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Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412

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to Federal Rule of Evidence 412**

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I. INTRODUCTION

"They want to show that the plaintiff is a nut or a slut."¹

In contemporary sexual harassment litigation, this statement reflects a prevailing defense tactic. To establish a prima facie case of sexual harassment, plaintiffs must affirmatively demonstrate that they were subject to "unwelcome" sexual advances.² Defense lawyers utilize this standard to discover and admit evidence of the victim's prior sexual behavior to show invitation to or provocation of the alleged misconduct.³ While such practices may seem repugnant, their purpose is readily discernible. By disclosing the intimate details of plaintiffs' sex lives, defense lawyers, with the sanction of sexual harassment law, force claimants to think twice about continuing their claims. Potential plaintiffs might reconsider the initiation of a law suit entirely. In addition, such disclosures may be prejudicial to the prosecuting claimant, causing the factfinder to render the judgment or verdict accordingly.

Aggressive defense tactics demonstrate a rational response to increasing pressure. The combination of greater publicity of sexual harassment issues⁴ and more generous legal

1. Ellen E. Schultz and Junda Woo, *The Bedroom Ploy*, Wall St. J. A1 (Sept. 19, 1994) (quoting Philip Kay, plaintiff's counsel in a \$7.1 million sexual harassment suit, subsequently reduced, against the Chicago law firm Baker & McKenzie).

2. The 1980 EEOC Guidelines defining sexual harassment refer to "[u]nwelcomes sexual advances" as a component of sex-based harassment that is a "violation of section 703 of title VII." 29 C.F.R. § 1604.11(a) (1994); Title VII of the Civil Rights Act of 1964 is codified at 42 U.S.C. § 2000e et seq (1994). The EEOC regulations were cited approvingly by the Supreme Court when it first considered sexual harassment as an actionable claim under Title VII. *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 63-67 (1986). Moreover, in referring to the EEOC Guidelines, the Court asserted that, "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" Id. at 68 (citation omitted).

The centrality of the unwelcomeness standard and its manipulation by the employment discrimination defense bar are considered in Parts II and III of this Note.

3. The defense attorneys interviewed for a recent Wall Street Journal article on sexual harassment suits expressed some regret, yet little disinclination, to lead the jury into the victim's bedroom. Schultz and Woo, Wall St. J. at A1 (cited in note 1). One lawyer stated, "I may be uncomfortable doing it—it's certainly something I'd prefer not to do—but I don't allow myself the luxury of regret." Id. On the subject of welcomeness, another lawyer argued, "If the plaintiff talked about sex on the job, it makes inquiries into her sexual background relevant If she claims the harassment interfered with her sex life, her extramarital affairs become relevant." Id. Examples of defense bar direct examination questions include inquiries into the plaintiff's experience with X-rated films, former lovers, and premarital sex. Id.

4. In the fall of 1991, the nation was transfixed by the stream of accusations and counter-accusations focusing upon sexual harassment that consumed the confirmation proceedings to elevate Clarence Thomas to the Supreme Court. See, for example, Maureen Dowd, *The Thomas Nomination; Taboo Issues of Sex and Race Explode in Glare of Hearing*, N.Y. Times 1-1 (Oct. 13, 1991); Ruth Marcus, *Hill Describes Details of Alleged Harassment; Thomas Categorically Denies All Her Charges; Court Nominee Calls Ordeal Lynching for Uppity Blacks*, Wash. Post A1 (Oct. 12, 1991). For many commentators, the bruising Hill/Thomas hearings typified how the

remedies⁵ has led to an upsurge in the reporting and filing of employment discrimination claims.⁶ Moreover, the monetary relief

prevalence of gender-based stereotypes is an obstacle to effective sexual harassment litigation. See Ann C. Juliano, Note, *Did She Ask for It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 Cornell L. Rev. 1558, 1559 n.8 (1992). See generally 65 S. Cal. L. Rev. 1283, 1279-1582 (1992) (devoting over 300 pages to commentary on the Hill/Thomas hearings). The accusations of Professor Hill were soon followed by reports of other high profile charges of sexual misconduct involving Senator Bob Packwood of Oregon, certain naval officers who attended the infamous 1991 "Tailhook" convention, and President Clinton and Paula Jones. See generally Helen Dewar and Florence Graves, *Packwood: Behavior Was 'Wrong'; Senator Rejects Calls to Resign*, Wash. Post A1 (Dec. 11, 1992); John Lancaster, *Navy Harassment Probe Stymied; Aviators Refuse to Help Identify Culprits at Tailhook Party*, Wash. Post A1 (May 1, 1992); Michael Isikoff, *Clinton Named Defendant in Sexual Harassment Suit*, Wash. Post A1 (May 7, 1994).

5. Concurrent with, and, as some have argued, largely as a result of, the publicity surrounding the Hill/Thomas hearings, Congress passed the Civil Rights Act of 1991 ("1991 Act"), Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in various sections of 29 U.S.C. and 42 U.S.C.), with language liberalizing the remedial scheme available to sexual harassment claimants under Title VII. See Major Charles B. Hernicz, *The Civil Rights Act of 1991: From Conciliation to Litigation—How Congress Delegates Lawmaking to the Courts*, 141 Milit. L. Rev. 1, 5-6 (discussing how the 1991 Act may be accurately described as the "Anita Hill Civil Rights Act of 1991" in light of Congressional efforts to make amends for the confirmation debacle). Under the 1991 Act, for the first time prevailing plaintiffs may garner compensatory and punitive damages rather than merely the equitable and administrative remedies that were formerly the exclusive means of recovery under Title VII. 42 U.S.C. § 1981a(b) (Supp. 1992). In addition, Title VII claimants may now demand to have their complaints heard before a jury. 42 U.S.C. § 1981a(c) (Supp. 1992).

Charles Hernicz laments the enactment of the jury trial and compensatory and punitive damage provisions of the 1991 Act, due to the shift in focus from "remediation" to "litigation" as the fundamental employment discrimination doctrine. Hernicz, 141 Milit. L. Rev. at 4. As Hernicz argues:

The 1991 Act contains . . . a more fundamental, yet not specifically articulated, change in employment discrimination theory—the transformation from an administrative system of remediation to a litigation-oriented cause of action for damages. One of "the most basic and far-reaching" of [Title VII's] provisions was the emphasis on employer-employee conciliation that was manifested by the law's restrictions on litigation and by enforcement by the EEOC. The 1991 Act shifts the emphasis of Title VII from conciliation with equitable remedies to litigation with tort-like damage awards. Congress made this left turn from the freeway of fundamental civil rights theory without providing a clear indication of direction or even a likely destination. The burden of navigating therefore falls on the already overburdened courts.

Id. (citation omitted).

Although the 1991 Act caps the potential compensatory and punitive damage awards available to plaintiffs by indexing them based upon the size of the employer, it is unclear whether such limitations preempt relief for other bias claims based upon the same facts. See 42 U.S.C. § 1981a(b)(3) (Supp. 1992) (setting forth the limitations on monetary relief ranging from \$50,000 to \$300,000). See also Hernicz, 141 Milit. L. Rev. at 64-68 (discussing the potential overlap between 42 U.S.C. § 1981a and 42 U.S.C. § 1981 remedies when the plaintiff alleges multiple theories of discrimination).

6. Sexual harassment charges filed with the EEOC have increased by 112% over the last three years, from 5,623 in 1989 to 11,908 in 1993. *Study Finds Sexual Harassment Awards from EEOC Doubled from 1992-1993*, Daily Lab. Rep. (BNA) No. 100, D-9 (May 26, 1994). In addition, requests for right-to-sue notices for sexual harassment cases have increased from 13.3% of all EEOC resolutions in 1990 to 24.4% in 1993. Id. See also Hernicz, 141 Milit. L. Rev. at 73 (reporting that sexual harassment complaints with the EEOC were up sixty-nine percent

recovered by sexual harassment complainants nearly doubled from 1992 to 1993, according to a study of cases handled by the EEOC.⁷ Aside from the direct costs of litigation, sexual harassment cases may cost a large employer a substantial amount in terms of lost productivity and talent. Many firms must also employ "slush funds" to quietly settle suits that could otherwise result in messy public trials.⁸ In this environment of sharply increased stakes, the efforts of employers to intimidate plaintiffs and to indict their character merely reflect economic and legal realities.⁹

Yet, notwithstanding the media attention devoted to issues of sexual harassment and the greater likelihood of substantial recovery, research indicates that sexual harassment remains a vastly underreported form of employment discrimination¹⁰ despite the fact that the incidence of sexual misconduct in the workplace is quite high.¹¹

in fiscal year 1992 and that two-and-a-half times as many complaints were filed in the first quarter of 1993 as compared with the first quarter of 1991).

7. Daily Lab. Rep. (BNA) No. 100 at D-9. The study "found that 1546 employees won \$25.2 million in monetary benefits from their employers last year, including back pay, remedial relief, damages, promotions and reinstatements. The number of awards increased by 15.4 percent from the previous year while the amount of the awards increased by 98 percent" *Id.* The author of the study attributed the significant increases to the publicity surrounding the sexual harassment charges raised by Anita Hill, as well as the provisions of the 1991 Act allowing the victims of sexual harassment to recover compensatory and punitive damages. *Id.*

8. Michelle Ingrassia, *Sexual Correctness*, Newsweek 57, 58 (Oct. 25, 1993) (stating that the indirect expenses of litigation "cost Fortune 500 companies more than \$8 million a year").

9. Schultz and Woo, Wall St. J. at A1 (cited in note 1) (observing that "[w]ith juries awarding big verdicts, . . . defense attorneys say, cases can't easily be settled for nuisance amounts, and companies are fighting back with every legal weapon at hand").

10. For purposes of convenience, the evidence cited in this Note regarding the frequency of sexual harassment relates only to female victims. Although studies show that men are a statistically significant group of sexual harassment complainants, the vast majority, approaching ninety percent, are women. Daily Lab. Rep. (BNA) No. 100 at D-9 (cited in note 6). Of those women who filed charges with the EEOC in 1992, sixty-two percent were white, 14.4 percent were African-American and 14.7 percent were other races. *Id.*

11. See, for example, Barbara A. Gutek, *Sex and the Workplace* 46 (Jossey-Bass, 1985) (reporting that 53.1 percent of working women experience some form of sexual harassment in the workplace). "Research indicates that the problem is quite pervasive. Estimates of the percentage of women who have encountered sexual harassment in the workplace range from 42% to 90%." David E. Terpstra and Douglas D. Baker, *A Hierarchy of Sexual Harassment*, 121 J. Psych. 599, 599 (1987).

In 1981, a federal government report found that forty-two percent of women respondents claimed that they had been subjected to some form of sexual harassment at an estimated two-year cost from 1979 to 1980 of \$189 million. United States Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Is It a Problem?* 2-3 (1981). See also Daniel Goleman, *Sexual Harassment: It's About Power, Not Lust*, N.Y. Times C1, C12 (Oct. 22, 1991) (describing the government report). Goleman notes:

In a 1981 study of 10,648 women working for the Federal Government, 42 percent say they had been harassed. In a third of the cases the harassment took the form of unwanted sexual remarks; 28 percent involved leers and suggestive looks, and a quarter involved being touched. About 15 percent of women complained of being pressured for

Few women complain of being sexually harassed because the noneconomic costs of reporting an incident are seen as prohibitive.¹² Women fear that they will be blamed for the conduct, that nothing would be done in the event of a complaint, and that they would suffer negative repercussions in the form of retaliation and further harassment.¹³ For many women who fear the consequences of a complaint, leaving the job may seem like less effort than filing a claim.¹⁴

Thus, although a more generous remedial scheme and greatly increased public awareness encourage women to pursue claims of sexual harassment, examination of the victim's sex life to demonstrate "welcomeness" compounds the fear and loathing associated with filing a complaint. The victim of sexual harassment is violated twice in prosecuting her claim. First, she is subject to the harassing conduct itself. Then, in attempting to show that the alleged misconduct was invited, her adversary will attack her character and morality.

Recognizing that potential claimants must be encouraged to prosecute their complaints and protected when they do so, both

dates, and 9 percent said they had been pressured for sexual favors. One percent reported being assaulted or raped at work.

Id. A follow-up report issued five years later found roughly the same frequency of sexual harassment, but the costs over a two year period had risen to \$267 million. United States Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* 39 (1988).

12. "Despite company policies forbidding harassment, many victims say they believe that reporting it will simply lead to more trouble. In a study of 2,000 women working at large state universities . . . most had not reported sexual harassment because they feared they would not be believed, that they would suffer retaliation, would be labeled as troublemakers, or would lose their jobs." Goleman, N.Y. Times at C12.

13. See Gutek, *Sex and the Workplace* at 70-73 (cited in note 11) (describing the reactions to sexual harassment arising from the author's study). Recent accounts show that the underreporting of sexual harassment is particularly high in the federal law enforcement agencies. See *Sexual Harassment Claim Handling Faulty at Law Enforcement Agencies*, Daily Lab. Rep. (BNA) No. 45, at D-11 (March 9, 1994) (discussing Congressional hearings involving the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco and Firearms, and the Federal Bureau of Investigation); Ingrassia, *Newsweek* at 58 (cited in note 8) (describing the experience of FBI special agent Suzane Doucette who became the target of a criminal investigation after filing a discrimination complaint with the Justice Department). Fear of lodging a formal complaint also permeates the halls of Capitol Hill:

A recent study by the Washington Post showed that more than 93% of congressional staffers would hesitate to file sexual harassment charges against their elected bosses and 83% would fear being fired for submitting allegations.

A similar study by the Congressional Management Foundation reported that 60% of the women who work in Senate offices had misgivings about making complaints, and nearly 70% said that a formal action could jeopardize their chances to work elsewhere on Capitol Hill.

Tony Snow, *Congress Can Get Away With Nearly Anything*, Cleveland Plain Dealer 7B (April 18, 1994).

14. Gutek, *Sex and the Workplace* at 74.

Congress and the Judicial Conference of the United States initiated proceedings that culminated in the recent amendment of Rule 412 of the Federal Rules of Evidence.¹⁵ Amended Rule 412, effective December 1, 1994, regulates both civil and criminal cases involving sexual misconduct. Former Rule 412 ("Former Rule" or "Former Rule 412")—the "rape shield" rule—barred certain evidence of the past sexual behavior of an alleged victim in federal rape prosecutions.¹⁶ Amended Rule 412 ("Amended Rule" or "Amended Rule 412") bars evidence of sexual behavior or sexual predisposition in any civil or criminal proceeding,¹⁷ and, as the Advisory Committee Note states, "will . . . apply in a Title VII action in which the plaintiff has alleged sexual harassment."¹⁸

This Note examines the intended impact of Amended Rule 412 upon the conduct of sexual harassment litigation. Part II considers the development of sexual harassment as a valid cause of action under Title VII, with particular emphasis upon the unwelcomeness standard. Part III first examines the process by which Rule 412 was amended under the mandates of the Rules Enabling Act,¹⁹ and how the drafters of the new rule created a ban on the introduction of evidence that does not foreclose the defendant's opportunity to prove welcomeness. Part III then explores the numerous arguments that introduction of evidence of unwelcomeness distorts the factfinding process by infusing often irrelevant and highly prejudicial information into sexual harassment proceedings. These arguments support the creation and enforcement of a sexual harassment evidence shield.

Part IV of this Note discusses the standard by which evidence of the plaintiff's sexual conduct or sexual predisposition remains admissible under the revised rule. While Amended Rule 412 significantly narrows the range of evidence available to the defendant, it

15. The full text of Amended Rule 412 is included in Appendix I.

16. In particular, the rape shield rule barred sexual history evidence "in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code." Chapter 109A of title 18 proscribes knowing involvement in "aggravated sexual abuse" or knowing or complicit involvement in acts of "abusive sexual contact." 18 U.S.C. §§ 2241 and 2244 (1988). See text of Former F.R.E. 412 codified at 28 U.S.C. app. F.R.E. 412 (1988). Unless otherwise indicated, all citations to F.R.E. 412 and the accompanying Advisory Committee commentary refer to the amended version of the rule.

17. F.R.E. 412(a)(1),(2).

18. Notes of Advisory Committee, F.R.E. 412.

19. 28 U.S.C. §§ 2071-2077 (1988). While both Congress and the Standing Committee on Rules of Practice and Procedure of the Judicial Conference considered separate amendments to Rule 412, this Note will focus upon the amendment undertaken pursuant to the Rules Enabling Act. Although both Houses of Congress, in separate legislation, considered extending Rule 412 to civil cases, the text ultimately adopted is that of the Judicial Conference's amendment. See notes 68-74 and accompanying text.

provides that such evidence "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."²⁰ The substantive portion of Part IV, then, concerns the categories and types of sexual history "otherwise admissible" under the federal evidence rules with probative value high enough to withstand the presumption against admission. As set forth in Part IV, efforts to show welcomeness involve the circumstantial use of character evidence for a "non-propensity" purpose. The admission of such evidence is governed by Rule 404(b). By its language, Rule 404(b) allows the introduction of evidence of specific acts only, barring admission of opinion or reputation evidence.²¹ Reference to evidence "otherwise admissible" under the federal rules thus ensures that only specific acts may be considered for admission under Amended Rule 412.

Finally, Part IV considers the balancing test contained in section (b)(2) of the Amended Rule. While the Advisory Committee Note accompanying the new rule offers very little guidance regarding the admissibility of otherwise proscribed evidence, existing cases holding certain evidence inadmissible under the welcomeness standard provide guidance as to the proper balance between probativeness and prejudice. Examination of these cases in light of the policies underlying the amendments to Rule 412 will provide guidance for future application of the rule.

II. SEXUAL HARASSMENT AND THE "UNWELCOMENESS" STANDARD

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating with respect to compensation, terms, conditions, or privileges of employment based on race, color, religion, sex, or national origin.²² With little legislative history to guide interpretation of Title VII's prohibition against discrimination based on sex,²³ courts

20. F.R.E. 412(b)(2).

21. F.R.E. 404(b) permits the introduction of evidence of "other crimes wrongs or acts . . . to show motive, opportunity, intent . . ." See notes 200-18 and accompanying text.

22. 42 U.S.C. § 2000e-2(a)(1) (1988).

23. *Meritor*, 477 U.S. at 64. The reference to sex discrimination was a last-minute amendment to Title VII. *Id.* at 63. See Juliano, 77 Cornell L. Rev. at 1562 n.26 (cited in note 4). "The amendment was proposed by Representative Howard Smith of Virginia, Chairman of the House Rules Committee. Some commentators believe the prohibition against discrimination based on sex was added as an attempt to defeat the entire bill." *Id.* "[The inclusion of 'sex'] was offered as an addition to other proscriptions by opponents in a last-minute attempt to block the bill which became the Act . . ." *Barnes v. Costle*, 561 F.2d 983, 987 (D.C. Cir. 1977). Representative Smith's plan failed. "One of the most powerful remedies for sex discrimination

initially struggled with the application of Title VII to claims of sexual harassment.²⁴ By the last half of the 1970s, however, courts began to recognize sexual harassment as a valid claim under Title VII.²⁵ While the early cases incorporating sexual harassment as actionable employment discrimination were premised upon the status of the parties and the demand of sexual consideration,²⁶ later cases began to recognize unwelcome sexual attention as an additional cause of action under Title VII.²⁷

available today owes its origin to a misfired political tactic on the part of opponents of the Act." J. Ralph Lindgren and Nadine Taub, *The Law of Sex Discrimination* 110-11 (West, 1988).

24. Juliano, 77 Cornell L. Rev. at 1563. See also Michael D. Vhay, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. Chi. L. Rev. 328, 329-33 (1988) (citing and discussing the early cases which refused to find that sexual harassment violated Title VII). Title VII bars discrimination "because of" the target's sex. 42 U.S.C. § 2000e-2 (a)(1)-(2). This standard, commonly referred to as the "but for" test, requires that the proscribed action would not have occurred "but for" the employee's gender. The early cases construing Title VII's applicability in respect of gender discrimination found that sexual harassment did not meet the but for test. The harassing conduct did not occur because of the victim's sex, but rather because of the unique interpersonal relationship between the parties. See, for example, *Corne v. Bausch and Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975); *Barnes v. Train*, 13 FEP Cases (BNA) 123, 124 (D. D.C. 1974). For these courts, "Jane Doe was harassed because she was Jane Doe, not because she was a woman." Juliano, 77 Cornell L. Rev. at 1563.

25. In 1976, the federal district court for the District of Columbia found that the retaliatory actious of a male supervisor taken because a female employee declined his sexual advances constituted sex discrimination within the parameters of Title VII. *Williams v. Saxbe*, 413 F. Supp. 654, 657-58 (D. D.C. 1976). The defendant in this case argued that the plaintiff's refusal to provide sexual consideration did not separate her as an impermissible class from other employees (men) subject to similar demands. *Id.* at 657. The court rejected this argument noting that "the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated." *Id.* at 657-58. The following year, the Third Circuit also held that Title VII is violated when a supervisor makes sexual advances toward a subordinate and then conditions the employee's job status on a favorable response to the advances. *Tomkins v. Public Service Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977).

26. See *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1389 (D. Colo. 1978) (finding that a supervisor's sexual demands on his female subordinate had become a "term or condition" of employment, and thus actionable under Title VII); *Garber v. Saxon Business Prods., Inc.*, 552 F.2d 1032, 1032 (4th Cir. 1977) (same); *Williams v. Civiletti*, 487 F. Supp. 1387, 1389 (D. D.C. 1980) (same); *Miller v. Bank of America*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (holding that when an employer actively or tacitly approves of a personnel policy requiring sexual favors as a condition of employment, such a case would be actionable under Title VII).

27. See, for example, *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (holding that an abusive work environment constitutes a term or condition of employment, and is thus actionable under Title VII notwithstanding the lack of tangible job detriments); *Walter v. KFGO Radio*, 518 F. Supp. 1309, 1316 (D. N.D. 1981) (accepting the proposition that an "intimidating, hostile, or offensive work environment" would create a cause of action under Title VII); *Brown v. City of Guthrie*, 22 FEP Cases (BNA) 1627, 1631-32 (W.D. Okla. 1980) (same). Susan Estrich argues that the early "egregious" cases of sexual harassment involving demands for sexual consideration in exchange for job benefits "paint[ed] a picture of sexual harassment as an extreme and rare event." Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 822 (1991). Estrich argues, "[i]n real life, sexual harassment is a pervasive and common problem, but the cause of

In 1980 the EEOC issued guidelines on sexual discrimination that explicitly recognized sexual harassment as a violation of Title VII.²⁸ As the administrative interpretation of the statute by the enforcing agency,²⁹ the guidelines, although not binding upon the courts, were accorded deference³⁰ in the development of the sexual harassment cause of action.³¹ The guidelines' definition of sexual harassment was designed to incorporate cases in which job benefits are premised upon accession to sexual demands as well as cases in which the unlawful conduct creates a hostile or abusive work environment.³²

Both variants of actionable sexual harassment are currently recognized by the courts. "Quid pro quo" harassment occurs when the extension or denial of job benefits flows from the employee's submission to or rejection of her supervisor's advances.³³ The paradigm factual situation is "sleep with me or I'll fire you,"³⁴ yet courts have recognized a range of attempts to trade employment opportunities for sexual favors as meeting the necessary demand of reciprocity.³⁵ The

action was premised on its being unusual and rare. Perhaps there was no other way to win the early battles." *Id.*

28. 45 Fed. Reg. 74,677 (1980) (codified at 29 C.F.R. § 1604.11 (1993)). See generally Nancy Fisher Chudacoff, Significant Development, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII*, 61 B.U. L. Rev. 535 (1981).

29. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

30. See, for example, *Bundy*, 641 F.2d at 947; *Walter*, 518 F. Supp. at 1315; *Caldwell v. Hodgeman*, 25 FEP Cases (BNA) 1647, 1649 (D. Mass. 1981).

31. As the Supreme Court has instructed, the EEOC's interpretations of Title VII "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

32. 45 Fed. Reg. 74,677 (1980). Specifically, the Guidelines define sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . ." 29 C.F.R. § 1604.11(a) (1993). The harassment becomes cognizable under Title VII under the following conditions:

when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id.

Feminist scholars offer less restrictive definitions of sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power," Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 1 (Yale U., 1979); and "unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as a worker," Lin Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* 14 (McGraw-Hill, 1980).

33. 29 C.F.R. § 1604.11(a)(1),(2) (1993).

34. Juliano, 77 Cornell L. Rev. at 1566 (cited in note 4).

35. See, for example, *Tomkins*, 568 F.2d at 1048-49 (finding a violation of Title VII when a supervisor conditions the entirety of a subordinate's job status, including her "evaluation

second, and more recently developed, sexual harassment claim involves unwanted or unilateral sexual advances that are not directly linked to tangible job detriments or benefits. Hostile work environment harassment occurs when the employee is subject to conduct that is demeaning or degrading because of her gender, regardless of whether demands for sexual consideration are involved.³⁶

Under the EEOC guidelines, both quid pro quo and hostile work environment claims are premised upon an assessment that the alleged misconduct was "unwelcome."³⁷ Only unwelcome advances or requests may constitute sexual harassment irrespective of the further criteria enumerated in the guidelines. In other words, the conduct must be unwelcome before it can create an intimidating work environment or form the basis of an illegal demand for sexual consideration.

In 1982, the Eleventh Circuit created a two-part standard for unwelcome sexual conduct in *Henson v. City of Dundee*.³⁸ The court

continued employment, promotion, or other aspects of career development" on a favorable response to his sexual advances).

36. 29 C.F.R. § 1604.11(a)(3). The physical or verbal abuse suffered by the employee poisons the work environment, interfering with her capacity to perform her job. See *Meritor*, 477 U.S. at 67 (holding hostile work environment harassment actionable under Title VII if it is "sufficiently severe or pervasive to 'alter the conditions of [the victim's employment]'").

37. The EEOC Guidelines state: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct . . . constitute sexual harassment. . . ." 29 C.F.R. § 1604.11(a) (1993) (emphasis added).

38. 682 F.2d 897 (11th Cir. 1982). The court explicitly relied upon the EEOC Guidelines in formulating the elements of a valid claim for sexual harassment under Title VII. *Id.* at 903 (explaining that "the EEOC has recently issued regulations that provide a useful and informative set of guidelines on sexual harassment"). The court repeatedly cited the EEOC Guidelines in structuring the elements of proof necessary to establish prima facie claims of quid pro quo and hostile work environment harassment. *Id.* at 903-04 (hostile work environment), 909-10 (quid pro quo).

Because "neither the courts nor the E.E.O.C. have suggested that every instance of sexual harassment gives rise to a Title VII claim against an employer," *id.* at 903, the *Henson* court promulgated discreet elements of proof that the plaintiff must affirmatively demonstrate to make a prima facie showing of the validity of her claim. *Id.* at 903-05 (five part test for hostile work environment harassment), 908-09 (five-part test for quid pro quo harassment). While the five-part tests for quid pro quo and hostile work environment claims issued in *Henson* vary slightly, they are identical with respect to the required showing of "unwelcomeness." *Id.* at 903 (hostile work environment), 909 (quid pro quo). Under the *Henson* rules, to establish a claim of hostile work environment harassment, the plaintiff must show: (1) the employee belongs to protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a "term, condition, or privilege" of employment; and (5) respondeat superior. The elements of a quid pro quo claim are identical except for conditions (4) and (5). For a complete examination of the standard of employer liability for sexual harassment, see Glen Staszewski, Note, *Using Agency Principles for Guidance in Finding Employer Liability for Supervisor's Hostile Work Environment Sexual Harassment*, 48 Vand. L. Rev. 1057 (1995). To establish either sexual harassment claim under the *Henson* tests, then, a complainant must prove that she was "subject to unwelcome sexual harassment." *Henson*, 682 F.2d at 903 (citing the EEOC

defined unwelcome sexual conduct as conduct that the employee did not solicit or incite, and that is undesirable or offensive to the employee.³⁹ Other courts have had difficulty applying this standard, however, because the alleged conduct may be offensive or undesirable to the plaintiff, yet nonetheless “welcomed” by her in the eyes of her harasser. In essence, while the complainant may subjectively find the advances offensive, thereby fulfilling the latter portion of the *Henson* test, her supervisor or coworkers may view her outward conduct as indicative of her receptiveness.⁴⁰ Such potential inconsistencies in the application of the rule have not slowed its adoption, however, for an affirmative showing of unwelcomeness is now required in a majority of federal circuits.⁴¹

Four years after *Henson*, the Supreme Court took up the issue of sexual harassment as a Title VII cause of action. In a seminal opinion, *Meritor Savings Bank, F.S.B. v. Vinson*,⁴² the Court established

regulations for the proposition that “only unwelcome sexual advances generate Title VII liability”).

39. *Henson*, 682 F.2d at 903 (citing *Gan v. Kepro Circuit Systems*, 28 FEP Cases (BNA) 639, 641 (E.D. Mo. 1982); *Vinson v. Taylor*, 23 FEP Cases (BNA) 37, 42 (D. D.C. 1980)).

40. The confusion generated by a test of unwelcomeness that incorporates both subjective and objective elements is exemplified by the district court's struggles in *Burns v. McGregor Electronic Industries, Inc.*, 807 F. Supp. 506 (N.D. Iowa 1992). In an earlier hearing of the same case, the district court had concluded that, while the defendant's work environment was abusive, the plaintiff lacked the capacity for offense because she had appeared nude in a national magazine distributed in the workplace. The Eighth Circuit Court of Appeals reversed, stating that the lower court's finding of unwelcome harassment was inconsistent with its ruling that the plaintiff was not offended by the conduct of her employer. *Burns v. McGregor Electronic Industries Inc.*, 955 F.2d 559, 565 (8th Cir. 1992). On remand, however, the district court again found for the employer on the basis that the plaintiff's past conduct rendered her incapable of offense. *Burns*, 807 F. Supp. at 509. In essence, the district court subordinated the plaintiff's subjective findings of hostility and harassment to the objective effect that her outward conduct—having appeared nude—had on her employer and coworkers. See also EEOC Policy Guidance on Current Issues of Sexual Harassment, EEOC Compl. Man. (CCH) ¶ 3114 at 3271 n.10 (March 19, 1990) (advocating that EEOC investigators prioritize the objective effects of the charging party's conduct in evaluating welcomeness).

41. See Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. Rev. 499, 513 n.85 (1994) (citing opinions of the eleven of thirteen circuit courts of appeals that have required an unwelcomeness showing in a sexual harassment claim). Seven circuit courts of appeal have expressly adopted *Henson's* prima facie showing of unwelcomeness. See *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 782-84 (1st Cir. 1990); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), vacated in part on reh'g, 900 F.2d 27 (4th Cir. 1990); *Jones v. Flagship International*, 793 F.2d 714, 719 (5th Cir. 1986); *Yates v. Avco Corp.*, 819 F.2d 630, 634 (6th Cir. 1987); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988); *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1515 (9th Cir. 1989); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557 (11th Cir. 1987). The Second Circuit, although not citing *Henson*, has also adopted an unwelcomeness requirement. *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 578 (2d Cir. 1989). But see *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 860 (3d Cir. 1990) (declining to impose a welcomeness standard).

42. 477 U.S. 57 (1986). For a thorough analysis of *Meritor*, including the proceedings below, see generally Christopher P. Barton, Note, *Between the Boss and a Hard Place: A*

that both variants of sexual harassment are actionable under Title VII.⁴³ It is the Court's analysis of the welcomeness standard, however, that has had a potentially broader effect on sexual harassment litigation in this country.⁴⁴

In *Meritor*, the district court found that the respondent engaged in voluntary sexual activities and could not therefore state a claim of sexual harassment.⁴⁵ The Supreme Court dismissed the district court's reliance on the "voluntariness" of the sexual relations, holding instead that a factual determination of welcomeness must control.⁴⁶ According to the Court, it is the obligation of the trier of fact to determine "whether [the plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation . . . was voluntary."⁴⁷

The Court also reversed the D.C. Circuit's presumption that evidence of the respondent's "dress and personal fantasies" was irrelevant.⁴⁸ Under the Court's reasoning, inquiries into the plaintiff's receptiveness are not limited to instances of actual sexual contact, but also include reference to the complainant's speech, mannerisms, and choice of clothing.

Henson and *Meritor* thus establish that the plaintiff's invitation to or provocation of the alleged harassment is of central, if not

Consideration of Meritor Savings Bank, FSB v. Vinson and the Law of Sexual Harassment, 67 B.U. L. Rev. 445 (1987).

43. *Meritor*, 477 U.S. at 64 (quid pro quo) and 73 (hostile work environment). *Meritor* is one of only two cases in which the Court has squarely considered the status of sexual harassment under Title VII. In the second opinion, *Harris v. Forklift Systems, Inc.*, the Court reaffirmed *Meritor* yet held that the plaintiff need not show that the conduct creating a hostile work environment "seriously affect[ed] plaintiff's psychological well being." 114 S. Ct. 367, 371 (1993).

44. See *The Supreme Court—Leading Cases*, 100 Harv. L. Rev. 100, 283-84 (1986) (stating that the showing of welcomeness sanctioned in *Meritor* is a new "defense" to sexual harassment that "entirely misunderstands what constitutes 'receptive' sexual behavior by females" and that will end up putting the plaintiff on trial).

45. *Meritor*, 477 U.S. at 67-68.

46. *Id.* at 68. The Court stated that "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII." *Id.* The Court held instead that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" *Id.* (citing the EEOC Guidelines, 29 CFR § 1604.11(a) (1985)). Although voluntariness and welcomeness would appear to be synonymous, the Court was attempting to distinguish voluntariness—which is read as consent (rape)—from welcomeness, an entirely different factual matter.

47. *Id.*

48. *Id.* at 68-69. The Court stated that "it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant." *Id.* at 69.

determinative, importance to the disposition of her claim.⁴⁹ Unwelcomeness is a factual issue which, under the EEOC guidelines, must be determined in light of “the record as a whole” and under “the totality of the circumstances.”⁵⁰ Evidence of welcomeness beyond the immediate circumstances of the alleged misconduct therefore becomes

49. Criticisms of the welcomeness test abound. Principally, critics argue that the plaintiff's proof of unwelcomeness is an anomaly in Title VII litigation. In other disparate treatment contexts, specifically racial harassment, the offensive conduct is presumed to be offensive and the plaintiff is under no burden to establish the existence or materiality of the harassing conduct. See Lisa Rhode, Note, *The Sixth Circuit's Double Standard in Hostile Work Environment Claims: Davis v. Monsanto Chemical Co.*, 858 F.2d 345 (6th Cir. 1988), 58 U. Cin. L. Rev. 779, 812 (1989) (stating that racial comments are intrinsically offensive). The presumption that harassment based on race, religion and national origin is inherently unwelcome led to the much earlier development of hostile work environment theories for these forms of employment discrimination. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (race); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (religion); *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977) (national origin).

It is argued in response that sexually suggestive conduct can, under certain circumstances, have social utility, and, moreover, that it is much harder to control than speech or conduct reflecting racial biases. One writer has noted: “[S]exually-oriented speech includes an added dimension of legitimate traditional courtship activity which makes it more difficult to regulate than speech focusing on race, religion, or ethnicity.” Theodore F. Claypoole, Comment, *Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation*, 48 Ohio St. L. J. 1151, 1154 (1987). The EEOC concurred in its amicus brief in *Meritor*: “Whereas racial slurs are intrinsically offensive and presumptively unwelcome, sexual advances and innuendo are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous.” Brief for the United States and Equal Opportunity Employment Commission as Amici Curiae at 13, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979).

The conception that racial harassment is qualitatively different than sexual harassment reflects a continuing bias in sexual harassment law grounded in sexual stereotypes. The fact that the workplace is not presumptively free of sexually offensive conduct means that the law recognizes that “boys will be boys.” The workplace is an extension of the dating scene, and, within this environment, women act at their peril if they speak, dress, or act in a certain way. As one commentator has stated: “Women have a right to work in any given working environment without constantly negotiating sexually offensive conditions and without monitoring their dress and speech to make sure they are exuding an appropriate level of unwelcomeness.” Jolynn Childers, Note, *Is There a Place For a Reasonable Woman in the Law?: A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 Duke L. J. 854, 862 n.29 (1993).

Sexual harassment law would much better serve the objectives of Title VII, and better recognize the sexual behavior of men and women, if the “unwelcomeness” test were substantially modified. The workplace should be presumed to be free of sexually offensive conduct, thereby removing the plaintiff's burden of establishing offensiveness. In addition, because a woman's election to be available to a man is not fungible—it does not translate into a desire for *all* men—the burden of persuasion to establish the plaintiff's appreciation of the alleged misconduct should shift to the defendant. For additional arguments modifying the operation of the “unwelcomeness” test, see *id.*; Catherine A. O'Neill, Comment, *Sexual Harassment Cases and the Law of Evidence: A Proposed Rule*, 1989 U. Chi. Legal F. 219, 235 n.60 (1989); Redford, 72 N.C. L. Rev. at 524-48 (cited in note 41).

50. 29 C.F.R. § 1604.11(b) (1993); *Meritor*, 477 U.S. at 69 (citing same).

relevant,⁵¹ although the admissibility of such evidence is left to the prerogative of the trial court.⁵²

Procedurally, unwelcomeness is an evidentiary issue⁵³ that, as the totality of the circumstances test requires, involves a wide range of facts.⁵⁴ The plaintiff has the burden of persuasion, yet the burden is discharged when unwelcomeness is established by a preponderance of the evidence.⁵⁵ On appeal, the factual finding of (un)welcomeness is subject to a "clearly erroneous" standard of review.⁵⁶

After *Meritor* and the extension of the Court's imprimatur, the concept of unwelcomeness is firmly entrenched in sexual harassment law. The range of evidence to be considered by the factfinder is limited only by the totality of the circumstances, including conduct well beyond the conditions that prompted the complaint. While the plaintiff faces a comparatively light burden in establishing unwelcomeness, a contrary finding quickly hardens and may not be disturbed upon review.

51. Pursuant to the "totality of the circumstances test," defendants offer, and many courts accept, evidence of the plaintiff's sexual history wholly unrelated to the transition in question. See Part III.B.3 for a criticism of this phenomenon.

52. *Meritor*, 477 U.S. at 69 (stating that evidentiary questions involving relevance and prejudice are "properly addressed to the District Court").

53. Chudacoff, 61 B. U. L. Rev. at 561 (cited in note 28) (stating that "[w]hether the advances are unwelcome . . . becomes an evidentiary question well within the courts' ability to resolve"); *Henson*, 682 F.2d at 903.

54. See note 51.

55. *Perkins v. General Motors Corp.*, 709 F. Supp. 1487, 1499 (W.D. Mo. 1989). The preponderance standard is a benefit for plaintiffs because it reduces the quantum of evidence that they must present in order to make an affirmative showing. As the *Perkins* court noted: "Preponderance of the evidence means [merely] the greater weight of evidence." *Id.* Because plaintiffs bear the burden of persuasion, however, if the evidence is equally balanced or of equal probativeness, the plaintiff has not met her burden. *Smith v. United States*, 726 F.2d 428, 430 (8th Cir. 1984).

It has been argued that the purposes of Title VII would be better served by a shift in the burden of persuasion to the defendant. This would mean that sexual harassment would be presumptively unwelcome and that zero sums in the parties' evidence of unwelcomeness would be construed in favor of the plaintiff. Childers, 42 Duke L. J. at 862 n.29 (cited in note 49).

56. F.R.C.P. 52(a). "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* If there are two permissible views of the evidence, the interpretation assigned by the trier of fact must be adopted, particularly when the interpretation hinges upon credibility determinations. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

III. DEVELOPMENT OF THE CIVIL SEXUAL MISCONDUCT EVIDENCE SHIELD

The unwelcomeness test, particularly as interpreted in *Meritor*, licenses the defendant to discover and introduce a broad range of evidence regarding the plaintiff's conduct. If the plaintiff's speech and dress are relevant to the determination of welcomeness,⁵⁷ certainly other sexually-oriented conduct in the workplace⁵⁸ or in other contexts becomes material.⁵⁹ The broad latitude given the defense bar in establishing that the plaintiff welcomed her harassment⁶⁰ powered the drive to amend Rule 412.⁶¹

A. *The Amendment of Rule 412*

The Federal Rules of Evidence contain provisions protecting litigants from the admission of irrelevant or prejudicial evidence.⁶² In rape prosecutions, however, the inquiry into whether the victim consented to sexual contact renders the victim's past sexual behavior material. Prior to the enactment of Rule 412,⁶³ a rape victim's past sexual behavior was introduced by the defendant to impeach her credibility⁶⁴ as well as to demonstrate her desire for sexual relations

57. See note 48 and accompanying text.

58. Participation in lewd or vulgar workplace humor, for example.

59. See, for example, *Stang v. Leaseway Transp. Corp.*, 1990 U.S. Dist. LEXIS 2657, *4 (E.D. Ill.) (rejecting defense counsel's attempt to introduce legitimacy of plaintiff's children).

60. Commentators argue that the maintenance of the unwelcomeness standard in sexual harassment law means that "harassment" should be stricken from the designation of the cause of action. In essence, if harassment can be welcomed, how does it remain harassment? See Juliano, 77 Cornell L. Rev. at 1570 (cited in note 4) (citing dictionary definitions of harassment to show that it implies unwelcomeness).

61. See Notes of Advisory Committee, F.R.E. 412 ("[t]he [new] rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details").

62. See F.R.E. 402 and 403.

63. Rule 412 was the creation of Congress alone rather than the product of Judicial Conference-Supreme Court deliberations pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. The Privacy Protection for Rape Victims Act of 1978 (H.R. 4727) became law on October 28, 1978. Pub. L. No. 95-540, 92 Stat. 2046 (1978). The legislation's sole purpose was to add Rule 412 to the Federal Rules of Evidence.

64. The impeachment theory holds that an unchaste woman, therefore a woman of had moral character, is less likely to speak the truth than a woman of good moral character. See, for example, *State v. Coella*, 3 Wash. 99, 28 P. 28, 29 (1891); *Anderson v. State*, 104 Ind. 467, 4 N.E. 63, 65 (1885). By the time of the enactment of Rule 412, many courts barred the use of a rape victim's past sexual history for impeachment purposes on the basis that there is no logical relation between character for chastity and character for truthfulness. Such a position "would necessarily imply the absurd proposition that the extra-marital sexual history of a female witness would be admissible to impeach her credibility in any case in which she testified." *State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 545 P.2d 946, 950 (1976) (en banc). See also *McLean v. United States*, 377 A.2d 74, 79 n.8 (D.C. App. 1977) (stating that, if admissible, such evidence

on the occasion charged.⁶⁵ Recognizing the logical inconsistencies inherent in the use of such evidence⁶⁶ and the damage to the victim involved in its admission, Congress enacted an affirmative evidence shield under Rule 412 to replace the more ambiguous, discretionary, and considerably less restrictive provisions of Rules 404-406, 608-609, and 611(a) that previously governed the admissibility of evidence of the victim's past sexual history.⁶⁷

The effort to amend Rule 412 to incorporate civil actions involving sexual misconduct originated in Congress.⁶⁸ Under the Rules Enabling Act,⁶⁹ however, Congress gave the federal judiciary the power to prescribe its own rules of conduct and procedure.⁷⁰ By the

could be used to impeach the veracity of a woman anytime she testified); *State v. Geer*, 13 Wash. App. 71, 533 P.2d 389, 391 (1975) (finding that a woman's unchaste character has little bearing on her ability to tell the truth).

65. F.R.E. 404 proscribes the use of character evidence to prove that an individual acted in conformity with his or her character trait on a particular occasion. F.R.E. 404(a). In criminal cases, however, a defendant is privileged to introduce "[e]vidence of a pertinent trait of character of the victim of the crime" as an exception to the propensity rule. F.R.E. 404(a)(2). In the majority of jurisdictions, the privilege is limited to proof by opinion or reputation evidence only. This exception has been employed by rape defendants to establish consent. If the victim has been promiscuous or unchaste in the past, it is more likely that she consented to sexual contact with the defendant. Indeed, the Advisory Committee Note to F.R.E. 404(a)(2) explicitly states that "an accused may introduce pertinent evidence of the character of the victim . . . in support of a claim of . . . consent in a case of rape. . . ." Notes of Advisory Committee, F.R.E. 404(a)(2).

Although rape defendants are invited by the evidence rules to introduce the victim's past sexual history as evidence of her character for promiscuity, many courts, even prior to the enactment of Rule 412, employed considerations of relevance and probative value to exclude such evidence. See, for example, *United States v. Stone*, 472 F.2d 909, 916 (5th Cir. 1973); *McLean*, 377 A.2d at 77; *State ex rel. Pope*, 545 P.2d at 949; *People v. Whitfield*, 58 Mich. App. 585, 228 N.W.2d 475, 478-79 (1975); *Geer*, 533 P.2d at 391.

66. For a thorough discussion of the false linkages between a woman's sexual history and her character for veracity and her character for promiscuity, see O'Neill, 1989 U. Chi. Legal F. at 224-33 (cited in note 49).

67. In the discussion preceding the passage of H.R. 4727, the bill that ultimately became Rule 412, the bill's sponsors criticized the "traditional approach" of the federal evidence rules that "permit[s] great latitude in bringing out intimate details about a rape victim's life." 124 Cong. Rec. H34912 (Oct. 10, 1978) (statement of Representative Mann). To protect the privacy of rape victims, the rape shield rule was designed to "preclude the routine use" of evidence of past sexual history in favor of a more limited regime of admissibility pursuant to the guidelines of the new rule. *Id.* at H34913. There were no House, Senate, or Conference Committee reports on Rule 412, and, because the rule was solely the creation of Congress, no Advisory Committee note was drafted. For additional legislative history on predecessor bills, see *Privacy of Rape Victims*, Hearing before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 94th Cong., 2d Sess. (July 29, 1976).

68. See, for example, 137 Cong. Rec. S9610 (July 10, 1991) (proposing harassment evidence shield, Rule 412B, as a provision of the Violence Against Women Act of 1991).

69. 28 U.S.C. §§ 2071-2077.

70. In particular, the Supreme Court has the power to prescribe the rules of practice and procedure (including the evidence rules) for the federal judiciary. 28 U.S.C. § 2072. The grant of rulemaking authority is subject to Congressional review and Congress maintains the ultimate

spring of 1992, the Advisory Committee on Criminal Rules of the Judicial Conference had begun to consider its own alternative to the Rule 412 amendments then percolating through Congress.⁷¹ The minutes of the committee's meeting of October 1992 and the report of the committee chairman on the proposed changes to Rule 412 reveal that the preferred method of amending Rule 412 was pursuant to the procedures of the Rules Enabling Act.⁷² Throughout 1993 and the majority of 1994, two separate proposals to amend Rule 412 existed—one the creation of Congress and the other the creation of the Judicial Conference.⁷³ In the end, however, Congress adopted the text

legislative right to reject, modify, or defer any of the rules created by the federal judiciary. 28 U.S.C. § 2074(a).

71. Minutes of the Advisory Committee on the Federal Rules of Criminal Procedure 12 (April 23-24, 1992) (all minutes, letters and correspondence referring to Rule 412 are available from the Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States). The Judicial Conference of the United States is responsible for "carry[ing] on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States." 28 U.S.C. § 331 (1988). To aid it in the discharge of this duty, the Judicial Conference may authorize the appointment of advisory committees that consider and recommend rules of practice and procedure for the federal judiciary. 28 U.S.C. § 2073(a)(2). At the present time, there are five advisory committees serving the Judicial Conference, including an Advisory Committee on Evidence Rules. When the amendments to Rule 412 were first considered under the auspices of the Rules Enabling Act, the Advisory Committee on Evidence Rules had been deactivated and the Advisory Committee on Criminal Rules was responsible for Rule 412. The Advisory Committee on Evidence Rules was reactivated in December 1992, and it thereafter shepherded the amendments to Rule 412.

72. The minutes of the Criminal Rules Committee's October 1992 meeting disclose that assurances were given to Senator Joseph Biden, the primary sponsor of the Senate's efforts to amend Rule 412, that "Rule 412 would be given early and prompt consideration under the Rules Enabling Act," and that any proposed amendments "would be published on an abbreviated comment period." Minutes of the Advisory Committee on the Federal Rules of Criminal Procedure 13 (Oct. 12-13, 1992). See also "Letter of Transmittal to Judge Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, from Judge William Terrell Hodges, Chairman, Advisory Committee on Criminal Rules" in Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Criminal Procedure and the Federal Rules of Evidence, Committee on Rules of Practice and Procedure, Judicial Conference of the United States ("Preliminary Draft") 104 (Dec. 1992) (reporting the committee's proposed rule to the Standing Committee). "Given Congress' high interest in the topic of violence against women, the committee believed that it would be appropriate to propose changes to Rule 412 through the Rules Enabling Act procedures and publish the proposed amendment for public comment." *Id.*

It is unsurprising that organs of the Judicial Conference would assert their primacy in the rules amendment process, yet ironic given the fact that Rule 412 was solely the creation of Congress. See notes 63, 66-67, and accompanying texts.

73. During the period in which the Conference's proposal was subject to scrutiny under the Rules Enabling Act, members of the Judicial Conference sought to forestall further action on the Congressional proposal. See, for example, Letter of Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure, and Stanley Marcus, Chair, Ad-Hoc Committee on Gender-Based Violence to Senator Joseph Biden (Oct. 18, 1993) ("The [Conference] amendment[] reflect[s] the deliberative and exacting process contemplated by the Rules Enabling Act. . . . Most respectfully, we renew our suggestion that [Congress'] proposed changes

and supporting advisory committee note of the Judicial Conference proposal, and the proposed rule became law when it was incorporated in the Violent Crime and Law Enforcement Act of 1994.⁷⁴ This Note therefore tracks the development of the revisions to Rule 412 made pursuant to the Rules Enabling Act.

As published for public comment, proposed Rule 412 ("Proposed Rule" or "Proposed Rule 412") contained a number of reforms, beyond the extension of the rule to civil cases, that substantially departed from the then-existing framework of the rape shield rule.⁷⁵ The Proposed Rule simplified the form and structure of the rape shield rule to eliminate some of the confusion caused by the rule in its then present form.⁷⁶ Under the Proposed Rule, a three-part structure establishing: (1) a presumption against the admissibility of past sexual behavior; (2) exceptions to the inadmissibility presumption; and (3) court guidelines governing the admissibility of excepted evidence replaced the more convoluted provisions of the Former Rule. This format was carried over to the Amended Rule and is now the foundation of the provision adopted by Congress.

A principal casualty of the Proposed Rule's simplified provisions was the rape shield's explicit ban on the use of opinion or reputation evidence.⁷⁷ Both the Proposed and the Amended Rule establish a presumption against the use of sexual history evidence, yet appear to admit evidence of opinion, reputation, or specific instances of con-

to Evidence Rule 412 . . . be withdrawn to permit the remaining important stages of the Rules Enabling process to go forward"); Letter of Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure, to Senator Joseph Biden (March 30, 1994) ("the amendments to Evidence Rule 412 . . . are in the final stages of the rulemaking process. Approval of legislation that would directly amend these rules, despite the nearly concluded rulemaking process, would effectively bypass the Rules Enabling Act process, render useless the hard work of our volunteer lawyers, judges and professors and frustrate the intent of the Act").

74. P.L. 103-322, Title IV, Subtitle A, Ch. 4 at 40141(b), 109 Stat. 1919 (1994). Congressional action on Rule 412 was required because the Supreme Court, as the final judicial authority on the federal rules, 28 U.S.C. § 2074, had transmitted the Conference's proposal to Congress stripped of any reference to Rule 412's incorporation of civil actions. Congress restored the rule's references to civil actions in the 1994 crime bill (H.R. 3355) and the sexual harassment evidence shield became effective December 1, 1994.

The substitution of the Conference's proposal is unremarkable because, by the time the full Congress would have considered passage of its own proposal, the amendment process under the Rules Enabling Act had been completed. Congress, therefore, adopted a new rule created in accordance with statutory authority and with the participation of interested members of both the bench and the bar.

75. The text of Proposed Rule 412 appears in Appendix II.

76. Proposed Advisory Committee Note ("Proposed Note") reprinted in Preliminary Draft at 115 (cited in note 72).

77. "[R]eputation or opinion evidence of the past sexual behavior of an alleged victim . . . is not admissible." Former F.R.E. 412(a), 28 U.S.C. app. F.R.E. 412 (1988).

duct if such evidence of past sexual behavior survives the presumption against its use.⁷⁸

The Proposed Rule, while disposing of the explicit ban on opinion and reputation evidence, widened the scope of sexual history evidence covered by Former Rule 412. In addition to the presumption against admissibility of evidence of past sexual behavior, the Proposed Rule also presumptively barred evidence of sexual "predisposition."⁷⁹ The Advisory Committee note to the Amended

78. Several commentators on the rule proposal argued that the loss of an explicit reputation and opinion evidence ban would greatly reduce the protection afforded victims of sexual misconduct, thereby undercutting the policy of the new rule. See, for example, Statement of Women's Legal Defense Fund on Proposed Amendments to Federal Rule of Evidence 412, (April 28, 1993). "[R]eputation and opinion evidence are especially problematic, because of their dubious reliability, limited probative value, and potential for prejudicial impact." *Id.* at 10. Congress apparently agreed because its proposed rule retained the opinion and reputation evidence ban of the rape shield rule.

In her summary report of public comment on the proposed rule, Dean Margaret A. Berger, reporter for the Advisory Committee on Rules of Evidence, surmised that removal of the opinion and reputation evidence ban was necessary because the drafters envisioned that the new rule would apply to cases involving sexual misconduct in which the plaintiff's character is at issue. Report of Margaret A. Berger, Reporter, Advisory Committee on Rules of Evidence 23 (May 3, 1993) ("Berger Report"). The example offered by the Advisory Committee of such a case was a defamation action where "[opinion and reputation] evidence might be essential to show that the alleged defamatory statements were true or did not damage the plaintiff's reputation." Proposed Note at 120 (cited in nota 76).

The evidence rules permit proof by opinion, reputation, or specific instances of conduct when character is in controversy. F.R.E. 405. The paradigm case is defamation. Edward W. Cleary, ed., *McCormick on Evidence* § 187 at 551 (West, 3d ed. 1984). Dean Berger argued, however, that a reasonable reading of the proposed rule would require that the rule only apply if the person against whom evidence is offered may be characterized as a "victim of sexual misconduct." Solutions Memorandum of Margaret A. Berger, Reporter, Advisory Committee on Rules of Evidence 8-9 (May 3, 1993) ("Berger Memorandum"). Such victims would include the actual targets of sexual abuse rather than, for example, the targets of defamatory comments regarding sexual promiscuity. In essence, then, because most victims of sexual misconduct do not put their characters in controversy, the rules permitting the offer of opinion and reputation evidence when character is in issue should not overcome or even apply to Rule 412's evidence shield. The current Advisory Committee Note to Rule 412, at Dean Berger's suggestion, now reads that cases involving sexual misconduct in which the person against whom evidence is offered is not properly considered a "victim" (target) of the misconduct are beyond the scope of Rule 412. Notes of Advisory Committee, F.R.E. 412. The relationship between sexual harassment claims and the modes of permissible proof under Rule 412 is discussed in Part IV.

79. Proposed F.R.E. 412(a), reprinted in Appendix II. The Proposed Rule failed to provide a definition of sexual predisposition, however, and this prompted several commentators to request that one be supplied. See Letter of Professor Paul F. Rethstein to Judge Ralph K. Winter, Chair, Advisory Committee on Evidence Rules 5 n.7 (May 9, 1993) (noting that predisposition is a new word in the Federal Rules of Evidence); Statement of Professor Myrna Raeder, Chairperson, Rules of Criminal Procedure and Evidence Committee, Criminal Justice Section of the American Bar Association 7 (April 12, 1993) ("ABA Statement") (stating that the commentary must clearly address the definition of predisposition); Comments of the National Association of Criminal Defense Lawyers 6 (April 14, 1993) (arguing that unless sexual predisposition is clearly defined as a category of proscribed evidence it should be excluded from the rule). In her summary report, Dean Berger responded to the requests for a definition of sexual predisposition. Berger Report at 5-6, 20. "[T]he addition of 'predisposition' . . . [is]

Rule now states that evidence of sexual predisposition is proof "that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking."⁸⁰ The addition of a presumptive ban on predisposition evidence, therefore, recognizes that proof of the victim's speech, dress, or lifestyle, although sexually suggestive, should not be admissible.

Although the Proposed Rule broadened the scope of proscribed evidence, it also provided exceptions to the proscription under certain circumstances.⁸¹ As published for comment, the Proposed Rule contained two alternate exceptions for civil cases. The first stated that sexual behavior or predisposition evidence would be admissible if it were "essential to a fair and accurate determination of a claim or defense"; the second alternative provided that such evidence could be used if "its probative value substantially outweighs the danger of unfair prejudice to the parties and harm to the victim."⁸²

The Advisory Committee ultimately opted for the balancing test.⁸³ Given the remedial purposes of the rule, particularly the desire

intended to cover evidence that is being offered for the inference that the victim engaged in prior sexual conduct, but that does not fit into a plain meaning definition of sexual misconduct. Examples are evidence of dreams, fantasies, partying, watching pornography and provocative dressing." *Id.* at 20. Dean Berger proposed that the Advisory Committee commentary make clear that the additional ban on "predisposition" evidence was incorporated to fully effectuate the protections of Rule 412. Berger Memorandum at 2.

80. Notes of Advisory Committee, F.R.E. 412.

81. See Proposed F.R.E. 412(b)(4), reprinted in Appendix II.

82. *Id.*

83. Most of the commentators on the Proposed Rule had favored the latter of the two proposals. They argued that a balancing test involving considerations of probative value and prejudice would be familiar to the courts and that the requirement that the probative quality of the evidence "substantially" outweigh its prejudicial impact would serve to protect alleged victims. Comments of the Committee on Federal Courts, The State Bar of California 4 (April 30, 1993); ABA Statement at 9 (cited in note 79). Several commentators noted, however, that in civil cases in which only a preponderance is required for plaintiffs to win, it would be unfair to deny defendants admittedly relevant evidence. See Comments of Professor Edward L. Kimball 2 (March 3, 1993) (stating that the extant provisions of F.R.E. 403 offer the correct standard); Comments of the Federal Rules of Evidence Committee of the American College of Trial Lawyers 5 (April 7, 1993) (arguing that the qualifying adverb "substantially" be removed because it tips the scales too far in admitting relevant evidence).

The Federal Courts Committee of the New York City Bar Association ("Federal Courts Committee") articulated a strong preference for the "essential evidence" option, however, noting that "the first alternative is preferable because it better ensures that a rule of evidence will not, directly or indirectly, effect a significant change in substantive law." Report on Proposed Amendments to Rule 412 of the Federal Rules of Evidence by the Federal Courts Committee of the Association of the Bar of the City of New York 3 (April 29, 1993) ("Federal Courts Committee Report"). In particular, the Federal Courts Committee was concerned that adoption of the balancing test, coupled with the new rule's presumption against the use of sexual history

to protect victims of sexual harassment,⁸⁴ this choice was the rational alternative. If the sexual history evidence used to prove welcomeness is deemed "essential," and if essential evidence is excepted from Rule 412's proscriptions, then the exception eviscerates the rule. The creation of a sexual harassment evidence shield is pointless if the proof excepted from the rule is exactly the evidence that the rule is designed to ban. Moreover, if the determination of whether evidence

evidence, would amend the substantive law of sexual harassment by limiting the defendant's capacity to prove welcomeness. *Id.* at 3-9. In favoring the "essential evidence" option, the Federal Courts Committee asserted that the substantive law of sexual harassment, especially the defendant's opportunity to defend on the basis of welcomeness, should not be co-opted by a procedural provision. In addition to advocating the "essential evidence" option under proposed F.R.E. 412(b)(4), the Federal Courts Committee also endorsed the inclusion of explicit guidelines in the Advisory Committee commentary on the construction of the term "essential." *Id.* at 10. Specifically, the Federal Courts Committee proposed its own addition to the commentary that read that the requirement that evidence be essential, although creating a higher standard of relevancy than that prescribed by Rule 402, "is not intended . . . to preclude a litigant from introducing evidence necessary to establish a claim or defense." *Id.* at 3. The obvious implication for judges and practitioners seeking guidance on excepted evidence would be that proof of welcomeness is "essential" to the defense of sexual harassment claims.

Michael Chepiga, the Federal Courts Committee's representative at the Advisory Committee hearings on Proposed Rule 412 (held May 6, 1993), argued that the new rule should not affect the development of the substantive law. "That is for the judges construing the statutes in the cases to develop . . . [a] rule of evidence shouldn't dictate that or lead the way on that." Transcript of Proceedings, Judicial Conference Advisory Committee on Evidence Rules 15 (May 6, 1993).

Noting the Federal Courts Committee's preference in her summary report, Dean Berger responded by questioning the effect of the proposed balancing test upon the substantive law of sexual harassment. Berger Report at 26 (cited in note 78). "Whether the second proposed alternative in subdivision (b)(4) must be rejected as inconsistent with the developing substantive law of sexual harassment is debatable." *Id.* Berger argued that the *Meritor* Court itself envisioned a balancing test for the admissibility of the sexual harassment plaintiff's past sexual conduct. *Id.* (citing *Meritor*, 477 U.S. at 69, stating that "the District Court must carefully weigh the applicable considerations [i.e. probative quality and prejudicial impact] in deciding whether to admit evidence of [the plaintiff's provocative dress and publicly expressed sexual fantasies]"). Yet, in advising the Advisory Committee, Dean Berger declined to endorse outright either the essential evidence or balancing test option. "The Advisory Committee will have to consider carefully whether the notion that some evidence of an alleged victim's prior sexual history and predisposition may be excluded in a sexual harassment claim—in accordance with the applicable substantive law—is better handled through the first or second alternatives." *Id.* at 27.

84. While the text of the Proposed Rule stated in subdivision (a) that the new sexual behavior and predisposition evidence shield would extend to civil cases, several commentators noted that the rule, either in the text or commentary, should explicitly incorporate sexual harassment. See, for example, Statement of Women's Legal Defense Fund on Proposed Amendments to Federal Rule of Evidence 412 8-9 (April 28, 1993) (arguing that "[t]he term 'sexual misconduct' as used in the proposed amendments should be clearly defined to include claims of sexual harassment. Without explicit guidance, some might inaccurately interpret the term 'cases involving sexual misconduct' in an unduly narrow way—for example, as including only those civil cases involving physical contact, such as sexual assault").

As enacted, the Advisory Committee Note to Rule 412 states that "Rule 412 will . . . apply in a Title VII action in which the plaintiff has alleged sexual harassment." Notes of Advisory Committee, F.R.E. 412.

is "essential" is made on a case-by-case basis, this would call for the courts to reach conclusions that they have not been trained to draw by the other provisions of the Federal Rules of Evidence. The prevailing advantage of the balancing test is that the courts are accustomed to its provisions. The comparison of probative quality and prejudicial impact is mandated by Rule 403, and the courts are therefore familiar with the terms of the balancing test favored by the Advisory Committee and now required by the exception to the sexual harassment evidence shield.⁸⁵

With respect to sexual harassment, then, the Proposed Rule, although it removed the ban on opinion and reputation evidence, substantially increased the protections afforded victims of workplace harassment. The rule barred evidence not only of the plaintiff's sexual behavior, but also proof of her dress, speech, and lifestyle that might give rise to sexual connotations. The combined effect of the shield against sexual behavior and sexual predisposition evidence was to preclude all types of proof of welcomeness—evidence of past sexual history as well as sexually explicit conduct not involving actual sexual contact. In addition, the drafters of the Proposed Rule, in opting for the balancing test for excepted evidence, declined to label proof of welcomeness "essential" to the defense of a sexual harassment claim. Rather, the Advisory Committee adopted the position that proof of welcomeness is conditionally relevant. It is admissible only if its probative worth substantially outweighs its prejudicial effect.

The Supreme Court, however, pursuant to its authority, gutted the proposed rule, stripping it of references to civil cases.⁸⁶ The Court, in its annual transmission of rule proposals to Congress, ordered that Rule 412 take effect without applying to civil cases.⁸⁷ The Court's primary concern was that the extension of the rule to civil cases would abridge the substantive rights of defendants.⁸⁸ In particular, the Court argued that the amendment could exceed the Court's authority under the Rules Enabling Act, which bars the creation of

85. The civil case exception that initially appeared at subdivision (b)(4) of the Proposed Rule now appears at subdivision (b)(2) of the Amended Rule. See F.R.E. 412 (b)(2).

86. See Randall Samborn, *High Court Rejects Move for Civil Rape Shield*, National Law Journal A12 (May 23, 1994).

87. *Id.* The Court's order and the text of the rule as transmitted to Congress appear at 62 U.S.L.W. 4301 (May 10, 1994).

88. Letter of Chief Justice William H. Rehnquist to the Honorable John F. Gerry, Chair of the Executive Committee of the Judicial Conference of the United States (April 29, 1994), reprinted in Communication from the Chief Justice, the Supreme Court of the United States, Transmitting an Amendment to the Federal Rules of Evidence as Adopted by the Court, Pursuant to 28 U.S.C. 2076, House Document 103-250, 103d Cong., 2d Sess. (1994).

rules that "abridge, enlarge or modify any substantive right."⁸⁹ To illustrate its argument, the Court pointed to the threat posed by the Proposed Rule to evidence of welcomeness solicited by *Meritor*.⁹⁰ Implicit in this illustration is the fact that the Court viewed proof of welcomeness to be integral to the maintenance of the defendant's substantive right of defense against claims of sexual harassment.⁹¹

Part III.B of this Note is a response to the Court's opposition to the creation and enforcement of a sexual harassment evidence shield under Rule 412. While the new rule substantially reduces the quantum of proof of welcomeness formerly available to defendants, it does not completely foreclose the defendant's capacity to demonstrate provocation or invitation of the alleged misconduct if the evidence is of sufficient probative quality. Because introduction of proof of welcomeness distorts the fact-finding process by infusing often irrelevant and highly prejudicial information into sexual harassment proceedings, an affirmative limitation on the use of such evidence is necessary.

B. A Civil Sexual Harassment Evidence Shield Is Justified

The law of evidence presumes that most evidence, if relevant, is admissible.⁹² Even relevant evidence must be excluded, however, if the danger of unfair prejudice outweighs probative value.⁹³ "Probative value" refers to the capacity of the evidence to prove an issue of consequence in the litigation.⁹⁴ "Unfair prejudice" concerns the likelihood

89. *Id.* (citing 28 U.S.C. § 2072(b)).

90. *Id.*

91. In its comment endorsing the "essential evidence" option for excepted evidence, the Federal Courts Committee thus foreshadowed the position ultimately taken by the Supreme Court. See note 83.

Congressional adoption and enactment of the Proposed Rule rendered moot the Court's opposition, however, for Congress retains the capacity to modify substantive legal rights through the legislation of rules for the federal courts. As stated by the Supreme Court in *Hanna v. Plumer*: "[T]he constitutional provisions for a federal court system . . . carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." 380 U.S. 460, 472 (1965). Congress is therefore immune to considerations of whether an ostensibly procedural provision detracts from underlying substantive legal rights. Its rulemaking authority is not subject to Rules Enabling limitations.

92. F.R.E. 402 establishes the presumption that virtually all relevant evidence is admissible unless something can be found to bar it. "Relevant" evidence is evidence that has the "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." F.R.E. 401.

93. F.R.E. 403.

94. Charles A. Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5214 (West, 1978).

that the proffered evidence will divert the trier of fact, leading to decision on an improper basis.⁹⁵

The probative value of the plaintiff's sexually-related conduct is nearly always suspect, and, moreover, such evidence tends to divert the factfinder from an examination of the plaintiff's allegations to an evaluation of her conduct. The substantial prejudice and lack of probative value associated with admission of plaintiff's past sexual conduct provide ample basis for the development and enactment of a sexual harassment evidence shield.

1. Purported "Welcomeness" Reflects Power, Not Sex

The unwelcomeness requirement presupposes that harassers and their victims are motivated by sexual attraction. While a woman is not expected to appreciate derogatory and demeaning epithets based solely upon her gender, the law assumes that, unless she indicates otherwise, she may be receptive to sexual advances or other sexual behavior. Because men and women do not occupy equal positions of power in the workplace, however, receptiveness to sexual attention may reflect intimidation rather than desire.⁹⁶

Institutionally, women are at the mercy of their male supervisors. When job benefits, promotions, or even positive performance reviews are conditioned upon acquiescence to harassment, welcomeness might reflect fear for the victim's job rather than acceptance.⁹⁷

95. Notes of the Advisory Committee, F.R.E. 403. A primary objective in barring unfairly prejudicial evidence is to preclude "inducing decision on a purely emotional basis." *Id.*

96. The disequilibrium of workplace power between the genders is reflected in the labor statistics collected by the Bureau of the Census, Current Population Study. As of 1993, women held 47.8% of the approximately 32 million "managerial and professional specialty" jobs in the economy, yet only 42% of actual "executive" positions. U.S. Dep't. of Comm., Bureau of the Census, *Statistical Abstract of the United States: 1994* 407 (114th ed. 1994).

Women constitute 18.6% of architects; 8.6% of engineers; 21.8% of physicians; 10.8% of dentists; 42.5% of college and university teachers; and 22.9% of lawyers. *Id.* Conversely, in 1993 women held 63.8% of the positions considered "technical, sales and administrative support" in the Current Population Survey. *Id.* at 408. Women comprised 99.3% of dental hygienists; 79.6% of legal assistants; 96.2% of secretaries, stenographers, and typists; 97.2% of receptionists; 82% of general office clerks; 88.4% of bank tellers; and 90.9% of bookkeeping, accounting, and auditing clerks. *Id.* at 407-08.

Aside from the underrepresentation of women in positions of power, women continue to earn less than men in the same occupations. As of 1993, the median weekly earnings of all male workers was \$514 while female workers earned \$395. *Id.* at 429. Male managerial and professional employees earn on average \$791 per week compared with \$580 for women. *Id.* Male operators, fabricators, and laborers earn \$399 in median weekly income while women in the same category earn \$288. *Id.*

97. Susan Estrich argues that the imposition of the unwelcomeness test in cases of quid pro quo harassment is absurd because consent in the face of coercion is an impossibility. "Even if you believe that I might freely consent to sex with my supervisor in some other circumstances,

When a woman's professional future is based upon the decisions of her male supervisor, she may accept, or at least not object to, his advances. The crucial distinction, however, is that her actions are borne of coercion and not attraction.

The power differential in the workplace manifests itself in other ways. Because men constitute the majority of managers, the remedial scheme designed by the employer to address issues of sexual harassment may be infused with sexual stereotypes. If a woman does indeed lodge a complaint with her employer, she may be told that she is hypersensitive or that her own actions are to blame.⁹⁸ The plaintiff's complaint may not be taken seriously,⁹⁹ and, if it is, she may risk further harassment or retaliation.¹⁰⁰ Given the perceived futility and costs of disclosing her harassment, the victim may elect instead to suffer in silence.

Because they represent a particularly small minority in certain professions, women may be subjected to harassment simply for displaying the audacity to enter the male domain. When confronted with women as co-workers, men working in traditionally male-dominated professions may lash out, using sexually-explicit or offensive conduct as their weapon.¹⁰¹ Welcomeness is not an issue

can free will exist in the face of coercion? With a gun to my head, would you even ask about philanthropy?" Estrich, 43 Stan. L. Rev. at 831 (cited in note 27).

98. See *Waltman v. International Paper Co.*, 875 F.2d 468, 471 (5th Cir. 1989) (plaintiff told "she should expect this type of behavior working with men"); *Hansel v. Public Service Co. of Colorado*, 778 F. Supp. 1126, 1129 (D. Colo. 1991) (plaintiff instructed to "work on your peer relations" and to try to "fit in better"); *Morris v. American Nat'l. Can Corp.*, 730 F. Supp. 1489, 1492 (E.D. Mo. 1989) (plaintiff told that alleged harassment amounted to nothing more than "horseplay" and "pranks" and that "the conduct might stop if she didn't let it bother her so much"), modified, 952 F.2d 200 (8th Cir. 1991).

99. See *Brooms v. Regal Tube Co.*, 881 F.2d 412, 416 n.1 (7th Cir. 1989) (plaintiff told by supervisor to inform harasser that her husband had given her berpes); *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983) (complainant told by supervisor to submit to harasser's advances).

100. Obviously, when the harasser is also the victim's supervisor, her job benefits may be threatened or she may receive negative performance reviews and undue criticism. See, for example, *Drinkwater*, 904 F.2d at 855-56 (plaintiff's performance rating adjusted downward at behest of supervisor); *Walker v. Sullair Corp.*, 736 F. Supp. 94, 97 (W.D. N.C. 1990) (supervisor maintained negative file on plaintiff and strenuously objected to affirmative evaluation by another supervisor), modified, 946 F.2d 888 (4th Cir. 1991); *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370, 1373 (9th Cir. 1990) (complaints about supervisor precipitate criticism of work performance and discipline for trivialities), vacated, 501 U.S. 1201 (1991), modified, 948 F.2d 532 (9th Cir. 1991), cert. denied, 112 S. Ct. 1294 (1992); *Starrett v. Wadley*, 876 F.2d 808, 812 (10th Cir. 1989) (after plaintiff rejects his advances, supervisor scrutinizes her work more closely than others and threatens her job security).

101. See, for example, *Morris*, 730 F. Supp. at 1490-91 (plaintiff asked "do you spit or swallow" and whether she has lost a pair of women's underwear including a soiled sanitary napkin); *Hall*, 842 F.2d at 1012 (male crew member urinated in plaintiff's water bottle).

when such conduct occurs because it is purely reflective of power.¹⁰² Finally, sexual harassment involving explicit or implicit threats of violence¹⁰³ can never be said to be welcomed by the victim.¹⁰⁴ By resorting to violence, the defendant belies any claim that his sexual advances were welcome. If the purpose of the unwelcomeness test is to prevent legitimately consensual workplace activity from being called harassment,¹⁰⁵ it is inapplicable in this context.

When sexual harassment is based upon power and not upon sex, evidence that the victim acquiesced is probative only of her recognition of the power differential existing between herself and her harasser. Attempted showings of welcomeness may thus divert the factfinder because submission to power may be misperceived as acceptance rather than as coerced submission.

2. The Analogy to Consent in Rape Cases

The rape shield rule of Former and Amended Rule 412 bars use of the victim's sexual history as proof of consent in federal rape prosecutions. While a detailed analysis of the efficacy of the rape shield is beyond the scope of this Note,¹⁰⁶ the enactment of the rule represents an affirmative effort to limit the use of illegitimate evidence and to curtail routine defense tactics similar to those used in the sexual harassment context. During the congressional deliberations on Former Rule 412, it was suggested that the objectives of the rule—the exclusion of irrelevant and/or prejudicial evidence—could be achieved under the extant evidentiary rules relating to permissible

102. The *Morris* court recognized that fact in stating that harassment visited upon the plaintiff "more likely than not [was] generated by the same animus that generated the note, 'This is what you should be doing instead of a man's job.'" *Morris*, 730 F. Supp. at 1496.

103. See *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 61 (2nd Cir. 1992) (plaintiff's arm grabbed so hard as to leave bruises); *Reed v. Shepard*, 939 F.2d 484, 486 (7th Cir. 1991) (plaintiff physically hit in kidneys and maced); *Brooms*, 881 F.2d at 417. In *Brooms*, "[Defendant] showed [plaintiff] one of several photocopies of a racist pornographic picture involving bestiality. [Defendant] threatened that the picture depicted how she 'was going to end up.'" *Id.*

104. The problems associated with admitting the evidence of welcomeness in these circumstances is analogous to the use of such evidence in the rape context. See Part III.B.2.

105. See Claypoole, 48 Ohio St. L. J. at 1155 (cited in note 49) (explaining that "[s]exually-oriented speech or activity can be considered legitimate if it is not coercive, is not offensive, and is part of the customary and normal courtship process"); EEOC Policy Guidance, EEOC Compl. Man. (CCH) ¶3114 at 3270 (cited in note 40) (stating that "sexual attraction may often play a role in the day-to-day social exchange between employees").

106. The scholarship and case law discussing Former Rule 412 is quite large. For analysis of the rule in its prior state, see generally Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn. L. Rev. 763 (1986).

uses of character evidence.¹⁰⁷ This suggestion was rejected, and the creation of Former Rule 412 thus reflects the willingness of the drafters of the Federal Rules of Evidence to reform the rules when past sexual experience is used improperly as character evidence.¹⁰⁸

Although significant differences exist between the conduct of sexual harassment trials and rape prosecutions, the concerns underlying the use of welcomeness and consent evidence are largely the same.¹⁰⁹ First, the focus in sexual harassment cases, as in rape cases, is often on the conduct of the complainant. Under the welcomeness standard, the plaintiff, in claiming that she was offended, puts her character in issue.¹¹⁰ Before the jury may assess the culpability of the defendant, the plaintiff must overcome the attempt to link her past conduct to her capacity for offense.

Second, the victim's past behavior may be the determinant of her assent in both a sexual harassment trial and a rape prosecution. The rape defendant may counter the victim's verbal protestations on the occasion charged with evidence of her consent or provocative

107. O'Neill, 1989 U. Chi. Legal. F. at 222 n.18 (cited in note 49) (citing Hearing on H.R. 14666 Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 94th Cong., 2d Sess. 29 (1976)).

108. In essence, notwithstanding the fact that the rape defendant faces the potential loss of his liberty, Congress perceived that the need to protect rape victims' privacy outweighs the defendant's right to unfettered use of past sexual history evidence. See Susan R. Klein, Comment, *A Survey of Evidence and Discovery Rules in Civil Sexual Harassment Suits with Special Emphasis on California Law*, 11 Indus. Rel. L. J. 540, 573 (1989) (discussing F.R.E. 412 and other rape shield laws that apply in criminal proceedings).

The debate concerning the constitutionality of the rape shield rule continues. Commentators have argued that the Constitution confers a right on the criminal defendant to introduce all defensive evidence that is relevant to the determination of his legal guilt or innocence. Under this reasoning, "any restrictions on defense evidence that issue out of other considerations than relevance—such as solicitude for the interests of victims and witnesses or the extrinsic policy of encouraging them to come forward . . . —would have to fail." Paul F. Rothstein, *Federal Rules of Evidence: Rules of Evidence for the United States Courts and Magistrates* 136.13-14 (Clark, Boardman, Callaghan, 2d ed. 1994) (emphasis deleted).

For arguments regarding the constitutionality of Former Rule 412, see J. Alexander Tanford and Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980); David Haxton, Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 Wis. L. Rev. 1219. See also Rothstein, *Federal Rules of Evidence* at 1.36.14-15 (citing cases considering the constitutionality of Rule 412).

109. As stated by Susan Estrich, "[u]nwelcomeness has emerged as the doctrinal stepchild of the rape standards of consent and resistance, and shares virtually all of their problems." Estrich, 43 Stan. L. Rev. at 827 (cited in note 27).

110. While the federal evidence rules prevent a sexual harassment defendant from introducing the plaintiff's past sexual behavior to show a propensity for sexually explicit conduct, the rules do allow the introduction of character evidence as proof of a subsidiary element of a claim or offense. See F.R.E. 404(a) (setting forth the propensity rule) and F.R.E. 404(b) (allowing the introduction of character evidence for purposes other than to show action in conformity). Part IV.B of this Note discusses how the defendant's showing of welcomeness implicates the circumstantial use of character evidence for a non-propensity purpose governed by F.R.E. 404(b).

conduct on prior occasions. Similarly, because welcomeness is presumed in sexual harassment cases, the plaintiff's statements that certain behavior offends her may not suffice. Her past conduct may be consistent, in the defendant's eyes, with the presumption of welcomeness and the harassment may be excused on this basis.¹¹¹ Unless and until the plaintiff expresses her nonassent, the harassment may continue even if the plaintiff's silence is borne of fear for her job.¹¹²

Finally, past sexual history is often introduced in rape and sexual harassment trials for purposes other than to directly exculpate the defendant. As in rape cases, if jurors become aware that the sexual harassment plaintiff has engaged in sexually explicit conduct in the past, they may reach impermissible conclusions with respect to the facts in issue. The jury may elect to punish the plaintiff for her past behavior,¹¹³ or, alternatively, the jury may infer that the plaintiff has the propensity to invite sexual attention and that her character does not lend itself to offense.¹¹⁴

The danger of jury overvaluation or misuse of sexual history evidence was a primary consideration in the creation of Former Rule 412.¹¹⁵ The existence of an analogous danger in cases of sexual harassment militates strongly in favor of the extension of the rule to the civil realm.¹¹⁶

111. "[U]nwelcomeness may be judged not according to what the woman meant, but by the implication that the man felt entitled to draw. The ambiguity plainly exist[s] only in his perception, not hers. The courts, however, privilege *his* interpretation." Estrich, 43 Stan. L. Rev. at 829 (cited in note 27). See also, *Dockter v. Rudolf Wolff Futures, Inc.*, 684 F. Supp. 532, 533 (N.D. Ill. 1988), *aff'd*, 913 F.2d 456 (7th Cir. 1990) (reasoning that "[a]lthough Plaintiff rejected [her boss's sexual overtures], her initial rejections were neither unpleasant nor unambiguous, and gave [her boss] no reason to believe that his moves were unwelcome").

112. Estrich, 43 Stan. L. Rev. at 828.

113. When evidence has the potential to suggest decision based upon factors other than those in issue, the evidence should be excluded as unfairly prejudicial. See F.R.E. 403 and accompanying Advisory Committee Note.

114. The finding of a "propensity" to welcome sexual attention violates the propensity rule contained in F.R.E. 404. The inability or unwillingness of the courts to enforce the evidence rules to prevent impermissible jury conclusions led to the development of Amended Rule 412. As stated by the Advisory Committee on Evidence Rules, the creation of a sexual harassment evidence shield is designed to "safeguard the alleged victim against . . . the infusion of sexual innuendo into the factfinding process." Notes of Advisory Committee, F.R.E. 412.

115. As noted during the Congressional proceedings, "rape trials [have] become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt . . ." 124 Cong. Rec. H34912 (Oct. 10, 1978) (statement of Representative Holtzman).

116. "Of all the countervailing considerations permitted to be weighed against the probative value of . . . proffered evidence, none is so vital to the correct outcome of the trial as the consideration of jury overvaluation or misuse of evidence." O'Neill, 1989 U. Chi. Legal F. at 238 (cited in note 49). By definition, evidence is unfairly prejudicial and must be excluded if it leads to a decision on an improper basis. Notes of Advisory Committee, F.R.E. 403. Because the courts refused to heed this requirement in respect of the misuse of sexual history evidence,

Aside from the implicit illegitimacy of sexual history evidence, the extrinsic policies of protecting rape victims' privacy and encouraging claim reporting also led to the enactment of Rule 412.¹¹⁷ These dual policies also hold true with respect to the conduct of sexual harassment litigation.¹¹⁸ The civil plaintiff files her claim often at a humiliating and degrading expense.¹¹⁹ This loss of privacy leads inexorably to the underreporting of sexual harassment offenses.¹²⁰

Given the singularity of evidentiary concerns underlying the use of sexual history in both rape and sexual harassment litigation, the creation of a civil evidence shield is a logical and necessary measure.¹²¹ Critics of the application of Rule 412 to civil cases object to the extension of the rule on fairness grounds. They argue that the categorical exclusion of sexual history evidence denies the defendant substantive legal rights.¹²² If the defendant is barred from presenting

Congress interposed Former Rule 412. It is, therefore, logical to argue that when sexual history evidence may be similarly misused in the civil context, the rule, or an analogue, should apply.

117. 124 Cong. Rec. H34912 (Oct. 10, 1978) (statement of Representative Holtzman).

118. See O'Neill, 1989 U. Chi. Legal F. at 239-40 (cited in note 49). See also Part I (discussing the underreporting of sexual harassment).

119. Concern for the need to protect the privacy of sexual harassment victims led the court in *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Cal. 1983), to become one of the first advocates of stronger limitations on the admissibility of sexual history evidence. "Without . . . protection from the courts, employees whose intimate lives are unjustifiably and offensively intruded upon in the workplace might face the 'Catch-22' of invoking their statutory remedy only at the risk of enduring further intrusions into irrelevant details of their personal lives in discovery, and presumably, in open court." *Id.* at 761.

120. O'Neill, 1989 U. Chi. Legal F. at 240 (cited in note 49). The *Priest* court recognized the potential for underreporting in noting that it was "deeply concerned that civil complaints based on sexual harassment in the workplace will be similarly inhibited, if discovery tactics such as the one used by defendant herein are allowed to flourish." *Priest*, 98 F.R.D. at 762.

Moreover, those who engage in sexual harassment generally realize that their victims are reluctant to report their offenses. Victims of sexual harassment who value their privacy are therefore trapped by the fear of lodging a complaint. As Catherine MacKinnon has observed: [P]art of the power held by perpetrators of sexual harassment is the threat of making the sexual abuse public knowledge. This functions like blackmail in silencing the victim and allowing the abuse to continue. . . . To add to their burden the potential of making public their entire personal life, information that has no relation to the fact or severity of the incidents complained of, is to make the law of this area implicitly complicit in the blackmail that keeps victims from exercising their rights and to enhance the impunity of perpetrators. In effect, it means open season on anyone who does not want their entire intimate life available to public scrutiny.

Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 114-15 (Harvard U., 1987).

121. See O'Neill, 1989 U. Chi. Legal F. at 233-243; Juliano, 77 Cornell L. Rev. at 1577 (cited in note 4); Klein, 11 Indus. Rel. L. J. at 574 (cited in note 108).

122. Indeed, this was precisely the objection made by members of the Supreme Court when Proposed Rule 412 was transmitted to Congress stripped of any reference to a civil evidence shield. In a letter to Judge Gerry, Chair of the Executive Committee of the Judicial Conference, Chief Justice Rehnquist explained, "[t]his Court recognized in *Meritor Savings Bank v. Vinson*, . . . that evidence of an alleged victim's 'sexually provocative speech or dress' may be relevant in workplace harassment cases, and some Justices expressed concern that the proposed

necessary evidence to establish welcomeness, the plaintiff's prima facie burden becomes much easier to meet. In addition, because the civil plaintiff need only prove her case by a preponderance of the evidence (rather than the prosecution's much stricter burden of showing guilt beyond a reasonable doubt in a criminal case), an evidentiary ban imposed on the defendant could unfairly slant the case in the plaintiff's favor.¹²³

This 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.¹²⁴ Therefore, while sexual harassment defendants now face a comparatively more difficult burden in establishing welcomeness, evidence that is truly probative of this issue remains well within their reach.

Perhaps the strongest response to critics of a civil evidence shield, however, is the creation and continued validity of Former and Amended Rule 412's criminal evidence shield. The Federal Rules of Evidence are designed to encourage the introduction and to compel the admission of all relevant evidence.¹²⁵ Critics of reform provisions like the rape shield rule assert that the extant evidence rules incorporate issues common to all trials and that the rules, therefore, should not develop differently for each substantive crime and civil cause of action.¹²⁶ Yet, the Federal Rules of Evidence currently include provisions tailoring the application of the rules to the introduction of certain types of evidence.¹²⁷ When experience demonstrates, therefore, that the gatekeeping function of Rule 403 is inadequate to bar prejudicial evidence, more restrictive evidentiary provisions are appropriate.¹²⁸ Categorical limitations on the

amendment might encroach on the rights of defendants." Communication from the Chief Justice, House Document 103-250, 103d Cong., 2d Sess. (1994) (cited in note 88).

123. Federal Courts Committee Report at 9 (cited in note 83).

124. F.R.E. 412(b)(2). Although neither the rule nor the accompanying Advisory Committee Note offer concrete guidance on the operation of the subsection (b)(2) exception for civil cases, the standard of admissibility under the subsection's balancing test is the subject matter of Part IV of this Note.

125. "All relevant evidence is admissible." F.R.E. 402.

126. Tanford and Bocchino, 128 U. Pa. L. Rev. at 551 (cited in note 108).

127. The basic rules of relevance and admissibility contained in Rules 401-403 are supplemented by categorical rules of exclusion set forth in Rules 404-412. These categorical exclusions were created to address "[t]he frequent recurrence of certain potentially prejudicial situations." Eric D. Green and Charles R. Nesson, *Problems, Cases and Materials on Evidence* 133 (Little, Brown, 2d ed. 1994).

128. O'Neill, 1989 U. Chi. Legal F. at 242 (cited in note 49).

admissibility of evidence in response to the exigencies of a particular offense are thus sanctioned by the federal rules themselves.

A final argument against the extension of the rape shield to civil cases is that the complainants in rape and sexual harassment offenses suffer different damages.¹²⁹ The rape victim has been physically violated by means of violent, coerced submission. In coming forward, she risks further psychological trauma. Under these circumstances, evidence of the victim's past sexual history may be justifiably excluded, given the severity of the offense and the need to protect the victim's privacy and mental well-being.¹³⁰ Conversely, sexual harassment plaintiffs suffer actual physical injuries only in the most extreme cases. Their damages are primarily emotional and comparatively less severe.¹³¹ Moreover, the sexual harassment plaintiff seeks compensation for her injuries rather than the incarceration of a dangerous individual. The defendant's capacity to show welcomeness should thus be a risk that the plaintiff must bear in seeking monetary relief.¹³² Denying the defendant free access to the plaintiff's sexual history would allow the plaintiff to trade, cost-free, a comparatively slight degradation for a potentially large economic reward.¹³³

This argument not only ignores the severe trauma caused by workplace harassment,¹³⁴ but it also misconstrues the essential remedial purpose of Amended Rule 412. Although Former Rule 412 was developed to serve the dual policies of protecting rape victims' privacy and encouraging the reporting of rape offenses,¹³⁵ the rule's essential purpose was to correct an illegitimate use of evidence. The recent amendments to Rule 412 reflect the judgment that past sexual history serves virtually no evidentiary function in either the rape or sexual

129. Indeed, the essential purpose of the welcomeness inquiry is to determine if the alleged harassment victim suffered any damages at all. The welcomeness test purports to distinguish appropriate from inappropriate advances. Radford, 72 N.C. L. Rev. at 541 (cited in note 41).

130. "Although all trials are invasive to some degree, seldom does the alleged need to secure evidence justify intrusion into such an intimate sphere." O'Neill, 1989 U. Chi. Legal F. at 230 (cited in note 49).

131. The judgment that sexual harassment is not pervasive and therefore of minimal impact is an acutely male phenomenon. See Radford, 72 N.C. L. Rev. at 521-22 (cited in note 41) (discussing the gender-based "perception gap" regarding sexual harassment).

132. In essence, the "quid pro quo" of a meritless claim is the denial of relief.

133. Susan Estrich disputes this argument, noting that the additional prerequisites in establishing both hostile work environment and quid pro quo harassment make a showing of unwelcomeness unnecessary to legitimate the plaintiff's claim of sexual harassment. Estrich, 43 Stan. L. Rev. at 826-27 (cited in note 27).

134. The trauma of sexual harassment often leads the victim to remain silent because she blames herself for the misconduct. Gutek, *Sex and the Workplace* at 72 (cited in note 11).

135. See note 117 and accompanying text.

harrassment contexts. That is, it makes a material fact, either welcomeness or consent, more or less probable only under quite limited circumstances. Past sexual conduct is thus properly barred from admission because it is not probative of immediate sexual desire and its prejudicial impact is devastating.

The evidence rules reflect the belief that all relevant evidence bears on the truth of a matter in controversy and, as such, should be admissible at trial.¹³⁶ While Rule 403 is normally the arbiter of admissibility, when the evidence involved implicates a categorical rule of exclusion, the balance between probativeness and prejudice has already been made. Congress, in creating Former Rule 412, authoritatively resolved the dispute concerning the relative probative value and prejudicial impact of sexual history evidence offered by defendants in rape prosecutions. This calculation is categorical and is implicated whenever evidence of past sexual conduct is offered to prove the invitation or provocation of sexual misconduct. A civil evidence shield is a necessary and logical concomitant of the rape shield rule, for, if a criminal evidence shield can withstand the counterweight of the defendant's liberty interest, a civil evidence shield is justifiable when only the defendant's pocketbook is at stake.¹³⁷

The analogy between consent and welcomeness and, by extension, rape and sexual harassment, supports unification of the evidentiary provisions governing these causes of action. If the use of sexual history evidence is restricted in one offense, it should be similarly limited when offered for the same purpose in the other. The inherent infirmities that render past sexual behavior inadequate as proof in rape prosecutions are also present when sexual history is offered to show welcomeness.¹³⁸ It is unremarkable, therefore, that an evidentiary mechanism that has reformed abuses in the criminal context should be implemented to preclude similar abuses in civil cases involving sexual misconduct.

136. F.R.E. 401 and 402. Relevance is determined by probative value which is in turn defined as the tendency of an item of evidence to establish the proposition that it is offered to prove. Cleary, ed., *McCormick on Evidence* § 185 at 541 (cited in note 78). Admittedly relevant, and therefore probative, evidence may be excluded from trial, however, if its potential for prejudice to the nonoffering party outweighs its probative value. F.R.E. 403.

137. Klein, 11 Indus. Rel. L. J. at 574 (cited in note 108).

138. The *Priest* court recognized early on the evidentiary linkages between rape and sexual harassment: "It is often said, that those who do not learn from history are condemned to repeat it. By carefully examining our experience with rape prosecutions, however, the courts and bar can avoid repeating in this new field of civil sexual harassment suits the same mistakes that are now being corrected [by Rule 412] in the rape context." *Priest*, 98 F.R.D. at 762.

3. Evidence of the Plaintiff's Sexual History Is Not Probative of Welcomeness

The prejudicial impact of sexual history evidence is undeniable. The introduction of prior sexual conduct entices the factfinder to infer that the victim of workplace harassment is an unchaste and immoral woman and thus somehow undeserving of protection.¹³⁹ Yet, while the prejudicial effect of sexual history evidence is certainly a factor in weighing its admissibility,¹⁴⁰ most courts continue to evaluate the validity of such evidence based upon considerations of relevance and probativeness.¹⁴¹ The conception that the victim's past conduct is reflective of her receptiveness on the occasion charged, however, perpetuates some of the most pernicious stereotypes undermining the effectiveness of sexual harassment law.

Guided by *Meritor*, courts attempt to distinguish sexually explicit behavior that is demonstrative of welcomeness from that which is not. The courts often fail at this task because the past sexual behavior of the plaintiff objectifies her in the eyes of the court.¹⁴² Certainly she is the type of woman who would welcome sexual harassment (or at least not be offended by it) because she has been sexually aggressive in the past.¹⁴³ Thus, it is only the bad woman who is a

139. In her last, unfinished manuscript, Mary Joe Frug describes the phenomenon whereby the sexual harassment legal rules withhold protection based upon considerations of welcomeness as the "sexualization of the female body." Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 Harv. L. Rev. 1045, 1050 (1992). "Sexualization . . . occurs, paradoxically, in the application of . . . sexual harassment laws that are designed to protect women against sex-related injuries. These rules grant or deny women protection by interrogating their sexual promiscuity. The more sexually available or desiring a woman [has been] the less protection these rules are likely to give her." *Id.*

140. The Advisory Committee Note to Amended Rule 412 ensures that considerations of prejudicial impact will remain primary in determining the admissibility of sexual history evidence. "This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking." Note of Advisory Committee, F.R.E. 412.

141. This is understandable because the *Meritor* welcomeness standard casts a wide net for proof of invitation or provocation. See notes 44-56 and accompanying text.

142. See Estrich, 43 Stan. L. Rev. at 830 (cited in note 27) (arguing that the welcomeness test forces the factfinder to "see women only as the sexual objects of men").

143. Susan Estrich laments the continued misperception that sexual history evidence is generally probative of welcomeness. She argues that the opportunity to prove welcomeness, sanctioned by *Meritor*, reinforces some of the most demeaning sexual stereotypes of women. *Id.* at 826. This effect is particularly regrettable in light of the opportunity for reform presented by the creation of sexual harassment as a valid cause of action under Title VII. Professor Estrich states that:

Given their recent vintage, sexual harassment suits presented unique opportunities to shape the cause of action with a heightened awareness of the traditional sexist doctrines

victim of sexual harassment, because, as the courts tell us, she really must have wanted it.¹⁴⁴

This argument rests on the assumption that sexual conduct is fungible. Manifestations of sexuality by a complainant prompt the conclusion that she is available to all men. In *Weiss v. Amoco Oil Co.*,¹⁴⁵ for example, the court found that discovery of a woman's past sexual conduct with coworkers was permissible because it allowed the harasser to prove that his actions were welcomed, or at least that he thought they were welcomed, by the complainant.¹⁴⁶ Implicit in the *Weiss* court's analysis is the assumption that assent to sexual relations with certain individuals translates into a prospective desire for sexual contact.

The assumption that past sexual conduct is fungible and therefore relevant to welcomeness also underlies the court's opinion in *Mitchell v. Hutchings*.¹⁴⁷ In deciding whether the defendants in a sexual harassment action could depose the plaintiffs' former and current sexual partners,¹⁴⁸ the court declined to deny outright such a discovery request.¹⁴⁹ Rather, the court concluded that the plaintiffs' past sexual history could, if known by the alleged harasser, "establish the context of the relationship between plaintiffs and [the defendant] and may have a bearing on what conduct [the defendant] thought was

. . . . The fact that many federal courts jettison such opportunities daily, that the worst of rape litigation stands more as an example followed than one rejected, is the most persuasive and painful evidence of the durability of sexism in the law's judgment of the sexual relations of men and women.

Id. at 816.

144. Christina A. Bull, Comment, *The Implications of Admitting Evidence of a Sexual Harassment Plaintiff's Speech and Dress in the Aftermath of Meritor Savings Bank v. Vinson*, 41 UCLA L. Rev. 117, 146 (1993) (quoting Phyllis Schlafly's argument that "[f]or the virtuous woman, sexual harassment is not a problem").

145. 142 F.R.D. 311 (S.D. Iowa 1992).

146. Id. at 316. In *Weiss*, the plaintiff had been terminated by Amoco after allegations of sexual harassment were made against him. The plaintiff, charging wrongful termination, sought discovery of his accuser's sexual history. Id. at 312. In ruling on the accuser's motion for a protective order, the court declined to apply Iowa's sexual harassment evidence shield in the context of a wrongful termination claim, stating that the Iowa provision "is not a prophylactic rule which restricts . . . discovery in all civil cases." Id. at 314. See Iowa Code Ann. § 668.15(1) (West Supp. 1994) (stating that in a civil sexual abuse case "a party seeking discovery of information concerning the plaintiff's sexual conduct . . . must establish specific facts showing good cause for that discovery"). Relying instead upon the broad discovery mandate of F.R.C.P. 26(b)(1) and the assertion in *Meritor* that sexual history is relevant to the assessment of welcomeness, the court determined that *Weiss*' accuser had failed to meet her burden of establishing the necessity of a protective order. Id. at 315-17.

147. 116 F.R.D. 481 (D. Utah 1987).

148. Id. at 483. The defendants sought to depose "a photographer who ha[d] allegedly taken sexually suggestive pictures of one or more of the plaintiffs" and a coworker of one of the plaintiffs who had allegedly been fondled by her. Id.

149. Id. at 484.

welcome.”¹⁵⁰ The implication is that proof of a complainant’s prior sexual activity, if known by the defendant, is inherently suggestive of welcomeness. Welcomeness in one context merges with and becomes indistinguishable from alleged welcomeness in a later context.

While most courts reject this analysis with respect to the plaintiff’s interactions with third parties,¹⁵¹ past sexually explicit activity with the alleged harasser is generally considered to be highly probative of welcomeness.¹⁵² In *Reichman v. Bureau of Affirmative Action*,¹⁵³ the court refused to consider the defendant’s advances as unwelcome, given the plaintiff’s “flirtatious” behavior toward the defendant.¹⁵⁴ Specifically, the court noted that the plaintiff frequently complimented the defendant on his appearance, straightened his tie, moved her body “in a provocative manner” around the defendant and “otherwise acted unprofessionally.”¹⁵⁵ This behavior ultimately vitiating the plaintiff’s capacity to claim offense.¹⁵⁶ Similarly, in *Sardigal v. St. Louis Natl. Stockyards Co.*,¹⁵⁷ the court ruled that the plaintiff’s prior contact with the defendant precluded a claim of unwelcome harassment.¹⁵⁸ The court reasoned that if the conduct charged by the

150. *Id.* Although the court ultimately denied the defendants’ discovery request, reasoning that “evidence of sexual conduct which is remote in time or place to plaintiffs’ working environment is irrelevant,” the plaintiffs’ past sexual history would be “obviously relevant” simply if known by the defendant. *Id.*

151. See *Department of Fair Employment & Housing v. Fresno Hilton Hotel*, 1984 WL 54283 (Cal. F.E.H.C.). In refusing to admit evidence of a sexual harassment victim’s past sexual history, the California Fair Employment & Housing Commission reasoned that even if the complainant engaged in sexual banter with men other than her alleged harasser and had a number of sexual partners, it would not follow that the sexual overtures of another individual would not offend her. *Id.* at *15-16. As stated by the Commission, to find otherwise, “we would have to believe that the emotional responses of harassment victims are fungible and indistinguishable. Furthermore, we would also have to accept the absurd and deeply offensive notion that a woman’s consensual conduct with some individuals negates her right to say ‘no’ to the same or similar conduct with others.” *Id.* at *16.

152. See *Bigoni v. PayN Pak Stores*, 48 FEP Cases (BNA) 732, 734 (D. Ore. 1988) (permitting discovery by employer of plaintiff’s sexual relations with her alleged harasser); *Evans v. Mail Handlers*, 32 FEP Cases (BNA) 634, 637 (D. D.C. 1983) (concluding that the plaintiff’s allegations of unwelcome sexual advances were unfounded given the existence of a consensual sexual relationship between the parties up to the time of plaintiff’s termination). But see *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 779-80 (S.D. Ohio 1988) (holding that the plaintiff was subject to unwelcomed sexual harassment notwithstanding the fact that she had maintained a voluntary, consensual sexual relationship with the defendant several years earlier).

153. 536 F. Supp. 1149 (M.D. Pa. 1982).

154. *Id.* at 1164.

155. *Id.*

156. *Id.* at 1177.

157. 42 FEP Cases 497 (BNA) (S.D. Ill. 1986).

158. *Id.* at 502.

plaintiff did indeed occur, she would have ceased any voluntary association with the defendant.¹⁵⁹

Although the relevance of sexual history evidence may be greater if the parties have engaged in prior sexual relations,¹⁶⁰ the use of such evidence in virtually any context is inherently degrading to women. When the proffered evidence involves relations between the plaintiff and third parties, the implication is that the plaintiff's availability to one man is transferable to all men. When the evidence reflects past sexual contact between the parties the assumption is that prior assent cannot be withdrawn.

The relevance of prior sexually provocative behavior is explicitly sanctioned in *Meritor*.¹⁶¹ By suggesting that the plaintiff's sexually explicit conduct is relevant in a sexual harassment claim, the *Meritor* Court implied that, in effect, women are responsible for the sexual behavior of their harassers.¹⁶² Welcomeness, then, becomes a matter to be assessed by the harasser rather than the victim.¹⁶³ The relevant inquiry is not what the woman intended to express by her behavior, but rather what the defendant interpreted it to mean.¹⁶⁴

159. *Id.* at 501. The court stated, "If the plaintiff had been subjected to the type of outrageous conduct described by her she would not voluntarily be in the company of the culprit, much less voluntarily visit him, and most incomprehensible of all, allow him to come into her home at night after he had threatened to rape her. This defies belief." *Id.*

160. Prior sexual relations between the parties are a perverse influence, however, because the existence of prior sexual contact may divert the factfinder from the events in question. Evidence arguably probative of welcomeness may thus confuse the issue.

161. Bull, 41 UCLA L. Rev. at 144 (cited in note 144)

162. Childers, 42 Duke L. J. at 874 (cited in note 49). The courts adopt the perspective of male harassers in concluding that it is the female victim who bears ultimate responsibility for the alleged harassment. See *McLean v. Satellite Technology Services, Inc.*, 673 F. Supp. 1458, 1459-60 (E.D. Mo. 1987) (stating that because the plaintiff "possessed a lusty libido and was no paragon of virtue . . . it is [the] plaintiff who bears the responsibility for whatever sexually suggestive conduct is involved in this case"); *Gan v. Kepro Circuit Systems*, 28 FEP Cases (BNA) 639, 640 (E.D. Mo. 1982) (finding that any propositions that occurred were prompted by the plaintiff's own sexual aggressiveness and sexually explicit conversations); *Honea v. SGS Control Services, Inc.*, 859 F. Supp. 1025, 1030 (E.D. Tex. 1994) (denying summary judgment on the plaintiff's claim because the fact that she wore no bra to work and presented roses to male coworkers presented a genuine issue of fact as to welcomeness).

163. The resulting effect, of course, is that the harasser will not view his conduct as offensive. Donna L. Laddy, Comment, *Burns v. McGregor Electronic Industries: A Per Se Rule Against Admitting Evidence of General Sexual Expressions as a Defense to Sexual Harassment Claims*, 78 Iowa L. Rev. 939, 959 (1993). Studies indicate that a perception gap exists between men and women regarding the offensive nature of sexual advances in the workplace. Barbara Gutek found that 67.2% of men as compared to 16.8% of women would be "flattered" by the invitation to have sex with a coworker while 15% of men and 62.8% of women would be insulted by such a request. Gutek, *Sex and the Workplace* at 96 (cited in note 11).

164. The defendant's interpretations are licensed by his knowledge of the plaintiff's sexual history. In *Mitchell v. Hutchings*, for example, the court refused to admit evidence of the plaintiff's sexual history on the basis that such evidence was too "remote" from the pending claim to be relevant. 116 F.R.D. at 484. Remoteness, however, is a function of the defendant's

Courts, therefore, require women who have engaged in sexually suggestive conduct to provide affirmative notice of offense to their harassers in order to overcome the presumption of welcomeness.¹⁶⁵

Imposing a duty to warn of unwelcomeness, however, reinforces the conventional, repressive view of women's sexuality that pervades the law of sexual harassment.¹⁶⁶ It is reflective of the sexual stereotyping that grounds judicial conceptions of what constitutes offensive conduct.¹⁶⁷ When women engage in sexual banter in the

knowledge, and, had the defendant merely been aware of the plaintiffs' sexual history, it would be available to him in his defense. *Id.*

Similarly, in *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983), a case widely cited for its progressive assessment of the relevance of sexual history evidence, the Fourth Circuit concluded that "[a] person's private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcomed and unsolicited sexual harassment." *Id.* at 254 n.3. This sentence is immediately preceded, however, by the court's assertion that there was no evidence that the defendants were aware of the plaintiff's use of nicknames with possible sexual connotations. *Id.*

165. See, for example, *Loflin-Boggs v. City of Meridian, Miss.*, 633 F. Supp. 1323, 1327 n.8 (S.D. Miss. 1986), *aff'd mem.*, 824 F.2d 971 (5th Cir. 1987) (1988) (asserting that the plaintiff's participation in the conduct leading to an allegedly hostile work environment would not bar a claim of sexual harassment provided that she is "able to identify with some precision a point at which she made known to her co-workers or superiors that such conduct would henceforth [sic] be considered offensive"); *Vermitt v. Hough*, 627 F. Supp. 587, 599 (W.D. Mich. 1986) (stating that the plaintiff could exclude herself from allegedly harassing activities simply by saying that she did not "like" the activities); *Ukarish v. Magnesium Electron*, 31 FEP Cases (BNA) 1315, 1321 (D. N.J. 1983) (holding that the plaintiff's private indications of offense in her diary were insufficient to demonstrate unwelcomeness).

Nadine Tauh, plaintiff's attorney in *Tomkins v. Public Service Electric and Gas Co.*, 568 F.2d 1044 (3d Cir. 1976), argues that, except in extreme cases, the absence of an objective measure with which to judge the effect of harassment makes it "seem[] fair to require as a general matter that the woman attempt to make known to the harasser that she finds his conduct offensive." Nadine Tauh, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. Rev. 345, 375-76 (1980). The EEOC has also adopted this position, stating that, in assessing unwelcomeness, the agency's "investigation should determine whether the victim's conduct is consistent, or inconsistent, with her assertion that the sexual conduct is unwelcome." EEOC: Policy Guidance on Sexual Harassment (March 19, 1990) BNA Fair Employment Practices 405:6681, 6686. In making this determination, "[i]nvestigators and triers of fact [should] rely on objective evidence, rather than subjective, uncommunicated feelings." *Id.* at 405:6686 n.10 (emphasis added).

In addition to communication with the harasser, the courts also look to whether the victim has reported alleged misconduct to her employer as a gauge of unwelcomeness. See *Highlander v. K.F.C. National Management Co.*, 805 F.2d 644, 646, 650 (6th Cir. 1986); *Scott v. Sears Roebuck & Co.*, 798 F.2d 210, 214 (7th Cir. 1986); *Neville v. Taft Broadcasting Co.*, 42 FEP Cases (BNA) 1314, 1317 (W.D. N.Y. 1987), *aff'd mem.*, 857 F.2d 1461 (2d Cir. 1987) (concluding that because plaintiff did not report any of the alleged incidents of harassment to management until she was facing termination, the incidents either did not occur or were not considered significant by plaintiff); *Spencer v. General Electric Co.*, 697 F. Supp. 204, 210 (E.D. Va. 1988) (describing plaintiff's failure to complain about any alleged assaults for more than two years as "particularly telling").

166. See generally Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1203-09 (1989).

167. See Estrich, 43 Stan. L. Rev. at 830-31 (cited in note 27) (arguing that the standard of judgement in sexual harassment is "painfully male"); Bull, 41 UCLA Rev. at 144 (cited in note

workplace, participate in sexual innuendo, or tell vulgar jokes, they waive any claim that they have been harassed.¹⁶⁸ It is presumed that the workplace may be inundated with sexual innuendo.¹⁶⁹ Yet when women elect to conform to the behavioral standards of the workplace, such activity may be fatal to their claims of sexual harassment.¹⁷⁰ When male plaintiffs talk about their sexual experiences, it is ignored;¹⁷¹ when women disclose their sexual history, it is highlighted.¹⁷² Men's use of vulgar language is treated as "poor word choice,"¹⁷³ while a woman's use of the same language constitutes an invitation to harassment.¹⁷⁴ When men give sexually explicit gifts, it is

144) (stating that "[c]ourts interpret the behavior of women at work with [a] sexual framework . . . [that] cast[s] women as sexual receivers and men as sexual initiators"); Childers, 42 Duke L. J. at 872-73 (cited in note 49) (arguing that the *Meritor* Court's ambiguous definition of unwelcomeness promotes the use of gender stereotypes by the lower courts).

168. See *Gan*, 28 FEP Cases at 641 (holding that the plaintiff substantially welcomed the harassing conduct because she "actively contributed to the distasteful working environment by her own profane and sexually suggestive conduct"); *Vermett*, 627 F. Supp. at 599, 605 (citing the EEOC Guidelines on sexual harassment in support of the argument that the "context" within which the alleged incidents occurred must be considered and that the context of the instant case involved the plaintiff's participation in sexual joking and vulgarity).

169. As stated by the Sixth Circuit in *Rabidue v. Osceola Refining Co.*:

[I]t cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

805 F.2d 611, 620-21 (6th Cir. 1986) (quoting the district court opinion).

170. *Reed v. Shepard*, 939 F.2d 484 486-87, 491-92 (7th Cir. 1991) (holding that the plaintiff welcomed the alleged misconduct because she "not only experienced the depravity [of her coworkers] with amazing resilience, but she also relished reciprocating in kind").

171. See *Showalter v. Allison Reed Group Inc.*, 767 F. Supp. 1205, 1208 (D. R.I. 1991), aff'd sub nom. *Phetosomphone v. Allison Reed Group, Inc.*, 984 F.2d 4 (1st Cir. 1993) (dismissing as irrelevant to their claims of sexual harassment the repeated workplace disclosures by two male claimants of their sexual exploits).

172. See *Walker v. Sullair Corp.*, 736 F. Supp. 94, 98 (W.D. N.C. 1990), modified, 946 F.2d 888 (4th Cir. 1991) (finding plaintiff's discussions about her sex life and sexual fantasies and reports regarding the sexual content of her dates to be relevant to welcomeness).

173. See *Young v. Mariner Corp.*, 56 Emp. Prac. Dec. ¶40,814 at 67,285 (N.D. Ala. 1991) (explaining that "[t]he Court is not concerned with whether [defendant] described [plaintiff's] attitude problem in 'locker room' parlance . . . or whether he used more politico language. 'Locker room' parlance would demonstrate a poor choice of words on [defendant's] part, but . . . [would] . . . confirm [] that [defendant] . . . believed that [plaintiff] had a poor attitude").

174. See *Loftin-Boggs*, 633 F. Supp. at 1327 (explaining that "[p]laintiff admitted at trial that she cursed and used vulgar language while at work. . . . Any harassment plaintiff received relating to her relationship with [defendant] was prompted by her own actions, including her tasteless joking"); *Gan*, 28 FEP Cases at 640 (stating that "[a]ny such propositions that did occur were prompted by [plaintiff's] own sexual aggressiveness and her own sexually-explicit conversations").

irrelevant;¹⁷⁵ when women do the same, it supports a finding of welcomeness.¹⁷⁶

Despite the fact that courts view a woman's participation in certain types of workplace conduct as probative of welcomeness, in reality, women join in workplace sexual banter and innuendo for reasons entirely unrelated to welcomeness.¹⁷⁷ Most women seek acceptance by their male peers as equals. This generally means behaving as men do.¹⁷⁸ Ironically, women's attempts to "fit in," to narrow the divide between themselves and their male coworkers are often used by the courts to further separate the sexes. In the end, the courts punish women for the type of behavior that is demanded in the workplace.¹⁷⁹

The fact that the courts continue to view a woman's sexually explicit conduct as probative of welcomeness suggests that an adjustment in perspective is required.¹⁸⁰ What is demanded, and what has

175. See *Showalter*, 767 F. Supp. at 1208.

176. See *Reed*, 939 F.2d at 487.

177. This does not mean that a particular woman's sexually explicit conduct does not accurately reflect her personality and attitudes about sexual expression. While a woman may be said to have welcomed "reciprocal" or "proportionate" sexually provocative behavior, it is another thing entirely to conclude that she knowingly invited more extreme forms of harassment.

178. As one plaintiff stated: "[I]t was real important for me to be accepted. It was important for me to be a police officer and if that was the only way that I could be accepted, I would just put up with it and [keep] my mouth shut." *Reed*, 939 F.2d at 492 (quoting trial record).

179. Bull, 41 UCLA L. Rev. at 145 (cited in note 144); Estrich, 43 Stan. L. Rev. at 830-31 (cited in note 27).

180. Many commentators have endorsed the continued evolution of the "reasonable woman" standard first enunciated in *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). Under the *Ellison* standard, the court is required to adopt a woman's perspective in evaluating the alleged misconduct. The plaintiff may establish a prima facie case of hostile work environment harassment by showing "conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Id.* at 879. The reasonable woman standard, its supporters argue, would effectively bypass the "perception gap" that hinders effective adjudication of sexual harassment claims. See *Abrams*, 42 Vand. L. Rev. at 1203 (cited in note 166) (stating that "[h]ostile environment doctrine must begin from an understanding of the way in which those practices challenged as sexual harassment are likely to be experienced differently by women than by men").

This Note does not examine the reasonable woman standard because its adoption would only partially address the concerns raised by defendants' use of sexual history evidence. While the reasonable woman standard may broaden the range of activities that constitute sexual harassment, its application is only tangentially related to welcomeness. Even if, after adoption of the reasonable woman standard, employers would face increased liability under Title VII, they would, if sued, continue to use the plaintiff's past sexual history in the effort to establish welcomeness. The reforms associated with the reasonable woman standard are therefore distinguishable from those embodied by the amendments to Rule 412. The reasonable woman standard seeks to widen the scope of activities constituting harassment, while Amended Rule 412 controls the evidence offered to prove that the plaintiff nonetheless welcomed an even broader range of harassment.

been provided by Amended Rule 412, is an authoritative recasting of what constitutes relevant evidence of welcomeness. Under the new rule, only in limited circumstances will the plaintiff's sexual history be probative. These circumstances are discussed below in Part IV.

4. Policy Reasons in Support of a Sexual Harassment Evidence Shield

Plaintiffs who assert claims of sexual misconduct in the workplace are deserving of protection. While Title VII incorporates an administrative model of sexual harassment adjudication wherein the EEOC is primarily responsible for the initial processing, investigation, and certification of claims,¹⁸¹ it is the private plaintiff who is ultimately responsible for the prosecution of her grievance.¹⁸² Because private litigants generally pursue claims of workplace harassment,¹⁸³ the private cause of action flowing from a right to sue notice is the fundamental means of enjoining illegal employment practices involving sexual misconduct. Individual claimants are therefore instrumental to the effective enforcement of Title VII.

The law should accord sexual harassment plaintiffs greater protection because they are the guarantors of a fundamental civil right—the right to be free from unwelcome sexual advances in the workplace. A sexual harassment suit is thus distinguishable from other civil actions because the plaintiff seeks the vindication of a public as well as private interest.¹⁸⁴ Beyond the limited resources of

181. See 42 U.S.C. § 2000e-5(b) (1988) (discussing enforcement provisions for equal employment claims).

182. 42 U.S.C. § 2000e-5(f)(1) provides that the charging party may seek a right-to-sue notice from the EEOC both if the Commission has dismissed the complaint or if the Commission has found reasonable cause to believe that the charge is true but has failed to file a civil action against the respondent. The Supreme Court has held that the actions of the EEOC should not prejudice the charging party's right to judicial determination of the merits of her claim. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973). The issuance of a right-to-sue notice is therefore not a matter subject to the discretion of the Commission. Both the statute and applicable regulations require the Commission to issue a right to sue letter upon the charging party's request. 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28 (1994). See also *Jones v. United Gas Improvement Corporation*, 383 F. Supp. 420, 424 (M.D. Pa. 1974) (stating that the issuance of a right to sue letter is a "ministerial act required both by the statute and applicable regulations").

183. While Title VII permits the EEOC to institute a civil action against a respondent if a satisfactory conciliation agreement cannot be reached, 42 U.S.C. § 2000e-5(f)(1), the volume and diversity of employment discrimination claims filed with the Commission preclude effective use of this mechanism. See generally Prepared Testimony of Janice Goodman, Vice President, The National Employment Lawyers Association before the House Subcommittee on Select Education and Civil Rights, Federal News Service, July 28, 1994, available in LEXIS, News Library, Fednew file (stating that the EEOC's backlog of investigations for 1993 had reached over 85 cases and that 97% of federal actions are filed by private attorneys or pro se).

184. Klein, 11 Indus. Rel. L. J. at 574 (cited in note 108).

the EEOC, the only way to effectuate public policy is to ensure the maintenance of a private right of action to address workplace harassment.¹⁸⁵ If plaintiffs are intimidated or harassed in the prosecution of their claims, society loses in equal measure with the individual victim.¹⁸⁶ When the underlying provisions of sexual harassment law deny vindication of valid claims of employment discrimination, more explicit protections are required.

In addition to the policy goals served by the creation of a sexual harassment evidence shield, a presumption against the use of sexual history evidence is also of practical importance. Defendants' attempts to introduce questionable and embarrassing evidence wastes the time and resources of the parties and the courts.¹⁸⁷ While the *Meritor* welcomeness standard invites a broad range of proof, evidence that is clearly not probative and highly prejudicial should be presumptively barred from litigation. The civil evidence shield contained in Amended Rule 412 narrows the scope of evidence that is admissible under a welcomeness theory and allows the courts and the parties to focus more effectively on the plaintiff's prima facie showing of unwelcomeness.

The enactment of a sexual harassment evidence shield is, therefore, in accordance with public policy and practical necessity. It encourages plaintiffs to enforce, through a private cause of action, the remedial scheme of Title VII, and it protects them when they do so. It does not foreclose access to truly probative evidence, yet it sensitizes the courts to the need for closer scrutiny of proof of welcomeness.

IV. THE STANDARD OF ADMISSIBLE PROOF OF WELCOMENESS UNDER THE SEXUAL HARASSMENT EVIDENCE SHIELD

A. Policy and Scope of Amended Rule 412 in Cases of Sexual Harassment

As the Advisory Committee note makes clear, Amended Rule 412 serves dual policies. The sexual harassment evidence shield is designed to protect plaintiffs' privacy, thereby encouraging them to

185. *Id.*

186. *Id.*

187. Bull, 41 UCLA L. Rev. at 134-35 (cited in note 144).

file and pursue legal claims against alleged offenders.¹⁸⁸ In making the encouragement of sexual harassment actions an objective of the rule's incorporation of civil cases, the drafters acknowledge the fact that discovery and admission of proof of welcomeness is a barrier for potential claimants, leaving workplace harassment substantially underreported. The extrinsic policies of the civil evidence shield are therefore identical to the policy objectives that grounded the rape shield rule. The presumptive ban on sexual behavior and sexual predisposition evidence serves to safeguard victims' privacy and to provide an incentive for the prosecution of claims. The civil evidence shield is thus a mechanism to aid in the enforcement of Title VII.¹⁸⁹ By removing the prospect of embarrassment and further harassment from the calculus of potential plaintiffs, Amended Rule 412 empowers them to pursue the private cause of action that is the primary means of enjoining sexual harassment under Title VII.

The second policy objective of the amendments to Rule 412 is intrinsic to the law of evidence. The Advisory Committee Note refers to the "sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process"¹⁹⁰ as the primary dangers that the civil evidence shield is designed to address. Reference to sexual stereotyping reflects the assessment that evidence of the victim's sexual history is of minor probative value because it is filtered through the factfinder's preconceived notions of proper sexual expression. In essence, sexual stereotyping leads finders of fact¹⁹¹ to overvalue the probative quality of evidence that is offered as proof of welcomeness. In limiting the range of admissible evidence, then, the drafters of the rule acknowledge that affirmative evidentiary guidelines are necessary to encourage proper assessments of probative worth.

188. Notes of Advisory Committee, F.R.E. 412 (explaining that "[b]y affording victims protection in most instances, the rule . . . encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders").

189. While the effective enforcement of Title VII is an objective of Amended Rule 412, the drafters also acknowledge that the victim's access to relief is a primary goal: "There is a strong social policy in not only punishing those who engage in sexual misconduct, but also in providing relief to the victim. Thus, Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment." *Id.*

190. *Id.*

191. It is interesting to note that when the Advisory Committee commentary refers to the dangers of sexual stereotyping, it does not designate which entities within the factfinding process are likely to subscribe to stereotypical conceptions of sexual expression. The implication is that, in referring to sexual stereotyping, the drafters of the rule considered that both the courts and the public require guidance concerning the probative quality of certain means of proof of welcomeness.

The rule's goal of delimiting the impact of sexual innuendo in the factfinding process implicitly recognizes the fact that evidence offered to prove welcomeness is often highly prejudicial and therefore very damaging. Sexual "innuendo" is not proof of a matter in controversy, but rather the use of sexually explicit evidence for its effect upon the factfinder. Jurors aware of the plaintiff's sexual history may seek to punish her and reject her claim, or they may conclude that she lacks the capacity for offense. The highly prejudicial nature of sexual history evidence is clearly recognized by Amended Rule 412, not only in the Advisory Committee commentary, but also in the text of the Rule itself. The probative value of evidence that surmounts the rule's presumptive ban must "substantially outweigh" its prejudicial impact.¹⁹² Sexual history evidence therefore faces a higher threshold of relevancy because its potential to arouse the prejudices of the factfinder has been demonstrated in the case law.

While Amended Rule 412 serves the dual policies of curing illegitimate uses of evidence and safeguarding victims' privacy, its proscriptions are not reciprocal. The defendant in a sexual harassment claim may not invoke the sexual harassment evidence shield. Employment of the rule's presumptive ban is reserved for those who "can reasonably be characterized as a 'victim of alleged sexual misconduct.'" ¹⁹³ Subject to the limitations of the other evidence rules, then, the sexual harassment plaintiff may seek to introduce the defendant's past sexual conduct without the defendant benefiting from the protections afforded by the Amended Rule.

Amended Rule 412, in barring both evidence of sexual behavior and sexual predisposition, incorporates the entire spectrum of proof that defendants have sought to offer under a theory of welcomeness. The Advisory Committee commentary provides definitions of both "behavior"¹⁹⁴ and "predisposition"¹⁹⁵ that make clear that the rule applies to all modes of sexually explicit conduct offered in evidence.

The presumptive ban of the civil evidence shield is not confined to the actual offer of proof, however, for the drafters intended that the considerations embodied by the Amended Rule also guide the conduct

192. The "reverse" balancing test of subdivision (b)(2) of the rule is discussed below in Part IV.C.

193. Notes of the Advisory Committee, F.R.E. 412.

194. "Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact In addition, the word 'behavior' should be construed to include activities of the mind, such as fantasies or dreams." *Id.* (citations omitted).

195. Sexual predisposition is "evidence that does not directly refer to sexual activities or thoughts, but that the proponent believes may have a sexual connotation for the factfinder." *Id.*

of discovery.¹⁹⁶ Although the text of the rule does not explicitly address discovery issues, the Advisory Committee commentary asserts that the courts should enter appropriate protective orders pursuant to Federal Rule of Civil Procedure 26(c) "[i]n order not to undermine the rationale of Rule 412."¹⁹⁷ Rule 26 permits discovery of inadmissible evidence, yet the evidence must be "reasonably calculated to lead to the discovery of admissible evidence."¹⁹⁸ A presumption in favor of the issuance of protective orders is reasonable because the discovery of a complainant's sexual history, given the proscriptions of Amended Rule 412, will not lead to the further discovery of admissible evidence.¹⁹⁹

Amended Rule 412 is thus intended to apply to the range of evidence-gathering and -admitting functions provided by the federal civil justice system. The sexual harassment evidence shield is designed to address the evidentiary problems of prejudice and low probative value associated with the admission of proof of the plaintiff's sexual history. It also serves as a mechanism to aid in the enforcement of Title VII, and, as such, its protections are limited to the actual victims of workplace harassment.

*B. Modes of Proof Excepted from the Sexual Harassment
Evidence Shield by Rule 412(b)(2)*

The amendments to Rule 412 disposed of the explicit ban on opinion and reputation evidence formerly provided in the rape shield rule.²⁰⁰ The conclusion that Rule 412 now admits proof of welcome-ness by opinion, reputation, or specific instances of conduct is misplaced, however, for the language in subdivision (b)(2) of the rule (excepting certain proof from the civil evidence shield) provides for the admission of specific acts only.

The civil exception to the sexual harassment evidence shield contains two coordinate provisions. Evidence offered to prove welcome-ness may be admissible according to the (b)(2) exception if it is admissible under the rules of evidence and its probative value "substantially outweighs" its prejudicial effect.²⁰¹ The civil exception

196. Berger Report at 27-28 (cited in note 78).

197. Notes of Advisory Committee, F.R.E. 412.

198. F.R.C.P. 26(b)(1).

199. Rule 26(c) was enacted to "prevent the unjust effects" that abuse of the discovery process might precipitate. *Priest*, 98 F.R.D. at 761. In conjunction with the Amended Rule, then, evidence of the plaintiff's past sexual history, as a general matter, is neither discoverable nor admissible.

200. See notes 77-78 and accompanying text.

201. F.R.E. 412 (b)(2).

to Amended Rule 412 therefore requires that proof of welcomeness must be admissible under the extant evidence rules before the (b)(2) balancing test is applied. The existing rules of evidence that govern proof of welcomeness prescribe that only specific conduct may be offered in evidence. Reference to evidence "otherwise admissible" under the federal rules thus ensures that only specific acts may be considered for admission under the Amended Rule.

The welcomeness standard enunciated in *Meritor* calls for the use of character evidence. Character evidence is proof that reflects upon a person's disposition or upon the person's disposition in respect of a general trait, such as honesty, temperance, or peacefulness.²⁰² The welcomeness standard of sexual harassment law invites the introduction of character evidence that is reflective of the plaintiff's disposition with regard to sex and expressions of sexuality as well as her capacity for offense.

The law of evidence carefully constrains the use of character evidence in varying contexts based upon considerations of probativeness and prejudice.²⁰³ Character questions arise in two ways in litigation.²⁰⁴ First, a person's character may be a material element of a crime, claim or defense.²⁰⁵ That is, the question of character may be a material fact in determining the rights and liabilities of the parties.²⁰⁶ In this context, character is said to be "in controversy" or "in issue." Cases in which character is in controversy fall under Federal Rule of Evidence 405(b).²⁰⁷ Rule 405(b) places no restrictions upon whether character may be proved by opinion, reputation, or specific acts evidence because, if character is an essential element, parties should be free to utilize evidence that is most probative.²⁰⁸

Litigants may also seek to introduce character evidence when character itself is not an essential element of a claim or defense. In this instance, character evidence is used "circumstantially" to establish that an individual acted in conformity with his character on the

202. Cleary, ed., *McCormick on Evidence* § 195 at 574-75 (cited in note 78). See also Notes of Advisory Committee, F.R.E. 406.

203. Cleary, ed., *McCormick on Evidence* § 186 at 549.

204. Stephen A. Saltzburg and Michael M. Martin, *Federal Rules of Evidence Manual* 213 (Michie, 5th ed. 1990).

205. *Id.*

206. Cleary, ed., *McCormick on Evidence* § 187 at 551 (cited in note 78) (providing as examples a negligence action for entrusting an automobile to an incompetent driver and an action for defamation).

207. F.R.E. 405(b) applies to cases "in which character or a trait of character of a person is an essential element of a charge, claim, or defense . . ."

208. Saltzburg and Martin, *Federal Rules of Evidence Manual* at 302 (cited in note 204); Cleary, ed., *McCormick on Evidence* § 188 at 552 (cited in note 78).

occasion in question.²⁰⁹ The circumstantial use of character evidence is strictly regulated by the federal evidence rules due to its highly prejudicial impact. Federal Rule of Evidence 404(a) prohibits the introduction of circumstantial character evidence to establish action in conformity with the actor's propensity.²¹⁰ The "propensity rule" of Rule 404(a) bars the conclusion that past acts prove the commission of the act that is the subject of litigation.²¹¹

Evidence that is probative of character may be relevant as circumstantial proof of a material fact that is distinct from whether an individual acted in conformity with his character.²¹² Character evidence offered for such a "non-propensity" purpose is allowed by Rule 404(b).²¹³ If character evidence is offered for a purpose other than to establish action in conformity with character, it must be evidence of specific acts only. The text of Rule 404(b) provides that non-propensity character evidence must be offered in the form of "crimes, wrongs or acts."²¹⁴ Proof of a material element of a claim or defense which implicates character, by the terms of Rule 404(b), may not be offered in the form of opinion or reputation evidence.²¹⁵ Rule 404(b), therefore, effectively designates the mode of character evidence admissible for non-propensity purposes.

The question, then, is whether sexual harassment is a claim in which character is an essential element or merely of circumstantial relevance. Cases in which character is an essential element are ex-

209. Saltzburg and Martin, *Federal Rules of Evidence Manual* at 214; Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* § 99 at 536 (Lawyers Cooperative, 2d ed. 1994).

210. F.R.E. 404(a) reads in pertinent part: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . ."

211. F.R.E. 404(a) provides exceptions to the propensity rule, yet these exceptions apply only in criminal cases. Saltzburg and Martin, *Federal Rules of Evidence Manual* at 214-15 (cited in note 204); Mueller and Kirkpatrick, *Federal Evidence* § 99 at 537 (cited in note 209). Propensity evidence excepted from Rule 404(a) may only be proved by opinion or reputation evidence in accordance with Rule 405(a).

212. Cleary, ed., *McCormick on Evidence* § 188 at 553 (cited in note 78).

213. F.R.E. 404(b) reads: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ."

214. F.R.E. 404(b) (emphasis added).

215. Because Rule 404(b) demands that non-propensity character evidence be of substantial probative value, proof of specific conduct is the only satisfactory mode of evidence suitable for Rule 404(b) purposes. As stated by the drafters of the federal evidence rules, "Of the three methods of proving character . . . evidence of specific instances is the most convincing." Notes of Advisory Committee, F.R.E. 405(b). See also Mueller and Kirkpatrick, *Federal Evidence* § 99 at 537 (cited in note 209) (stating that only "specific instances of conduct" may prove the factual matters set forth in Rule 404(b)).

tremely rare.²¹⁶ For character to be in controversy it must be the ultimate fact that, under the substantive law, determines the rights and liabilities of the parties.²¹⁷ When character is an inferential, rather than the ultimate, fact of a claim it cannot be said to be an essential element.²¹⁸

A plaintiff's character for sexual promiscuity or sexual aggressiveness is not an essential element in a claim of sexual harassment.²¹⁹ The ultimate fact of whether the alleged misconduct occurred depends upon a range of factors that include not only examination of the plaintiff's character but also considerations of the alleged harasser's conduct as well as the employer's degree of culpability. Evidence of the plaintiff's past sexual conduct is used

216. Mueller and Kirkpatrick, *Federal Evidence* § 122 at 537; Linda J. Krieger and Cindi Fox, *Evidentiary Issues in Sexual Harassment Litigation*, 1 Berk. Women's L. J. 115, 118 n.12 (1985).

217. Cleary, ed., *McCormick on Evidence* § 187 at 551 (cited in note 78).

218. J. Weinstein and M. Berger, 1 *Weinstein's Evidence* ¶401 [03] (Times Mirror, 1994).

219. Prospective plaintiffs must be extremely careful in ensuring that character remains a "nonessential" element in sexual harassment litigation or they risk losing the benefits of the new evidence shield. The 1991 Act permits sexual harassment plaintiffs to seek compensatory and punitive damages, 42 U.S.C. § 1981a(b) (Supp. 1993), "provided that the complaining party cannot recover under section 1981 of this title." 42 U.S.C. § 1981a(a) (Supp. 1993) (citing 42 U.S.C. § 1981 (1981 and Supp. 1993)). Section 1981 does not reach claims of gender discrimination. See *Bobo v. ITT, Continental Baking Co.*, 662 F.2d 340, 342 (5th Cir. 1981) (noting that "[a]lthough § 1981 strikes at many forms of racial discrimination, no court has held that allegations of gender based discrimination fall within its purview. Courts at every level of the federal judiciary have considered the question and reached the opposite result"); *Runyon v. McCrary*, 427 U.S. 160, 167 (1976) (explaining that "42 U.S.C. § 1981 is in no way addressed to . . . categories of selectivity [based on gender or religion]"). Thus, virtually the only means for the plaintiff to obtain compensatory and punitive damages for sexual harassment under federal law are pursuant to the provisions of the 1991 Act. 42 U.S.C. § 1981a(b) (Supp. 1993). See *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028, 1036-37 (1992) (holding that Title IX of the Education Amendments of 1972 affords sexual harassment claimants compensatory and punitive damages). Under the 1991 Act, however, compensatory and punitive damage awards are capped and indexed according to the size of the employer. 42 U.S.C. § 1981a(b)(3) (\$300,000 maximum).

Those plaintiffs, or, more accurately, those plaintiffs' lawyers who seek recovery beyond the statutory limits of the 1991 Act risk coopting the benefits of Amended Rule 412 in the pursuit of more money. In essence, if a plaintiff adds a pendant state tort claim of emotional distress to her federal action for sexual harassment, the same jury that is barred by Amended Rule 412 from hearing evidence of the plaintiff's prior sexual conduct as proof of welcomeness *must* hear the same evidence for purposes of determining whether she was indeed offended by the defendant's sexual advances. See 42 U.S.C. § 1981a(c) (Supp. 1993) (allowing the plaintiff to request a jury trial if she seeks compensatory and punitive damages). Character is an essential element in emotional distress claims because the plaintiff's character for offense is the supervening issue that determines the validity of her claim. Cleary, ed., *McCormick on Evidence* § 187 at 551 (cited in note 78).

While the plaintiff may seek a limiting instruction from the court to the jury confining sexual history evidence to the determination of emotional distress, there is no way to be certain that the jury will not consider the plaintiff's past sexual conduct in assessing welcomeness. Potential plaintiffs must therefore carefully consider whether the costs of impleading emotional distress outweigh the benefits of enhanced recovery.

circumstantially to establish her invitation to or provocation of the alleged harassment on the occasion charged. Proof of welcomeness may not be used to demonstrate that the plaintiff acted in conformity with her promiscuous or aggressive character, for this would violate Rule 404(a)'s propensity rule. Rather, proof of welcomeness is used circumstantially to prove one element or component of the alleged transaction. Evidence of welcomeness is thus governed by the "other purposes" provision of Rule 404(b).

The defendant's capacity to show that his advances were welcomed by the plaintiff is a material fact in sexual harassment litigation that may be proved circumstantially only by offering evidence of the plaintiff's sexually explicit conduct. The defendant's proof of welcomeness, in accordance with Rule 404(b), is thus limited to specific instances of conduct.

The requirement of Rule 412(b)(2) that excepted evidence must be "otherwise admissible" ensures that, notwithstanding the disposal of the explicit ban on opinion and reputation evidence, only specific instances of the plaintiff's conduct may be introduced by defendants. Proof of welcomeness, then, even prior to the application of the balancing test for civil cases, is limited by the terms of Amended Rule 412.

C. The Calculation of Probative Quality and Prejudicial Impact Pursuant to the Rule 412(b)(2) Balancing Test

The second provision of the (b)(2) exception to Amended Rule 412 admits evidence of sexual behavior or predisposition if "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."²²⁰ The language of the (b)(2) balancing test tracks that of the original rape shield rule.²²¹ Yet, while the rape shield rule reversed the standard of admissible evidence pursuant to Rule 403, the balancing test of the civil evidence shield is an even more stringent constraint upon the admissibility of sexual history evidence.

Rule 403 delimits the range of otherwise admissible evidence if the prejudicial impact of such evidence substantially outweighs its probative value.²²² Rule 403 applies a cost-benefit analysis to prof-

220. F.R.E. 412(b)(2).

221. Subdivision (c)(3) of former F.R.E. 412 read in pertinent part: "If the court determines . . . 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 . . ."

222. F.R.E. 403.

ferred evidence.²²³ The costs of an item of proof are not compared directly to its benefits, however, for the Rule 403 balancing test is weighted in favor of the admission of probative evidence. Even if the probative quality of proffered evidence is subordinate to its prejudicial effect, it may remain admissible. The language of Rule 403—requiring that the danger of unfair prejudice must “substantially” outweigh probative value—contemplates that a lesser quantum of probative worth counterbalances a comparatively greater potential for prejudice.²²⁴

The balancing test of the sexual harassment evidence shield reverses the standard set forth in Rule 403. Under the new rule, the presumption is that proof of sexual behavior or predisposition, although relevant, should remain inadmissible unless the defendant demonstrates a particular need for the evidence. Moreover, the cost-benefit analysis envisioned by the Rule 412(b)(2) exception significantly weights the scales against the probative value of sexual history evidence. The balancing test acknowledges the devastating prejudicial effect of sexual history evidence and, accordingly, mandates that the probative value of proffered evidence must *substantially* outweigh its potential to prejudice the plaintiff in the eyes of the factfinder. Thus, under the Amended Rule 412(b)(2) balancing test, the proponent has access to only narrowly tailored, exceptionally probative, proof of welcomeness.

This admissibility standard restores the higher threshold of probative value that Congress removed from the original rape shield rule. It was noted during hearings on the rape shield rule that the need to demonstrate “substantial” probative worth could run afoul of a defendant’s Sixth Amendment Confrontation Clause protections.²²⁵ The final version of the rule, therefore, omitted the word “substantially” from its balancing test for excepted evidence.²²⁶

223. See, Cleary, ed., *McCormick on Evidence* §185 at 544 (cited in note 78) (stating that Rule 403 is the mechanism by which courts determine whether the “value [of evidence] is worth what it costs”).

224. See Mueller and Kirkpatrick, 1 *Federal Evidence* § 93 at 479 (cited in note 209) (explaining that “the power to exclude evidence under FRE 403 should be sparingly exercised. The tenor of the language supports this conclusion, since it contemplates admitting rather than excluding evidence when probative worth seems equally balanced against dangers like prejudice and confusion of issues”).

225. See Hearings before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 94th Cong., 2d Sess. 6 (1976) (statement of Reger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division, Department of Justice).

226. See subdivision (c)(3) of Former F.R.E. 412 (articulating balancing test without use of the word “substantially”).

The new evidence shield, however, restores the proponent's burden of establishing substantial probative value.²²⁷ Civil defendants must not only demonstrate the probative worth of their evidence, but also its capacity to overcome a more stringent admissibility standard than that imposed under the old rule. The Rule 403 balancing test has thus been effectively reversed, both in terms of emphasis and magnitude, by the civil amendments to Rule 412. The focus under the (b)(2) balancing test is upon prejudicial impact, and a greater quantum of probative value must be shown to overcome the presumption against admissibility.

This type of reverse Rule 403 balancing test appears only one other time in the Federal Rules of Evidence. Rule 609(b) allows past convictions more than ten years old to be used for impeachment purposes only if "the probative value of the conviction . . . substantially outweighs its prejudicial effect."²²⁸ Rule 609(b), after promulgation by the Supreme Court, was revised by Congress to admit evidence of stale convictions, yet only in rare and exceptional circumstances.²²⁹ The stringency of the admissibility standard for stale convictions reflects a basic distrust of the probative value of such evidence concerning the present tendency of a witness for truthfulness and veracity.²³⁰ The drafters of the rule also recognized the exceptional potential for prejudice resulting from the presentation of prior criminal

227. It is crucial to note that Rule 412 reverses the burden of demonstrating admissibility established by Rule 403. The usual procedure under Rule 403 is for the opponent to justify the exclusion of evidence. See Saltzburg and Martin, *Federal Rules of Evidence Manual* at 164 (cited in note 204) (suggesting that a motion *in limine* might best serve the interests of opponents). Conversely, the (b)(2) exception to Amended Rule 412 requires the proponent to justify admissibility. Notes of Advisory Committee, F.R.E. 412. With respect to evidence of welcomeness, this burden shifting lightens the plaintiff's load. "If the evidence is . . . offered pursuant to . . . subdivision [(b)(2)], the burden of demonstrating admissibility is shifted to the proponent of the evidence. *Meritor*, however, assumes that the opponent has the Rule 403 burden of persuading the court to exclude." Berger Report at 11 (cited in note 78).

228. F.R.E. 609(b).

229. Both the Supreme Court and House Judiciary Committee versions of the rule contained an absolute ban on evidence of convictions older than ten years. Rules of Evidence, H.R. Rep. No. 93-650, 93d Cong., 1st Sess., in U.S.C.C.A.N. 7051, 7085 (1974). The Senate adopted a modified version of the rule, admitting evidence of stale convictions, but only if supported by specific facts and circumstances. Rules of Evidence, S. Rep. No. 93-1277, 93d Cong., 2d Sess., in U.S.C.C.A.N. 7051, 7061-62 (1974). While permitting the use of prior convictions, the Senate Judiciary Committee asserted that "[i]t is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances." *Id.* at 7062. The Senate version of the rule was ultimately adopted with the added requirement of advance notice of intent to use evidence of past convictions. Rules of Evidence, H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess., in U.S.C.C.A.N. 7051, 7103 (1974).

230. See *United States v. Sims*, 588 F.2d 1145, 1147-48 (6th Cir. 1978) (noting that "stale convictions have little, if any, probative value for determining the credibility of a witness, and their admission into evidence should be allowed only in exceptional circumstances").

acts.²³¹ Accordingly, this provision has been read narrowly by the courts.²³²

While the admissibility of past convictions and prior sexual history gives rise to qualitatively different considerations of probativeness and prejudice, the magnitude of these considerations is largely the same. The offer of prior convictions to impeach a witness and sexual history to establish welcomeness both involve the use of prior "bad acts" as substantive proof. Neither form of evidence is generally probative of the matters that they are intended to prove,²³³ and their potential for prejudice led the drafters of the federal evidence rules to enact uniquely stringent standards of admissibility. Given the singularity of evidentiary concerns underlying the use of stale convictions and past sexual history, the narrow construction of the balancing test of Rule 609(b) should translate into a similarly stringent application of Amended Rule 412(b)(2). The interpretation of Rule 609(b), admitting proof of prior convictions only in rare and exceptional circumstances,²³⁴ should guide the interpretation of the balancing test for proof of sexual history.

A stringent standard of admissibility fails to define, however, what types of evidence remain "substantially" probative. While the (b)(2) balancing test has been drafted to foreclose most forms of proof of welcomeness, certain evidence nonetheless survives the presumption against admissibility. Unfortunately, the rule's text and Advisory Committee commentary provide very little guidance regarding the continued validity of otherwise proscribed evidence.²³⁵ While the criminal provisions of Amended Rule 412 contain specific exceptions for certain types of proof,²³⁶ the Advisory Committee opted for the balancing test in subdivision (b)(2) in recognition of the scope and

231. *Id.* at 1148.

232. See, for example, *United States v. Solomon*, 686 F.2d 863, 872-73 (11th Cir. 1982) (holding that "evidence of convictions more than ten years old may be admitted only in 'exceptional circumstances'" (quoting *United States v. Cathey*, 591 F.2d 268, 276 (5th Cir. 1979))); *United States v. Cavender*, 578 F.2d 528, 531 (4th Cir. 1978) (holding that "since the power is to be exercised only in the 'rare' and 'exceptional' case, the District Court is required under the Rule to support its finding with 'specific facts and circumstances'").

233. See Part III.B.3 of this Note regarding the lack of probative value of past sexual history as proof of welcomeness.

234. *Solomon*, 686 F.2d at 872-73.

235. Judge Ralph Winter, chair of the Advisory Committee on Evidence Rules, stated that the lack of affirmative guidance on the (b)(2) balancing test enhances the discretion of the courts in applying the rule. "There will be a lot of intermediate cases And the courts will just have to work it out case by case." Schultz and Woo, *Wall St. J.* at A1 (cited in note 1).

236. See F.R.E. 412(b)(1)(A)-(C) and accompanying Advisory Committee Commentary. The Advisory Committee Note provides case cites to guide interpretation of the criminal exceptions to the rule.

variety of evidence offerable under a theory of welcomeness.²³⁷ Thus, courts are left with little guidance as to what constitutes *substantially* probative evidence under the new regime of Amended Rule 412.

Some courts, however, have already engaged in the type of balancing that is envisioned by the new civil evidence shield. These courts have recognized that evidence of sexual behavior or predisposition is particularly damaging to sexual harassment plaintiffs, and, perhaps more importantly, that its probative value is exceedingly low. Reference to the analysis of these cases, coupled with the above arguments for narrow application of the (b)(2) balancing test, should enable courts to administer the new evidence shield in accordance with its objectives.

First, the complainant's sexual behavior with third parties outside the workplace is well beyond the scope of evidence capable of surviving the sexual harassment evidence shield. In *Priest v. Rotary*,²³⁸ the district court issued a protective order under F.R.C.P. 26(c)²³⁹ to block the employer's attempt to discover information regarding the plaintiff's prior sexual relationships.²⁴⁰ In addition to noting the chilling effect upon the institution of sexual harassment claims were such discovery to proceed,²⁴¹ the court disposed of the defendant's discovery efforts by asserting that the inferences raised by introduction of the plaintiff's sexual history were so weak that they could not outweigh the obvious risk of prejudice.²⁴²

The district court in *Cronin v. United Service Stations, Inc.*²⁴³ reached a similar conclusion with respect to the probative value of the plaintiff's sexual history with third parties outside the workplace. The defendants in *Cronin* sought to show that because the complainant was abused by her boyfriend at home, she was incapable of being offended by workplace harassment.²⁴⁴ The court dismissed the defen-

237. The Notes of the Advisory Committee, F.R.E. 412, provide that, "[s]ubdivision (b)(2) . . . employs a balancing test rather than the specific exceptions stated in subdivision (b)(1) in recognition of the difficulty of foreseeing future developments in the law. Greater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment."

238. 98 F.R.D. 755 (N.D. Cal. 1983).

239. F.R.C.P. 26(c) provides that, upon motion by a party or a person from whom discovery is a right, a court may issue an order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ."

240. *Priest*, 98 F.R.D. at 756-57 n.1.

241. *Id.* at 761.

242. *Id.* at 760. While the defendant was seeking to use the plaintiff's sexual history to establish her practice of pursuing sexual relationships for economic gain, the court's analysis of the probative value of past sexual history with third parties applies equally well to the use of past intimate relationships as proof of welcomeness.

243. 809 F. Supp. 922 (M.D. Ala. 1992).

244. *Id.* at 932.

dants' offer of abuse as irrelevant to the demonstration of welcomeness.²⁴⁵ Noting that Title VII litigation should not become a tool for further harassment of the victim, the court concluded that "absent a showing of a particularized relevance and need to delve into the deeply private sexual life of a party," a court should not allow the offer of such irrelevant evidence.²⁴⁶

Cases like *Cronin* and *Priest* reflect the conception that the plaintiff's sexual behavior with third parties outside the workplace is illegitimate proof of welcomeness. For purposes of Amended Rule 412, this evidence does not rise to the level of materiality demanded by the civil evidence shield.

Second, the plaintiff's sexually explicit conduct outside the workplace, even if known to her harasser, also does not meet the substantially probative test set forth in Amended Rule 412(b)(2). The Eighth Circuit Court of Appeals, in *Burns v. McGregor Electronic Industries, Inc.*,²⁴⁷ reversed the lower court's finding of welcomeness based upon nude pictures of the plaintiff having appeared in a national magazine.²⁴⁸ The court found that the plaintiff, by posing nude in a magazine replete with lewd and sexually explicit material, did not waive the right to claim offense at her employer's advances.²⁴⁹ If appearing nude in a magazine distributed throughout the workplace²⁵⁰ is insufficient evidence of welcomeness, similarly suggestive conduct

245. *Id.* The court went on to recognize "[t]hat [the plaintiff] may have been abused at home in no way means that [the plaintiff] deserved abuse at work, that she 'welcomed' [the defendant's] abuse, or that she could not possibly be affected by [the defendant's] actions because she was used to such abuse." *Id.*

246. *Id.*

247. 989 F.2d 959 (8th Cir. 1993).

248. The procedural history of *Burns* is fairly convoluted, yet fully described in Laddy, 78 Iowa L. Rev. at 948-951 (cited in note 163). In essence, a panel of the Eighth Circuit had reversed as internally inconsistent the district court's factual finding that, although the workplace advances were unwelcome, plaintiff lacked the capacity for offense. *Burns*, 989 F.2d at 961 (citing *Burns Electronic Industries, Inc.*, 955 F.2d 559, 565 (8th Cir. 1992)). The court of appeals remanded the case with instructions for the district court to consider the totality of the circumstances in evaluating the plaintiff's hostile work environment claim. *Id.* The district court, on remand, found that the workplace advances created an abusive working environment, but that, again, "the employer's behavior did not offend the plaintiff because she had earlier posed nude for *Easyriders*." *Id.* at 961-62.

249. *Burns*, 989 F.2d at 963. The court stated that "[t]he plaintiff's choice to pose for a nude magazine outside work hours is not material to the issue of whether plaintiff found her employer's work-related conduct offensive." *Id.* The court went on to state: "[The plaintiff's] private life, regardless how reprehensible the trier of fact might find it to be, did not provide lawful acquiescence to unwanted sexual advances at her work place by her employer. To hold otherwise would be contrary to Title VII's goal of ridding the work place of any kind of unwelcome sexual harassment." *Id.*

250. The magazine photos of the plaintiff, showing her pelvic tattoo and pierced nipples, were circulated through the workplace in support of a petition drafted by her fellow employees for her termination. *Burns*, 955 F.2d at 561.

outside the workplace should also fail the Rule 412(b)(2) balancing test.²⁵¹

Third, the ban on proof of welcomeness should not end at the employer's door, for sexually explicit behavior within the workplace is equally infirm as evidence of accession to sexual advances on the occasion charged. The Fourth Circuit Court of Appeals acknowledged in *Swentek v. USAir, Inc.*²⁵² that the plaintiff's participation in workplace sexual pranks and innuendo was insufficient to block her claim of sexual harassment.²⁵³ In assessing welcomeness, then, the plaintiff's election to "fit in" by behaving like her coworkers should not be misinterpreted as an invitation to harassment.²⁵⁴ In addition, the plaintiff's choice of apparel should not be similarly misconstrued.²⁵⁵

Fourth, the fact that participation in workplace sexual banter does not waive claims of offense means that the plaintiff's duty to warn of unwelcomeness should also be dispatched. If the plaintiff's involvement in workplace sexual innuendo does not entitle the defendant to presume welcomeness, then nothing is needed to dispel an already illegitimate assumption.²⁵⁶ In short, if the plaintiff's underly-

251. Women often engage in sexually explicit conduct for reasons entirely unrelated to sexual expression. Many need the money earned for appearing nude in a magazine or topless in a bar. See Laddy, 78 Iowa L. Rev. at 956 n.123 (cited in note 163) (citing Pamela Mendels, *At the Top of the Topless Heap; Even Fantasyland Exacts a High Toll; Money Is Good, But Burnout Is High*, *Newsday* 50 (Dec. 20, 1992)). Mendels writes that "[f]or dancers with little education and few other prospects, the money represents a fortune, honestly made. 'I'm not on welfare. I'm not laying on my back. I don't have sugar daddies . . .,' says Dakota, 29, a mother of three." *Id.*

252. 830 F.2d 552 (4th Cir. 1987).

253. "Plaintiff's use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment.' . . . The trial judge must determine whether plaintiff welcomed the particular conduct in question from the alleged harasser." *Id.* at 557 (citing *Katz v. Dole*, 709 F.2d 251, 254 n.3 (4th Cir. 1983)).

254. See, for example, *Cardin v. Via Tropical Fruits, Inc.*, 1993 U.S. Dist. LEXIS 16302 *49 (July 9, 1993). In finding sexual harassment unwelcome, the court stated that, "[t]he necessary efforts of a victim to cope with a difficult and oppressive work environment in order to retain a much-needed job can be mistaken for welcomeness. A victim of pervasive sexual innuendo and vulgar joking may participate in order to 'fit in' and defuse the offensive milieu despite the fact that the harassment exacts a substantial psychological toll." *Id.*

255. See *Honea v. SGS Control Services, Inc.*, 859 F. Supp. 1025, 1030 (E.D. Tex. 1994) (stating that "the text of Title VII does not require a woman to wear a bra in order to pursue a claim for sexual harassment"); *Wilson v. Wayne County*, 856 F. Supp. 1254, 1260 (M.D. Tenn. 1994) (finding "[t]he fact that an eighteen-year-old girl wore shorts during the summer months in Tennessee, wore a bathing suit on a canoe trip, and engaged in non-sexual horseplay with a co-worker her own age should not be perceived by even the most optimistic fifty-three-year-old man as a willingness to have sex with him").

256. The EEOC has disposed of the plaintiff's duty to warn of unwelcomeness, yet maintains the requirement that the complainant's conduct must indicate the advance is unwelcome. See EEOC Policy Guidance on Current Issues of Sexual Harassment, No. 915.050 (March 19, 1990) in EEOC Compliance Manual (CCH) ¶3114 at 3267:

ing conduct is not probative of welcomeness, then no duty to warn arises.

Fifth, authorities that properly construe sexually explicit workplace conduct demand affirmative indication by the plaintiff that her behavior is directed at her harasser.²⁵⁷ If the defendant is unaware of the plaintiff's conduct, such conduct cannot form the basis of a welcomeness defense.²⁵⁸ Substantially probative proof of welcomeness requires a finding that the plaintiff initiated or reciprocated specific instances of contact with the defendant that surpass the threshold of banter, joking, or attempts to establish familiarity.

Even if the plaintiff's conduct does exceed this threshold level, however, it must still be linked temporally and reciprocally to the defendant's advances. In *Shrout v. Black Clawson Co.*,²⁵⁹ for example, the court concluded that, notwithstanding the existence of a prior sexual relationship between the parties,²⁶⁰ the defendant's behavior created a hostile work environment.²⁶¹ The offensive conduct occurred after the termination of the parties' relationship,²⁶² and was of such degree as to vitiate any link between their present and past interactions.²⁶³

Similarly, in *Wangler v. Hawaiian Electric Company, Inc.*,²⁶⁴ the court refused to grant summary judgment to the defendant despite proof that the plaintiff had baked birthday cakes for him, signed cards to him "Love, Andrea," and had given him a picture of herself in a belly dancing costume.²⁶⁵ The court found this evidence insuffi-

While a complaint or protest is helpful to a charging party's case, it is not a necessary element of the claim. Indeed, the Commission recognizes that victims may fear repercussions from complaining about the harassment and that such fear may explain a delay in opposing the conduct. . . . [Yet,] [w]hen welcomeness is at issue, the investigation should determine whether the victim's conduct is consistent, or inconsistent, with her assertion that the sexual conduct is unwelcome.

Id. at 3270-71.

257. See Radford, 72 N.C. L. Rev. at 532 (cited in note 41) (proposing a new definition of welcomeness that "anything other than 'yes' must be interpreted to mean no" . . . unless the defendant "can show by objective evidence that the target affirmatively and freely solicited or consented to his advances").

258. *Swentek*, 830 F.2d at 557. See also *Zowayyed v. Lowen Co., Inc.*, 735 F. Supp. 1497, 1504 (D. Kan. 1990) (refusing to credit defendant's testimony regarding plaintiff's joking and bragging about sexual advances to a coworker as proof of welcomeness for summary judgement purposes).

259. 689 F. Supp. 774 (S.D. Ohio 1988).

260. Id. at 779.

261. Id. at 780-81.

262. Id. at 779.

263. Id. at 780.

264. 742 F. Supp. 1458 (D. Hawaii 1990).

265. Id. at 1463-64.

ciently connected to the charged event wherein the defendant had forced himself upon the plaintiff.²⁶⁶

The evidentiary standard for proof of welcomeness enacted by Rule 412 thus narrows the range of evidence available to defendants. Examination of the case law which properly calibrates the balance between probative value and prejudicial impact reveals that the reach of the courts should not extend beyond the workplace. Moreover, even sexually provocative behavior exhibited in the workplace does not rise to the level of "substantial" probativeness unless directed at the harasser and related to his advances both reciprocally and temporally. The plaintiff's election to speak, dress, or act in a certain manner should not be misconstrued by the courts as evidence of welcomeness. One who defends against claims of sexual harassment must establish a specific relationship between himself and the plaintiff supported by specific facts indicative of welcomeness. The defendant should not be permitted to appropriate the complainant's behavior with other individuals, nor should he offer proof that has become stale or irrelevant to the events in question.

V. CONCLUSION

The sexual harassment evidence shield of Amended Rule 412 is consistent with and in furtherance of the remedial objectives of Title VII. Proper application of the new rule should serve the dual policy goals of protecting victims' privacy and encouraging them to bring claims. In addition, the civil provisions of the Amended Rule cure an evidentiary abuse that threatens effective enforcement of Title VII. The sexual harassment evidence shield blocks access to proof of welcomeness that is both highly prejudicial and insufficiently probative to merit admission. The civil amendments to Rule 412, while narrowing the scope of evidence available to defendants, except proof that is truly probative of welcomeness. Such evidence distinguishes advances that have been invited by the plaintiff from those that are unwelcomed and should be sanctioned.

*Paul Nicholas Monnin**

266. *Id.* The plaintiff, in support of her claim, introduced a letter from the defendant that read "our relationship was never mutual. You looked to me for paternal love, whereas I desperately wanted you for my Lolita." *Id.* at 1463.

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APPENDIX I

Text of Amended Rule 412, Federal Rules of Evidence

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

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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.

APPENDIX II

Text of Proposed Rule 412, Federal Rules of Evidence

Rule 412. Sex Offense Cases; Relevance of Victim's Past Sexual Behavior or Predisposition

(a) Evidence Generally Inadmissible. Evidence of past sexual behavior or predisposition of an alleged victim of sexual misconduct is not admissible in any civil or criminal proceeding except as provided in subdivisions (b) and (c).

(b) Exceptions. Evidence of the past sexual behavior or predisposition of an alleged victim of sexual misconduct may be admitted only if it is otherwise admissible under these rules and is—

(1) evidence of specific instances of sexual behavior with someone other than the person accused of the sexual misconduct, when offered to prove that the other person was the source of semen, other physical evidence, or injury;

(2) evidence of specific instances of sexual behavior with the person accused of the sexual misconduct, when offered to prove consent by the alleged victim;

(3) evidence of specific instances of sexual behavior, when offered in a criminal case in circumstances where exclusion of the evidence would violate the constitutional rights of the defendant; or

(4) evidence of specific instances of sexual behavior, or other evidence concerning the sexual behavior or predisposition of the victim, when either type of evidence is offered in a civil case in circumstances where [the evidence is essential to a fair and accurate determination of a claim or defense] [its probative value substantially outweighs the danger of unfair prejudice to the parties and harm to the victim].

(c) Procedure to Determine Admissibility. Evidence must not be offered under this rule unless the proponent obtains leave of court by a motion filed under seal, specifically describing the evidence and stating the purposes for which it will be offered. The motion must be

served on the alleged victim and the parites and must be filed at least 15 days before trial unless the court directs an earlier filing or, for good cause shown, permits a later filing. After giving the parties and alleged victim an opportunity to be heard in chambers, the court must determine whether, under what conditions, and in what manner and form the evidence may be admitted. The motion and the record of any hearing in chambers must, unless otherwise ordered, remain under seal.