goes on to conclude that it "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness." *Id.* Rule 412, on the other hand, excludes evidence "whether offered as substantive evidence or for impeachment." FED. R. EVID. 412 advisory committee's note.

102. This Comment includes in the policy category evidence excluded due to factors of unreliability; for example, rules regarding hearsay and the requirement of personal knowledge.

103. 2 MUELLER & KIRKPATRICK, *supra* note 85, § 159, at 200.

104. State v. Clarke, 343 N.W.2d 158, 161 (Iowa 1984).

105. United States v. Kasto, 584 F.2d 268, 272 (8th Cir. 1978) (citing United States v. Nixon, 418 U.S. 683 (1974)).

106. FED. R. EVID. 611(a).

Moreover, "'[a] defendant does not enjoy unrestricted latitude in the cross-examination of adverse witnesses. He is limited to issues relevant to the trial, and it is within the broad discretion of the trial court to determine which issues are relevant.'"[107]

If a rule excludes evidence because of policy considerations, its operation may conflict with a defendant's rights. If a defendant's compulsory process right is implicated, the court must weigh the defendant's constitutional right against the legitimate interests of the state or the witness.[108] The evidence can be excluded without violating the defendant's compulsory process right only if the court finds that the defendant's interests are outweighed by the state's or witness's interests.[109]

More often, however, the defendant is asserting his right to confront witnesses when evidence has been excluded for policy reasons. The Supreme Court has answered the question of whether the evidence was unconstitutionally excluded differently depending on the reasons for the exclusion. In *Davis v. Alaska*,[110] the Supreme Court found that the defendant's right to confront a juvenile witness superseded the state's interest in keeping juvenile criminal records sealed.[111] But the Court restricted its holding to the facts of the case, stating that "[i]n this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender."[112] In *Olden v. Kentucky*,[113] the Court held that the trial court's exclusion of the victim's personal relationship with her boyfriend, under a Rule 403 balancing test, was unconstitutional because it eclipsed the defendant's right to confront the victim-witness about her motive to fabricate.[114] And in *Chambers v. Mississippi*,[115] the Court held that the defendant's right to confront witnesses outweighed the state's "voucher rule,"[116] which prevented the person calling a witness from treating the witness as a hostile witness.[117] Nevertheless, the defendant's constitutional right to confront wit-

107. United States v. Torres, 937 F.2d 1469, 1473 (9th Cir. 1991) (quoting United States v. Kennedy, 714 F.2d 968, 973 (9th Cir. 1983)).

108. *See* Haxton, *supra* note 13, at 1256.

109. *See id.* Witnesses do "have constitutional rights that can be violated if they are required to answer every relevant question." *Id.* A witness's rights at issue more often involve privacy interests.

110. 415 U.S. 308 (1974).

111. *See id.* at 320.

112. *Id.* at 319.

113. 488 U.S. 227 (1988).

114. *See id.* at 232-33.

115. 410 U.S. 284 (1973).

116. *See id.* at 298.

117. *See id.* at 296. The Court minimized the state's interest in having a rule requiring the caller of a witness to vouch for his or her credibility; "[t]he 'voucher' rule has been condemned as archaic, irrational, and potentially destructive of the truth-gathering process." *Id.* at 296 n.8.

nesses has limitations. In *Chambers v. Mississippi*, the Court noted that "[o]f course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[118]

A rule may also exclude evidence based on a privilege, which exists to prevent information from being disclosed regardless of its relevance or trustworthiness; "the effect of a privilege is to suppress the truth."[119] The assertion of a privilege may conflict with the defendant's right to compulsory process. In *United States v. Nixon*,[120] when this conflict occurred, the Court subverted the privilege in order to preserve the defendant's constitutional right. The Court held that "[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."[121] Regarding a conflict between a privilege and the defendant's confrontation right, the Seventh Circuit Court of Appeals has held that privileges "can be trumped by constitutional rights, such as the right of confrontation conferred by the Sixth Amendment and interpreted to include the right of cross-examination."[122]

Rule 412, however, has not been established as a privilege, even though the protection of the victim's privacy rights is often cited as a motivation for the Rule.[123] Most important, the Advisory Committee's Note does not explore the relevance justification for the Rule. The Rule is based on a "strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim."[124] Interestingly, Rule 412 excludes evidence even when offered for the purposes of impeachment. Because the Rule

118. *Id.* at 295. In *United States v. Barrett*, 766 F.2d 609 (1st Cir. 1985), the First Circuit Court of Appeals held that the trial court "has the discretion to limit cross-examination once the defendant's Sixth Amendment right to establish the potential bias of the [witness] has been satisfied." *Id.* at 614.

119. 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 501.1, at 507 (4th ed. 1996).

120. 418 U.S. 683 (1974).

121. *Id.* at 713.

122. United States v. Rainone, 32 F.3d 1203, 1206 (7th Cir. 1994). One related issue which the Supreme Court has ruled on is the constitutionality of excluding testimony as a sanction for discovery violations. In *Taylor v. Illinois*, 484 U.S. 400 (1988), the defendant argued that such an exclusion violated his Sixth Amendment rights to compulsory process. *See id.* at 402. The Supreme Court held that "such a sanction is not absolutely prohibited by the Compulsory Process Clause of the Sixth Amendment." *Id.*

123. Commentators have argued that protecting victim-witnesses does not always ally with the interests of the prosecutor, and that the Rule ought therefore to be cast directly as a privilege. *See* 23 WRIGHT & GRAHAM, *supra* note 20, § 5382, at 523-24. Nevertheless, the Rule can be contrasted with an evidentiary privilege, "the invocation of which frequently results in the loss of highly relevant evidence in the interest of furthering policies extrinsic to the fact-finding process." Galvin, *supra* note 2, at 887.

124. 1 GRAHAM, *supra* note 119, § 412.1, at 480.

excludes evidence based on a policy of protection, it has been frequently challenged as violating the defendant's constitutional rights to compulsory process and confrontation of witnesses.[125]

If the Rule were enunciated and justified as a rule of relevance, then the cloudy constitutional issues would become clearer. All evidence of a victim's sexual past is not necessarily irrelevant. However, a relevance analysis would allow the exclusion of evidence which is irrelevant on that basis alone; such evidence is now excluded solely on the basis of policy. Furthermore, if the evidence is relevant, the trial court should weigh the defendant's right against the state's interest in excluding the evidence or the witness's privacy interest. The trial court should not immediately admit the evidence because the exclusion was based on a rule of policy, and assume that the Rule is therefore automatically trumped by the defendant's constitutional rights. The policy justifications for the Rule continue to be constitutionally challenged, thereby eclipsing the more justifiable and obvious rationale for the Rule. Furthermore, the stereotypical thinking that such evidence was relevant to the victim's credibility and the issue of consent under the common law needs to be fully confronted and reevaluated. By failing to analyze the relevance of the victim's sexual history, the drafters shortchanged the Rule, as well as sexual crime victims.

The constitutional arguments portray the dual thought processes behind the Rule and the importance of determining its most legitimate rationale. Even if evidence is relevant, the state's interest can override the defendant's constitutional right, and the evidence can be constitutionally excluded. The state's interest, however, remains unclear, at least until the rationalization for the Rule is clarified.

The evidence excluded by Rule 412 is often irrelevant, in which case no constitutional conflict exists, because the defendant has no constitutional right to present irrelevant evidence. As already noted, not all evidence of the victim's sexual past is irrelevant. But evidence which is excludable *both* because it is irrelevant and because of a social policy can avoid constitutional conflict if excluded as irrelevant. The drafters could have avoided controversy and confusion by clarifying the relevance rationale of the Rule and by including specific instances of evidence constitutionally required to be admitted; distinct categories of evidence should have been enumerated and specified under the "constitutionally required" exception.

It is clear from the Congressional commentary that the Rule's supporters were primarily attempting to protect the victim, given the strong language of protection and the attempt to control impeachment uses of the evidence. There may have been an unconscious, or conscious, belief, even on the part of the Rule's

125. *See supra* note 12.

supporters, that in some way this evidence was relevant to the victim's credibility or consent. It was believed to be minimally relevant, perhaps, but it still carried some probative value. By refusing to acknowledge that the evidence usually lacks relevance, the Rule's drafters succumbed to the sexist notion that a woman's sexual past has bearing on her propensity to consent to sexual relations or to fabricate the charge. Therefore, lower courts will be forced to continue to determine on a case-by-case basis what evidence of the victim's sexual history is relevant for which purposes. However, once it is accepted and codified that this evidence is not relevant to consent or credibility, the specific constitutionally required and relevant exceptions can be enumerated.

2. *The Necessary Specific Constitutional Exceptions*

The situations in which evidence of the victim's sexual history must be admitted due to the defendant's constitutional rights can be enumerated.[126] The catchall phrase admitting evidence if "constitutionally required" is neither necessary nor appropriate. If the defense to a sexual assault charge is that the victim consented to the sexual act, the defendant has a constitutional right to present evidence relevant to the victim's consent, evidence that often includes her sexual history with the defendant. This is expressly allowed by the Rule. The defendant's constitutional rights may also require admission of evidence of an alternative source of the victim's injury, covered by an exception to the Rule.

Furthermore, evidence relevant to a defense of misidentification could include evidence of the lack of non-transmission of a sexually transmitted disease from the victim to the defendant, or the birth of a baby to the victim nine months after the alleged assault which was not possibly the biological child of the defendant.[127] If the defendant asserts a defense of mistake, that he reasonably but incorrectly thought the victim was consenting, then the defendant's constitutional rights may require admission of parts of the victim's sexual history.[128] Admission of evidence relevant to defenses of misiden-

126. The defendant in a sexual assault case has available a number of defenses, ranging from "I wasn't there" to "there was a sexual act but she consented." Evidence relevant to one defense often is irrelevant to another defense. *See* Haxton, *supra* note 13, at 1233.

127. *See id.* at 1235.

128. Such a defense has "figured prominently" in the rape reform debate. 23 WRIGHT & GRAHAM, *supra* note 20, § 5387, at 582. The example of an admissible mistake defense given by Professors Wright and Graham is that "the defendant had been told that the victim is 'turned on' by aggressive men and that her 'no' really means 'yes.'" *Id.* Nevertheless, the authors admit that "[s]everal limitations on this exception must be observed if it is not to be abused," including that the defendant knew about the victim's prior sexual activity; that the prior activity was similar to the activity between the victim and the defendant; and that the defendant's belief was reasonable. *Id.* § 5387, at 582-83. Some would argue that the relevance of such evi-

tification and mistake, however, is constitutionally required to be admitted only if the defendant has not already introduced evidence exclusively relevant to consent.[129]

Moreover, the defendant may have a constitutional right to the admission of evidence of the victim's sexual history to show "a *pattern* of distinctive, consensual sexual behavior by the alleged victim that is highly similar to the facts of the incident being charged."[130] Evidence relevant to the defense of mistake or evidence that the victim had a pattern of behavior is constitutionally required *only* if the defendant has not already introduced evidence exclusively relevant to the sexual contact.[131] In addition, admission of evidence might be constitutionally required in cases where the defendant is utilizing the evidence to correct misrepresentations, or to impeach witnesses with prior inconsistent statements.[132]

D. Application of the Rule to Individual Cases

The Federal Rule has been applied relatively infrequently in comparison to state rape shield rules, because sexual crimes are usually charged as violations of state, not federal, laws.[133] The majority of

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dence turns on how the defendant came to know about the information: "[t]he defendant's knowledge of the complainant's prior sexual conduct can be relevant to show consent if . . . the knowledge was acquired from the complainant as a disclosure." Haxton, *supra* note 13, at 1240 (citations omitted).

129. *See* Haxton, *supra* note 13, at 1233-35.

130. 2 MUELLER & KIRKPATRICK, *supra* note 85, § 159, at 204. One particular strain of such evidence would be proof that the victim was a prostitute, "but even evidence of prostitution is irrelevant to consent if the circumstances surrounding the alleged sexual assault are dissimilar to the prostitution." Haxton, *supra* note 13, at 1237.

131. *See* Haxton, *supra* note 13, at 1235.

132. *See* 2 MUELLER & KIRKPATRICK, *supra* note 85, § 159, at 202-03. Evidence to show the victim's bias is in the same general category.

133. Nevertheless, federal courts have had occasion to employ Rule 412 in criminal cases, usually in cases of sexual crimes on Native American reservations, where the federal courts have jurisdiction. Although several state rape shield statutes have been challenged as facially unconstitutional, none have been found so. *See* Smith, *supra* note 12, § 2, at 287. Some courts, however, have held particular exclusions of evidence under state rape shield rules unconstitutional. In *Latzer v. Abrams*, 602 F. Supp. 1314 (E.D.N.Y. 1985), limitations placed on the defendant's right to cross-examine the child victim regarding the victim's prior volitional sexual acts were a violation of the defendant's right to confront witnesses against him. The court applied *Davis v. Alaska*, 415 U.S. 308 (1974), and held that "rape shield rules must yield to a criminal defendant's right to cross-examine witnesses for bias or improper motive." *Id.* at 1319. The court indicated that such a rule would also apply in this case to a defendant's right to cross-examine witnesses as to possible misidentification. *See id.* at 1319-20. On the other hand, some cases have held that the Rule's exclusion did not violate the defendant's constitutional rights. In *Stephens v. Miller*, 13 F.3d 998 (7th Cir. 1994), the court held that the defendant had no constitutional right to introduce evidence of statements he made to the victim regarding her prior sexual conduct. The defendant offered the statements as proof that the victim had a motive to fabricate the charges against him, but the court found that the evidence

federal cases concerning the application of Federal Rule 412 have revolved around the defendant's constitutional rights.

Although many courts have found that the specific application of the Federal Rule led to unconstitutional results, the Rule itself has apparently never been found unconstitutional.[134] The most influential case has been *Doe v. United States*,[135] decided in 1981, in which the Court of Appeals for the Fourth Circuit determined that the lower court's exclusion of the victim's sexual history violated the defendant's constitutional right to confront witnesses.[136] The court held that evidence of the defendant's knowledge of the victim's sexual history was admissible as relevant to the defendant's state of mind.[137] By framing reputation evidence as solely evidence of the

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was being offered for the purpose of displaying the victim's sexual preferences to embarrass the victim. *See id.* at 1001-03. In *Logan v. Marshall*, 540 F. Supp. 3 (N.D. Ohio 1981), the court held that the defendant did not have a constitutional right to cross-examine the victim as to any venereal disease she might have had at the time of the alleged assault. The defendant had not made an adequate offer of proof regarding the relevance of the evidence, and the court found that such evidence was constitutionally excluded since it would only "be used to impeach the credibility of the victim by references to her sexual history." *Id.* at 6. These decisions have not been uniform. For example, in *Latzer v. Abrams*, 602 F. Supp. 1314 (E.D.N.Y. 1985), evidence was constitutionally required to be admitted as relevant to the victim's motive, but in *Stephens v. Miller*, 13 F.3d 998 (7th Cir. 1993), similar evidence offered for the same purpose was not constitutionally required to be admitted. In addition, in both *Stephens* and *Logan*, the defendants were not allowed to introduce evidence they argued was constitutionally required to be admitted; the exclusion was not due to the court's weighing of the defendant's valid constitutional right against the state's interests, but rather could be credited to the courts' refusal to believe that the defendants were truly offering the evidence for the purposes stated. Stephens v. Miller, 13 F.3d 998 (7th Cir. 1993); Logan v. Marshall, 540 F. Supp. 3 (N.D. Ohio 1981).

134. *See supra* text accompanying notes 14-15.

135. 666 F.2d 43 (4th Cir. 1981). The victim appealed from a pretrial ruling by the trial court to allow evidence and cross-examination of the victim's sexual history. *See id.* at 45. Consolidated with that appeal was the victim's appeal from the judgment against her in a civil case she had initiated to permanently seal the record of the criminal case. *See id.*

136. The defense was not explicitly one of mistake of fact that the victim had consented; the defendant merely argued that telephone conversations in which the victim discussed her sexual past were relevant to his state of mind. *See id.* at 48.

137. *See id.* The Fourth Circuit also found that some of the evidence admitted at trial should have been excluded, specifying the following:

> (1) evidence of the victim's "general reputation in and around the Army post . . . where [the defendant] resided";
>
> (2) evidence of the victim's "habit of calling out to the barracks to speak to various and sundry soldiers";
>
> (3) evidence of the victim's "habit of coming to the post to meet people and of her habit of being at the barracks at the snack bar";
>
> (4) evidence from the victim's former landlord regarding "his experience with her" alleged promiscuous behavior;
>
> (5) evidence of what a social worker learned of the victim.

Id. at 47.

defendant's state of mind, the court avoided the Rule 412 bar on reputation evidence as well as the Rule's substantive limitations on the introduction of the victim's sexual past.[138]

In admitting phone conversations between the defendant and the victim regarding the victim's sexual history, the court found them to be relevant and "not the type of evidence that the rule excludes."[139] Significantly, the court reasoned that the rationale of the Rule was to exclude evidence *not relevant* to the consent or credibility of the victim.[140] The court further stated that "[t]here is no indication, however, that this evidence was intended to be excluded when offered solely to show the accused's state of mind."[141] This approach left the door open for the admission of all evidence of the victim's sexual history within the knowledge of the defendant and claimed by the defendant to be relevant to his mistake that the victim had consented.

In *United States v. Begay*,[142] the Tenth Circuit Court of Appeals found that the trial court had erred by not allowing the defendant, accused of aggravated sexual abuse of a child, to cross-examine a medical witness on other possible causes of the victim's injury.[143] Furthermore, the court held that the defendant had a right to cross-examine the victim on her sexual history for the purpose of impeaching her memory of the abuse.[144] The defendant was allowed to impeach the witness on the basis that her memory of abuses by another person was stronger than her memory of abuses by the defendant, thereby discrediting her testimony regarding her memory of her abuse by the defendant.[145]

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138. The Fourth Circuit recognized that the evidence of the victim's sexual habits was being offered mainly in the form of opinion and reputation evidence, and was therefore barred by Rule 412. The court explained the "constitutional justification for excluding reputation and opinion evidence" of the victim's sexual history as follows: "First, an accused is not constitutionally entitled to present irrelevant evidence. Second, reputation and opinion concerning a victim's past sexual behavior are not relevant indicators of the likelihood of her consent to a specific sexual act or of her veracity." *Id.*

139. *Id.* at 48. The evidence of the defendant's state of mind included the opinions of others that the victim was promiscuous. *See id.* at 47.

140. *See id.* at 48.

141. *Id.*

142. 937 F.2d 515 (10th Cir. 1991).

143. *See id.* at 525-26.

144. *See id.* at 521.

145. *See id.* Apparently the victim's testimony regarding the circumstances of the attack was not strong, and she at times indicated she could not clearly remember what happened. Therefore the court found that "cross-examination about the [third person] incidents was relevant and probative on the central issue whether [the victim's] memory was clear and accurate on critical details about the Begay incident as contrasted with the [third person] incidents." *Id.*

Other cases have found the Rule to be constitutional in its particular application. In *United States v. Payne*,[146] the Ninth Circuit Court of Appeals held that the defendant's right to confront a child sexual assault victim was not violated by the exclusion of evidence that the child had engaged in consensual sexual activity with another. The court reasoned that "the probative value of minor inconsistencies regarding an obviously embarrassing situation is virtually nil and does not outweigh the prejudicial effect" of the evidence.[147] In *United States v. Cardinal*,[148] the Sixth Circuit Court of Appeals held that the trial court's exclusion of prior claims of sexual abuse made by a child victim did not compromise the defendant's right to confront witnesses. The defendant offered the evidence as relevant to the victim's credibility, arguing that consequently Rule 412 did not apply.[149] The Court of Appeals held that the trial court, in excluding the evidence, had properly demonstrated a "sensitivity to the policy supporting the rape-shield rule."[150] The Eighth Circuit Court of Appeals, in *United States v. Azure*,[151] held that the trial court properly excluded evidence of the child victim's prior history offered by the defendant to impeach her.[152] The court stated that evidence offered for impeachment purposes did not satisfy the specific exception of Rule 412, and therefore was not admissible.[153]

There has not been a uniform analysis of the constitutional issues raised by sexual crime defendants. In *Payne*, evidence was excluded because it had de minimus probative value;[154] yet in *Azure*, no relevance discussion was even entertained.[155] Moreover, in *Doe*, the court treated the evidence as if it were solely evidence of the defendant's state of mind and ignored the implications that the evidence also should have been classified as evidence of the victim's sexual history.[156] In so doing, the court ignored the language and objectives of Rule 412 and created a new exception.[157]

146. 944 F.2d 1458 (9th Cir. 1991).

147. *Id.* at 1469.

148. 782 F.2d 34 (6th Cir. 1986).

149. *See id.* at 36.

150. *Id.*

151. 845 F.2d 1503 (8th Cir. 1988).

152. *Id.* at 1506. The defendant first tried to introduce the evidence under one of the specific exceptions to Rule 412, but failed. *See id.* at 1505.

153. *See id.* at 1506. The court did not fully explore the constitutional issues, but merely stated that when offered for impeachment purposes, the evidence was not admissible under Rule 412. *See id.*

154. *See* United States v. Payne, 944 F.2d 1458, 1470 (9th Cir. 1991).

155. *See* United States v. Azure, 845 F.2d 1503 (8th Cir. 1988).

156. *See* Doe v. United States, 666 F.2d 43, 47-48 (4th Cir. 1981).

157. *See* DiBattiste, *supra* note 6, at 145.

E. Criticisms of and Commentary on the Rule

A major flaw in Rule 412 is its "failure to distinguish between benign and invidious uses of sexual conduct evidence."[158] This inadequacy "stems from a misperception by the drafters of the precise wrong to be redressed" by the Rule.[159] The Advisory Committee's Note's failure to explore possible justifications for the Rule other than "strong social policy" has led to a wide variety of interpretations by courts and commentators as to the purpose of Rule 412.[160] Interpretations include ending the misuse of evidence of the victim's sexual history, protecting privacy interests of victims, and excluding wholly irrelevant evidence.[161]

Courts and commentators alike have criticized the Rule's drafters for not explaining the breadth of the "as constitutionally required" provision. In *Begay*, the court noted that "'the Rule provides no guidance as to the meaning of the phrase "constitutionally required."'"[162] Without a clear explanation "from the Supreme Court stating when a rule of evidence must yield to the accused's sixth amendment right to offer proof in support of a defense, the catch-basin provision offers no guidance to trial courts regarding what evidence meets the statutory standard."[163] Although there are several specific situations in which admission of evidence may be constitutionally required to be admitted, the drafters made no attempt to

158. Galvin, *supra* note 2, at 812.

159. *Id.*

160. FED. R. EVID. 412 advisory committee's note.

161. Rape shield rules have been interpreted by commentators as serving widely varied purposes. One commentator noted that it was "apparent that the only evidence excluded exclusively by rape shield statutes is sexual conduct evidence that is highly probative." Haxton, *supra* note 13, at 1254. Rape shield rules, another concluded, "were meant to exclude irrelevant and prejudicial evidence that does nothing but taint the fact-finding process." Galvin, *supra* note 2, at 887. Yet another commentator recognized only the privacy interest of the victim as a motivation for rape shield rules. *See* Jason M. Price, Note, *Constitutional Law—Sex, Lies and Rape Shield Statutes: The Constitutionality of Interpreting Rape Shield Statutes to Exclude Evidence Relating to the Victim's Motive to Fabricate*, 18 W. NEW ENG. L. REV. 541, 541 (1996).

162. United States v. Begay, 937 F.2d 515, 523 (10th Cir. 1991) (quoting United States v. Saunders, 736 F. Supp. 698, 703 (E.D.Va. 1990)).

163. Galvin, *supra* note 2, at 886-87. Evidence was also "getting in under the catch-all exception when the judge [was] sympathetic to the argument that the victim was an undeserving one." *Transcript of Proceedings*, Administrative Office of the United States Courts Judicial Conference Advisory Committee on Evidence Rules 56 (May 6, 1993) (statement of Danielle Ben-Jehuda, staff attorney with the NOW Legal Defense and Education Fund). Other critics of the provision noted that *all* evidence that is constitutionally required to be admitted will be admitted, regardless of a specific rule that would exclude the evidence. *See* Galvin, *supra* note 2, at 886. One member of the Advisory Committee on the Rules of Evidence admitted that "[i]t is an odd clause, because it suggests that there is something unconstitutional about the rule." *Transcript of Proceedings, supra*, at 57 (statement of Chairman Ralph K. Winter).

categorize the exceptions and enumerate them.[164] It is poor policy to leave the construction of constitutional rights in the hands of lower courts because they may come to disparate conclusions.[165]

A woman's sexual choices in the past have little bearing on whether she consented to the sexual act from which a charge of rape or sexual assault has arisen. Although protecting victims of crime from unnecessary humiliation and harassment is a worthy goal, it is harmful to avoid the foundational analysis of whether evidence of the victim's sexual history is relevant. The policies supporting the Rule are paternalistic, chauvinistic, and outdated; by avoiding the most obvious and justifiable rationale for the Rule—that inquiry into the victim's sexual history is not relevant to whether she was raped—the drafters implicitly accepted the common law ideas that a sexually active woman is more likely to be raped or she is more likely to lie about being raped. Furthermore, these policies run the risk of supporting the prejudices that a sexually active woman is worthy neither of the jury's belief nor the law's protection.

Even when the defendant's rights to compulsory process and to confront witnesses are implicated, a balancing test of the defendant's rights and the victim's or state's interests should be required, because the defendant's rights "may be abridged by other legitimate interests in the criminal process. Courts may restrict the defendant's right if favoring other legitimate interests is neither arbitrary nor disproportionate to the detrimental effect on the defendant."[166] As it is stated, the Rule leaves the impression that if the defendant's constitutional rights are implicated, no other competing interests can supplant those rights.

Despite these criticisms,[167] the Rule has been fairly successful in implementing its policy. Nevertheless, though rarely discussed, the relevance value of evidence excluded by Rule 412 is often assumed to be high. The drafters failed to advocate the Rule as one that excludes irrelevant evidence, and thus the Rule has faced unnecessary constitutional confrontations and continues to engender confusion in its application.

164. *See* 1 GRAHAM, *supra* note 119, § 412.1, at 485.

165. *See* DiBattiste, *supra* note 6, at 155-56.

166. Price, *supra* note 161, at 546.

167. Critics have concluded that Rule 412 is a "sloppily drafted effort to foist off on the courts another politically-charged evidentiary issue that the legislators lacked the wit or courage to resolve." 23 WRIGHT & GRAHAM, *supra* note 20, § 5382, at 530.

IV. The Maine Rape Shield Rule

A. *Maine Common Law Rules Regarding the Victim's Sexual History*

Under the common law of Maine, evidence of the victim's sexual history was admitted as relevant to a supposed character trait of unchastity.[168] However, the common law rule in Maine espoused a somewhat unique use of the evidence. In the seminal case of *State v. Flaherty*,[169] decided in 1929, the Maine Supreme Judicial Court, sitting as the Law Court, stated that the victim's character trait of unchastity was admissible to "impeach the testimony of the prosecuting witness as to the want of consent."[170] This was a hybrid use of the evidence—it went to the victim's credibility but only on her testimony regarding a particular element of the crime of rape: lack of consent.

In *State v. Nelson*,[171] the Law Court reversed the trial court's exclusion of evidence of the victim's past sexual relationship with the defendant.[172] The court relied on an 1888 Indiana case to support its rationale that "[e]vidence of a prosecutrix's prior sexual relations with a defendant bears both on the prosecutrix's credibility *and* the issue of whether she acquiesced."[173]

In Maine, proof of the victim's sexual character could be shown only by evidence of general reputation, not by specific acts. This rule was established in 1889 in *Gore v. Curtis*.[174] In *Gore*, the court did not allow the defendant in a civil case for trespass for assault upon and solicitation of the victim, a married woman, to question the victim about her specific acts of unchastity, but offered to allow him to bring in her general reputation for unchastity.[175] The court's rationale was that "[p]ersons seeking damages in actions of this sort must be prepared to defend their general character; but are not required to come ready to explain the various specific questionable acts of their lives."[176] In *State v. Henderson*,[177] the Law Court noted

168. *See* State v. Flaherty, 128 Me. 141, 146 A. 7 (1929).

169. *Id.*

170. *Id.* at 146, 146 A. at 9.

171. 399 A.2d 1327 (Me. 1979). In *Nelson*, the defendant was charged with unlawful sexual contact, a crime not directly covered by the Rule when it was originally enacted.

172. *See id.* at 1329.

173. *Id.* at 1329 n.3 (emphasis added) (referring to Bedgood v. State, 17 N.E. 621, 623 (Ind. 1888)). It is unclear why the court chose not to rely on *Flaherty*; perhaps it was distinguishing *Flaherty* by stating that the evidence was relevant to *both* the victim's credibility *and* the issue of consent. *See* State v. Flaherty, 128 Me. 141, 146 A. 7 (1929).

174. 81 Me. 403, 17 A. 314 (1889).

175. *See id.* at 404, 17 A. at 314.

176. *Id.* at 405, 17 A. at 315.

177. 153 Me. 364, 139 A.2d 515 (1958).

that evidence of the victim's reputation for unchastity was admissible to impeach the victim—on the issue of lack of consent.[178] In *State v. McFarland*,[179] the Law Court held that "*[s]pecific acts* of prior unchastity are not admissible in a prosecution for rape."[180]

B. Enactment of Maine Rule of Evidence 412

1. Discussion of Text of Rule and Advisory Committee's Note

Maine Rule of Evidence 412 was enacted in 1983, five years after Federal Rule of Evidence 412. It is a rule of general inadmissibility of evidence of a sexual crime victim's past sexual behavior, with specific narrow exceptions.[181] The Rule as originally enacted applied when the crimes of rape, gross sexual misconduct, or sexual assault of a minor were charged.[182] It has been amended slightly, and now is triggered when the charge is rape, gross sexual assault, gross sexual misconduct, unlawful sexual contact, or sexual abuse of a mi-

178. *See id.* at 369, 139 A.2d at 518. The defendant was charged with statutory rape, for which consent was not a defense in Maine.

179. 369 A.2d 227 (Me. 1977).

180. *Id.* at 228 (emphasis added). The court utilized Maine Rule of Evidence 608(b), disallowing evidence of specific instances of conduct of a witness, when offered for the purpose of attacking his credibility by proof of extrinsic evidence. *Id.*

181. The Maine Rule as originally enacted stated:

> RULE 412—PAST SEXUAL BEHAVIOR OF VICTIM
>
> a. In a criminal case in which a person is accused of rape, gross sexual misconduct, or sexual abuse of a minor, reputation or opinion evidence of past sexual behavior of an alleged victim of such crime is not admissible.
>
> b. In a criminal case in which a person is accused of rape, gross sexual misconduct, or sexual abuse of a minor, the only evidence of a victim's past sexual behavior that may be admitted is the following:
>
> (1) Evidence of specific instances of sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
>
> (2) Evidence of specific instances of sexual behavior with the accused offered by the accused on the issue of whether the alleged victim consented to the sexual behavior with respect to which the accused is charged.

Me. Rptr., 449-458 A.2d LXVIII. In 1995, Maine Rule 412 was amended slightly, to reflect changes in the Maine Criminal Code and to extend the application of the Rule to the crime of unlawful sexual contact. ME. R. EVID. 412. The Committee noted that the crimes of "rape" and "gross sexual misconduct" had been combined into "gross sexual assault." *See* ME. R. EVID. 412 advisory committee's note to 1995 amend., *reprinted in* RICHARD H. FIELD & PETER L. MURRAY, MAINE EVIDENCE 176-77 (4th ed. 1997). The Committee gave no explicit reason for the extension of the Rule to cover unlawful sexual contact. *See id.* The Advisory Committee noted that "[t]he policies which made Rule 412 applicable to the crimes as earlier defined remain valid with respect to the redefined and renamed offense." *Id.* The Amendments to the Rule are mainly technical, to maintain consistency with the criminal code.

182. *See* Me. Rptr., 449-458 A.2d LXVIII.

nor.[183] It explicitly excludes all reputation and opinion evidence, no matter what the purpose of the offer, and limits admission of specific instances of the victim's sexual history to two narrow exceptions, both directed at evidence offered by the accused.[184]

The first exception admits evidence of the victim's past sexual behavior with someone other than the defendant, if offered by the defendant to prove that someone other than the defendant was the source of the victim's injury or the source of semen.[185] The second exception allows the defense to offer evidence of the victim's sexual history with the defendant, if offered to prove that the victim did in fact consent.[186] This exception is available only in "criminal prosecutions where consent of the victim is an issue."[187]

In addition to the exceptions explicit in the Rule, there are also unwritten exceptions, constituting the "residuum of circumstances where past sexual behavior of victims may become the subject of testimony at a trial."[188] The Advisory Committee's Note explains that although the Rule's specific exceptions are limited to evidence offered by the defendant, the prosecution may still introduce the subject by offering evidence of the victim's chastity.[189] By so doing, the prosecution creates a right for the defendant to rebut the prose-

183. *See* ME. R. EVID. 412.

184. The Advisory Committee's Note to Rule 412 does not elaborate on the definitions of "victim" and "accused." ME. R. EVID. 412 advisory committee's note, *reprinted in* RICHARD H. FIELD & PETER L. MURRAY, MAINE EVIDENCE 176-77 (4th ed. 1997) [hereinafter ME. R. EVID. 412 advisory committee's note]. Thus far, Maine courts have employed "victim" to mean the complaining victim in a prosecution, and have construed "accused" to mean the criminal defendant. The Note refrains from defining "sexual behavior," but the Law Court has ruled that "sexual behavior" does not include only volitional acts; it can also mean prior abuses. *See* State v. Jacques, 558 A.2d 706, 707 n.2 (Me. 1989).

185. *See* ME. R. EVID. 412(b)(1).

186. *See* ME. R. EVID. 412(b)(2).

187. ME. R. EVID. 412 advisory committee's note, *supra* note 184. One treatise suggested that in applying this narrow exception the court should "require that the circumstances of the prior instances be such as to raise a reasonable inference of consent at the time and place in question." RICHARD H. FIELD & PETER L. MURRAY, MAINE EVIDENCE § 412.2, at 180 (4th ed. 1997).

188. *Id.*

189. *See* ME. R. EVID. 412 advisory committee's note, *supra* note 184. The Note refers to *State v. Gagne*, 343 A.2d 186 (Me. 1975), although that case did not present exactly the same situation. In *Gagne*, the *defendant*, in impeaching a witness on her cross-examination, introduced an area of evidence that the court had previously forbidden the prosecution to enter. *See id.* at 194. Thus, the *prosecution* was allowed to explore the subject, after the *defendant* had opened the door. *See id. Gagne* does not hold that the prosecution can avoid a Rule of Evidence which excludes certain evidence. The specific exceptions in Rule 412 do not allow for any instance in which the prosecution may offer evidence of the victim's sexual history. If the prosecution introduces evidence of the victim's sexual past, the Rule has been violated. The Advisory Committee's Note states that "[o]bviously Rule 412 applies to the prosecution as well as to the defense," indicating that the drafters intended the Rule to apply with full force to the prosecution; therefore there should not be an instance in

cution's evidence. The other unwritten exception occurs when the victim is a minor and the presumption of naiveté is implicated.[190]

2. *Comparison to Federal Rule of Evidence 412*

Maine Rule of Evidence 412 is modeled on the original Federal Rule of Evidence 412.[191] The same bar to all reputation and opinion evidence applies.[192] The two exceptions to inadmissibility for specific acts of the victim's sexual history are also the same.[193]

Nevertheless, the Maine Rule differs from the original Federal Rule in many respects. The Maine Rule does not include the controversial "as constitutionally required" exception. The Committee apparently recognized that evidence constitutionally required to be admitted despite its potential exclusion by a rule of evidence would always be admitted, and stated in the first paragraph of the Advisory Committee's Note: "The rule is subject to the policy of Rule 402 on evidence constitutionally required to be admitted."[194] However, the reference to this obvious fact in the Advisory Committee's Note reveals a concern that Rule 412 would be unconstitutional.

Moreover, the Maine Rule does not require written notice, an in camera hearing, or other procedural mechanisms. Procedural safeguards were deemed unnecessary, "in light of the trial judge's power to control the presentation of the proof so as to minimize prejudice and the overall requirements of Rule 403."[195]

The Maine Rule excluded the introductory phrases included in original Federal Rule 412 that the Rule was to be applied "notwithstanding any other provision of law."[196] The Advisory Committee intentionally omitted this language that would make the Rule supreme over all others, specifically noting that Rule 403 considerations could exclude evidence even if it were admissible under Rule 412.[197] Furthermore, the Note states that the victim's statements about her sexual history might be admissible for impeachment purposes, in contrast to the current Federal Rule's Advisory Commit-

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which the prosecution is allowed to "open the door." *See* ME. R. EVID. 412 advisory committee's note, *supra* note 184.

190. Although the interaction between the childhood naiveté presumption and Rule 412 is very interesting, it is beyond the scope of this Comment. See *infra* note 235, for a limited discussion of the application of Rule 412 in cases where the childhood naiveté presumption was implicated.

191. ME. R. EVID. 412 advisory committee's note, *supra* note 184.

192. *See* Privacy Protection for Rape Victims Act, *supra* note 9; ME. R. EVID. 412.

193. *See* Privacy Protection for Rape Victims Act, *supra* note 9; ME. R. EVID. 412.

194. ME. R. EVID. 412 advisory committee's note, *supra* note 184.

195. *See id.*

196. *See* Privacy Protection for Rape Victims Act, *supra* note 9.

197. *See* ME. R. EVID. 412 advisory committee's note, *supra* note 184.

tee's Note, which asserts that the Rule is applicable *even if* the evidence is offered to impeach.[198]

3. *Advisory Committee's Justification for the Rule*

Maine Rule 412 was enacted "to curb perceived abuses in the use of evidence concerning the past sexual behavior of a victim of rape or sexual abuse."[199] The Advisory Committee's Note to Maine Rule 412 recognized that past abuses occurred when "some courts" allowed defense counsel to introduce the victim's sexual history on the issues of the victim's consent and the victim's overall credibility.[200] The Committee did not consider such abuses to be "a serious problem in Maine, where such testimony has been generally excluded."[201] Nonetheless, the Committee felt that some "dicta" in Maine cases might be misread to allow the introduction of the victim's sexual history.[202]

198. *See* ME. R. EVID. 412 advisory committee's note, supra note 184; FED. R. EVID. 412 advisory committee's note.

199. ME. R. EVID. 412 advisory committee's note, *supra* note 184.

200. *See id.* One treatise noted that "[t]o the extent that prior Maine cases may have permitted reputation or opinion evidence concerning a victim's lack of chastity, those cases are no longer good law." FIELD & MURRAY, *supra* note 187, § 412.1, at 179.

201. ME. R. EVID. 412 advisory committee's note, *supra* note 184. The Committee advanced this rationale despite many Maine cases that explicitly condoned the introduction of the victim's sexual history, embracing the common law rules of the time. Perhaps the Committee was relying on the most recent cases, such as *State v. White*, 456 A.2d 13 (Me. 1983), which did not allow specific instances of the victim's sexual history to be introduced in a child sexual abuse case, or *State v. McFarland*, 369 A.2d 227, 228 (Me. 1977), which held that specific instances of the victim's sexual history were not admissible in a rape prosecution. The Committee may have felt that these cases represented a trend toward exclusion of the victim's sexual history. Nevertheless, these cases can be read as merely excluding *specific acts* as a form of proof of the victim's sexual history, consistent with the common law rules allowing only reputation and opinion evidence to prove a victim's sexual history.

202. ME. R. EVID. 412 advisory committee's note, *supra* note 184 (citing State v. McFarland, 369 A.2d 227 (Me. 1977); State v. Dipietrantonio, 152 Me. 41, 122 A.2d 414 (Me. 1956); State v. Flaherty, 128 Me. 141, 146 A. 7 (1929)). In fact, *Flaherty* held that although proof of the victim's sexual history by *specific acts* was not allowed, evidence of the victim's *reputation* for unchastity was admissible. State v. Flaherty, 128 Me. at 146, 146 A. at 9. In both *Dipietrantonio* and *McFarland*, the only evidence offered, and thus the only evidence excluded, was *specific instances* of the victim's sexual history. State v. McFarland, 369 A.2d at 228; State v. Dipietrantonio, 152 Me. at 46, 122 A.2d at 418. Both *Flaherty* and *Dipietrantonio*, in excluding specific acts, specifically stated that evidence of reputation might be admissible. One should note that *McFarland* refers to *Flaherty* and *Dipietrantonio* to exclude specific acts. State v. McFarland, 369 A.2d at 228; State v. Flaherty, 128 Me. at 146, 146 A. at 7; State v. Dipietrantonio, 152 Me. at 46, 122 A.2d at 418. Thus, although none of these cases admitted specific acts to prove the victim's sexual history, all three indicated that the reason for the exclusion was not that the victim's sexual history was *per se* inadmissible, but rather that the *form* of evidence presented was inadmissible.

The Advisory Committee focused on the abuses suffered by a victim of sexual crimes and the misuse of evidence regarding her sexual history, stating: "The danger in the admission of such evidence is the likelihood that it will provoke moral and emotional reactions in the trier of fact increasing the risk of unfair prejudice."[203] The Rule overturned Maine's common law theory that the victim's sexual history, as an indication of her character trait of chastity, was relevant to her credibility especially on the issue of consent.[204] In addition, the Rule forbids the use of reputation or opinion evidence to prove the victim's sexual history; nevertheless, evidence of specific acts was the only form allowed under the common law. Nevertheless, the Advisory Committee did not refer to the fact that the Rule was overturning the common law theories of relevance of this evidence, nor did it comment on any theory of relevance regarding evidence of the victim's sexual history. Instead, the Rule is safely couched in a broad policy—to protect victims of sexual crimes.

Significantly, Rule 412 is within Article IV of the Maine Rules of Evidence, which is entitled "Relevance and its Limits."[205] The Advisory Committee's Note does not refer to the relevance of the victim's sexual history to either her credibility or her consent. In fact, the Advisory Committee's Note only mentions the words "relevant" or "relevancy" twice.[206] One of the two references occurs when the Advisory Committee explains that a victim's statements about her sexual history might be admissible if "relevant" to impeachment, or offered for "some other proper purpose."[207] The Committee did not indicate what another "proper purpose" might be, since the Rule purports to name the only two specific purposes for which the victim's sexual history may be offered.[208] In addition to clouding

203. ME. R. EVID. 412 advisory committee's note, *supra* note 184.

204. *See supra* text accompanying notes 33-36.

205. ME. R. EVID. art. IV.

206. *See* ME. R. EVID. 412 advisory committee's note, *supra* note 184. One reference occurs when the Advisory Committee's Note points out that the Rule applied only in criminal cases of rape, gross sexual misconduct, or the sexual abuse of a minor; in all other cases, the rules of "relevancy and impeachment" were to apply. *See id.*

207. *See id.*

208. Some Maine Rules of Evidence exclude evidence for all purposes including impeachment. Maine Rule of Evidence 408(b) excludes evidence of statements made at court-sponsored domestic relations mediation sessions, no matter what the purpose offered. ME. R. EVID. 408(b). Maine Rule of Evidence 410 excludes evidence of a withdrawn guilty or nolo contendere plea regardless of the purpose for which it is offered. ME. R. EVID. 410. Other Maine Rules, however, exclude evidence only when offered for specified purposes, but do not exclude the evidence when offered to impeach. For example, Maine Rule of Evidence 409 excludes evidence of any offer to pay medical costs if offered to "prove liability for the injury." ME. R. EVID. 409. Maine Rule of Evidence 411 excludes evidence of liability insurance if offered to prove negligence. ME. R. EVID. 411. Both Rules 409 and 411 allow the evidence to be admitted for purposes of impeachment.

the relationship between constitutional rights and the Rule, the absence of the Rule's relevance analysis allows the stereotypes and prejudices associated with information about the victim's sexual history to exist underneath the Rule of policy. The outdated and sexist ideas that a sexually active woman is more likely to be raped or to lie about being raped, or is less worthy of the protection of the law, are safely cloaked beneath the policy of protection of the victim and prevention of unfair use of her sexual past.

C. *Application of the Rule to Individual Cases*

1. *General Application of the Rule*

The Law Court has had several occasions to evaluate lower court interpretations of Rule 412 in sexual crime cases. Exclusions based on Rule 412 have been held constitutional in most cases although exclusions have been deemed unconstitutional in a few instances. The court has recognized that the defendant's right to confront witnesses does not automatically require admission of evidence of the victim's sexual history; the balancing test must be employed. Additionally, the Law Court and lower courts appear reluctant to apply Rule 412 when other rules can be applied to achieve the same result.[209]

Just a few months after the Rule was enacted, *State v. Siegfried*[210] was decided by the Law Court.[211] The Law Court upheld the trial court's exclusion of evidence of the victim's sexual past because its relevance "approached zero" and was therefore properly excluded under Rule 403 because the danger of unfair prejudice substantially

209. Sometimes the court has been able to exclude information based solely on mistakes made by the parties offering the evidence. For example, in *State v. Philbrick*, 551 A.2d 847 (Me. 1988), the Law Court upheld the trial court's decision to exclude the defendant's evidence that the victim was a prostitute. The defendant had asserted an alibi defense to the charge of gross sexual misconduct, rather than a consent defense which would have conflicted with his alibi defense; on appeal he argued that the trial court's exclusion had prevented him from asserting a consent defense. *See id.* at 850-51. The Law Court stated that if the evidence had been offered as relevant to a consent defense, it "would have been admissible," under the second exception of Rule 412. *See id.* at 851. Nevertheless, based on the inadequate offer made by the defendant, the evidence of the victim's prostitution was properly excluded. The Law Court also seemed to doubt the purpose the defendant stated for offering the evidence, noting that the defendant would not be allowed "to discredit the victim's character by attempting to show that she was a prostitute." *Id.* It is interesting to note that if the defendant had properly asserted a consent defense, as well as offered his evidence in the form of specific instances of sexual relations between himself and the victim, the evidence would have been admissible, according to the Law Court, even though it acknowledged that the defendant's aim was to attack the victim's character. *See id.*

210. 460 A.2d 1382 (Me. 1983).

211. Note that the Rule was not in effect when the trial court heard the case.

outweighed the probative value of the evidence.[212] The Law Court could have mentioned that Rule 412 would have reached the same conclusion if it had been in effect at the time of trial.

In *State v. Rossignol*,[213] the Law Court followed the Advisory Committee's Note's guidance that "admissibility of . . . evidence [of the victim's sexual past] is determined by considerations of relevancy and impeachment" when the charge is unlawful sexual contact, which is not explicitly within the scope of the Rule.[214] The defendant's offer of evidence regarding the victim's state of mind, which included evidence of her sexual experiences, was rejected by the trial court.[215] At trial, the defendant wanted the evidence admitted "to challenge the prosecutrix's credibility."[216] The Law Court upheld the trial court's exclusion of the evidence, because "[t]he trial court did not abuse its discretionary power in the areas of relevancy and impeachment."[217]

In *State v. Huntley*,[218] the defendant argued on appeal that the trial court had violated his constitutional rights by limiting his cross-examination of the victim regarding her abuse by another person.[219] The trial court allowed cross-examination on the issue of whether coercion of the victim by the other abuser had occurred, but not on the nature of the actual abuse.[220] The Law Court found that the limitation was not a violation of the defendant's constitutional rights.[221] The court reiterated that "the limitation of Rule 412 must be weighed against a defendant's constitutional right to present a proper defense by effective cross-examination," and found that the defendant's right did not automatically require unlimited cross-examination.[222]

In *State v. Adams*,[223] the defendant argued that evidence of the victim's sexual history was relevant to the victim's bias, which he had a constitutional right to expose.[224] The Law Court upheld the

212. *See* State v. Siegfried, 460 A.2d at 1383.

213. 490 A.2d 673 (Me. 1985).

214. *Id.* at 675.

215. *See id.* at 674.

216. *Id.* On appeal, the defendant slightly changed the characterization of his offer, stating it was for the purpose of showing "that the prosecutrix was biased against defendant." *Id.*

217. *Id.* at 675.

218. 681 A.2d 10 (Me. 1996).

219. *See id.* at 12-13.

220. *See id.*

221. *See id.* at 13.

222. *Id.* The defendant also argued that the evidence was admissible to rebut the childhood naiveté presumption on appeal, even though he had not preserved the issue at trial; the Law Court found no obvious error (the standard applied when the issue was not preserved at trial). *See id.*

223. 544 A.2d 299 (Me. 1988).

224. *See id.* at 301.

trial court's ruling to admit some evidence of the victim's sexual history with a limiting instruction.[225] Instead of utilizing Rule 412, however, the court relied on Rule 403 to uphold the exclusion, and noted that it "need not therefore decide whether the testimony was also precluded under Rule 412."[226]

In *State v. Steen*,[227] the Law Court upheld the trial court's ruling preventing the defendant's cross-examination of the victim about a prior rape allegation she had made.[228] The defendant offered this evidence on the issue of the victim's credibility.[229] The trial court excluded the evidence, primarily because the testimony regarding the victim's prior rape allegation was controverted; the trial court felt testimony on the issue would create a mini-trial.[230] The trial court weighed the competing considerations recognized in Rule 403, finding that the evidence had very little probative value as to the victim's credibility, and any such value was substantially outweighed by the danger of confusion of the issues.[231] Rule 412 could not be applied directly because the defendant was not offering evidence of voluntary sexual acts by the victim, but rather her statements about involuntary sexual assaults upon her.[232]

The Law Court upheld the lower court's "determination that the probative value of [the defendant's] evidence was outweighed by the possibility of jury confusion and delay," and found there had been no violation of the defendant's constitutional rights.[233] Although neither the trial court nor the Law Court directly attributed its ruling to Rule 412, the rationale of Rule 412 was implicated in the exclusion of the evidence due to Rule 403 considerations, which in some ways overlap Rule 412 considerations.

One of the "unwritten exceptions" to Rule 412 arose in *State v. Leonard*,[234] when the prosecution introduced evidence at trial of the victim's sexual history. The Law Court subsequently overturned the trial court's exclusion of this evidence. The Law Court found that the defendant should have been allowed to rebut the prosecution's evidence of the victim's lack of sexual experience prior to the assault.[235] Furthermore, the evidence should have been admitted for

225. *See id.*

226. *Id.*

227. 623 A.2d 146 (Me. 1993).

228. *See id.* at 150. The conviction, however, was later reversed on separate grounds.

229. *See id.* at 149.

230. *See id.*

231. *See id.*

232. This would be the obvious reason Rule 412 did not apply directly. Neither the trial court nor the Law Court stated the reason for not applying Rule 412.

233. State v. Steen, 623 A.2d at 150.

234. 513 A.2d 1352 (Me. 1986).

235. *See id.* at 1354-55.

the purpose of impeaching the victim's testimony concerning the background and circumstances of the charge.[236]

2. *Case Discussions of the Rationale of the Rule*

The Law Court expressly stated its view of the purpose of Rule 412 only once, in *State v. Jacques*,[237] a case regarding the childhood naiveté presumption. There, the court declared that "[t]he purpose of the Rule is to prevent a trial from becoming a trial of the victim, rather than the accused."[238] In *Adams*, the court upheld the exclusion of the victim's sexual history because it "carried the substantial risk of confusing the issues."[239] The Law Court seems to have viewed Rule 412 as encompassing the traditional Rule 403 considerations, given the court's reference to both Rule 412 and Rule 403, without distinguishing between the two Rules' purposes or results.

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236. *See id.* at 1355. The State elicited from the victim details of a prior sexual assault by the defendant "to establish the alleged scheme or plan to use the Complainant as a surrogate mother." *Id.* at 1354. Nevertheless, the Law Court felt that "[p]atently, there was no need to go into the details of the intercourse for purposes of showing the scheme or plan. . . . In so doing, the State 'opened the door' to evidence contradicting the Complainant's statements as to her chastity to attack her credibility." *Id.* The second "unwritten exception," the childhood naiveté presumption, has been prevalent in Maine case law. It was employed in *State v. Jacques*, 558 A.2d 706 (Me. 1989), where the Law Court upheld the pre-Rule 412 case law that evidence of a child victim's sexual history should be admitted. In *State v. Davis*, 406 A.2d 900 (Me. 1979), the Law Court adopted the defense's argument that such evidence should be admitted "to prevent the jury from assigning to the complainant's testimony the kind of credibility they might otherwise give it because of the tendency to attribute an innocence in sexual matters to a child." *Id.* at 901. In *State v. Jacques*, the Law Court held that although "[t]he past sexual behavior of a victim is generally not admissible" under Rule 412, "the State's legitimate interest in protecting victims of sexual abuse is neither absolute nor paramount." State v. Jacques, 558 A.2d at 707. In fact, "[t]he State's interest must be weighed against the defendant's constitutional right of effective cross-examination and to present a proper defense." *Id.* at 708. The Law Court later created limitations on the broad rule of *Jacques*, as exemplified in *State v. Knox*, 634 A.2d 952 (Me. 1993). The defendant in *Knox*, relying on *Jacques*, offered testimony from a ten-year-old witness who claimed to have had sexual relations with the fourteen-year-old victim four or five years prior to the alleged assault by the defendant, for the purpose of rebutting the childhood naiveté presumption. *See id.* at 953. The Law Court established that "[b]efore testimony to rebut the tender years assumption becomes admissible, the assumption itself must arise. *For the inference to arise, the child witness must display extraordinary sexual knowledge for his or her age.*" *Id.* (emphasis added). This modified approach to the childhood naiveté presumption, that the presumption is invoked only if the child portrays extraordinary sexual knowledge for her age, reflected federal law. In *United States v. Torres*, 937 F.2d 1469 (9th Cir. 1991), the Court of Appeals for the Ninth Circuit stated that the presumption of childhood naiveté was not triggered unless the child displayed extraordinary sexual knowledge for his or her age. *See id.* at 1474.

237. 558 A.2d 706 (Me. 1989).

238. *Id.* at 707.

239. State v. Adams, 544 A.2d 299, 301 (Me. 1988).

D. Summary and Criticisms of the Rule and Its Application

1. Summary and Analysis of Application of the Rule

Maine Rule of Evidence 412 has protected victims of sexual crimes from the exploitation of their sexual history in court. The general inadmissibility of evidence of the victim's sexual history and the complete bar to reputation and opinion evidence have severely limited the introduction of this evidence. Rule 412 forced courts to cease viewing the victim's sexual history as relevant to her credibility, and drastically reduced instances in which the victim's sexual history would be held relevant to the issue of consent. In several cases, including *Steen*, the court ruled that such evidence offered on the issue of the victim's credibility would not be admissible.[240] Although the Law Court has not had occasion to rule directly that such evidence is not admissible as relevant to the victim's consent, that may be because the Rule is working so well that evidence offered for this purpose is not admitted at the trial court level.[241]

Prior to the 1995 amendments to the Rule, courts trying unlawful sexual contact cases rarely employed Rule 412 by analogy, but rather used the principles of "relevancy and impeachment" for guidance, as instructed by the Advisory Committee's Note.[242] Thus, Rules 403 and 611 were more often employed. Although the policies of Rule 412 can be realized by applying Rule 403, the application of Rule 403 does not always produce the same outcome that Rule 412's use would have. In *Leonard*, the Law Court overturned the trial court's exclusion of evidence in an unlawful sexual contact case based on Rule 412, since "the better approach in determining admissibility of contradictory statements is for the trial court to consider admissibility in terms of probative value versus prejudicial effect and relevancy as addressed in M.R.Evid. 401-403."[243] In *State v. White*,[244] Rule 412 was not applied despite the fact that the defendant was charged with both unlawful sexual contact and gross sexual misconduct. The court was faced with the conflict of applying Rule 412 to the evidence with respect to the gross sexual misconduct charge, and applying rules of "relevance and impeachment" to the same evidence with respect to the unlawful sexual contact charge.[245] Nevertheless, Rule 412 could have been applied directly to the gross

240. *See* State v. Steen, 623 A.2d 146 (Me. 1993).

241. Note that in *State v. Philbrick* the Law Court excluded evidence that the victim was a prostitute because it was not relevant to her consent. State v. Philbrick, 551 A.2d 847, 850-51 (Me. 1988). The exclusion was based mainly on the defendant's failure to provide an adequate offer of proof that the evidence was specific evidence of consensual sexual relations with the victim prostitute, which would have fallen under the exception of Rule 412(b)(2). *See id.* at 851.

242. ME. R. EVID. 412 advisory committee's note, *supra* note 184.

243. State v. Leonard, 513 A.2d 1352, 1355 (Me. 1986).

244. 456 A.2d 13 (Me. 1983).

245. *Id.* at 14.

sexual misconduct charge and by analogy to the unlawful sexual contact charge, rather than being completely ignored. The amendments that extended the scope of the Rule to include unlawful sexual contact charges terminated this double standard and prevented courts from ignoring the rationale of Rule 412 in unlawful sexual contact cases.

Courts are reluctant to give Rule 412 the full force of its intended meaning, and often needlessly rely on Rule 403 or Rule 611 when Rule 412 applies directly. In *White*, the Law Court did not utilize Rule 412 to uphold the trial court's exclusion of evidence of the victim's prior abuse allegations.[246] Instead, the court relied on Rule 611 to allow the trial court discretion in limiting cross-examination to "protect witnesses from harassment or undue embarrassment."[247] In *State v. Day*,[248] the same issue was presented and the Law Court again employed Rule 611 alone.[249] Moreover, in *State v. Gagne*,[250] the Law Court limited evidence of possible prior abusers of the victim, employing the Rule 403 balancing test, and never mentioning Rule 412.[251] Finally, in *Adams*, the court, although alluding to the fact that both Rules 403 and 412 applied, excluded the evidence of past sexual acts of the victim with others solely on the basis of Rule 403 considerations.[252]

The Advisory Committee's Note states that "Rule 403 does apply even to evidence made specifically admissible by Rule 412," implying that Rule 412 should be considered before Rule 403.[253] Rule 412 should be employed when it applies directly to exclude the evidence, without forcing the trial judge to perform a Rule 403 balancing test which may or may not exclude the evidence.

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246. *See id.* at 15.

247. ME. R. EVID. 611(a).

248. 538 A.2d 1166 (Me. 1988) (limiting the defendant in his cross-examination of the child victim on the issue of prior allegations of sexual abuse she had made against others). Note that in this case, the defendant was charged with unlawful sexual contact, and the Rule had not yet been amended to apply directly to unlawful sexual contact cases. Nevertheless, Rule 412 could have been applied by analogy.

249. *See id.* at 1167-68.

250. 544 A.2d 795 (Me. 1989) (precluding cross-examination by the defendant of the child victim about others who may have abused her around the time of the alleged abuse by the defendant).

251. *See id.* at 796.

252. State v. Adams, 544 A.2d 299, 301 (Me. 1988). In *State v. Albert*, the Law Court noted that even if the defendant had shown that the evidence was admissible under one of Rule 412's exceptions, Rule 403 would have been applied, and might have kept the evidence out. State v. Albert, 495 A.2d 1242, 1243-44 (Me. 1985). This may reflect the Law Court's increasing level of comfort with Rule 412 and a willingness to employ it *before* Rule 403, in contrast to prior cases. Of course, in *State v. Albert*, the statement was dictum since the court had already found no obvious error in the exclusion of the evidence. *See id.* at 1243.

253. ME. R. EVID. 412 advisory committee's note, *supra* note 184.

2. *Suggestions for Textual Improvements to the Rule*

There are a few legitimate criticisms of Rule 412 and its application. By stating that the exceptions constitute the "only evidence of a victim's past sexual behavior" which is admissible, the Rule is misleading.[254] There are other circumstances in which such evidence is admissible, explicitly referred to in the Advisory Committee's Note: first, where the prosecution has opened the door on the victim's sexual history, and second, where the presumption of childhood naiveté has been triggered.[255] If the *prosecution* is permitted to bring in evidence that Rule 412 specifically prohibits the *defendant* from bringing in,[256] the Rule should so reflect.

Furthermore, the Rule should provide guidance on the application of the second exception specified in the Rule, when instances of sexual relations between the victim and the defendant are admissible. In *State v. Beckwith*,[257] a pre-Rule decision, and in *Pierce v. State*,[258] a post-Rule decision, the Court concluded that such evidence was admissible to prove the relations between the victim and the defendant. The mandate of *Beckwith* and *Pierce* is unsupportable, and should be explicitly rejected. In *Pierce*, although evidence of a continuing abusive relationship between the defendant and the victim was offered by the prosecution to show continuing abuse, it was considered by the court to be past acts of the defendant. Moreover, the evidence was determined to be admissible despite Rule 404(b)'s prohibition against past acts offered to prove a character trait, because the evidence was offered to show the defendant's intent and opportunity.[259] The court ignored the fact that the evidence was also evidence of the victim's sexual history, and that Rule 412 should have been activated, whether or not the exception allowed the evidence. Even more troubling is the following statement in *Pierce*: "Evidence that the defendant engaged in sexual activity with the victim named in the indictment, whether prior to or subse-

254. ME. R. EVID. 412(b).

255. Although Rule 412 has limited the childhood naiveté presumption as stated in *Jacques*, the presumption of naiveté continues to be triggered when a child exhibits extraordinary sexual knowledge for his or her age. Although Rule 412 does not appear to be the direct cause of this limitation on the presumption of childhood naiveté, it very well may have given the Law Court pause to consider the conflict stated in *Jacques*. It is unclear from the Rule by what standard the child's knowledge should be judged, and how judges should make those determinations.

256. *See* State v. Nadeau, 653 A.2d 408 (Me. 1995); State v. Leonard, 513 A.2d 1352 (Me. 1986).

257. 158 Me. 174, 180 A.2d 605 (1962).

258. 463 A.2d 756 (Me. 1983).

259. *See id.* at 761. This case can be compared to *Doe*, discussed in *supra* Part III, in which the court treated facts of the victim's sexual history within the knowledge of the defendant as solely knowledge of the defendant, relevant to his state of mind, and upon which Rule 412 had no bearing. *See* Doe v. United States, 666 F.2d 43, 48 (4th Cir. 1981).

quent to the alleged offense but tending to demonstrate a continuity of the activity, was admissible to prove the relationship and mutual disposition of the parties."[260] This statement should be clarified because it "goes somewhat beyond the narrow confines of Rule 412(b)(2)."[261] Furthermore, "evidence of one kind of sexual behavior at one point in time might not be probative of consent to another kind of sexual act committed under other circumstances."[262] Thus, the exception should be narrowly tailored to allow only evidence of similar acts under similar circumstances.[263]

Although case law makes it clear that past abuses as well as volitional acts of the victim are covered by Rule 412,[264] the Rule itself should elucidate this concept. The results of *Gagne* and *Day*, which allowed some cross-examination of the victims about prior abuses by others, but did not exclude the evidence completely, could thus be avoided. In neither case did the Law Court mention Rule 412 in its decision.

According to the Advisory Committee, a procedural mechanism such as the one created in Federal Rule 412 was not necessary.[265] Nevertheless, the use of a procedural mechanism would be beneficial in that it would create a structure for the consideration of such evidence, allow both sides ample opportunity to foresee and prepare for the potential admission of such evidence, and give the trial judge adequate time to make a decision regarding admission.

3. *Proposal that Justification for Rule be Fully Explored*

From the Advisory Committee's Note and the application of the Rule, it is clear that the Rule is intended to further policy objectives. It is not a privilege, even though the victim's right to privacy is implicated. And it is not a rule of relevance, judging from the fact that no relevance rationales are offered for the Rule in the Advisory

260. Pierce v. State, 463 A.2d at 761. Note that this argument was derived from pre-rules cases *Beckwith* and *State v. Seaburg*, 154 Me. 210, 145 A.2d 550 (1958). Because this was a case of child sexual abuse, consent was not an element; thus, the rule as stated should have been inapplicable.

261. FIELD & MURRAY, *supra* note 187, § 412.2, at 181. The exception in Rule 412(b)(2) allows such evidence *only* with regard to the victim's consent to the particular crime charged.

262. *Id.* § 412.2, at 180.

263. In *State v. Leonard*, the defendant was allowed to offer his testimony as to the past sexual relations between himself and the victim in order to impeach her testimony that there had been no prior abuses. Again, the evidence was admitted despite the fact that consent was not an issue. *See* State v. Leonard, 513 A.2d 1352 (Me. 1986). Furthermore, in *State v. Nadeau*, 653 A.2d 408 (Me. 1995), the prosecution was allowed to enter the same type of evidence.

264. *See* State v. Hoffstadt, 652 A.2d 93 (Me. 1995); State v. Jacques, 558 A.2d 706 (Me. 1989).

265. ME. R. EVID. 412 advisory committee's note, *supra* note 184.

Committee's Note or in cases applying it. The drafters failed to recognize relevance arguments in support of the Rule.[266]

Not only did the drafters evade the relevance implications of the Rule, they failed to address the confrontation between the Rule as a policy measure and the rights of the defendant to introduce relevant evidence. The Advisory Committee gave no guidance on the intended solution to a conflict between the defendant's rights and the government's interest in preventing the admission of the evidence. Moreover, part of that policy was surely the protection of the victim's right to privacy. Yet the Note gives no guidance on the appropriate resolution of a situation in which the victim's right to privacy conflicts with the defendant's constitutional rights.

Furthermore, if the drafters felt that the Rule reflected a strong social policy, they could have excluded the evidence even for purposes of impeachment.[267] If the goal of Maine Rule 412 is the protection of victim-witnesses, then the Rule should be applicable irrespective of the evidence's probative value. No matter what the purpose, once the evidence is admitted, the victim will become subject to humiliation and embarrassment, and her privacy will have been invaded. In addition, the Advisory Committee's Note's instruction that statements of the victim's sexual history may be admissible to impeach is confusing. In *Leonard*, evidence of the victim's statements concerning her sexual history was admissible in order to impeach the credibility of her testimony;[268] yet in *Steen*, Rule 412 was not even mentioned when statements of the victim regarding sexual history, offered to impeach her testimony, were excluded.[269] Thus, it would seem that Rule 412 does cover *statements* about sexual history; it is not clear, however, whether the impeachment would be permissible using *other evidence* of the victim's sexual past.

The Rule needs and deserves a relevance analysis. A person's sexual past is not relevant to his or her likelihood of being raped or of lying about being raped. Nor should it be subversively considered to determine whether the victim is worthy of the protection of

266. Nevertheless, some would argue that the Rule is a relevance measure, masquerading under the guise of policy. One treatise has commented that "Rule 412 as written represented a policy judgment that while evidence of a victim's prior sexual conduct might have some marginal probative force, its use nonetheless should be confined to a few narrow exceptions." FIELD & MURRAY, *supra* note 187, § 412.3, at 183.

267. *See* ME. R. EVID. 408(b) advisory committee's note, *supra* note 184 (explaining that exclusion of evidence of statements made in mediations of domestic relations is applicable regardless of the purpose for which it is being offered, because of the "strong public policy" supporting the Rule); FED. R. EVID. 412 advisory committee's note (explaining that evidence of the victim's past sexual history is excluded for *all purposes*, including impeachment, except those stated specifically in the Rule).

268. *See* State v. Leonard, 513 A.2d 1352 (Me. 1986).

269. *See* State v. Steen, 623 A.2d 146 (Me. 1993).

the law. Framing the Rule as a rule of relevance would alleviate the conflict with the defendant's constitutional rights and prevent the lax application of the Rule resulting from a lack of appreciation that evidence of the victim's sexual history may be excludable both on the basis of irrelevance and the basis of policy.

In summary, Maine Rule of Evidence 412 has been a powerful tool for excluding irrelevant evidence, or relevant but highly prejudicial evidence, of a sexual crime victim's sexual past. The Rule should be amended to codify the holdings regarding the "unwritten exceptions"; a procedural mechanism should be employed; the definition of "past sexual behavior" should be clarified; and the Rule's Advisory Committee's Note should reevaluate the justifications for the Rule.

V. CURRENT FEDERAL RULE OF EVIDENCE 412: THE SEXUAL HARASSMENT SHIELD

A. 1994 Amendments to Federal Rule of Evidence 412

1. The Process of Amending the Rule

The extension of the Rule to civil cases was highly controversial. The Supreme Court ultimately refused to promulgate a Judicial Conference version of amended Rule 412 covering civil cases.[270] The United States Congress disagreed with the Supreme Court, and responded by passing the amended version of Rule 412 itself.

In January of 1993, Senator Joseph Biden (D-DE), Chair of the Senate Judiciary Committee, introduced the Violence Against Women Act in the United States Senate, which proposed the extension of Rule 412 to civil cases.[271] The Act also suggested the creation of two new rules of evidence, 412A and 412B, which would mirror Rule 412 and would apply to all criminal cases and civil cases.[272] The proposed amendments to Rule 412 required that courts detail the reasoning behind orders admitting evidence of the victim's sexual history and also revised the balancing test.[273] In all three proposed rules, reputation and opinion evidence was barred, and evidence of specific instances was admissible only if the probative value outweighed the danger of unfair prejudice.[274]

The Judicial Conference, via the Committees on Criminal and Civil Rules, discovered that Congress was autonomously revising

270. *See* H.R. REP. No. 103-250, at v-vi (1994).

271. *See* S. REP. No. 103-138, at 39 (1993). The Act had been proposed, but not passed, in the Senate in 1990 by Senator Biden. *See id.* at 37. Senator Biden introduced the Act "in response to the escalating problem of violence against women.... There are also some crimes, including rape and family violence, that disproportionately burden women." *See id.*

272. *See id.* at 59.

273. *See id.* at 59, 89-91.

274. *See id.* at 89-91.

Rule 412, and thus bypassing the Judicial Conference procedure.[275] The major impetus for the Judicial Conference to begin drafting revisions to Rule 412 was "to forestall action by the Congress and to avoid a bypass of the Rules Enabling Act process."[276] In April of 1994, the Judicial Conference forwarded the revised rule to the United States Supreme Court.[277] The Rule as proposed by the Judicial Conference extended the scope of the Rule to encompass civil cases and deleted the balancing test of Rule 412,[278] in favor of the general application of the Rule 403 balancing test.

The Supreme Court adopted the revisions to the criminal application of Rule 412 but refused to adopt the amendment to Rule 412 extending it to civil cases.[279] Some Justices of the Supreme Court felt "that the amendment might exceed the scope of the Court's authority under the Rules Enabling Act, which forbids the enactment of rules that 'abridge, enlarge or modify any substantive right.'"[280] The Court's posture arose from fear that its holding in *Meritor Savings Bank v. Vinson*[281] would be jeopardized.[282] In *Meritor Savings*

275. The Judicial Conference has a Standing Committee on Rules of Practice and Procedure, which in turn has Advisory Committees on different areas of rules. *See* FIELD ET AL., *supra* note 84, at 459. In the case of Rule 412, the Advisory Committees on Criminal Rules, Civil Rules, and the Rules of Evidence all took part at one time or another. *See Minutes of the Advisory Committee on Federal Rules of Criminal Procedure* (Oct. 12 & 13, 1992), *available in* 1992 WL 694252 (W.C.U.S.), at *9; *Minutes of the Committee on Rules of Practice and Procedure* (Dec. 17-19, 1992), *available in* 1992 WL 739926 (J.C.U.S.), at *5; *Minutes of the Committee on Rules of Practice and Procedure* (June 17-19, 1993), *available in* 1993 WL 818942 (J.C.U.S.), at *13. The Judicial Conference was established to provide the Supreme Court with recommendations for creating and amending rules of procedure. *See supra* note 84. The Rules of Evidence Committee was disbanded when Rule 412 was originally being revised by the Judicial Conference; the Committee was, however, recreated before the Rule was submitted to the Supreme Court, and it made major revisions to the drafts created by the Committees on the Rules of Civil Procedure and the Rules of Criminal Procedure. *See Minutes of the Committee on Rules of Practice and Procedure* (June 17-19, 1993), *available in* 1993 WL 818942 (J.C.U.S.), at *14-*15.

276. *Minutes of the Meeting of the Committee on Rules of Practice and Procedure* (Dec. 17-19, 1992), *available in* 1992 WL 739926 (J.C.U.S.), at *5.

277. *See Amendments to Federal Rules Sent to Congress by Supreme Court*, 62 U.S.L.W. 1165, 1165 (May 10, 1994).

278. *See* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, § 5381.1, at 154 n.13 (Supp. 1996) [hereinafter WRIGHT & GRAHAM SUPP.].

279. *See* H.R. DOC. NO. 103-250, at v (1994). Had Congress not taken action by December 1, 1994, the Rule, as amended by the Supreme Court, would have automatically become law. *See Amendments to Federal Rules Sent to Congress by Supreme Court*, 62 U.S.L.W. 1165, 1165 (May 10, 1994). The Committee on the Rules of Evidence was disturbed that the Supreme Court rejected its proposed amendments to Rule 412. *See Minutes of the Advisory Committee on Federal Rules of Evidence* (May 9, 1994), *available in* 1994 WL 809917 (J.C.U.S.), at *1.

280. H.R. DOC. NO. 103-250, at v (1994) (citing 28 U.S.C. § 2072(b) (1994)).

281. 477 U.S. 57 (1986).

282. *See* H.R. DOC. NO. 103-250, at v (1994).

Bank, a civil case concerning sexual harassment, the Supreme Court held "that evidence of an alleged victim's 'sexually provocative speech or dress' may be relevant in workplace harassment cases."[283] Additionally, the Chief Justice noted that "some Justices expressed concern that the proposed amendment might encroach on the rights of defendants" in sexual harassment suits.[284] In April of 1994, the Supreme Court forwarded the revised rules to Congress omitting the civil application provision of Rule 412.[285] The Committee of the Judicial Conference responded that the proposed amendments to Rule 412 would not disturb the Supreme Court's holding in *Meritor Savings Bank*, because Rule 412 "was a fact specific rule that would require taking [the *Meritor Savings Bank*] opinion into account."[286]

Thus, Congress took action to amend Rule 412 itself. The Judicial Conference Committee's discussion with the House of Representatives led to the passage in the House and Senate of an amended Rule 412 identical to that suggested to the Supreme Court by the Judicial Conference in August 1994,[287] as part of the Violent Crime Control and Law Enforcement Act.[288]

2. *Summary of Amendments and Discussion of Advisory Committee's Note*

The Rule was modified in several important respects. Although the three criminal exceptions remained virtually unchanged,[289] the Rule was extended to include civil cases:

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283. *Id.* (quoting Meritor Sav. Bank v. Vinson, 477 U.S. at 69).

284. *Id.*

285. *See Amendments to Federal Rules Sent to Congress by Supreme Court*, 62 U.S.L.W. 1165, 1165 (May 10, 1994).

286. *Minutes of the Advisory Committee on Federal Rules of Evidence* (May 19, 1994), *available in* 1994 WL 809917 (J.C.U.S.), at *1.

287. *See* 23 WRIGHT & GRAHAM SUPP., *supra* note 278, § 5381.1, at 153.

288. *See* Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §§ 13701-4223 (1994). *See also New Federal Rules Are Mandated by 1994 Crime Bill*, 63 U.S.L.W. 2146 (Sept. 13, 1994). The amended Rule became effective December 1, 1994. *Id.* at 2147.

289. The specific exceptions in the criminal provision of the Rule were modified only slightly. Under the first specific exception, the scope of evidence of the victim's sexual behavior allowed to prove that the defendant was not the source of injury or semen was slightly expanded. In addition, the permitted use of "physical evidence" was added to the rule. The exception no longer requires that the victim's sexual behavior be "with others." *See* 23 WRIGHT & GRAHAM SUPP., *supra* note 278, § 5388.1, at 221. Furthermore, the revised exception alters the format of the inquiry slightly by asking whether a person other than the defendant *was* the source of injury rather than asking whether the defendant *was not* the source of injury. *See id.* The second specific exception originally allowed evidence of the victim's sexual behavior with the defendant; amended Rule 412 allows evidence of the victim's sexual behavior "with respect to" the defendant, which will make admissible *mental* behavior of the victim. *See id.* § 5389.1, at 227. In addition, the exception was expanded to include evidence offered by the prosecution, although the prosecution was not limited to offering this evidence "to prove consent" as the defense was. *Id.*

> In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.[290]

290. FED. R. EVID. 412(b)(2). The entire text of the amended rule is as follows:

> Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition
>
> (a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.
>
> (b) Exceptions.
>
> (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
>
> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
>
> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
>
> (C) evidence the exclusion of which would violate the constitutional rights of the defendant.
>
> (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
>
> (c) Procedure to determine admissibility.
>
> (1) A party intending to offer evidence under subdivision (b) must:
>
> (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
>
> (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
>
> (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

FED. R. EVID. 412.

The civil provision resembles the "constitutionally required" exception in criminal cases in that it applies no matter what the purpose of the offered evidence.[291] A balancing test is employed rather than the enumeration of specific exceptions "in recognition of the difficulty of foreseeing future developments in the law."[292] The Rule 412 balancing test differs substantially from the traditional balancing test in Rule 403. It places the burden on the proponent and requires the probative value of the evidence to substantially outweigh its dangers, in contrast to the Rule 403 test which requires the danger or consideration to substantially outweigh the probative value in order for the evidence to be excluded. In addition, Rules 412 and 403 require different considerations to be taken into account.[293]

Reputation and opinion evidence, although not expressly barred, is precluded because the only exceptions require evidence of specific acts. Therefore, reputation and opinion evidence is implicitly barred "in recognition of the limited probative value and dubious reliability of evidence of reputation or evidence in the form of an opinion."[294]

The confusing and controversial clause "notwithstanding any other provision of law" was removed. It was replaced with "if otherwise admissible," indicating that evidence can only be admitted under the Rule's exceptions if it is admissible under other rules of evidence.[295] Thus, Rule 412 can no longer be construed as outweighing all other evidentiary rules.

When discussing the reason for extending the Rule to all criminal cases, the Committee felt it was explanation enough to note that the reason was "obvious."[296] When explaining the reasoning behind the addition of a clause for civil cases, the Committee felt that the rationale was "equally obvious."[297] The reasoning is not altogether obvious, however, because sexual harassment is different from rape. Nevertheless, the application of a sexual harassment shield logically parallels the rape shield rule because evidence of the victim's sexual

291. *See* 23 WRIGHT & GRAHAM SUPP., *supra* note 278, § 5389.2, at 230.

292. FED. R. EVID. 412(b) advisory committee's note.

293. *Compare* FED. R. EVID. 412, *with* FED. R. EVID. 403. Rule 403 lists the considerations to be balanced against probative value as "danger of unfair prejudice, confusion of the issues, or misleading the jury, or . . . undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. On the other hand, Rule 412 requires only "the danger of harm to any victim and of unfair prejudice to any party" to be considered. FED. R. EVID. 412(b)(2).

294. FED. R. EVID. 412(b) advisory committee's note.

295. FED. R. EVID. 412(a).

296. FED. R. EVID. 412 advisory committee's note. The Rule still does not exclude evidence of the victim's sexual history in criminal cases for crimes other than sexual crimes, even if a sexual crime occurred during the commission of the charged crime.

297. *Id.*

history is often utilized in the same manner at trial and discovery as it is in rape trials.[298]

The Advisory Committee's Note does, however, illuminate the meanings of "past sexual behavior" and "sexual predisposition." "Past sexual behavior" includes "all activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact."[299] In addition, "sexual behavior" encompasses "activities of the mind, such as fantasies [or] dreams."[300] "Sexual predisposition," on the other hand, means "evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder."[301] Significantly, the Note explains that evidence "relating to the alleged victim's mode of dress, speech, or lifestyle will not be admissible" because it is evidence of "sexual predisposition."[302] This statement foreshadowed the Rule's interference with the holding of *Meritor Savings Bank*.[303]

Although the procedures specified in the Rule, requiring an in camera hearing after a written motion, do not apply directly to discovery, the Advisory Committee's Note directs courts to consider the Rule's policy of protecting victims when ruling on protective orders and requests for confidentiality in discovery proceedings.[304] Therefore, "[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."[305]

3. *Advisory Committee's Justification for the Amended Rule*

With the 1994 Amendments, the first Advisory Committee's Note to ever accompany the Rule was published. The purposes of the amendments, according to the Note, were "to diminish some of the confusion engendered by the original rule and to *expand the protection* afforded alleged victims of sexual misconduct."[306] Further-

298. *See* Paul Nicholas Monnin, Special Project, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155, 1180-84 (1995).

299. FED. R. EVID. 412 advisory committee's note.

300. *Id.*

301. *Id.*

302. *Id.*

303. Note that the criminal provision of the Rule excludes evidence of both "sexual behavior" and "sexual predisposition," although its exceptions refer only to acts of "sexual behavior." Therefore, to be admissible in a criminal case, "sexual predisposition" evidence would have to fall under the "constitutionally required" exception.

304. *See id.*

305. *Id.*

306. *Id.* (emphasis added).

more, the Rule purports "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."[307]

The Committee reinforced the Rule's policy of "*shielding* the alleged victim from potential embarrassment and *safeguarding* the victim against stereotypical thinking."[308] And again, the Committee referred to "[t]he strong social *policy* of *protecting* a victim's privacy and encouraging victims to come forward to report criminal acts."[309] Repeatedly, words of protection and policy are used to explain the theory of the Rule, even though the title of the Rule is "Sex Offense Cases; *Relevance* of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition."[310] The relevance of the evidence is not discussed in the Advisory Committee's Note. Instead, the Rule continues to be based mainly on the policy objectives of protecting the privacy of the victim, preventing the misuse of the evidence, and encouraging victims to report sexual assaults.

In addition, the Advisory Committee's Note states that evidence, even if admissible by a rule such as Rule 402, which allows only the presentation of relevant evidence, might be barred by Rule 412.[311] The selection of Rule 402 as a point of illumination, indicates that the Committee regarded some evidence of the victim's sexual history as relevant, but preferred that the basis of the bar be the policy considerations of Rule 412.

The framing of the Rule as a policy measure opens the door to claims of unconstitutional application in criminal cases. Critics argue the extension of the Rule to civil cases subverts defendants' constitutional rights.[312] The Advisory Committee's Note explains the "constitutionally required" exception with this example: "[S]tatements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking to prove consent."[313] The Committee's choice of an example of a victim's statement rather than an actual sexual act of the victim is noteworthy. Furthermore, the example chosen relates the evidence to a defense of consent, already covered under

307. *Id.*

308. *Id.* (emphasis added).

309. *Id.* (emphasis added). The Advisory Committee's Note clarified that if the crime or claim did not involve sexual misconduct, Rule 412 would not apply. However, the Note explained, the witness will "be protected" by other rules, for example Rules 403 and 404. *See id.* The Committee's choice of the words "be protected" further portrayed its view that the Rule is one of policy and not relevance.

310. FED. R. EVID. 412 (emphasis added).

311. *See* FED. R. EVID. 412 advisory committee's note.

312. *See* Galvin, *supra* note 2, at 771.

313. FED. R. EVID. 412 advisory committee's note.

one of the specific exceptions. Therefore, although the Committee did touch upon the conflict between the defendant's right to compulsory process and the Rule, the example given provides little guidance. Furthermore, the Committee gave no guidance as to the appropriate resolution of any conflict between Rule 412 and the defendant's right to confront witnesses against him.

With regard to civil cases, the application of a balancing test indicates that some evidence is relevant; otherwise, there is no probative value to weigh. The Advisory Committee's Note explained that, "[i]n an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be *relevant*, non-work place conduct will usually be *irrelevant*."[314] The Committee gave no guidance on the rule of relevance in sexual harassment cases, but instead tread lightly around this important issue, using the language "may perhaps."[315]

In summary, the Rule drafters adopted the revisions for the same policy reasons that the Rule was originally enacted: to protect the victim and to encourage the reporting of sexual assaults and sexual harassment. The Committee skirted the potential confrontation between the Rule and the holding of *Meritor Savings Bank*, as well as the issue of the relevance value of the excluded evidence. By neglecting to assert a relevance theory for the Rule (that the Rule excludes only wholly irrelevant evidence), the drafters implicitly asserted a belief that the evidence has some relevance. Thus, the drafters effectively preserved the stereotypes they claimed to be seeking to avoid. If the evidence has any relevance, it must be to the issue of consent or the victim's credibility, the common law bases for admitting the evidence. If the evidence is relevant to consent, it must be because a woman's consent to sexual relations with one person is relevant to her consent with another. If the evidence is relevant to the victim's credibility, then it must be because sexual character is linked to character for honesty. These rationales flow from stereotypes and gender-based assumptions about sexuality that the Rule was supposedly intended to avoid.

B. The Implications of a Sexual Harassment Shield

1. Elements of Sexual Harassment as Characterized by Meritor Savings Bank v. Vinson

The extension of the Rule to civil cases has greatly impacted sexual harassment claims made under Title VII of the Civil Rights Act of 1964.[316] The Civil Rights Act of 1964 prohibits discrimination on

314. *Id.* (emphasis added).
315. *Id.*
316. 42 U.S.C. § 2000e-2 (1994).

the basis of race, color, gender, religious, or national origin in employment hiring and practices.[317] The "gender" category was added to Title VII during last minute deliberations on the Civil Rights Act, as "something of an accident, at best."[318] Sexual harassment was first recognized as a valid Title VII claim in federal courts in 1976.[319]

Meritor Savings Bank v. Vinson, decided by the Supreme Court in 1986, is the seminal sexual harassment case; it marked the first time the Supreme Court addressed the issue of sexual harassment claims under Title VII.[320] *Meritor Savings Bank* confirmed that sexual harassment can arise in two forms: quid pro quo harassment, when job benefits or compensation are conditioned on submission to sexual advances, and hostile environment harassment, when an employee is subjected to demeaning statements or degrading conduct due to his or her gender.[321]

In *Meritor Savings Bank*, the Supreme Court held that both forms of sexual harassment rely on an "unwelcomeness" standard.[322] The conduct constituting the sexual harassment must be unwelcome in two senses: a reasonable person would have found the advances unwelcome and the victim in particular did not welcome the ad-

317. The Act reads, in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id.

318. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816 (1991). In fact, the gender category was added in an effort to defeat the Civil Rights Act of 1964. *See id.* at 816-17. It appears that this affects some courts' views of the worth of sexual discrimination or sexual harassment claims. In *Meritor Savings Bank*, the Supreme Court noted that, "[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives," and even relayed some of the arguments *against* including sex. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-64 (1986).

319. *See* D. Kelly Weisberg, *Introduction*, *in* APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION 725, 729 (D. Kelly Weisberg ed., 1996). The first federal court case to recognize sexual harassment was *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

320. *See* Sloan, *supra* note 94, at 378.

321. *See* Meritor Sav. Bank v. Vinson, 477 U.S. at 65. The plaintiff in *Meritor Savings Bank* claimed that her supervisor had harassed her by suggesting "that they go to a motel to have sexual relations," and by making "demands upon her for sexual favors . . . both during and after business hours"; he also "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions." *Id.* at 60. The district court had considered only the quid pro quo form of sexual harassment, and neglected to reflect on whether a hostile environment had been created. *See id.* at 62. The Court of Appeals noted this as one of its reasons for remanding the case. *See id.*

322. *See id.* at 68.

vances.[323] Furthermore, the Court found that "[t]he correct inquiry is whether the respondent by her conduct indicated that the alleged sexual advances were unwelcome."[324] The Supreme Court noted the district court's determination that the plaintiff's sexual interaction with her supervisor was "voluntary" and therefore denied relief to the plaintiff.[325] The District of Columbia Circuit Court of Appeals reversed the district court's decision, remarking in a footnote that the victim's "dress and personal fantasies" were irrelevant, even though testimony on the subject was allowed at trial.[326] The Supreme Court affirmed the Court of Appeals's decision, while strongly disagreeing with the Court of Appeals on the relevance of the victim's dress and personal fantasies.[327]

In defining the elements of a sexual harassment claim, the Court relied on the Equal Employment Opportunity Commission (EEOC) guidelines in requiring a showing of "unwelcomeness."[328] In a since oft-quoted phrase, the Court stated that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"[329] It went on to evaluate the relevance of the victim's dress and personal fantasies, even though it was not necessary to do so. The Court held that "a complainant's sexually provocative speech or dress . . . is obviously relevant."[330]

In making abundantly clear that dress and speech of the victim may be relevant in a sexual harassment claim, the Supreme Court articulated a theory of relevance, but did not give lower courts gui-

323. The objective standard has been criticized because it merely reflects the judgment of the dominant male class. *See* Weisberg, *supra* note 319, at 730, 756. The subjective standard has also been sharply criticized, because it focuses the inquiry on the victim's behavior and state of mind. *Id.*

324. Meritor Sav. Bank v. Vinson, 477 U.S. at 68.

325. *See id.* at 61.

326. Vinson v. Taylor, 753 F.2d 141, 146 n.36 (D.C. Cir. 1985). The Court of Appeals decision stated that:

> The District Court did not elaborate on its basis for the finding of involuntariness, but it may have considered the voluminous testimony regarding Vinson's dress and personal fantasies. . . . Since, . . . a woman does not waive her Title VII rights by her sartorial or whimsical proclivities, . . . that testimony had no place in this litigation.

Id.

327. *See* Meritor Sav. Bank v. Vinson, 477 U.S. at 69. Note that the Supreme Court manipulated the language and reference in the Court of Appeals decision from "dress and personal fantasies" to "sexually provocative speech or dress," even though "speech" is an entirely different matter from "personal fantasies," and "sexually provocative" was not the characterization used by the Court of Appeals.

328. *See id.* at 65-68 (referring to the EEOC Guidelines at 29 C.F.R. § 1604.11(a) (1985)).

329. *Id.* at 68.

330. *Id.* at 69.

dance on the proper application of the theory.[331] As a result, some lower courts have interpreted the "proclamation of relevance in [*Meritor Savings Bank*] to be a strong argument in favor of automatic admission and consideration of evidence concerning the plaintiff's conduct."[332] Since *Meritor Savings Bank*, the evidence admitted by lower courts includes photographs of the plaintiff nude, lunches shared by plaintiff and defendant, personal notes from plaintiff to the defendant, and even sexual jokes made by the plaintiff to others.[333]

The application of the "unwelcomeness" standard has drawn much criticism, namely the subjective strand of the standard (that the victim personally felt the advances to be unwelcome).[334] The Supreme Court's strong emphasis that the *conduct* of the victim was the best indicator of whether the advances were unwelcome has been sharply criticized because the victim's conduct becomes "the yardstick by which we measure assent."[335] The standard focuses the inquiry on the victim. Often such an inquiry incorporates the victim's clothing, dress, sexual predisposition, and even sexual activities unrelated to work.[336]

The "unwelcomeness" standard in sexual harassment parallels the consent element in rape and sexual assault, because it focuses on the victim.[337] The standard may go so far as to lead to a situation where

> a plaintiff with a substantial sexual history is held to be so experienced that she can withstand any work environment without being offended, while a plaintiff with no sexual history is vulnerable to attack from the defendant for being too sensitive to what most would consider an acceptable and harmless work environment.[338]

2. *Rule 412's Overlay on the "Unwelcomeness" Standard*

Does the civil provision of Rule 412 restrict the standard of relevance espoused in *Meritor Savings Bank*, or overturn the decision

331. *See* Sloan, *supra* note 94, at 384. "[B]ecause this statement is not a definitive standard for admitting evidence, the lower courts have had to interpret it and create standards for themselves." *Id.*

332. *Id.*

333. *See id.*

334. Although some courts interpreted *Meritor Savings Bank* as allowing increased admissibility of evidence of the victim's sexual predisposition, others restricted the use of such evidence despite *Meritor Savings Bank*. *See id.* at 388-89.

335. Estrich, *supra* note 318, at 828.

336. The "unwelcomeness" standard also "presupposes that harassers and their victims are motivated by sexual attraction," and it fails to recognize that sexual harassment embodies power differentials rather than sexual attraction. *See* Monnin, *supra* note 298, at 1155, 1178.

337. In effect, "the unwelcomeness requirement performs the doctrinal dirty work of the consent standard in rape law." Estrich, *supra* note 318, at 830.

338. Sloan, *supra* note 94, at 382.

completely, as the Supreme Court feared? Some believe that the exclusion of evidence of "sexual predisposition" in Rule 412 was intended "to modify if not to reverse the Supreme Court's decision in the Meritor" case.[339] It is possible that amended Rule 412 creates a presumption of irrelevance for evidence of sexual predisposition, which *Meritor Savings Bank* deemed to be "obviously relevant."[340]

Another inquiry must precede the question of whether amended Rule 412 modifies *Meritor Savings Bank*. Is Rule 412 one of relevance or of policy? Because the holding in *Meritor Savings Bank* is based on a relevance rationale, then a policy expounded by Rule 412 might not conflict with the *Meritor Savings Bank* holding. Policy considerations are sometimes subverted to allow the introduction of evidence relevant to the defendant's defense. If the Rule is primarily policy, the evidence may still be constitutionally excluded, but the court must weigh competing interests and find that the state's legitimate interest in protecting victims outweighs the defendant's constitutional right to confront his accuser. "[T]he pertinent inquiry in resolving this conflict is whether the benefit gained by advancing the interests of rape shield statutes is arbitrary and disproportionate when compared to the detrimental effect on the defendant's right to examine a witness's motive to fabricate."[341]

On the other hand, if amended Rule 412 is based primarily on a theory of relevance, then it may effectively modify the *Meritor Savings Bank* standard. If the amended Rule creates a new standard of relevance, then it excludes, as irrelevant, evidence of the victim's speech and dress which *Meritor* deemed "obviously relevant," and directly conflicts with the *Meritor Savings Bank* holding.[342] Even if amended Rule 412 doesn't completely overrule *Meritor Savings Bank*, it modifies it because "it requires courts to enunciate [the *Meritor Savings Bank* relevance] logic more carefully and to consider the prejudice of stereotypical thinking when engaging in the balancing mandated by Revised Rule 412(b)(2)."[343]

Because the civil portion of the Rule creates a balancing test, the Rule permits an absolute subversion of *Meritor Savings Bank* in the individual application of that test. The Rule creates a vehicle by which judges, based on the particular facts of a case, may choose to impose the *Meritor Savings Bank* standard or bypass it. If the latter occurs, then "[a]rmed with a presumption against admissibility and

339. 23 WRIGHT & GRAHAM SUPP., *supra* note 278, § 5385.1, at 194. The Judicial Conference Committee, however, claimed that it did not intend for amended Rule 412 to overrule *Meritor Savings Bank*. *See Minutes of the Advisory Committee on Federal Rules of Evidence* (May 9, 1994), *available in* 1994 WL 809917, at *1 (J.C.U.S.).

340. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986).

341. Price, *supra* note 161, at 561.

342. *See* Meritor Sav. Bank v. Vinson, 477 U.S. at 69.

343. 23 WRIGHT & GRAHAM SUPP., *supra* note 278, § 5385.1, at 194.

the reverse balancing test, new Rule 412 will turn the focus of a sexual harassment suit away from the prior sexual conduct of the plaintiff and back towards the defendant and the particular incidents of the defendant's sexual advances in question."[344]

C. *Application of the Amended Rule*

1. *In the Criminal Context*

Amended Rule 412 has been applied in criminal cases to exclude evidence of the victim's sexual history. For example, in *United States v. Roman*,[345] evidence of the victim's sexual history with persons other than the defendant was excluded. The court found that such defense evidence was "an attempt to illustrate indirectly to the trial jury the complainant's alleged sexual behavior in the distant past with individuals other than the defendant, thereby damaging her credibility."[346]

In *United States v. Alexander*,[347] the defendant was limited in his cross-examination of the victim-witness regarding prior inconsistent statements about her sexual history. The appeals court found the evidence did not fall within one of Rule 412's specific exceptions, and was therefore properly excluded; moreover, such exclusion did not create a violation of the defendant's constitutional rights since his main purpose was to attack the credibility of the victim.[348] Because he was allowed full cross-examination into the victim's character for dishonesty, his constitutional rights were not violated.[349]

2. *In the Civil Context*

The new civil section of Rule 412 has had a major impact on civil claims through its direct application in trials and its application by analogy to discovery proceedings.[350] The Advisory Committee's Note to the Rule, acknowledging that the Rule cannot apply directly to discovery proceedings, instructs that its rationale be employed in discovery.[351] The Note states:

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344. Sloan, *supra* note 94, at 401.

345. 884 F. Supp. 124 (S.D.N.Y. 1995).

346. *Id.* at 125. The court excluded evidence of a paternity test, which the defendant hoped to use to attack the victim's credibility. *Id.*

347. No. 94-10568, 1996 WL 19179 (9th Cir. Jan. 18, 1996).

348. *See id.* at *4.

349. *See id.*

350. Critics have argued that "despite all the hoo-rah about protecting the privacy of victims, 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," because it does not apply directly to discovery. 23 WRIGHT & GRAHAM SUPP., *supra* note 278, § 5393.1, at 250 (footnote omitted).

351. *See* FED. R. EVID. 412 advisory committee's note.

> 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.[352]

Issues regarding admissibility of the victim's sexual history have generally been decided in the context of discovery motions and motions under Rule 412. The Rule requires that evidence of a victim's sexual history be presented in a written motion at least fourteen days prior to trial if it is going to be offered into evidence.[353]

Rule 412 has been employed to prevent discovery of the victim's sexual history in sexual harassment cases.[354] For example, in *Barta v. City & County of Honolulu*,[355] the plaintiff, alleging sexual harassment by her employer, was granted a discovery motion to prevent discovery of her sexual conduct outside the workplace. In preventing discovery of non-workplace conduct, the court was guided by the understanding that "[a]lthough Rule 412 is a rule controlling the admissibility of evidence rather than its discoverability, Rule 412 must inform the proper scope of discovery in this case."[356] Although the order protected information about the plaintiff's off-duty sexual

352. *Id.* Some states require a good cause showing to discover information about the victim's sexual history, via a statute or rule of civil procedure. *See* 23 WRIGHT & GRAHAM SUPP., *supra* note 278, § 5393.1, at 250 (footnote omitted).

353. *See* FED. R. EVID. 412(c).

354. Many courts have also prohibited discovery of the victim's sexual history in cases where Rule 412 was not directly applicable. In *Janopoulos v. Harvey Walner & Assocs.*, No. 93 C 5176, 1995 WL 107170 (N.D. Ill. Mar. 7, 1995), the plaintiff in a sexual harassment claim moved that any evidence of her marital history be protected from discovery. *See id.* at *1. The court, in excluding the evidence, did not employ Rule 412 in its ruling, however, but instead applied Rules 401 and 402. *See id.* at *2. It found that the plaintiff's marital history was not per se evidence of sexual history and therefore was not within the ambit of Rule 412. *See id.* at *1. Nevertheless, the court concluded that the evidence should be excluded because it found that "no fact at issue in this case will be more or less probable than it would be without evidence regarding the plaintiff's marital history," and the evidence thus had zero relevance. *Id.* at *2. In *Stalnaker v. KMart Corp.*, No. CIV.A.95-2444-GTV, 1996 WL 397563 (D. Kan. July 11, 1996), the Rule was utilized by the defendant, who moved to prevent the plaintiff from asking non-party witnesses about their prior romantic or sexual activities. The court found that Rule 412 did not apply directly because the information was not going to be used against "victims" but rather against the defendant, *see id.* at *2, and it did not apply directly during discovery proceedings. *See id.* at *3. The court ruled that the plaintiff was allowed to ask non-parties about prior sexual harassment by the defendant because that was not "voluntary" sexual conduct by the non-parties, which would be the only protection afforded by the application of Rule 412 by analogy. *See id.* at *4.

355. 169 F.R.D. 132 (D. Haw. 1996).

356. *Id.* at 135.

conduct, the defendant was nonetheless allowed to inquire about the plaintiff's social contacts and the identity of persons with whom the plaintiff may have had sexual contact, because "[s]uch discovery efforts appear reasonably calculated to lead to the identity of individuals who have relevant information and other appropriate purposes towards resolution of Plaintiff's claims."[357]

In *Sanchez v. Zabihi*,[358] the defendants sought a court order compelling the plaintiff to testify to her sexual past, based on their defense that the victim was actually the aggressor. The defendants "essentially defend[ed] this action by claiming that [the] Plaintiff [could not] show that the sexual harassing behavior was unwelcome."[359] The defendants sought to ask the plaintiff about any sexual relations she had with co-workers in the ten years prior to the incident alleged. The court applied Rule 412 and ordered that the questions be answered by the plaintiff, but with the limitation that the questions cover only the three years prior to the sexual harassment alleged.[360]

The exclusion of evidence of the victim's sexual history has also been employed as a sanction for not complying with Rule 412's notice requirement.[361] In *Sheffield v. Hilltop Sand & Gravel Co.*,[362] the defendant had not complied with the requirement of Rule 412(c) that evidence of a party's sexual history be kept under seal.[363] As a sanction for that violation, the court excluded the evidence of the victim's participation in discussions of sexual matters at work, never reaching the relevance argument regarding the evidence.[364]

When applied in *Arno v. Club Med, Inc.*,[365] Rule 412 required the exclusion of the victim's dress when offered by the defendant, because the trial court determined that the dress was being offered to show the victim's sexual predisposition.[366] The defendant claimed to be offering the evidence to show specifically that the victim had

357. *Id.* at 137.

358. 166 F.R.D. 500 (D.N.M. 1996).

359. *Id.* at 501.

360. *See id.* at 502.

361. It remains unclear whether exclusion of evidence due to a defendant's failure to comply with the notice and hearing requirements of Rule 412 would constitute a constitutional violation. The Supreme Court ruled in *Taylor v. Illinois*, 484 U.S. 400 (1988), that the exclusion of evidence as a sanction for violations of the discovery process was not an infringement upon the constitutional rights of the defendant; nevertheless, that decision can be distinguished from rape shield rule cases because in *Taylor* the issue was the introduction of a witness, not a particular piece of evidence, and in *Taylor* the violation was a discovery violation, not a violation of an evidence rule's notice or hearing requirement.

362. 895 F. Supp. 105 (E.D. Va. 1995).

363. *See id.* at 107.

364. *See id.* at 109.

365. Civ. No. 89-20656 SW, 1995 WL 380124 (N.D. Cal. June 22, 1995).

366. *See id.* at *3.

to assist the defendant in taking the victim's clothes off during the incident in question.[367]

In *Alberts v. Wickes Lumber Co.*,[368] the court ruled on specific questions asked in the defendant's deposition of the plaintiff. The first question asked whether the victim was using birth control at the time of the alleged assault.[369] The plaintiff had already testified in her deposition that she was not using birth control on the date of the assault.[370] The court found that although proof that the victim was lying would factor into her credibility, the evidence was excludable because if it were introduced, it could lead the jury "to conclude that because the plaintiff used birth control methods, she consented to, or even invited, the defendant's conduct."[371]

However, Rule 412 has not always adequately prevented the discovery of evidence of the victim's sexual history. For example, in *Alberts*, the defendant was allowed to depose the plaintiff on the issue of whether or not she had condoms in her glove compartment several weeks after the alleged assault.[372] The reason the court gave for allowing this discovery was that if indeed there were condoms in her glove compartment at that time, the only way the defendant would have known about them was if he were invited to view the new stereo in her car, as he alleged, and saw the condoms at that time.[373] The court offered a precarious link to relevance: that if the plaintiff invited the defendant to view her stereo system just a few months later, it somehow proved that the plaintiff was not as traumatized by the alleged sexual assault as she claimed.[374]

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367. *See id.* Although the trial court found that "the probative value of [the victim's] clothing was outweighed by the danger of unfair prejudice to [the victim]" and the defendant was not allowed to bring up the evidence in his case in chief, the court allowed the defendant to cross-examine the victim on the issue of her clothing and "how it was removed." *Id.* This contradiction was not explained in the Appeals Court decision. *See* Arno v. Club Med Inc., 22 F.3d 1464 (9th Cir. 1994).

368. No. 93-C4397, 1995 WL 117886 (N.D. Ill. Mar. 15, 1995).

369. *See id.* at *1.

370. *See id.* at *2.

371. *Id.* at *2. The question was asked by the defendant on the basis that

> the plaintiff alleges that on the night in question the defendant James Crew, after being allowed into her hotel room attempted to force the plaintiff to have sexual intercourse with him. During the incident, the plaintiff has testified that she told him, in an attempt to dissuade him, that she did not have any birth control available to her at that time.

Id. at *6 n.1.

372. *See id.* at *3.

373. *See id.*

374. *See id.* The court went on to state, "[p]roof of this type would allow the defendants a strong argument to the jury that the plaintiff, Susan Alberts could not possibly have been as traumatized as she now claims to be .... A person so traumatized would not place herself in such a position." *Id.* The court assumed that if the defendant was correct, that the victim had condoms in her glove compartment, it would *prove* that the victim invited the defendant to her home. Furthermore, the court ignored the possibility that the defendant could prove his visit to the victim's

Finally, the *Alberts* court allowed the defendant to question the plaintiff about her sexual behavior with others following the assault.[375] The court allowed the question because the plaintiff included in her damages claim the fact that she had trouble experiencing sexual intimacy after the attack.[376] The court's tenuous rationale for allowing this question was that Rule 412 prohibits only "evidence offered to prove that any alleged victim engaged in other sexual behavior" in contrast to the evidence sought, which was "testimony by [the victim] that she did not engage in other sexual behavior."[377] The court employed the analogy of the prosecution opening the door; by outlining her damages the plaintiff had subjected herself to intrusive discovery of her sexual past. Consequently, the defendant, in the eyes of the court, had a right to obtain and to utilize this evidence fully. The court stated:

> Having *chosen* to inject into the proceedings her present inability to engage in certain types of behavior, plaintiff cannot now claim the protection of Rule 412 . . . in order to bar the defendant from seeking discovery of facts that would rebut her claim in the most traditional, basic and fundamental of ways—by proving that it is simply not true.[378]

Courts have also employed Rule 412 when deciding defendants' motions to compel plaintiffs to answer questions about their sexual history. In *Ramirez v. Nabil's, Inc.*,[379] the defendants in a sexual harassment suit persuaded the court to compel discovery of the plaintiffs' medical records, even though they contained information about the victims' sexual history.[380] The court viewed the information in the records as relevant to the victims' claims of damages for emotional distress and self-esteem losses, and allowed the discovery.[381] The court also noted that the plaintiffs had "proferred no

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home without necessarily referring to the condoms in the glove compartment of her car.

375. *Id.* at *5.

376. *See id.*

377. *Id.*

378. *Id.* at *5 (emphasis added). The court was unphased that the defendant would explore the victim's sexual behavior since the attack. Indeed, the court permitted the defendant to allege that the victim was not truly having sexual intimacy problems by offering evidence of every sexual encounter the victim had since the attack.

379. No. Civ.A. 94-2396-GTV, 1995 WL 609415 (D. Kan. Oct. 5, 1995).

380. *See id.* at *3.

381. *See id.* The court provided little analysis of why the information was discoverable, but did note that "the requests for the medical records and other information appear reasonably calculated to lead to the discovery of admissible evidence regarding the claims of emotional distress by [the plaintiffs] and possibly . . . sexual propensities." *Id.*

adequate reason for barring the discovery."[382]

In *Bottomly v. Leucadia National*,[383] the court permitted the defendant in a sexual harassment suit to discover the plaintiff's medical and psychological records, even though the records contained evidence of her sexual history. The issue again revolved around the plaintiff's asserted damages, which "opened the door" to the defendant discovering and utilizing information about her sexual past.[384] The court noted:

> Although, plaintiff, by putting her psychological and emotional condition in issue waives privacy claims as to those matters which are related to causation and damages as to her claim, plaintiff does not waive privacy interests on matters that are unrelated to the case or not calculated to lead to admissible evidence.[385]

Nevertheless, the plaintiff lost the right to protect her medical and psychological reports, which the court considered might lead to admissible evidence.[386]

The plaintiff in *Blackmon v. Buckner*[387] made a claim against jail officials stemming from a sexual assault he suffered in jail. The court granted the defendants' Rule 412 motion to offer evidence of the plaintiff's sexual history to show that the "plaintiff sexually 'teased' other jail inmates, including some of the black inmates who, he alleges, sexually assaulted him."[388] The defendants were allowed this evidence because the plaintiff claimed he had been a "target of sexual taunting and harassment," and the defendants therefore had a right to "try to rebut that evidence with evidence that plaintiff himself was engaging in sexual teasing and taunting."[389] The court made an implicit analogy to the unwritten exception to Rule 412 in criminal cases, discussed above, that if the prosecution "opens the door" on the issue of the victim's sexual history, then the defendant

382. *Id.* The Rule puts the burden on the proponent of the evidence to assert the reasons that the evidence is admissible; it does not place the burden on the opponent to convince the court that the evidence is inadmissible.

383. 163 F.R.D. 617 (D. Utah 1995).

384. *See id.* at 619-20.

385. *Id.* at 619.

386. *See id.* The court had also ruled in an earlier discovery order to allow extensive deposing of plaintiff as to other sexual harassment in a prior employment relationship. Without determining admissibility, the court has said if a *modus operandi* of sexual harassment claims can be shown, such evidence may be admissible on whether the harassment alleged in this case actually occurred. However, this allowance may not be used to justify prying in to unrelated sexual activities or history that merely attacks plaintiff's character and subjects her to harassment or unjustified embarrassment not rationally incident to the litigation.

Id. at 621 n.3 (citations omitted).

387. 932 F. Supp. 1126 (S.D. Ind. 1996).

388. *Id.* at 1128.

389. *Id.*

is allowed to explore the issue fully. By asserting that he was a target for sexual assault and harassment by other inmates, the plaintiff "opened the door."[390]

3. *Cases Discussing the Rationale of the Amended Rule*

Time and time again, courts have expressed their perceptions that Rule 412 is primarily one of policy; irrelevance is rarely mentioned as the reason for the Rule 412 exclusions of evidence of the victim's sexual history. Undoubtedly this view of the purpose of the Rule affects the decisions made by courts, especially when the evidence is being considered under the balancing test of the civil subsection of the Rule, where the probative value is weighed against the potential harm to any victim and unfair prejudice to any party.

In *Sheffield*, the court explained its belief that the Rule was enacted "to protect rape victims from humiliating and excessive cross-examination with regard to their past sexual behavior."[391] In ruling on a protection from discovery request, the court in *Stalnaker v. KMart Corp.*[392] concluded that the evidence should be protected because "[s]uch discovery is potentially embarrassing and annoying."[393] In *Barta*, the court noted that some discovery of the victim's sexual history was prohibited because it would "subject [the victim] to embarrassment, oppression, or harassment."[394]

Courts have often failed to perceive that such evidence tends to be irrelevant and have also viewed the Rule as based solely on a policy, a policy that excludes *relevant* evidence. In *Blackmon*, the court summed up its understanding of the Rule for civil cases:

> In civil cases like this one, the rule by no means prohibits evidence of the alleged victim's sexual conduct or sexual predisposition, for such evidence may be *highly relevant* in many

390. The defendant was also allowed to introduce evidence that the plaintiff was a homosexual, and that he had been engaged in a "consensual homosexual relationship." *Id.* This was admissible to show the plaintiff's bias against one of the defendants, who had refused to return the plaintiff's cell mate, his alleged homosexual partner, to his cell. *See id.* at 1129. The court stated: "Admitting evidence of this consensual homosexual relationship may be embarrassing to Blackmon . . . [but] Blackmon has come forward with no evidence of unusual harm or unfair prejudice that might result to him from admission of evidence of the relationship." *Id.* In addition, the plaintiff pointed out to the court that even if he had engaged in "sexual teasing," that is not a defense to sexual assault. *See id.* at 1128. The court agreed with the plaintiff on this point, but held that since this was not directly a claim for sexual assault against the perpetrators, but rather against negligent jail officials, and the central issue was whether the officials had sufficient notice of the risk of harm to the plaintiff, the evidence was therefore admissible. *See id.*

391. Sheffield v. Hilltop Sand & Gravel Co., 895 F. Supp. 105, 107 (E.D. Va. 1995).

392. 71 Fair Empl. Prac. Cas. (BNA) 705 (D. Kan. 1996).

393. *Id.* at 707.

394. Barta v. City & County of Honolulu, 169 F.R.D. 132, 137 (D. Haw. 1996).

> civil cases. . . . [T]he rule requires courts to consider precisely the potential relevance of such evidence and to prevent its use for purposes of exploiting stereotypes or subjecting a party or witness to gratuitous embarrassment and invasion of privacy.[395]

The application of Rule 412 has been inhibited by this narrow view of the Rule and by a reluctance to recognize that often the evidence of the victim's sexual history is irrelevant and is being exploited, either to prejudice the jury unfairly or to harass the victim into dropping the charges altogether.

D. Commentary, Criticisms, and Summary of Amended Rule 412

Several criticisms can be made of amended Rule 412.[396] The exclusion of the "notwithstanding any other provision of law" clauses, although intended to ensure the recognition of constitutional rights, may have gone too far in the other direction. In *United States v. Platero*,[397] the Tenth Circuit held that the defendant should have been allowed to confront fully the victim-witness about a relationship the trial judge had determined never existed.[398] By leaving the determination to the jury, the judge allowed the defendant to enter highly prejudicial evidence. The jury was given the option of disbelieving the evidence, but only after it had already been aired. Thus the purpose of Rule 412 was defeated entirely.

Rather than ensuring protection of victims, the expansion of the Rule to civil cases gives trial court judges more discretionary power.[399] This may make it difficult to construe the Rule to do justice in cases not envisioned by the Rule's drafters, even though the Rule was created purposefully to be flexible to accommodate those unforeseen circumstances.[400] The lack of symmetry between the

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395. Blackmon v. Buckner, 932 F. Supp. at 1128 (emphasis added).

396. Some commentators believe that extending the Rule to cover civil cases makes the Rule difficult to defend. *See* 23 WRIGHT & GRAHAM SUPP., *supra* note 278, § 5382.1, at 167. They ask, in the context of a civil sexual harassment action:

> 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 to be "sexual harassment"?

Id.

397. 72 F.3d 806 (10th Cir. 1995).

398. *See id.* at 809, 815-16.

399. *See* 23 WRIGHT & GRAHAM SUPP., *supra* note 278, § 5382.1, at 168.

400. *See id.* Some commentators have asked:

> Is it possible that these constructions of the Rule will dilute the protection of the Rule for its original beneficiaries—rape victims—or that strict application of the Rule as written in cases where the justice of such application is problematic will trivialize or delegitimate the sound principles that supported it in its original version?

Id.

criminal and civil provisions of the Rules has also been criticized,[401] even though many other rules distinguish their applications between civil and criminal rules.[402]

One major shortfall of the Rule as a policy measure is that evidence of the victim's sexual history is excluded only if it is offered to prove the victim's sexual behavior or sexual predisposition.[403] Although the Advisory Committee's Note indicates that the Rule applies whether the information is offered as substantive evidence or for impeachment,[404] the Rule nonetheless only applies when the evidence is being offered to prove the victim's sexual behavior or predisposition. Consequently, "[t]here is always the danger that unscrupulous counsel might offer 'evidence of' sexual behavior or predisposition for some other purpose with the hope or expectation that the jury might use it for the impermissible purpose."[405]

The balancing test of Rule 412 is difficult for courts to apply, especially in the context of discovery motions.[406] At such an early stage in the proceedings, the relevance of information is often difficult to ascertain. One court noted:

> However difficult this balancing of interests may be at the time of trial, it is substantially more difficult when made at the time of discovery and before the facts, issues, and positions of the parties have crystallized and before a majority of the evidence surrounding the alleged incident is in the possession of the parties, much less before the court.[407]

In discovery proceedings, Rule 412 must be considered in conjunction with Rule 26 "in order not to undermine the rationale of Rule 412."[408] Each trial court must ask: "[W]hether the information

401. *See* Monnin, *supra* note 298, at 1184.

402. *See id.* For example, Federal Rules of Evidence 413 and 414 apply only to criminal cases, yet Federal Rule of Evidence 415, regarding similar evidence, applies only in civil cases. *See* FED. R. EVID. 413; FED. R. EVID. 414; FED. R. EVID. 415.

403. *See* 23 WRIGHT & GRAHAM SUPP., *supra* note 278, § 5384.1, at 187.

404. See FED. R. EVID. 412 advisory committee's note.

405. 23 WRIGHT & GRAHAM SUPP., *supra* note 278, § 5384.1, at 187.

406. The balancing test is actually "content free [and] somewhat subjective and unclear." *Transcript of Proceedings, supra* note 163, at 13. The Washington Supreme Court has held that the state court "cannot use prejudice and embarrassment to the victim as part of the balancing process" because those considerations are already implicitly incorporated into the state's rule; to consider them again would constitute double counting. 23 WRIGHT & GRAHAM SUPP., *supra* note 278, § 5392, at 242 (citing State v. Hudlow, 659 P.2d 514 (Wash. 1983)). The court went on to hold that the "only factors to be considered are the integrity of the factfinding process and the defendant's right to a fair trial." *Id.* (citing State v. Hudlow, 659 P.2d 514 (Wash. 1983)).

407. Alberts v. Wickes Lumber Co., No. 93-C4397, 1995 WL 117886, at *1 (N.D. Ill. Mar. 15, 1995).

408. Stalnaker v. KMart Corp., No. CIV.A.95-2444-GTV, 1996 WL 397563, at *3 (D. Kan. July 11, 1996) (citations omitted). *See also* Alberts v. Wickes Lumber Co., No. 93-C4397, 1995 WL 117886 (N.D. Ill. Mar. 15, 1995). Other discovery rules,

sought . . . is reasonably calculated to lead to the discovery of admissible evidence in light of the parties' claims and defenses, while remaining mindful of the policy underlying Rule 412."[409]

In summary, the application of Rule 412 to civil cases has prevented much irrelevant or only slightly relevant evidence of the victim's sexual history from being introduced in evidence or even discovered. Although the Rule does not apply directly to discovery proceedings, courts have employed the Rule, as instructed in the Advisory Committee's Note, to discovery proceedings. This has resulted in the exclusion of some questions soliciting irrelevant or only slightly relevant information from discovery depositions or interrogatories.

Defendants can still obtain and admit evidence of the plaintiff's sexual past, however, in several situations. The most prevalent is when the plaintiff claims emotional or psychological damages as a result of the sexual harassment or assault. It is arguable that in every sexual harassment case where the plaintiff asserts damages going beyond the actual incident she will be subject to the use of the sexual history to rebut or deny her damages.[410]

VI. RECOMMENDATION FOR MAINE TO ENACT A SEXUAL HARASSMENT SHIELD

A. General Arguments For and Against Sexual Harassment Shields

Sexual harassment is a pervasive problem in today's society. Between forty and eighty percent of all women have reported experiencing some form of sexual harassment in their lives.[411] Just like the criminal complainant, "[t]he civil plaintiff files her claim often at a humiliating and degrading expense. This loss of privacy leads inexorably to the underreporting of sexual harassment offenses."[412] Furthermore, although the EEOC is the agency responsible for pursuing sexual harassment complaints, "it is the private plaintiff who is

such as Rule 37, have also been utilized to make a motion based on evidence falling under Rule 412. *See* Ramirez v. Nabil's, Inc., No. Civ.A. 94-2396-GTV, 1995 WL 609415 (D. Kan. Oct. 5, 1995); Sanchez v. Zabihi, 166 F.R.D. 500 (D.N.M. 1996). Rule 412(c) also provides a mechanism for motions to be made regarding evidence within the purview of Rule 412. *See* Biggs v. Nicewonger, Co., 897 F. Supp. 483 (D. Or. 1995) (discussing plaintiff's motion in limine to exclude sexual history evidence); Sheffield v. Hilltop Sand & Gravel Co., 895 F. Supp. 105 (E.D. Va. 1995) (discussing motions in limine made by both parties concerning sexual history evidence).

409. Sanchez v. Zabihi, 166 F.R.D. at 502.

410. *See* Ramirez v. Nabil's, Inc., No. Civ.A. 94-2396-GTV, 1995 WL 609415 (D. Kan. Oct. 5, 1995); Alberts v. Wickes Lumber Co., No. 93-C4397, 1995 WL 117886 (N.D. Ill. Mar. 15, 1995).

411. *See* Weisberg, *supra* note 319, at 725.

412. Monnin, *supra* note 298, at 1183 (footnote omitted).

ultimately responsible for the prosecution of her grievance."[413] Private plaintiffs must apply to the EEOC for a right-to-sue notice and must then follow through in the civil court system.[414] Thus, if the purpose of amended Rule 412 is to encourage reporting of sexual crimes by protecting the privacy rights of victims, the extension of Rule 412 to civil cases contributes to that end.

Furthermore, if the purpose of Rule 412 is to prevent the harassing use of needlessly embarrassing and humiliating exposure of the victim's sexual history, then the extension of Rule 412 to civil cases, and to sexual predisposition, also contributes to that end. By allowing a judge to consider the harm to any victim or the unfair prejudice to any party, as weighed against the probative value of the evidence, the Rule allows for exclusion of the evidence. Nevertheless, because the Rule does not apply directly to discovery, this information can still be requested during discovery in order to embarrass and humiliate the victim and to discourage her from pressing her claim.

If the purpose of Rule 412 is to prevent the use of *irrelevant* evidence of the victim's sexual history, however, then the extension to civil cases is problematic due to the current substantive standard of sexual harassment, "unwelcomeness." Because evidence of the victim's sexual past is not probative of the "unwelcomeness" of the defendant's sexual advances, its exclusion does not eclipse the defendant's right to present relevant evidence in his defense. Because courts often view evidence of the victim's sexual history as relevant to her "sexual predisposition," however, the evidence is not categorically excluded. Until the standard of "unwelcomeness" is modified, the Rule's civil provision does not fully prevent the admission of the victim's past sexual behavior. Armed with the "unwelcomeness" standard, the Rule's critics argue that "the categorical exclusion of sexual history evidence denies the defendant substantive legal rights."[415] Nevertheless,

> [t]his objection presupposes that the ban on sexual history evidence, or at least the presumption against its use, will deny the defendant access to essential evidence. As enacted, however, Amended Rule 412 excepts from the sexual harassment shield evidence of sexual behavior or sexual predisposition that is of sufficient probative value. . . . [E]vidence that is truly probative of this issue remains well within [a defendant's] reach.[416]

A faction remains which argues that amended Federal Rule 412 "goes no further than to codify existing federal case law on sexual harassment, and it continues to rely upon individual judges to make

413. *Id.* at 1194.
414. *See id.* & n.182.
415. *Id.* at 1183.
416. *Id.* at 1184 (footnote omitted).

decisions about probative value, prejudicial effect, and the relative weight of these factors."[417] Nevertheless, commentators generally agree that amended Rule 412 "significantly narrows the range of evidence available to the defendant."[418]

In Maine, if Rule 412 were extended to civil cases, it would help prevent the misuse of evidence of the victim's "sexual predisposition" in civil cases, provide protection for a sexual harassment plaintiff's right to privacy, and exclude irrelevant evidence in trials and throughout the discovery process.

B. Elements of Sexual Harassment Under Maine Law

The Maine Fair Employment Act prohibits certain types of employment discrimination:

> It is unlawful . . . [f]or any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of . . . sex . . . or, because of those reasons to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment . . . .[419]

Maine law recognizes both forms of sexual harassment in the workplace established in the EEOC guidelines: quid pro quo harassment and hostile environment harassment.[420] The Law Court has had only a few occasions to rule on sexual harassment cases since it was recognized as a cause of action in Maine in 1989 and has instituted the "unwelcomeness" standard that prevails in the federal cause of action.[421]

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417. Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 138 (1996) (footnote omitted).

418. Monnin, *supra* note 298, at 1160.

419. ME. REV. STAT. ANN. tit. 5, § 4572(1)(A) (West 1989 & Supp. 1996-1997).

420. *See id.*; Bowen v. Department of Human Servs., 606 A.2d 1051 (Me. 1992). *See also* Monnin, *supra* note 298, at 1163-64.

421. In *Bowen*, a case of first impression, the Law Court found that the plaintiff would have had a cause of action for sexual harassment if she had been able to establish that vulgar speech was used in her presence in the workplace and directed at her *because she was a woman*. Bowen v. Department of Human Servs., 606 A.2d at 1053-54. The court relied on federal sexual harassment statutes and precedent for guidance. *See id.* at 1053. In *Nadeau v. Rainbow Rugs*, 675 A.2d 973 (Me. 1996), the Law Court found that a hostile work environment could be created by merely one incident of sexual harassment; a pattern of harassment need not have occurred. The court adopted the federal standard laid out in *Meritor Savings Bank*, that both an objective reasonable person would have found the environment hostile and that the victim subjectively found the environment abusive. *See id.* at 976. In *Knox v. Combined Ins. Co. of America*, 542 A.2d 363 (Me. 1988), the Law Court held that sexual assaults and sexual harassments in the workplace were compensable under the Workers' Compensation Act. *See id.* at 366.

C. *Drafting a Sexual Harassment Shield for Maine Rule 412*

If the Advisory Committee for the Maine Rules of Evidence were to draft a civil provision of Rule 412, it should consider utilizing a specific exception approach to the Rule, the same that is used in the criminal section of the Rule. Specific exceptions would allow the evidence only in the form of specific instances of conduct, thus remaining consistent with the other provisions of the Rule. Such a provision might read:

> In a civil case in which a person is accused of sexual harassment, sexual assault, or other sexual misconduct, the only evidence of a victim's past sexual behavior that may be admitted is the following:
>
> (1) Evidence of specific instances of sexual behavior with the accused, offered by the accused or the victim upon the issue of whether the sexual advances of the accused were or were not "unwelcome."[422]
>
> (2) Evidence of specific instances of sexual behavior, known to the defendant at the time of the alleged sexual misconduct, offered by the accused or the victim upon the issue of his or her mistaken belief that the sexual advances were welcomed.

The Rule should also require an in camera hearing for all evidence offered as admissible under Rule 412. Such a provision could be based on the Federal Rule, which reads:

> Procedure to Determine Admissibility:
>
> (1) A party intending to offer evidence under [this rule] must:
>
> (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered . . . .
>
> (B) serve the motion on all parties and notify the alleged victim . . . .
>
> (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.[423]

Although the Federal Rule's Advisory Committee's Note dictates the application of the Rule's principle to discovery proceedings, discovery abuse remains rampant, even though some judges have used

422. Unfortunately, the unwelcomeness standard is infused in the law of sexual harassment, therefore it must be included in the Rule until the standard is changed. A rule of evidence should not be used to enact substantive changes in the law.

423. FED. R. EVID. 412(c).

their discretion to apply Rule 412 in discovery proceedings.[424] The Advisory Committee's Note to the Maine Rule should be revised to express an intent that the Rule be routinely considered in discovery proceedings, to prevent the use of discovery to intimidate the plaintiff and discourage her from pressing her claim.

The balancing test should be avoided because it creates inconsistent application of the Rule among trial courts. Furthermore, the Federal Rule's balancing test does not include all the elements of the traditional Rule 403 balancing test and thus engenders confusion. In order to narrow and define the scope of that evidence, specific exceptions should be utilized.

In sum, the extension of the scope of Maine Rule of Evidence 412 to include civil cases is necessary and would provide the beneficial effects of the prevention of the misuse of relevant but prejudicial evidence of the victim's sexual history, the exclusion of wholly irrelevant evidence of the victim's sexual history, and the preservation of the victim's right to privacy.

VII. CONCLUSION

Is there a viable concept of "sexual predisposition" under the law? If so, shouldn't the principles of the rules regarding character evidence apply? Does a person have a right to privacy, in effect a privilege, regarding his or her past sexual behavior, no matter what its probative value? Is the *misuse* of evidence of the victim's sexual history to invoke stereotypes and find fault the only justifiable motivation behind Rule 412? Can evidence of the victim's sexual past be evaluated on the basis of its relevance?

All of the above questions should have been addressed by the drafters of the federal and Maine rape shield rules. By framing the Rules as supported solely by policy, and ignoring relevance arguments, the drafters of the Rules failed to confront the sexual stereotypes surrounding a female sexual assault victim's sexual history. By failing to confront those stereotypes, namely that the victim's sexual history is relevant to her credibility or her consent, the drafters implicitly accepted them. Relevance analyses were left to individual courts, which resulted in an inconsistent application of the Rules and the creation of further confusion when it appears that there may be a conflict between the exclusion of the evidence and the defendant's constitutional rights.

Furthermore, the approach taken to the potential conflict between evidence excluded by the Rules and the defendant's constitutional rights depends upon the reason the Rules exclude the evidence. Evidence excluded for lack of relevance cannot violate

424. *See* Barta v. City & County of Honolulu, 169 F.R.D. 132 (D. Haw. 1996); Sheffield v. Hilltop Sand & Gravel Co., 895 F. Supp. 105 (E.D. Va. 1995).

the defendant's constitutional rights since the defendant's compulsory process right and right to confront witnesses encompass only relevant evidence.[425] If evidence is excluded because of a policy, however, the defendant's constitutional rights must be balanced against the state's interests; the evidence may still be constitutionally excluded if the state's interests outweigh the defendant's.[426] Evidence which is excludable on the dual bases of irrelevance and policy is currently excluded on the basis of policy, according to Maine and Federal Rules of Evidence 412.

The justification for the Rule should dictate in deciding whether the rape shield rule should be extended to civil cases in Maine. If the Rule is one of relevance, there is a strong case to be made that the sexual history of a victim is wholly irrelevant to whether she welcomed the advances in question. If the Rule is one of policy, however, it allows trial court judges who believe the evidence is relevant to the victim's welcoming of the advances to admit the evidence. And if the Rule is a privilege, then it would weigh heavily in a civil case and provide a bar to the introduction of even highly relevant evidence. Nevertheless, the Rules' drafters, courts, and commentators have repeatedly viewed the Rules as based on policy, thereby preventing a more candid and meaningful questioning of whether evidence of the victim's past sexual behavior is relevant or not.

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425. *See* United States v. Kasto, 584 F.2d 268, 272 (8th Cir. 1978).

426. *See* Davis v. Alaska, 415 U.S. 308, 319 (1974); Chambers v. Mississippi, 410 U.S. 284, 295 (1973).