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Stereotyping Evidence: The Civil Exception to the Federal Rape Shield Law and Its Embedded Sexual Stereotypes

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STEREOTYPING EVIDENCE: THE CIVIL
EXCEPTION TO THE FEDERAL RAPE
SHIELD LAW AND ITS EMBEDDED
SEXUAL STEREOTYPES

RAMONA C. ALBIN*

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I. INTRODUCTION

In a sexual harassment case where the plaintiff testified that her supervisor sent her sexually explicit emails, locked the door to a courtroom, exposed himself to her, and placed her hand on his genitals, the district court admitted evidence of the plaintiff's tongue and eyebrow piercings as relevant to whether she may have invited the defendant's conduct.¹ In another sexual harassment case where the plaintiff alleged her co-worker repeatedly touched her buttocks and tried to touch her groin, a federal district court admitted testimony about the plaintiff's "flirtatious nature" and physical conduct with co-workers at her previous job because it was "relevant" to whether she welcomed sexual conduct and its admissibility was within the court's "discretion in balancing prejudice and probativity."² Another district court denied a motion in limine in a sexual harassment case where the plaintiff sought to exclude evidence that she previously worked at a strip club because the court concluded that conversations at work about that previous job were "sufficiently probative to outweigh any prejudice."³ Even though its relevance is based on sexual stereotypes, courts admitted this evidence under an expansive civil exception to Federal Rule of Evidence 412, the federal rape shield law, as probative of women "inviting" or "welcoming" sexual harassment.

Federal Rule of Evidence 412 governs the admissibility of evidence of a victim's sexual behavior or sexual predisposition in civil and criminal cases.

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1. *Ferencich v. Merritt*, 79 F. App'x. 408, 410, 415 (10th Cir. 2003).

2. *Browne v. Signal Mountain Nursery, L.P.*, 286 F. Supp. 2d. 904, 909, 923 (E.D. Tenn. 2003).

3. *Cassidy v. CSX Transp., Inc.*, No. 6:03-376-DCR., 2005 WL 6740409, at *1, *2 (E.D. Ky. 2005).

Although Rule 412 generally bars “evidence to prove that a victim engaged in other sexual behavior” and “evidence offered to prove a victim’s sexual predisposition,” that evidence may be admissible in civil cases if “its probative value substantially outweighs the danger of harm” to the victim and unfair prejudice to any party.⁴ Because of a requirement under sexual harassment case law that plaintiffs prove the sexual harassment was “unwelcome”⁵ and a broad civil exception to Rule 412 that allows sexual predisposition evidence in civil cases, evidence such as a woman’s dress, her prior employment, and her “unladylike” language in the workplace, may be admissible. This is so even though the evidence is not relevant or probative of “welcomeness” and its admission is in direct opposition to the purpose of Rule 412 — to protect victim privacy, to avoid sexual stereotyping associated with disclosure of such information, and to prevent the taint of sexual innuendo in the trial process.⁶ In fact, the stereotypical nature of the evidence is the very reason it is admissible. It is admissible because courts accept tropes that a woman’s tongue piercing or a previous job as a stripper or her dress is relevant to her “inviting” harassment. Admitting such evidence wrongly allows the focus to be on the victim’s conduct rather than the perpetrator’s conduct.

The application of Rule 412 to civil cases cannot be uncoupled from rape law, sexual harassment law, and normative judgments of women’s sexuality. The common thread running throughout is the embedded sexual stereotype that “unchaste” women actually consent to forced sexual intercourse, welcome sexual harassment,⁷ and that women’s conduct that does not fall into “acceptable” bounds of behavior is not subject to legal protection.⁸ In civil cases, Rule 412 embeds this stereotype and normative judgment by giving courts broad discretion to admit sexual behavior and sexual predisposition evidence, where such evidence infuses sexual innuendo into the trial.

This Article examines the civil exception to Rule 412, its legislative

4. FED. R. EVID. 412(a), (b)(2).

5. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986) (where the Supreme Court found that “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome”).

6. See FED. R. EVID. 412 advisory committee’s note to 1994 amendment.

7. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 815 (1991); see also Grace S. Ho, *Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII’s Transformative Potential*, 20 YALE J.L. & FEMINISM 131, 134 (2008).

8. See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 52-53 (2002).

history, the impact of such an expansive exception on the admissibility of sexual behavior and sexual predisposition evidence in sexual harassment cases, and offers a proposal to amend the exception so that it effectuates the purpose of the Rule. Part I explains the through-line from rape law to the “unwelcomeness” requirement in sexual harassment law to the construction of the civil exception. Part II describes the legislative history of the civil exception and the impact of the Supreme Court’s opinion in *Meritor Savings Bank, FSB v. Vinson*⁹ on the construction of the civil exception. The legislative history highlights *Meritor*’s influence on the sexual stereotypes embedded in Rule 412. Part III shows the effect of the expansive civil exception on the admissibility of sexual predisposition evidence and sexual behavior evidence despite the general prohibition of the Rule. Part IV examines social science data related to sexual harassment and argues that the “unwelcomeness” requirement is based on the false premise that women “invite” or “welcome” sexual harassment. Part IV further contends that sexual predisposition evidence and sexual behavior evidence of the victim with individuals other than the defendant are not even probative of “welcomeness.” Part V proposes an amendment to the Rule so that the civil exception allows relevant evidence to be admitted while still effectuating the purpose of the Rule.

II. FROM RAPE LAW TO “UNWELCOMENESS” TO RULE 412

A. Rape Law, the Utmost Resistance Requirement, and “No” Means “Yes”

Normative judgments of female sexuality underlie rape law, sexual harassment law, and Rule 412.¹⁰ Until the 1970s, evidence of a victim’s past sexual behavior was generally admissible in rape cases because, according to the courts, unchaste women were more likely to consent to sexual

9. 477 U.S. 57 (1986).

10. This Article focuses on embedded sexual stereotypes related to women in the civil exception to Fed. R. Evid. 412 because the legislative history reflects a focus on female victims. Additionally, a literature review of data concerning sexual harassment concludes that sexual harassment generally involves female victims and male perpetrator(s). Paula McDonald, *Workplace Sexual Harassment 30 Years On; A Review of the Literature*, 14 INT’L. J. MGMT. REVS. 1, 7 (2012). EEOC data reflects that more complaints for sexual harassment are filed by women than men. From 2010-2020 EEOC data reflects women filed over 80% of charges. U.S. EQUAL EMP. OPPORTUNITY COMM’N, CHARGES ALLEGING SEX-BASED HARASSMENT FY 2010 - FY 2020, at 1, eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2020. Nonetheless, the sexual stereotypes embedded in the Rule affect all victims impacted by the Rule’s application.

intercourse.¹¹ In other words, rape law contained a “chastity requirement” for legal protection.¹² Not only was evidence of prior sexual behavior admissible, but common law before the 1970s generally required that the prosecution prove beyond a reasonable doubt that the victim exhibited utmost resistance or reasonable resistance to prove she did not consent to sexual intercourse.¹³

For example, in 1978, in *State of Wisconsin v. Muhammad*, the Wisconsin Supreme Court reversed and remanded a defendant’s rape conviction because the victim did not show sufficient resistance nor sufficient fear to excuse resistance.¹⁴ Wisconsin statutory law at that time required the government to prove that sexual intercourse was by force and against the victim’s will, meaning the government had to prove “her utmost resistance is overcome or prevented by physical violence or that her will to resist is overcome by threats of imminent physical violence likely to cause great bodily harm.”¹⁵ In concluding the evidence was insufficient to show utmost resistance, the court considered the victim’s “[sexual] experience,” that she was not a virgin, and that she invited the defendant up to her apartment to smoke marijuana.¹⁶ According to the court, the victim’s “unchaste character” meant she was more likely to consent even though the victim testified that she kicked, struggled, yelled, and there was medical testimony showing she suffered vaginal tearing from the sexual assault.¹⁷

Logically, the foundation of the utmost resistance requirement was the stereotype that women “want it,” they consented even though they resisted,

11. Reva B. Siegel, *A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, 1, 4 (Catharine A. McKinnon & Reva B. Siegel eds. 2004); see also *State v. Muhammad*, 162 N.W.2d 567, 571 (Wis. 1968) (where the court, quoting *Kaczmarzyk v. State*, 280 N.W. 362, 362-63 (Wis. 1938), stated: “The law recognizes that a woman of previous unchaste characters is more likely to consent to an act of sexual intercourse than is a woman who is strictly virtuous.”); see also Ramona C. Albin, *Appropriating Women’s Thoughts: The Admissibility of Sexual Fantasies and Dreams Under the Consent Exception to Rape Shield Laws*, 68 U. KAN. L. REV. 617 (2020).

12. Anderson, *supra* note 8, at 52-53; see also Albin, *supra* note 11, at 618.

13. Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962 (1998).

14. 162 N.W.2d at 571-72.

15. *Id.* at 570.

16. *Id.* at 571 (where the court explained its rationale by referencing the victim’s sexual experience, stating, “Furthermore, complainant was a woman of considerable experience. By her own testimony she was not a virgin at the time of the alleged rape, and in fact she was unable to say how many different males she had had sexual intercourse with prior to October 9, 1967.”).

17. *Id.* at 571-72.

and women actually desire forcible sexual intercourse. “No” means “yes,” and only through utmost resistance are women believed to not have consented. In other words, a victim of rape had to affirmatively show she did not want to be victimized, unlike any other violent crime.¹⁸ This stereotype, embedded in rape law, is reflected not only in criminal statutes requiring proof of utmost resistance, but also perpetuated by the legal academy. Addressing the issue of consent in rape cases, Roger Dworkin, at times quoting other commentators, wrote in the *Stanford Law Journal* in 1966:

The major problem regarding sexual intercourse with the use of force is to determine the degree of victim participation.” “Although a woman may desire sexual intercourse, it is customary for her to say, no, no, no (although meaning yes, yes, yes) and to expect the male to be the aggressor . . . It is always difficult in rape cases to determine whether the female really meant ‘no’ . . .” Slovenko explains that often a woman faces a “trilemma”; she is faced with a choice among being a prude, a tease, or an “easy lay.” Furthermore a woman may note a man’s brutal nature and be attracted to him rather than repulsed. Masochistic tendencies seem to lead many women to seek men who will ill-treat them sexually. The problem becomes even greater when one recognizes the existence of the so-called “riddance mechanism.” This is a phenomenon whereby a woman who fears rape unconsciously sets up the rape to rid herself of the fear and “get it over with.” The consent standard makes no provision for moralistic denial of willingness, for ambivalence, or for unconscious complicity.¹⁹

B. Meritor and the “Unwelcomeness” Requirement in Civil Sexual Harassment Law

These same stereotypes are also reflected in the limited legal protection against workplace sexual harassment under civil law. In the first instance, women could not recover damages in tort for sexual assault until the mid-nineteenth century.²⁰ Later, civil suits for seduction or indecent assault were actionable, even though each action included consent defenses borrowed from rape law.²¹ It was not until the late 1970s that federal courts even

18. *Privacy of Rape Victims: Hearings on H.R. 14666 and Other Bills Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 94th Cong. 1 (1976) [hereinafter *Hearings*] (statement of Mary Ann Lergen, Former N.O.W. National Rape Task Force Coordinator at 31); see also Albin, *supra* note 11, at 626.

19. Roger B. Dworkin, *The Resistance Standard in Rape Legislation*, 18 *STAN. L. REV.* 680, 682 (1966).

20. Siegel, *supra* note 11, at 5.

21. *Id.*

recognized a cause of action for sexual harassment.²² And, only in 1986, in *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court recognized sexual harassment claims under Title VII of the Civil Rights Act of 1964.²³ The holding in *Meritor*, however, was a double-edged sword. Although the Court recognized hostile work environment claims, at the same time, the Court found the essence of such claims to be whether the victim welcomed the harassing conduct.²⁴ The Court focused on the victim's conduct by placing the burden on the plaintiff to show the conduct was "unwelcome," and that requirement appears to assume that such conduct is "welcome" unless the plaintiff proves otherwise.²⁵ And because the plaintiff must fulfill the "unwelcomeness" element, the defense may admit evidence of "welcomeness," *i.e.*, evidence the plaintiff invited the sexual conduct.

In *Meritor*, Sidney Taylor, a vice-president of the bank, hired Mechelle Vinson as a teller trainee in 1974.²⁶ Taylor became Vinson's supervisor.²⁷ Over a four-year period, Vinson was promoted to teller, head-teller, and ultimately Assistant Branch Manager.²⁸ These promotions were merit-based.²⁹ Vinson took sick leave in September 1978, and in November, the bank fired her for excessive leave.³⁰ Vinson sued the bank, arguing Taylor sexually harassed her throughout her four years at the bank.³¹

At trial, Vinson testified that as soon as she completed her probationary period, Taylor began harassing her.³² First, Taylor invited her to dinner, and during dinner, he proposed having sex at a motel.³³ Vinson initially refused but later agreed because she was afraid she would lose her job if she refused.³⁴ Taylor continually made demands on Vinson for sex during and after work.³⁵ Because of these demands, Vinson estimated she had sex with

22. Estrich, *supra* note 7, at 816.

23. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986).

24. *Id.* at 68.

25. Courtney Fraser, *From "Ladies First" to "Asking for It": Benevolent Sexism in the Maintenance of Rape Culture*, 103 CAL. L. REV. 141, 160 (2015).

26. *Meritor*, 477 U.S. at 59.

27. *Id.*

28. *Id.* at 59-60.

29. *Id.* at 60.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

Taylor forty to fifty times.³⁶ Vinson testified that Taylor fondled her in front of other employees, exposed himself to her at work, and forcibly raped her on several occasions.³⁷ Vinson also testified that Taylor fondled other female employees and introduced some corroborating testimony. However, the district court did not allow her to introduce pattern and practice evidence regarding Taylor's sexual advances.³⁸ Taylor denied all of Vinson's allegations, testifying that he did not have sexual intercourse with her, did not fondle her, and did not speak suggestively to her.³⁹

The district court found that Taylor had a voluntary sexual relationship with Vinson and that the relationship had no connection to her employment.⁴⁰ On that basis, the district court found no sexual harassment or sexual discrimination and denied relief.⁴¹ The district court also held the bank could not be liable for Taylor's actions because Vinson never filed a complaint or notified the bank of the alleged harassment.⁴² The Court of Appeals reversed and remanded, finding that the district court did not consider Vinson's hostile work environment claim.⁴³ Further, the Court of Appeals held that an employer may be liable for the sexual harassment of supervisory personnel under Title VII even if the employer did not know about it.⁴⁴

The Supreme Court granted certiorari and affirmed the Court of Appeals' decision.⁴⁵ In the Supreme Court, Meritor argued that the language of Title VII limits claims to tangible economic discrimination.⁴⁶ The Court rejected that argument. The Court explained that the Equal Employment Opportunity Commission ("EEOC") Guidelines prohibit sexual harassment "linked to the grant or denial of an economic quid pro quo" and, further, that the EEOC concluded that hostile work environment claims violate Title VII.⁴⁷ The Supreme Court held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive

36. *Id.*

37. *Id.*

38. *Id.* at 60-61.

39. *Id.* at 61.

40. *Id.*

41. *Id.*

42. *Id.* at 62.

43. *Id.*

44. *Id.* at 63.

45. *Id.*

46. *Id.* at 64.

47. *Id.* at 65.

work environment.”⁴⁸

In addressing whether the district court erred in finding that Vinson was not the victim of sexual harassment, the Court rejected the district court’s reliance on the voluntariness of the sexual behavior and found that the “welcomeness” of the sexual conduct was determinative. The Court stated, “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome.”⁴⁹ Even though the Court recognized the difficulty of proof relating to “welcomeness,” the Court decided that the crucial question “is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was ‘voluntary.’”⁵⁰

The Supreme Court discussed the type of evidence courts may consider in determining “unwelcomeness.” The Supreme Court rejected the Court of Appeals’ finding that testimony about Vinson’s “dress and personal fantasies” were irrelevant and should not have been admitted.⁵¹ According to the Court, the complainant’s “sexually provocative speech and dress” is “obviously relevant” to welcomeness.⁵²

The “unwelcomeness” requirement, countenanced by the Supreme Court in *Meritor*, is alive and well. To establish a hostile work environment claim under Title VII, the complainant must show that: (1) she belongs to a protected group; (2) she “has been subject to unwelcome sexual harassment”; (3) the harassment is based on the sex of the complainant; (4) the harassment is “sufficiently severe or pervasive to alter the terms or conditions of employment and create a discriminatorily abusive working environment”; and (5) there is a basis to hold the employer liable.⁵³ Significantly, for this type of claim, as the Supreme Court noted in *Harris v. Forklift Systems, Inc.*, a defendant only violates Title VII “when the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive work environment.’”⁵⁴ Because of the “sufficiently severe or pervasive” requirement, the “unwelcomeness” requirement is unnecessary. To prevail, the plaintiff must show not only that the harassment creates a

48. *Id.* at 66.

49. *Id.* at 68.

50. *Id.*

51. *Id.* at 68-69.

52. *Id.* at 69, 73.

53. *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 808 (11th Cir. 2010); *Thornton v. Fed. Express Corp.*, 530 F.3d 451, 455 (6th Cir. 2008); *Valentine v. City of Chicago*, 452 F. 3d 670, 677 (7th Cir. 2006).

54. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citations omitted).

hostile workplace, but also that the conduct amounts to “discriminatory changes in the terms or conditions of employment.”⁵⁵

In terms of *quid pro quo* sexual harassment, requested sexual favors and/or “unwelcome” sexual advances amount to *quid pro quo* sexual harassment when “(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment; or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.”⁵⁶ Here, too, the “unwelcomeness” requirement is superfluous. “Unwelcomeness” is irrelevant in this circumstance because autonomy in this context does not exist.⁵⁷

C. Rule 412 — The Gateway to the Admissibility of “Welcomeness” Evidence

In 1994, eight years after *Meritor*, Congress amended Fed. R. Evid. 412 to apply to civil cases, and this civil exception serves as the entryway to the admissibility of “unwelcomeness” and “welcomeness” evidence. “[P]rocedurally, unwelcomeness is an evidentiary issue.”⁵⁸ As amended in 1994, Rule 412 generally prohibits evidence of a victim’s sexual behavior and sexual predisposition in civil and criminal proceedings. The purpose of the rule is to “safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.”⁵⁹ The Rule provides:

Rule 412. Sex-Offense Cases: The Victim’s Sexual Behavior or Predisposition

(a) PROHIBITED USES. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

55. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

56. *Starnes v. Butler Cty. Ct. of Common Pleas*, 50th Jud. Dist., 971 F.2d 416, 425 (3d. Cir. 2020); *see also* *Valentin-Almeyda v. Mun. of Aguadilla*, 447 F.3d 85, 94 (1st Cir. 2006).

57. *Estrich*, *supra* note 7, at 831.

58. Paul Nicholas Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155, 1168 (1995) (demonstrating that requiring plaintiffs to prove “unwelcomeness” means evidence of “welcomeness” is potentially admissible under Rule 412).

59. FED. R. EVID. 412 advisory committee’s notes to 1994 amendment; *see also* *Albin*, *supra* note 11, at 621-22.

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) *CRIMINAL CASES*. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) *CIVIL CASES*. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.⁶⁰

I. Criminal Exceptions

Although the general prohibition purportedly applies to civil and criminal cases, the Rule outlines very different exceptions for civil and criminal cases. In criminal cases, there are three distinct exceptions. The first exception allows courts to admit evidence of specific instances of sexual behavior of the victim when offered to prove that someone other than the defendant was the source of semen or injury.⁶¹ Although this exception may allow admission of evidence of the victim's sexual behavior with individuals other than the defendant, it applies in limited circumstances because most rape victims know their attacker.⁶² The second exception allows courts to admit evidence of specific instances of the victim's sexual behavior with the defendant if offered by the defense to show consent or if offered by the prosecution.⁶³ Much broader than the first exception, this exception potentially allows evidence of sexual behavior between the victim and the defendant.⁶⁴ The third exception is a catch-all constitutional exception of

60. FED. R. EVID. 412(a) and (b).

61. FED. R. EVID. 412(b)(1)(A).

62. Michele C. Black et al., *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL (2011), https://www.nsvrc.org/sites/default/files/2021-04/NISVS_Report2010-a.pdf.

63. FED. R. EVID. 412(b)(1)(B).

64. See also Black et al., *supra* note 62 (stating that most rape cases are committed by someone known to the victim; given this fact, there is considerable criticism of the breadth of this exception).

limited use because exceptions one and two address many constitutional concerns.⁶⁵ The first and second exceptions allow only the admission of sexual behavior evidence. Sexual predisposition evidence is not admissible under those exceptions.

2. *Civil Exception*

Unlike the criminal exceptions, the civil exception includes a balancing test, where sexual behavior and sexual predisposition evidence may be admissible if the probative value of such evidence substantially outweighs “danger of harm to the victim and unfair prejudice to any party.”⁶⁶ The balancing test places the burden on the proponent for admissibility and requires the proponent to show that the probative value *substantially* outweighs unfair prejudice and harm to the victim.⁶⁷ Even though the civil exception balancing test is more rigorous than Federal Rule of Evidence 403, where courts may exclude relevant evidence if the probative value is substantially outweighed by the danger of unfair prejudice,⁶⁸ unlike the criminal exceptions, the admissibility of sexual behavior and sexual predisposition under the civil exception is discretionary. As discussed in the legislative history section below, Congress did not adopt this approach when the Rule was originally enacted in 1978 when the Rule only applied to rape or assault with intent to commit rape cases.⁶⁹ In 1978, Congress appears to have rejected this approach because the concern was that courts admitted evidence based on their own prejudices and biases. Therefore, to ensure victim privacy and limit sexual innuendo, courts’ discretion regarding this type of evidence was limited. However, when Congress amended the Rule in 1994 to apply to criminal and civil cases, the civil exception was much more expansive than the criminal exception.

Different from the criminal exceptions, the civil exception allows the admission of evidence of the victim’s sexual behavior *and* sexual predisposition.⁷⁰ Furthermore, sexual behavior evidence is not limited to interaction between the defendant and the victim; rather, evidence of the victim’s sexual behavior with individuals other than the defendant may be

65. FED. R. EVID. 412(b)(1)(C).

66. *Id.* § (b)(2).

67. FED. R. EVID. 412(b)(2) advisory committee’s note to 1994 amendment.

68. FED. R. EVID. 403.

69. Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 [hereinafter *Protection of Rape Victims Act*].

70. FED. R. EVID. 412(b)(2) (stating that the court may admit sexual predisposition and sexual behavior evidence under the civil exception under a balancing test, although the first two criminal exceptions do not admit both types of evidence).

admissible under the civil exception. The Rule does not define sexual behavior, but the 1994 Advisory Committee Note (“1994 Note”) does. The 1994 Note defines past sexual behavior as “all activities that involve actual physical conduct, *i.e.*, sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact.”⁷¹ Behavior also includes “activities of the mind, such as fantasies or dreams.”⁷² Thus, a victim’s thoughts may be admissible as sexual behavior.⁷³

Neither the Rule nor the 1994 Note explicitly defines sexual predisposition. Case law provides little to no additional guidance regarding the definition of sexual predisposition evidence beyond referencing language in the 1994 Note.⁷⁴ In civil cases, because there is little clarity regarding the definitions of sexual behavior and sexual predisposition evidence, other than the obvious categorization of sexual contact as sexual behavior, and because sexual behavior and sexual predisposition are both potentially admissible under the civil exception, courts may conflate or do not fully define sexual behavior or sexual predisposition evidence.⁷⁵ For example, one court categorized viewing pornography as sexual behavior, and another court categorized viewing or emailing sexually explicit videos as sexual predisposition evidence.⁷⁶

The 1994 Note provides some guidance as to the definition of sexual predisposition, even though the term is not explicitly defined. Referencing the Rule’s general prohibition regarding sexual predisposition evidence, the 1994 Note states that the 1994 amendment “is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the

71. FED. R. EVID. 412(a) advisory committee’s note to 1994 amendment; *see also* Albin, *supra* note 11, at 623.

72. FED. R. EVID. 412(a) advisory committee’s note to 1994 amendment.

73. *See* Albin, *supra* note 11, at 617, 642-644.

74. *See* Wolak v. Spucci, 217 F.3d 157, 160 (2d Cir. 2000); *see also* Ferencich v. Merritt, 79 F. App’x. 408, 414-515 (10th Cir. 2003); Glazier v. Fox, No. 2014-106, 2016 WL 827760 at *2 (D.V.I. Mar. 03, 2016).

75. *See* Wilson v. City of Des Moines, 442 F.3d 637, 640, 643 (8th Cir. 2006) (referencing touching as sexual behavior but not categorizing “sexually charged comments” as sexual behavior or sexual predisposition); *see also* Browne v. Signal Mountain Nursery, L.P., 286 F. Supp. 2d 904, 909, 923 (E.D. Tenn. 2003) (failing to categorize plaintiff’s “flirtatious behavior” or “bodily contact of a sexual nature” as sexual behavior or sexual predisposition evidence).

76. *See* Wolak, 217 F.3d at 160 (finding viewing pornography as falling “within Rule 412’s broad definition of behavior”); *but cf.* Smith v. Ergo Solutions, No. 14-382 (JDB), 2019 WL 3068293 at *4 (D.D.C. July 12, 2019) (categorizing videos that plaintiff emailed containing sexually explicit content as sexual predisposition evidence).

proponent believes may have a sexual connotation for the factfinder.”⁷⁷ The 1994 Note implies that such evidence is barred as sexual predisposition evidence.⁷⁸ But, incorporating the Supreme Court’s conclusion in *Meritor* that dress and speech are “obviously” relevant in sexual harassment cases, the 1994 Note also explains that mode of dress, speech, and lifestyle may be admissible under the civil exception as “sexual predisposition evidence.”⁷⁹ Thus, what a woman chooses to wear to work, her “lifestyle,” or choices wholly unrelated to whether she “invited” sexual harassment are potentially admissible under the civil exception. Just as rape law used women’s prior sexual behavior to delegitimize and disprove the plaintiff’s complaint, Rule 412 allows stereotyped evidence to be admitted to inject sexual innuendo into the factfinding process.

III. THE LEGISLATIVE HISTORY OF THE CIVIL EXCEPTION⁸⁰

Before the passage of state and federal rape shield laws in the 1970s, courts admitted evidence of women’s prior sexual behavior in rape cases. Women were either chaste, and therefore worthy of legal protection, or unchaste, of deficient character, and likely consented to sex.⁸¹ Basically, the law permitted “placing the victim and her reputation on trial in lieu of the defendant.”⁸² As a result of these and other evidentiary requirements, the conviction rate in rape cases was extremely low, and victims infrequently reported rape. For example, in the 1970s, data indicated that only 20% of victims of rape reported the crime, and less than 1% of reported rapes

77. FED. R. EVID. 412(a) advisory committee’s note to 1994 amendment.

78. *Id.*

79. *Id.*

80. The following discussion on the legislative history of the civil exception to Rule 412 draws, in part, on a discussion from a previous article, see *Appropriating Women’s Thoughts: The Admissibility of Sexual Fantasies and Dreams Under the Consent Exception to Rape Shield Laws*, 68 U. KAN. L. REV. 617 (2020) (focusing on the criminal exception to Rule 412 and arguing that sexual fantasies and dreams should not be considered sexual behavior and therefore should be inadmissible under the criminal consent exception. Because the consent exception allows evidence of sexual behavior and sexual behavior includes sexual fantasies and dreams, women’s thoughts, imagined or even unconscious, are potentially admissible under the criminal and civil exceptions).

81. Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 783-84 (1986); see also Anderson, *supra* note 8, at 52-53 (“Embedded within rape law, therefore, was an informal, though powerful, normative command that women maintain an ideal of sexual abstinence in order to obtain legal protection . . .”); Albin, *supra* note 11, at 618.

82. *Hearings*, *supra* note 18, at 3 (statement of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division, Department of Justice).

resulted in a conviction.⁸³

In the early 1970s, states began to address barriers to reporting and low conviction rates by passing rape shield laws that prohibited the admission of evidence of the victim's prior sexual history.⁸⁴ Congress was not far behind. In 1978, Congress amended the Federal Rules of Evidence to limit the admissibility of evidence of the victim's sexual behavior to add protection for rape victims.⁸⁵ The resulting Rule, Federal Rule of Evidence 412, provided that reputation or opinion evidence of past sexual behavior of a victim was inadmissible in rape cases unless such evidence was constitutionally required to be admitted, was past sexual behavior with the accused and offered by the accused to show consent, or was past sexual behavior with a person other than the accused offered to show the accused was not the source of semen or injury.⁸⁶ Rule 412 only applied to a small subset of criminal cases (rape or assault to commit rape) and did not apply to civil cases.⁸⁷ The 1978 Rule did not include advisory committee notes and did not define sexual behavior.

83. *Id.* at 23 (statement of Judge Sylvia Bacon, Chairperson, Criminal Justice Section, on behalf of the American Bar Association).

84. *Id.* at 1 (statement of Rep. William L. Hungate, Chair, Subcomm. on Criminal Justice) ("A number of States have addressed this issue and have modified their laws to make such evidence less easily admissible."); *see also id.* at 2 (statement of Elizabeth Holtzman).

85. *Protection of Rape Victims Act*, *supra* note 69.

86. *Id.*

87. *See id.*

("Rule 412. Rape Cases; Relevance of Victim's Past Behavior

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged. *Id.* at § 2(a)").

When drafting Rule 412, Congress recognized the importance of limiting judicial discretion regarding the victim's prior sexual history. The Rule, as enacted in 1978, attempted to limit judicial discretion and prohibited the admission of reputation or opinion evidence and specific instances of a victim's past sexual behavior in rape cases, unless the evidence fell within the consent exception, the constitutional exception, or circumstances where the accused sought to introduce such evidence to show that the accused was not the source of semen or injury.⁸⁸ During Congressional testimony on the Rule, witnesses noted that judges have been "reared in the same socialization process as jurors" and "are subject to the same prejudices and misunderstandings about the nature of rape as is the rest of society."⁸⁹ The rationale behind significantly limiting judicial discretion was so that judges would not allow the trial to become a referendum on "the victim's morality and conduct rather than an adjudication of the accused's guilt or innocence."⁹⁰ Thus, the Rule did not employ a balancing test.

In 1991, Congress considered amending Rule 412 to expand and clarify its criminal provision and extend the Rule to civil cases.⁹¹ The Judicial Conference, the principal policy-making body for the judiciary, wanted input regarding this amendment of the Federal Rules and therefore wanted to amend the rule through the Rules Enabling Act rather than through Congressional action.⁹² In November 1991, the Advisory Committee on the Federal Rules of Criminal Procedure of the Judicial Conference's Committee on Rules of Practice and Procedure ("Standing Committee") passed a motion to draft an amendment to Rule 412 making it applicable in all civil and

88. *Id.*

89. *Hearings*, *supra* note 18, at 34 (statement of Mary Ann Lagen, Former N.O.W. National Rape Task Force Coordinator).

90. *Id.* (Question and Answer Exchange between Representative Elizabeth Holtzman, sponsor of the Act to amend Rule 412 and Mary Ann Lagen, Former N.O.W. National Rape Task Force Coordinator).

91. Jud. Conf. of the U.S., Minutes of the Advisory Committee on Rules of Criminal Procedure, 12-13 (May 13-14, 1991), https://www.uscourts.gov/sites/default/files/fr_import/CR05-1991-min.pdf [hereinafter Criminal Procedure Advisory Committee Minutes May 13-14, 1991].

92. Jud. Conf. of the U.S., Minutes of the Advisory Committee on Rules of Criminal Procedure (Nov. 7, 1991), https://www.uscourts.gov/sites/default/files/fr_import/CR11-1991-min.pdf, at 6; *see also* Criminal Procedure Advisory Committee Minutes May 13-14, 1991, *supra* note 91, at 13 (stating the objective of the Advisory Committee on Criminal Rules to communicate to Congress the need to comply with the Rules Enabling Act).

criminal cases so that Congress would not adopt an unworkable rule.⁹³

In March 1992, the Evidence Subcommittee of the Advisory Committee on the Rules of Criminal Procedure (hereinafter called Criminal Rules Committee) circulated two draft amendments to Rule 412. In each of these drafts, the Rule equally applied to civil and criminal cases and did not carve out a separate civil exception involving a balancing test. Professor David Schlueter of St. Mary's University School of Law, the Reporter for the Criminal Rules Committee, authored one of the proposed amendments to the Rule.⁹⁴ In his draft, the criminal and civil provisions were addressed at the same time.

Schlueter's draft Rule excluded reputation or opinion evidence of past sexual behavior of the victim in a case where a person is accused of sexual misconduct. Sexual misconduct was defined as "sexual behavior with respect to which an offense under chapter 109A of Title 18, United States Code is alleged [criminal violation] and includes, but is not limited to, sex harassment or discrimination or gender bias claims [civil claims]"⁹⁵ Past sexual behavior meant "sexual behavior other than the alleged sexual misconduct."⁹⁶ Other than that language, sexual behavior was not defined. Evidence of specific instances of the victim's past sexual behavior was not admissible unless it was constitutionally required or was evidence of: (1) past sexual behavior with persons other than the person accused of sexual misconduct, offered by the accused on the issue of whether the accused was the source of semen or injury or; (2) was past sexual behavior with the person

93. See Jud. Conf. of the U.S., *supra* note 91, at 5-6. The Judicial Conference, authorized under 28 U.S.C. § 331, is a policy-making body that surveys court administration and submits recommendations to the Supreme Court to improve practice and procedure. 28 U.S.C. § 331. The Rules Enabling Act, 28 U.S.C. §§ 2072, 2073, 2075, provides that the Supreme Court may prescribe the rules of evidence and the Judicial Conference may recommend changes, deletions, or additions to the Rules of Evidence unless Congress passes legislation to reject, amend or defer those rules.; see also *How the Rulemaking Process Works*, UNITED STATES COURTS, <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> (last visited March 10, 2021) (discussing rulemaking and the functioning of the Judicial Conference).

94. Memorandum from Steve Saltzburg to the Evidence Subcomm. of the Advisory Comm. on Rules of Criminal Procedure 3 (Mar. 8, 1992), https://www.uscourts.gov/sites/default/files/fr_import/CR1992-04.pdf [hereinafter Memorandum from Steve Saltzburg] (attachment of Dave Schlueter's proposed amendment to Rule 412, at 1-7.); see also Jud. Conf. of the U.S., Minutes of the Advisory Committee on Rules of Criminal Procedure (April 23-24, 1992), https://www.uscourts.gov/sites/default/files/fr_import/CR04-1992-min.pdf [hereinafter Criminal Procedure Advisory Committee Minutes, April 23-24, 1992].

95. *Id.* at 3-4.

96. *Id.* at 3.

accused of sexual misconduct offered by the accused on the “issue of whether the alleged victim consented to the sexual behavior with respect to which such sexual misconduct is alleged.”⁹⁷ Schlueter’s draft did not reference sexual predisposition evidence.

Schlueter’s draft Advisory Committee Note stated the rationale for the Rule — that “victims of sexual misconduct should not be discouraged from coming forward for fear that their sexual activity or reputation will become the focus of the trial.”⁹⁸ Additionally, the Note explained the expansion of the Rule to civil cases: “[b]ecause such victims may seek civil remedies in addition to testifying in a criminal case, the Committee believed that a strong case could be made that the protections of the Rule should be extended to civil cases as well, where a person has been accused of sexual misconduct.”⁹⁹

Professor Steve Saltzburg circulated Schlueter’s proposed amendment to the Evidence Subcommittee of the Criminal Rules Committee and also his own proposed draft.¹⁰⁰ Saltzburg’s proposed redraft applied to any civil or criminal proceeding.¹⁰¹ According to Saltzburg, “the draft that Dave

97. *Id.* at 1-2.

98. *Id.* at 4.

99. *Id.*

100. *Id.* (attachment of Dave Schlueter’s proposed amendment to Rule 412), at 1.

101. *Id.* at 3-4. Professor’s Saltzburg’s proposed Rule reads in relevant part as follows:

Rule 412. Victim’s Past Sexual Behavior or Predisposition

(a) Evidence of a victim’s past sexual behavior or sexual predisposition is not admissible in any civil or criminal proceeding except as provided in subdivision

(b) Evidence of a victim’s past sexual behavior or predisposition may be admitted under the following circumstances:

(1) evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged if offered to prove that another person was the source of semen or injury;

(2) evidence of specific instances of sexual behavior with the person whose sexual misconduct is alleged if offered to prove consent;

(3) evidence of specific instances of sexual behavior if offered under circumstances in which exclusion would deny the person whose sexual misconduct is alleged a fair trial;

(4) evidence of reputation or opinion evidence when character is an element of a claim or defense.

(c) No evidence covered by this rule shall be admitted unless the party offering it files a motion under seal, not less than 15 days prior to trial or at such other time as the court may direct, seeking leave to offer the evidence at trial. The motion must describe with particularity the evidence and the purpose for which it is offered. The court shall permit any other party as well as the victim to be heard *in camera* on the motion and shall

[Schlueter] sent does not capture the actual vote of the full committee which was to make Rule 412 applicable in all civil and criminal cases.”¹⁰² Saltzburg was also concerned with making too many changes to the Rule because evidence concerning “invited advances” may be admissible in a civil sexual harassment case, as opposed to a criminal sexual assault prosecution.¹⁰³ Although Saltzburg did not specifically reference the Supreme Court’s *Meritor* holding as the reason for this concern, it is reasonable to infer that *Meritor* and subsequent federal sexual harassment case law were the basis for it. Essentially, Saltzburg’s draft Rule prohibited the admission of a victim’s past sexual behavior or sexual predisposition in civil or criminal proceedings except: (1) when evidence of specific instances of sexual behavior with persons other than the accused is offered to show another person was the source of semen or injury; (2) when evidence of specific instances of sexual behavior with the accused when the accused offers such evidence to prove consent; (3) when exclusion would deny the accused a fair trial and; (4) when character is an element of the claim or defense.¹⁰⁴ Saltzburg sought to simplify the Rule and make the trial court’s role more understandable.¹⁰⁵ Saltzburg did not define sexual behavior or sexual predisposition.

The subcommittee adopted the Saltzburg draft, and the Criminal Rules Committee reviewed that draft at its April 23-24, 1992 meeting.¹⁰⁶ At that meeting, the Committee expressed concern about Congress amending the Rule in the current legislative session, adding some urgency to the drafting process.¹⁰⁷ The Committee approved the concept of amending Rule 412, approved the draft in principle, and directed the subcommittee to continue refining the proposed draft.¹⁰⁸ The subcommittee’s draft was viewed as

determine whether the evidence will be admitted, the conditions of admissibility and the form in which the evidence may be admitted. The court may permit a motion to be made under seal during trial if a party claims good cause for not making a pretrial motion, and the court may consider the motion if it finds good cause show. The motion and the record of any *in camera* proceeding shall remain under seal during the course of all further proceedings both in the trial and appellate courts.

102. *Id.* at 3.

103. *Id.*

104. *Id.* at 4.

105. *Id.* at 5.

106. Memorandum from John Rabiej, Chief, Rules Comm. Support Office, Admin. Office of U.S. Courts, to Karen Kremer, Counsel, Legislative & Pub. Affairs Office, at 1, 3-4 (July 8, 1992) [hereinafter Memorandum from John Rabiej].

107. Criminal Procedure Advisory Committee Minutes April 23-24, 1992, *supra* note 94, at 12.

108. *Id.*

superior to other proposals because it simplified Rule 412, expanded its applicability to civil and criminal cases, included a fair trial exception, expanded the general prohibition language to include not only sexual behavior but also sexual predisposition, permitted admission in three “limited” circumstances, and allowed the admission of such evidence where character was an element of the crime, claim, or defense.¹⁰⁹ The standards for admissibility under civil and criminal cases would be the same.¹¹⁰

At its October 1992 meeting, the Criminal Rules Committee considered the subcommittee’s proposed amendment.¹¹¹ Professor Saltzburg identified two concerns regarding the amendment. The first concern was whether the Rule should apply to civil and criminal trials.¹¹² The minutes do not reflect many specifics regarding those concerns beyond whether the Rule could be “meaningfully applied” and “translating the rule from criminal to civil practice.”¹¹³ The second concern was whether the “constitutional exception” should be different for civil and criminal cases.¹¹⁴ The Committee modified the catch-all provision (b)(3) to “reflect the differences in criminal and civil cases.”¹¹⁵ The resulting draft amendment was substantially similar to the Saltzburg draft, except that the new draft Rule included separate civil and criminal catch-all exceptions.¹¹⁶ In this draft, exceptions (b)(1) and (b)(2) applied equally to civil and criminal cases and did not include a balancing test.¹¹⁷ However, the draft included separate constitutional catch-all exceptions for civil and criminal cases, and the civil catch-all exception included balancing test language.¹¹⁸ The Committee approved the draft

109. Memorandum from John Rabiej, *supra* note 106, at 4.

110. *Id.*

111. Jud. Conf. of the U.S., Minutes of the Advisory Committee on Rules of Criminal Procedure, at 10 (October 12-13, 1992), https://www.uscourts.gov/sites/default/files/fr_import/CR1092.pdf [hereinafter Criminal Procedure Advisory Committee Minutes October 12-13, 1992]; see also Memorandum from John Rabiej, *supra* note 106, at 1.

112. Criminal Procedure Advisory Committee Minutes October 12-13, 1992, *supra* note 111, at 10.

113. *Id.*

114. *Id.*

115. *Id.* at 10-11.

116. See 23 CHARLES ALAN WRIGHT & VICTOR GOLD, FEDERAL PRACTICE AND PROCEDURE, § 5371 at 496-97 fn. 20 (2018).

117. *Id.*

118. *Id.* Section (b)(4) states that “evidence of specific instances of sexual behavior or other evidence concerning the sexual behavior or sexual 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

amendment and forwarded it to the Standing Committee.¹¹⁹ Neither the draft amendment nor the accompanying Advisory Committee Note defined sexual predisposition or sexual behavior.

The Advisory Committee on Civil Rules (Civil Rules Committee) then commented on the Criminal Rules Committee's proposed amendment. At its November 1992 meeting, the Civil Rules Committee proposed several changes to the Criminal Rules Committee's draft.¹²⁰ First, the Civil Rules Committee draft did not begin with general prohibition language but only stated when sexual predisposition and sexual behavior evidence was potentially admissible.¹²¹ Second, in Section 412(a)(3), the Civil Rules Committee draft potentially allowed the admission of sexual predisposition evidence.¹²² The civil "constitutional" exception was basically the same in both drafts.¹²³ Importantly, the Advisory Committee Note included in the Civil Rules Committee draft stated that evidence of a victim's past sexual history was generally inadmissible in civil and criminal cases "unless the probative value of the evidence is sufficiently great to outweigh the invasion of privacy and potential embarrassment associated with public exposure of a person's sexual history."¹²⁴ In other words, such evidence may be admissible under an enhanced balancing test. The minutes of the Civil Rules Committee's meetings do not reflect a discussion of "unwelcomeness," "invited advances," or *Meritor*. Nonetheless, the civil exception potentially allowed sexual behavior *and* sexual predisposition evidence, unlike the criminal exception. The Advisory Committee Note did not include definitions of sexual behavior or sexual predisposition. The Civil Rules Committee approved the draft Rule and submitted the Rule to the Standing Committee.¹²⁵

probative value substantially outweighs the danger of unfair prejudice to the parties and harm to the victim]." The draft includes alternative language.

119. Criminal Procedure Advisory Committee Minutes October 12-13, 1992, *supra* note 111, at 12-13.

120. Jud. Conf. of the U.S., Minutes of the Advisory Committee on Civil Rules, at 12-14 (November 12-14, 1992), https://www.uscourts.gov/sites/default/files/fr_import/11-12-14-1992-min.pdf [hereinafter Criminal Rules Advisory Committee Minutes November 12-14, 1992].

121. *Id.*; see Memorandum from Sam C. Pointer, Jr., Chair, Advisory Comm. on Civil Rules, to Hon. Robert E. Keeton, Chair, Comm. on Rules of Prac. & Proc., Attachment, Proposed Amendment to the Federal Rules of Evidence Rule 412 at 1 (Nov. 20, 1992) [hereinafter Memorandum from Sam C. Pointer, Jr.].

122. *Id.* at 1.

123. *Id.* at 9.

124. *Id.* at 8.

125. *Id.* at 1.

At the Standing Committee's December 1992 meeting, the Standing Committee reviewed the Civil Rules Committee and Criminal Rules Committee's drafts and combined them.¹²⁶ The resulting rule included a general prohibition regarding the admissibility of evidence of a victim's past sexual history or sexual predisposition and four exceptions to the prohibition.¹²⁷ The first two exceptions mirrored the Civil and Criminal Rules Committees' drafts. The draft also provided for an exception in criminal cases where the exclusion of the evidence would violate the defendant's constitutional rights, the same as the Criminal Rules Committee's draft.¹²⁸ In an exception exclusive to civil cases, the Committee provided two options. Sexual behavior or sexual predisposition evidence may be admissible where the evidence met an essential/fair trial test "[essential to a fair and accurate determination of a claim or defense] or a balancing test [its probative value substantially outweighs the danger of unfair prejudice to the parties and harm to the victim]."¹²⁹ Unlike the criminal exceptions, sexual behavior and sexual predisposition may be admissible in civil cases, and courts would use a balancing test or the essential/fair trial test to make that determination.

This expansive view of the civil exception is reinforced in the Committee Note. The draft Committee Note appears to countenance a broad view of the civil and criminal exceptions by referencing a balancing test as the standard for admission under the exceptions. The Committee Note, in pertinent part, stated:

The expanded rule would exclude evidence of the alleged victim's sexual history in civil as well as criminal cases except in circumstances in which the probative value of the evidence is sufficiently great to outweigh the invasion of privacy and potential embarrassment that always is associated with public exposure of intimate details of sexual history.¹³⁰

The Committee Note explained the importance of expanding the Rule to civil and criminal cases but also showed that the drafters were less certain of the general prohibition as applied to civil cases. In terms of the justification for extending the Rule to all criminal cases, the Committee Note stated that

126. Memorandum from Dave Schlueter, Reporter, to the Advisory Comm. on Criminal Rules (Mar. 15, 1993) [hereinafter Memorandum from Dave Schlueter]; see also Albin, *supra* note 11, at 629.

127. Comm. on Rules of Prac. & Proc. of the Jud. Conf. of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Evidence, 144 F.R.D. 447, 559–63, 570–71 (1992).

128. *Id.* at 562.

129. *Id.* at 563.

130. *Id.* at 569.

the reason is “obvious” because there is a strong social policy to provide explicit protection of victim privacy and encourage victims to report all criminal acts.¹³¹ Although the Committee Note stated that the rationale in civil cases is equally obvious, it also provided that evidence of past sexual behavior or predisposition would be excluded unless the evidence had “high” probative value.¹³² There was no such statement about the criminal exception to the general prohibition. The Committee Note did not define sexual behavior or sexual predisposition.

To expedite consideration of Rule 412, this draft was approved and published for public comment.¹³³ The Standing Committee appointed an Advisory Committee on the Rules of Evidence (Evidence Advisory Committee) to lead the amendment of Rule 412 going forward.¹³⁴ On May 3, 1993, a few days before the public hearing on Rule 412, the Reporter of the Evidence Advisory Committee, Professor Margaret Berger, drafted a memorandum to committee members outlining the issues raised in public comments (Comments Memo) and possible solutions to those concerns (Solutions Memo).¹³⁵ Relevant to the civil exception, the Comments Memo reflected concerns about: (1) the lack of definitions for sexual behavior and sexual predisposition and the scope of such definitions; (2) the scope of the civil exception, the necessity of the general prohibition in general, and whether protection beyond 403 was needed in sexual harassment cases; (3) the application of the consent exception to civil sexual harassment cases; (4) the conflict between the draft as written and *Meritor*; and (5) the standard for admissibility under the civil exception (Rule 412(b)(4)), its breadth, and application.¹³⁶ Generally, the public comments, written and oral, reflect reservations about the need for the Rule to apply to civil cases at all, and, at bottom, reservations about limiting the admission of sexual behavior and

131. *Id.* at 570.

132. *Id.* at 571.

133. Memorandum from Dave Schlueter, *supra* note 126; *see also* Jud. Conf. of the U.S., Minutes of the Committee on Rules of Practice and Procedure, at 5, 7 (Dec. 17-19, 1992), https://www.uscourts.gov/sites/default/files/fr_import/ST12-1992-min.pdf [hereinafter Practice and Procedure Committee Minutes Dec. 17-19, 1992].

134. Memorandum from Dave Schlueter, *supra* note 126.

135. *See* Memorandum from Professor Margaret A. Berger, Reporter, to the Advisory Comm. on Rules of Evidence (May 3, 1993) (on file with author) [hereinafter Berger, Comments Memo]; Memorandum from Professor Margaret Berger, Reporter, to the Advisory Comm. on Rules of Evidence (May 3, 1993) (on file with the author) [hereinafter Berger, Solutions Memo].

136. Berger, Comments Memo, *supra* note 135, at 5, 7, 9-12.

sexual predisposition evidence in civil cases.¹³⁷ For example, a representative of the American College of Trial Lawyers (“ACTL”) testified at the public hearing on Rule 412 that there was no empirical evidence that courts failed to exclude past sexual conduct in civil cases. Commentators also argued that the application to civil cases was superfluous because Rule 403 provided sufficient protection for victims.¹³⁸

Some commentators expressed concerns about limiting the admissibility of “welcomeness” evidence and judicial discretion under the civil exception to the Rule.¹³⁹ Along the same lines, several commentators advocated for the most expansive version of the 412(b)(4) draft civil exception. The ACTL preferred the balancing test language — *i.e.*, specific instances of sexual behavior or predisposition of a victim may be admissible “when offered in a civil case in circumstances where the probative value substantially outweighs the danger of unfair prejudice to the parties and harm to the victim”¹⁴⁰ — with the deletion of the word substantially because including substantially “tips the scales too far in favor of excluding admittedly relevant evidence.”¹⁴¹ The Federal Courts Committee endorsed the 412(b)(4) essential/fair trial test — *i.e.*, specific instances of sexual behavior or predisposition may be admissible “when offered in a civil case in circumstances where the evidence is essential to a fair trial and accurate determination of a claim or defense”¹⁴² — because it would not be in conflict with existing sexual harassment law and would not limit the introduction of evidence.¹⁴³

Commentators were also concerned about the lack of definition of sexual behavior and sexual predisposition in the Rule.¹⁴⁴ The ACTL inquired whether sexual behavior included sexual remarks and language, which

137. *Id.* at 6-7; *see also* Judicial Conference of the U.S., Minutes of the Advisory Committee on Rules of Evidence 1, 3-4 (May 6-7, 1993), https://www.uscourts.gov/sites/default/files/fr_import/EV05-1993-min.pdf [hereinafter Evidence Advisory Committee Minutes May 6-7, 1993].

138. Berger, Comments Memo, *supra* note 135, at 7-8; *see also* Evidence Advisory Committee Minutes May 6-7, 1993, *supra* note 137, at 3-4.

139. Berger, Comments Memo, *supra* note 135, at 8-10.

140. Evidence Advisory Committee Minutes May 6-7, 1993, *supra* note 137, at 3-4.

141. Berger, Comments Memo, *supra* note 135, at 13.

142. *Id.* at 25-26.

143. *Id.* at 26. On the other hand, The Women’s Legal Defense Fund advocated for the elimination of the (b)(4) exception for civil cases because civil litigants do not have the same constitutional protections as criminal defendants. *Id.* at 24.

144. *Id.* at 9, 17; *see also* Evidence Advisory Committee Minutes May 6-7, 1993, *supra* note 137, at 4.

would then be excluded under the general prohibition.¹⁴⁵ The American Bar Association expressed concern about the failure to define sexual predisposition in the Committee Note or the Rule's text.¹⁴⁶ The National Organization for Women Legal Defense Fund commented that the term predisposition implies propensity on the part of the witness and therefore was an inappropriate term to reference in the Rule.¹⁴⁷ In the Comments Memo, Professor Berger responded to that comment by explaining that the rationale for excluding predisposition evidence was to exclude evidence offered to imply such a propensity, not because such evidence is actually relevant.¹⁴⁸ In fact, she noted that the drafters may have excluded predisposition evidence from the criminal exceptions because its probative value will never be high enough to justify admission.¹⁴⁹ The irony is that sexual predisposition evidence was potentially admissible under the civil exception, even though the drafters knew it was based on sexual stereotypes.

In the Solutions Memo, Professor Berger addressed the definitions of sexual behavior and sexual predisposition. The definition of sexual behavior includes evidence that "implies actual physical conduct consisting of sexual intercourse or sexual contact."¹⁵⁰ Professor Berger noted, however, that issues have arisen in state court because of evidence that does not neatly fall in the sexual behavior category but has a sexual connotation and may be used for that inference during trial.¹⁵¹ Berger explained that the Rule, as a whole, whether the evidence is classified as sexual behavior or sexual predisposition, intends to bar not only actual sexual contact, but also statements in diaries, thoughts (fantasies and dreams), private conduct offered for its sexual connotation (posing for nude photographs or watching pornography), and public conduct offered for its sexual connotation "such as dress, partying, going to pornographic movies."¹⁵² Professor Berger concluded that the general prohibition would bar, at least at the outset, all evidence fitting into those categories because Rule 412 is founded not only on a privacy rationale, but because "the rule is designed to protect alleged victims from potential embarrassment . . . , from unwarranted conclusions based on sexual stereotyping, and to encourage victims to come forward

145. Evidence Advisory Committee Minutes May 6-7, 1993, *supra* note 137, at 3-4.

146. Berger, Comments Memo, *supra* note 135, at 17.

147. *Id.* at 29.

148. *Id.*

149. *Id.* at 6.

150. Berger, Solutions Memo, *supra* note 135, at 1.

151. *Id.*

152. *Id.*

when they have been sexually assaulted or harassed” (emphasis in original).¹⁵³ According to Professor Berger, the general prohibition is meant to apply to both criminal and civil cases because of the embedded sexual stereotypes in sexual behavior and sexual predisposition evidence.

Professor Berger proposed amending the Commentary to clarify the meaning of sexual predisposition and sexual behavior and the broad reach of the general prohibition. Professor Berger suggested including the following two paragraphs in the Advisory Committee Note:

Past sexual behavior connotes all activities that involve actual physical conduct consisting of sexual intercourse or sexual contact or that imply sexual intercourse or sexual contact. *See, e.g., United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991), *cert. denied*, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); *State v. Charmichael*, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible). In addition, the word “behavior” should be construed to include activities of the mind, such as fantasies or dreams. *See* Charles A. Wright & Kenneth A. Graham, Jr., *Federal Practice and Procedure*, § 5384 at p. 548 (1980) (“While there may be some doubt under statutes that require ‘conduct,’ it would seem that the language of Rule 412 is broad enough to encompass behavior of the mind.”).

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to imply a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the fact finder. Admission of such evidence would contravene Rule 412’s objective of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(4) exception is satisfied, evidence such as that relating to the alleged victim’s mode of dress, speech, posing in the nude, and lifestyle will not be admissible.¹⁵⁴

The Advisory Committee Note to Rule 412 included the language above

153. *Id.* at 2.

154. Berger, Solutions Memo, *supra* note 135, at 4; *see also* Albin, *supra* note 11, at 617-661, where I provide a fulsome discussion of the definitions of sexual behavior and sexual predisposition and the admissibility of sexual fantasies and dreams as evidence of sexual behavior under the criminal consent exception. Under that definition of sexual behavior in the Note, such evidence is characterized as sexual behavior evidence and therefore admissible as evidence of consent. In the article, I argue that sexual fantasies and dreams, imagined or unconscious thoughts, are not relevant to consent and should be characterized as sexual predisposition evidence, so the evidence would be excluded under the criminal consent exception, Rule 412(b)(1)(b).

when Congress amended it, except the civil exception was referenced as Rule 412(b)(2) rather than (b)(4).¹⁵⁵ This amendment to the draft note provided some clarification, but it did not explicitly define sexual predisposition. And, although the general prohibition banned sexual behavior and sexual predisposition evidence, given the breadth of the civil exception, the general prohibition as applied to civil cases was limited at best.

The Evidence Advisory Committee, tasked with finalizing the Rule 412 amendment, met for the first time only three days after Professor Berger's Comments Memo and Solutions Memo.¹⁵⁶ Because of the expedited timeline, the Committee also had a public hearing during that meeting.¹⁵⁷ After testimony, the Evidence Committee discussed the draft amendment. Judge Winters, the Committee Chair, explained that the formulation of the Rule generally assumed admissibility in criminal and civil cases would be the same.¹⁵⁸ But that was not actually the case. The civil exception potentially allowed the admission of sexual predisposition *and* sexual behavior evidence and included a balancing test, unlike the more specific criminal exceptions. The Committee also discussed predisposition evidence. The Committee agreed that predisposition evidence should be excluded because it related to sexual innuendo and that "the Note must state clearly that sexual predisposition evidence is a type of evidence relating to sexual innuendo that is excluded regardless of whether it is being used for a propensity inference."¹⁵⁹ The Committee was concerned that the Rule would endorse the view that evidence such as a victim's dress or lifestyle would imply predisposition.¹⁶⁰ Under the civil exception, however, sexual predisposition evidence is admitted for that purpose.

Further emphasizing the distinction between the civil and criminal exceptions, the Committee decided that the criminal and civil exceptions should be in separate subsections, and the Committee renumbered the rule so that all the criminal exceptions would fall under subsection (b)(1) and the civil exception to the general prohibition would fall under section (b)(2).¹⁶¹ Importantly, the Committee rejected a balancing test as applied to the criminal exceptions because "a balancing test would be read as an invitation

155. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141(b)(2), 108 Stat. 1796, 1919.

156. Evidence Advisory Committee Minutes May 6-7, 1993, *supra* note 137, at 1.

157. *Id.* at 2.

158. *Id.* at 5.

159. *Id.*

160. *Id.*

161. *Id.* at 7-8.

to allow in evidence that was previously excluded.”¹⁶² The Committee did not have such concerns about the civil exception. The Committee decided that the civil exception needed to be broader than the criminal exception because, according to the Committee, civil cases were more unpredictable than criminal cases.¹⁶³ There is no additional discussion in the Minutes outlining the basis for this assumption. Given the resistance to applying the Rule to civil cases and concerns expressed about *Meritor*, the Committee likely compromised by adopting an expansive civil exception. The Committee attempted to rein in the scope of the civil exception somewhat by adopting the balancing test rather than the element/fair trial test. Under that test, there was concern that materiality would allow admissibility.¹⁶⁴ And, the Committee did not adopt a Rule 403 test because that was viewed as inadequate protection for the victim.¹⁶⁵ Yet, by adopting a balancing test, the Committee was aware that admissibility under the civil exception was broader than that under the criminal exception.¹⁶⁶

Consistent with this discussion, the Advisory Committee on Evidence Rules submitted a draft amendment to the Standing Committee for its June meeting.¹⁶⁷ This draft amendment included a general prohibition of sexual behavior and sexual predisposition evidence in civil or criminal proceedings involving sexual misconduct.¹⁶⁸ The draft amendment outlined three exceptions in criminal cases, none of which explicitly allowed the admission of sexual predisposition evidence, and then provided a separate civil exception.¹⁶⁹ Unlike the criminal exception, the civil exception allowed evidence of the victim’s sexual predisposition and sexual behavior if it were admissible under the Federal Rules of Evidence and “if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.”¹⁷⁰ And, unlike the criminal exception, the civil

162. *Id.* at 7.

163. *Id.*

164. *Id.* at 8.

165. *Id.* at 9.

166. *Id.* at 7.

167. Jud. Conf. of the U.S., Minutes of the Committee on Rules of Practice and Procedure, at 19-20 (June 17-19, 1993), https://www.uscourts.gov/sites/default/files/fr_import/ST06-1993-min.pdf; see also Jud. Conf. of the U.S., Report of the Advisory Committee on Evidence Rules, Attachment dated May 24, 1993, [hereinafter Attachment dated May 24, 1993], https://www.uscourts.gov/sites/default/files/fr_import/EV5-1993.pdf.

168. *Id.*

169. *Id.*

170. *Id.*

exception applied a balancing test, allowing greater leeway for the court in terms of admissibility, a test rejected by the Evidence Committee for the criminal exception because of the likelihood of courts admitting such evidence.¹⁷¹

The Committee Note provided the rationale for the Rule — to protect victim privacy and “sexual stereotyping that is associated with the public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process” and to encourage victims to participate in legal proceedings where they allege sexual misconduct.¹⁷² The Note stated that the Rule applied to civil and criminal proceedings and also provided that the rationale for the Rule applied equally to civil and criminal cases.¹⁷³ But, given the Rule’s structure, there were two different rules for criminal and civil proceedings. The Note defined sexual behavior as “all activities that involve actual physical conduct” and activities of the mind, such as fantasies or dreams.¹⁷⁴ Thus, sexual fantasies or dreams were potentially admissible as the victim’s sexual behavior under the civil exception.

The Note stated that sexual predisposition evidence is excluded. Neither the Note nor the Rule explicitly defined sexual predisposition. However, the Note stated that “the 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” because such evidence contravenes the purpose of the Rule.¹⁷⁵ In other words, the Note implied that sexual predisposition evidence is not admissible. Unless the civil exception was satisfied, “evidence such as that relating to the alleged victim’s mode of dress, speech, or life-style will not be admissible.”¹⁷⁶ Thus, the Note implied that such evidence was sexual predisposition evidence.

In the section on the civil exception, the Note provided the rationale for the different treatment of civil and criminal cases. The Note stated that applying the balancing test in civil cases, rather than specific exceptions, was justified because of the “difficulty of foreseeing future developments in the law.”¹⁷⁷ Thus, because of new and evolving causes of action in sexual

171. It should be noted that in the criminal context, case law provides that courts may apply Fed. R. Evid. 403 to evidence potentially admissible under Rule 412. *See United States v. Brown*, 810 F. App’x 105, 107 (3d Cir. 2020); *see also United States v. Hawkghost*, 903 F.3d 774, 777-79 (8th Cir. 2018).

172. Attachment dated May 24, 1993, *supra* note 167, Committee Note.

173. *Id.* at 1, 4-6.

174. *Id.* at 3.

175. *Id.* at 4.

176. *Id.*

177. *Id.* at 8.

harassment cases, courts needed “greater flexibility.”¹⁷⁸ The Note explained that the balancing test sufficiently protected victim’s rights because: (1) the burden is on the proponent of evidence to satisfy the test for admissibility and (2) the test is a reverse Rule 403 test and requires the probative value of the evidence to substantially outweigh prejudice and “harm to the victim.”¹⁷⁹ Nonetheless, that kind of discretion, rejected in criminal cases because it allowed the admission of evidence that violated victim privacy and discouraged victims seeking redress through the legal system, was permitted under the Rule in civil cases.

At the June 1993 Standing Committee meeting, the Committee made few substantive changes to the Evidence Committee draft, changes primarily related to criminal consent exception, and substantially adopted and approved the Evidence Committee draft and Committee Note.¹⁸⁰ In September 1993, the Standing Committee approved transmittal of the proposed amendment to the Supreme Court for consideration, and then, after approval, it would submit to Congress.¹⁸¹ In the transmittal letter to the Supreme Court, the Judicial Conference stated, in an attachment, that the purpose of the amendment to Rule 412 was to protect victim privacy in all civil and criminal cases.¹⁸²

The Supreme Court withheld approval to amend Rule 412 as applied to civil cases.¹⁸³ Citing *Meritor*, Chief Justice Rehnquist explained that application of the Rule to civil cases may abridge the rights of defendants because, in *Meritor*, the Court recognized that evidence of a victim’s “‘sexually provocative speech or dress’ may be relevant in workplace harassment cases.”¹⁸⁴ According to the Court, the amendment would exceed

178. *Id.* at 9.

179. *Id.*

180. Judicial Conference of the U.S., Minutes of the Committee on Rules of Practice and Procedure 1, 19–20 (June 17–19, 1993), https://www.uscourts.gov/sites/default/files/fr_import/ST06-1993-min.pdf; see also Memorandum from J. Ralph K. Winter & Professor Margaret Berger to the Advisory Comm. on Rules of Evidence, Supp. A (June 22, 1993).

181. Judicial Conference of the U.S., Minutes of the Committee on Rules of Practice and Procedure 1, 10–11 (Sept. 1993), https://www.uscourts.gov/sites/default/files/fr_import/ST9-1993.pdf.

182. Memorandum from L. Ralph Mecham, Director, Administrative Office of the United States Courts to the Chief Justice and Associate Justices of the United States Supreme Court, Attachment – Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure (Oct. 25, 1993) (on file with author).

183. Letter from Chief Justice William H. Rehnquist to John Gerry, Chair of the Exec. Comm. of the Judicial Conference (Apr. 29, 1994) (on file with author).

184. *Id.*

its authority under the Rules Enabling Act because it would modify a substantive right.¹⁸⁵

The Advisory Committee on the Rules of Evidence disagreed with the Supreme Court and determined that the application of the Rule in civil cases and the civil exception's balancing test was not inconsistent with the dictates of the Rules Enabling Act.¹⁸⁶ The Committee discussed modifying the balancing test in the civil exception to a Rule 403 test.¹⁸⁷ The Committee rejected that proposed formulation because it would essentially amount to "no rule for civil cases."¹⁸⁸ At bottom, the Committee found that the civil exception did not overrule *Meritor* nor violate the Rules Enabling Act because the Rule was "fact specific" and required taking *Meritor* into account.¹⁸⁹ The Advisory Committee on the Rules of Evidence resubmitted the draft amendment as originally submitted to the Supreme Court to the Standing Committee, noting that the Rule was within the Conference's authority under the Rules Enabling Act.¹⁹⁰

Because of the Supreme Court's action, the amendment to Rule 412 was not enacted under the Rules Enabling Act. In September 1994, Congress amended Rule 412 and used the language adopted by the Advisory Committee on the Rules of Evidence and the Standing Committee — the draft Rule originally submitted to the Supreme Court.¹⁹¹ The amended Rule contained a civil exception, allowing courts to determine the admissibility of sexual behavior and sexual predisposition evidence under a balancing test.

185. *Id.*

186. Memorandum from Ralph K. Winter, Chair of the Advisory Comm. on the Fed. Rule of Evidence to the Hon. Alicemarie Stotler, Chair of the Standing Comm. on Rule of Practice & Procedure – Attachment to Memorandum at 3-4 (May 17, 1994) (on file with author); *see also* Judicial Conference of the U.S., Minutes of the Advisory Committee on Rules of Evidence 2 (May 9–10, 1994), https://www.uscourts.gov/sites/default/files/fr_import/ev5-9.pdf [hereinafter Evidence Advisory Committee Minutes May 9-10, 1994].

187. *Id.* at 2.

188. *Id.*

189. *Id.*

190. *Id.*

191. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141, 108 Stat. 1796, 1918–19 (Sept. 13, 1994); *see also* Judicial Conference of the U.S., Minutes of the Committee on Rules of Practice and Procedure 3 (June 23–24, 1994), https://www.uscourts.gov/sites/default/files/fr_import/ST06-1994-min.pdf.

IV. REAL-WORLD CONSEQUENCES OF THE EXPANSIVE CIVIL EXCEPTION

Rule 412's broad civil exception significantly impacts the admissibility of evidence in sexual harassment cases. The discretion afforded by the balancing test and the admissibility of sexual predisposition evidence and sexual behavior evidence with individuals other than the perpetrator allows courts to admit evidence that is only relevant because of its sexual connotation for the factfinder.

A. Courts Admit Evidence of the Plaintiff's "Suggestive" Language at Work Because Workplace Behavior, Whether or Not in the Harasser's Presence, Is "Probative" of "Welcomeness"

In *Beard v. Flying J, Inc.*, the plaintiff filed several claims, including a hostile work environment claim under Title VII against Flying J and battery claims against her supervisor.¹⁹² The plaintiff, the Assistant Manager for Flying J's restaurant in Davenport, Iowa, alleged her supervisor frequently brushed his body against hers, rubbed cooking tongs across her breasts, and flicked a pen across her nipples.¹⁹³ The plaintiff told her supervisor that his behavior was unwelcome and complained to several Flying J employees.¹⁹⁴ Other female employees also complained to Flying J about this supervisor's conduct.¹⁹⁵ After an internal investigation by Flying J, where five of the six female employees interviewed by Flying J's district manager complained of inappropriate conduct by the supervisor, Flying J suspended that supervisor.¹⁹⁶ The manager investigating the claim thought the complaints against the supervisor were credible.¹⁹⁷ However, Flying J soon reinstated the supervisor because "according to a memo introduced at trial, Flying J management concluded that the women had conspired to remove Mr. Krout [the supervisor] from his position and that there was no evidence" of misconduct.¹⁹⁸ The plaintiff quit immediately after Flying J reinstated the supervisor.¹⁹⁹ A jury found for the plaintiff on her Title VII claim against Flying J and her battery claims against the supervisor but against her on the

192. 266 F.3d 792, 796 (8th Cir. 2001).

193. *Id.* at 797.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 800.

198. *Id.*

199. *Id.* at 797.

assault and hostile work environment claim against the supervisor.²⁰⁰

On appeal, the plaintiff argued that the district court erred by admitting evidence of workplace “sexual behavior.”²⁰¹ The district court allowed testimony at trial that the plaintiff touched a male employee in the upper thigh in a suggestive manner and that she “frequently spoke in sexually suggestive terms in the workplace.”²⁰² The Eighth Circuit affirmed.²⁰³ Citing *Meritor*, the court found that a plaintiff’s workplace behavior is “highly relevant to the question whether the alleged harassment was welcome,” and it was not an error to admit the evidence.²⁰⁴ According to the court, admission of this type of evidence is not contrary to the goal of Rule 412 because if a plaintiff engages in non-intimate sexual conduct in public at the workplace, it is not unfairly prejudicial.²⁰⁵ The court did not require the “sexual behavior” or “suggestive terms” to be directed at the defendant or even in the defendant’s presence.²⁰⁶ According to the court, the plaintiff speaking in a “sexually suggestive” manner at work is probative of “welcomeness.”²⁰⁷

In *Boeser v. Sharp*, the plaintiff sued her former employers and several management executives for sexual harassment.²⁰⁸ Boeser alleged that her supervisor propositioned her several times and then terminated her employment when she rejected his advances.²⁰⁹ She stated that the management executives were aware of previous complaints against the same supervisor and failed to investigate.²¹⁰ Before trial, Boeser filed a motion in limine under Rule 412 to exclude: (1) her public conduct before working with defendants; (2) conduct while working with them; and (3) conduct after

200. *Id.* at 796.

201. *Id.* at 801.

202. *Id.* at 798. It is not clear if all the evidence complained of is sexual behavior evidence or sexual predisposition evidence. The district court referred to it as sexual behavior but that is not consistent with the definition of sexual behavior in the Advisory Committee Notes where sexual behavior is defined as “all activities that involve actual physical conduct, *i.e.*, sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact.” FED. R. EVID. 412 advisory committee’s note to 1994 amendment.

203. *Id.* at 802.

204. *Id.* at 798, 801-02.

205. *Id.* at 801-02.

206. *Id.* at 798, 801-02.

207. *Id.* at 801-02.

208. 2007 WL 1430100 at *1 (D. Col. 2007).

209. *Id.*

210. *Id.*

she was terminated.²¹¹ The district court denied Boeser's motion to exclude her public conduct before her employment with the defendants.²¹² Even though the court explained that Rule 412 "is intended to be construed broadly to include any evidence that might have a sexual connotation for the factfinder," the court found that evidence of Boeser's public conduct before her employment with defendants may be admissible if defendants were aware of that conduct.²¹³

Under the court's logic, if the defendants simply knew of her prior alleged sexual behavior or predisposition, it would be probative of "welcomeness." But such evidence is only "relevant" because it plays into stereotypes regarding female sexuality; it carries an assumption that a woman's prior sexual conduct, not involving the defendant, is probative of her "welcomeness" to sexual harassment. Thus, it harkens back to the chastity requirement for legal protection under rape law.

In *Wilson v. City of Des Moines*, Wilson filed a sexual harassment claim against the city of Des Moines under Title VII and under the Iowa Civil Rights Act.²¹⁴ The plaintiff, Mary Wilson, worked for the Des Moines Public Works Department.²¹⁵ Wilson alleged that her crew chief, Keith McLey, sexually harassed her by physically touching her inappropriately and repeatedly having sexually offensive workplace discussions.²¹⁶ Wilson's co-worker complained about McLey's treatment of Wilson, and Wilson filed a formal complaint.²¹⁷ The City found that McLey acted inappropriately and issued a one-day leave of absence.²¹⁸ The City fired Wilson for misconduct.²¹⁹ The City alleged Wilson had significant workplace behavioral problems, including sleeping on the job, engaging in sexually explicit conversations at work, and refusing "to take responsibility for her own misconduct."²²⁰ The jury found for the City.²²¹

On appeal, Wilson argued, in part, that the district court erred by admitting evidence of her sexual language and behavior and witness testimony by a co-

211. *Id.* at *2.

212. *Id.* at *3.

213. *Id.*

214. 442 F.3d 637, 639 (8th Cir. 2006).

215. *Id.*

216. *Id.* at 640.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 639.

221. *Id.*

worker that Wilson spoke in a “lewd, rude, and unladylike fashion.”²²² The district court admitted that evidence because her workplace behavior was relevant to whether the sexual harassment was welcomed.²²³ Wilson argued that the admission of this evidence was contrary to the rationale behind Rule 412.²²⁴

The Eighth Circuit affirmed the district court’s admission of evidence of the plaintiff’s sexual predisposition or sexual behavior under the civil exception to Rule 412.²²⁵ The court rejected Wilson’s argument because “there was no danger of harm or prejudice to Wilson or any other party” and because it was relevant to Wilson’s claims.²²⁶ The court conceded that a victim’s private sexual behavior is not relevant but found that an alleged victim’s behavior in the workplace was probative of “welcomeness.”²²⁷ According to the court, because she made comments in public, privacy concerns or concerns about sexual stereotyping no longer existed. But the defense sought admission of this evidence because it would have a sexual connotation for the factfinder.²²⁸ As the appellate court stated, Ms. Sikes’ testimony was meant to demonstrate that Wilson was “lewd” and “unladylike” because of the language she used.²²⁹ This is precisely the type of sexual stereotyping that Rule 412 was meant to address.

B. Courts Admit Evidence of the Plaintiff’s Sexual Behavior at Prior Jobs Because It Is “Probative” of “Welcomeness” at a Later Job

In *Browne v. Signal Mountain Nursery, L.P.*, Browne sued her employer for sexual harassment under Title VII.²³⁰ According to Browne, within a few weeks of working with another employee in the greenhouse department, that employee began making comments about how pretty she was, touched her face, and soon began touching her buttocks, rubbing her shoulders, and brushing against her.²³¹ He also tried to touch her groin and “then asked her if she liked to be kissed down there.”²³² Browne reported these events to

222. *Id.* at 640.

223. *Id.* at 643.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. 286 F.Supp.2d 904, 910-11 (E.D. Tenn. 2003).

231. *Id.* at 909.

232. *Id.*

Signal Mountain Nursery's ("SMN") general manager, who was also the owner's daughter.²³³ SMN began an investigation into the allegations.²³⁴ Several months later, while the investigation continued, the general manager discovered an apron used by Browne with six plant bulbs in it and accused Browne of attempting to steal the bulbs, and SMN fired her.²³⁵ Browne's lawsuit followed.

At trial, the district court permitted co-workers and supervisors from her employment before she worked at SMN to testify about Browne's "flirtatious nature" and other incidents where she engaged in "bodily contact of a sexual nature" at work with them or male customers.²³⁶ The district court admitted that testimony over Browne's Rule 412 objection.²³⁷ The jury found for SMN.²³⁸ Browne filed a motion for a new trial alleging a number of evidentiary errors, including error admitting evidence under Rule 412.²³⁹ Browne argued that her prior workplace behavior was not relevant to the instant case because "the witnesses could not state what happened at SMN between her and the alleged harasser."²⁴⁰

The district court denied Browne's motion.²⁴¹ Citing *Beard* and *Meritor* for the proposition that workplace behavior is "highly relevant" to whether the harasser's conduct was "welcome," the district court found that the evidence was probative of what Browne felt was appropriate at work.²⁴² The district court thought that her "behavior" at another workplace was wholly relevant to whether she welcomed sexual harassment at SMN.²⁴³ The court stated, "[t]he fact her actions did not occur at the particular work environment where the alleged harassment occurred or between her and the alleged accuser does not diminish the relevance of those actions in this case."²⁴⁴ In other words, assuming arguendo, that she flirted at a previous workplace, that is probative of whether she "welcomed" harassment at SMN.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 909-10.

239. *Id.* at 922.

240. *Id.* at 922-23.

241. *Id.* at 924.

242. *Id.* at 923 (citing *Beard v. Flying J, Inc.*, 266 F.3d 792, 801 (8th Cir. 2001); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986)).

243. *Id.*

244. *Id.*

This sexual stereotype that alleged flirtatious conduct at a prior workplace is probative of “welcomeness” at all, let alone at a subsequent workplace, is precisely the type of evidence the Rule was meant to exclude. But, because of the broad civil exception and the discretion given to the court, the court admitted it. In fact, the district court explained that it was “soundly within its discretion in balancing prejudice and probativity.”²⁴⁵

In *Cassidy v. CSX Trans., Inc.*, Carrie Cassidy filed a sexual harassment, gender discrimination, and retaliation lawsuit against her former employer, CSX Transportation.²⁴⁶ Before trial, Cassidy filed a motion in limine under Rule 412 seeking to exclude the admission of testimony about her employment at the Pure Gold strip club before she worked at CSX.²⁴⁷ The district court denied the motion in limine.²⁴⁸ Relying in part on the district court’s holding in *Browne v. Signal Mountain Nursery, L.P.*, the district court in *Cassidy* concluded that conversations Cassidy had at CSX about her work at Pure Gold were “sufficiently probative to outweigh any prejudice” that could result by admitting such evidence.²⁴⁹ The district court noted, however, that Rule 412(c) required an *in-camera* hearing before the evidence was offered and would schedule that hearing at a later date.²⁵⁰ As in *Browne*, the evidence here involved sexual stereotypes and the infusion of sexual innuendo in the factfinding process. The notion that sexual predisposition evidence — *i.e.*, evidence relating to the victim’s lifestyle or prior employment — is sufficiently probative of “welcomeness” flies in the face of the legislative history and the purpose of the rule.

C. Courts Admit Evidence of the Plaintiff’s Dress and Adornments Under the Civil Exception

In *Ferencich v. Merritt*, county clerk office employee Cara Ferencich filed a sexual harassment Title VII claim, a retaliation claim, and a deprivation of civil rights under Section 1983 against the Board of Commissioners for Oklahoma County, her supervisor, and the county personnel director.²⁵¹ Ferencich worked at the county clerk’s office from July 2000 to June 2004 and alleged that her supervisor, Thomas Ferguson, began making sexual

245. *Id.* (citing *United States v. Feinman*, 930 F.2d 495, 499 (6th Cir. 1991)).

246. No. 6:03-376-DCR., 2005 WL 6740409 at *1 (E.D. Ky. 2005).

247. *Id.*

248. *Id.* at *2.

249. *Id.* at *2. The district court opinion did not specify the content of those conversations.

250. *Id.*

251. 79 F. App’x. 408, 411 (10th Cir. 2003).

comments to her as soon as she started working there.²⁵² He sent her sexually explicit emails and called her at home.²⁵³ There was also evidence that, at first, she reciprocated in some of the sexual “banter.”²⁵⁴ But, the harassment went beyond banter, and in January 2001, Ferguson locked the door to a courtroom where Ferencich and Ferguson were alone and placed Ferencich’s hand on his genitals.²⁵⁵ She pulled away, and then he began to unzip his pants and told her to look at his genitals.²⁵⁶ She told him she was not interested, they left the courtroom, and a witness testified that she looked upset that afternoon.²⁵⁷

Ferencich reported what happened to the director of personnel for the county.²⁵⁸ The county investigated the complaint by interviewing witnesses.²⁵⁹ The county learned that Ferguson had a prior complaint for inappropriate conduct and also exposed himself to a department head.²⁶⁰ The county concluded that Ferguson made inappropriate comments to Ferencich in person and via email but the sexual assault complaint was not definitive.²⁶¹ Ferguson was demoted, ordered to complete sexual harassment training, and told to stay away from Ferencich.²⁶² Approximately twice a month, Ferencich had to work in the same office as Ferguson.²⁶³ She told the head of personnel she was uncomfortable working near Ferguson.²⁶⁴ According to Ferencich, he “offered to place her desk in the middle of the street.”²⁶⁵ Ferencich quit about a month later.²⁶⁶

Ferencich sued, and before trial, she filed a motion in limine to exclude evidence of her tongue and eyebrow piercings based on prejudice and lack of relevance.²⁶⁷ Defendants argued the piercing was relevant to

252. *Id.* at 410.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 410-11.

261. *Id.* at 411.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 412.

“welcomeness.”²⁶⁸ Ferencich objected on relevance grounds but did not make a Rule 412 claim related to the piercings at trial.²⁶⁹ At trial, defendants were allowed to introduce evidence related to the piercings.²⁷⁰ The jury heard the following evidence regarding the piercings: (1) the only time Ferguson saw Ferencich’s tongue was when he asked her if she had a tongue ring, and he told her to open her mouth, and she did; (2) in response to defense counsel’s question and over objection, Ferencich testified that she wore an eyebrow and tongue ring to work; (3) defense counsel asked Ferencich if she thought there was a sexual connotation to the piercings and she answered no, and (4) Ferguson testified that an example of Ferencich’s flirting with him was her sticking out her tongue at him.²⁷¹ According to Ferguson, the “sexual purpose of the ring was ‘obvious.’”²⁷² The record does not reflect any testimony that Ferencich made any sexual comments regarding the tongue piercing.²⁷³

The jury found for the defendants.²⁷⁴ On appeal, Ferencich argued the district court erred by admitting evidence of her tongue and eyebrow piercings and that its admission violated Rule 412.²⁷⁵ The Tenth Circuit disagreed.²⁷⁶ Because Ferencich did not reference Rule 412 in the district court when seeking to exclude the evidence of eye and tongue piercings, the Tenth Circuit found that Ferencich waived her Rule 412 objection and reviewed the claim for plain error.²⁷⁷ To show plain error, Ferencich needed to establish prejudice and that the ruling affected her substantial rights.²⁷⁸ Citing the Advisory Committee Note’s “definition” of sexual predisposition, the Tenth Circuit explained that sexual predisposition evidence includes “mode of dress.”²⁷⁹ The court found the testimony relevant and not unduly prejudicial. The court credited Ferguson’s testimony that he interpreted Ferencich’s “showing him her tongue ring as flirting because of its perceived

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 415.

272. *Id.*

273. *Id.* at 412.

274. *Id.* at 413.

275. *Id.* at 414.

276. *Id.*

277. *Id.* at 415.

278. *Id.*

279. *Id.* at 414.

sexual use.”²⁸⁰ The court appears to accept the stereotype that tongue rings are sexual, even though there was no evidence that Ferencich made any sexual comments regarding her tongue ring to Ferguson or anyone else in her workplace. This is precisely the type of sexual innuendo that Rule 412 is meant to exclude.

In *Glazier v. Fox*, a civil sexual battery case, the plaintiff alleged the defendant grabbed her breasts and crotch and inserted his fingers in her vagina and rectum as she was leaving a party that they both attended.²⁸¹ The defendant argued that the alleged incident did not occur at all.²⁸² Pre-trial, the plaintiff filed a motion in limine seeking to exclude a photograph of the plaintiff’s dress from the waist-up the night of the alleged sexual battery and evidence that the plaintiff kissed another guest and performed a “bump and grind” on that guest at the same party.²⁸³

The plaintiff argued the evidence was not relevant because the defendant was not arguing that the conduct was consensual; thus, “welcomeness” was not at issue.²⁸⁴ In the alternative, plaintiff argued, even if relevant, the evidence must be excluded under Rule 412 because it was sexual predisposition evidence barred by the Rule.²⁸⁵ The defendant argued the photograph was relevant because the plaintiff had lost fifty pounds since the alleged sexual assault, and plaintiff’s attire would help the jury decide whether or not the defendant could have committed the assault because the defendant was ninety-one years old at the time.²⁸⁶ In terms of Rule 412, according to the defendant, the Rule was not applicable because public behavior is not implicated by Rule 412, and the evidence was not introduced to show sexual predisposition.²⁸⁷ Alternatively, defendant argued that even if Rule 412 was implicated, the evidence was admissible under the civil exception balancing test.²⁸⁸

The district court denied the motion explaining the Rule generally prohibits evidence offered to show the victim’s other sexual behavior or sexual predisposition.²⁸⁹ The district court noted that this prohibition is “not

280. *Id.* at 415.

281. 2016 WL 827760 at *1 (D.V.I. 2016).

282. *Id.*

283. *Id.*

284. *Id.* at *2.

285. *Id.*

286. *Id.* at *2, *4.

287. *Id.* at *2.

288. *Id.*

289. *Id.* at *2.

absolute” because sexual predisposition and sexual behavior evidence may be admissible under the civil exception.²⁹⁰ The district court found the civil exception applies not only in the criminal context but in the civil context in cases of sexual harassment and sexual battery.²⁹¹ The district court rejected the defendant’s argument that the Rule does not apply to public behavior. Citing the Advisory Committee Note, the court explained the Rule excludes evidence that “‘contravene[s] Rule 412’s objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against *stereotypical thinking*,’” and the court noted that it specifically references mode of dress, speech, or lifestyle as evidence based on public behavior that may fall into this category.²⁹² The court found the evidence at issue “may have a sexual connotation for the fact-finder” and therefore squarely falls within the Rule.²⁹³

After applying the Rule 412 balancing test, however, the court denied the plaintiff’s motion in limine.²⁹⁴ The court noted that the photograph of the plaintiff showed her wearing a “low-cut dress that reveals some of her cleavage.”²⁹⁵ Even though the court recognized a risk that jurors may draw a “less than flattering conclusion from the style of dress,” precisely the type of stereotypical thinking the rule was meant to address, the court decided that the danger of unfair prejudice was low because the dress was not “scandalous” and the photograph did not show her behaving inappropriately.²⁹⁶ The court found the probative value high because that picture was the only photograph of the plaintiff the evening of the assault and the size of the plaintiff was significant.²⁹⁷ Of course, the defense could have offered testimony about the plaintiff’s weight loss or used another contemporaneous picture, rather than one of her with low-cut cleavage. Nonetheless, the court denied the motion under the balancing test.²⁹⁸

These cases demonstrate the impact of the over-inclusive civil exception. Courts admitted evidence of women’s prior employment, “unladylike” language, dress, and tongue piercings. Such evidence invokes sexual stereotyping, sexual innuendo, and is offered for that reason. It necessarily

290. *Id.*

291. *Id.* at *3.

292. *Id.*; see also FED. R. EVID. 412 advisory committee’s note to 1994 amendment.

293. *Glazier*, 2016 WL 827760 at *4.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at *5.

causes unwarranted conclusions and infects the fact-finding process.

V. STEREOTYPED EVIDENCE SHOULD NOT BE ADMISSIBLE

A. *Sexual Harassment is Pervasive, Damaging, and Embedded*

Sexual harassment is widespread. The Equal Employment Opportunity Commission (“EEOC”) Select Task Force on the study of harassment in the workplace reported that 44% of harassment claims filed by federal employees in 2015 alleged sexual harassment.²⁹⁹ In the same report, the EEOC related that this number is dramatically under-inclusive “because approximately 90% of individuals who say that they have experienced harassment never take formal action against the harassment.”³⁰⁰ A meta-analysis of sexual harassment data estimated that between “40-75% of women and 13-31% of men experience some form of sexual harassment in the workplace.”³⁰¹ The EEOC Select Task Force reviewed social science literature and concluded that 25% to 85% of women report being sexually harassed in the workplace.³⁰²

Women file the vast majority of sexual harassment claims.³⁰³ A study funded by the National Women’s Law Center found that in 2016, 7,000 sexual harassment charges were filed, and women filed 82% of those charges.³⁰⁴ Women are four times more likely to say they have experienced sexual harassment and polling data reflects that nearly 48% of women have been sexually harassed.³⁰⁵ The United States Merit Systems Protection

299. Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, EQUAL EMP. OPPORTUNITY COMM’N 16 (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686302.

300. *Id.*

301. Chelsea Willness, Piers Steel, & Kibeom Lee, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERS. PSYCH. 127, 128 (2007) (explaining how meta-analysis can provide a common metric to alleviate statistical misconceptions regarding sexual harassment).

302. Feldblum & Lipnic, *supra* note 299, at 17.

303. Amanda Rossie, Jasmine Tucker, & Kayla Patrick, *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Women*, NAT’L WOMEN’S L. CTR. 4, 5 (2018) (citing a 2016 study funded by the National Women’s Law Center finding that 7,000 sexual harassment charges were filed and 82% of those charges were filed by women.); *see also* Feldblum & Lipnic, *supra* note 299 at 18, 19 (detailing that even though women file most harassment claims does not limit the impact of sexual harassment on men or gender nonconforming individuals).

304. Rossie, et al., *supra* note 303, at 4.

305. Megan Brennan, *U.S. Men Less Concerned Than in 2017 About Sexual*

Board found that approximately two in five federal female employees reported experiencing sexual harassment.³⁰⁶ Sexual harassment cuts across socioeconomic, geographic, cultural, and vocational boundaries.³⁰⁷

Women generally do not report harassment. The EEOC Select Task Force found that in 2016, approximately 70% of women who experienced sexual harassment did not inform a supervisor or manager about it.³⁰⁸ Only 6% to 13% of people who experience harassment formally report it.³⁰⁹ Generally, women do not report it because of the fear of retaliation.³¹⁰ Retaliation takes many forms. Women fear reporting the behavior may result in harsher harassment, increased disciplinary action, low-performance evaluations, or denial of promotions or raises.³¹¹ These fears are based on reality. A literature review of sexual harassment data confirmed that reporting may worsen outcomes for the victim.³¹² The EEOC Select Task Force referenced studies reflecting harm to the victim when sexual harassment claims are reported and noted that avoiding reporting is the “most reasonable course of action” for the victim.³¹³

Social attitudes about sexual harassment may be static. The EEOC Select Task Force Report found that current training programs on sexual harassment resulted in little or no improvement in attitudes about harassment based on a review of thirty years of social science data.³¹⁴ And, even after the high-profile cases exposed during the onset of the #MeToo movement, 2019 polling data shows that fewer men thought sexual harassment was a major problem in the workplace than before the #MeToo movement.³¹⁵

Harassment, GALLUP 5 (March 18, 2019), <https://news.gallup.com/poll/247823/men-less-concerned-2017-sexual-harassment.aspx#:~:text=Fifty%2Dfive%20percent%20of%20men,the%20same%20question%20are%20negligible>.

306. U.S. Merit Systems Protection Board, *Update on Sexual Harassment in the Federal Workplace*, U.S. MERIT SYSS. PROT. BD.13 (March 2018), https://www.mspb.gov/studies/studies/Sexual_Harassment_in_the_Federal_Workplace_Trends_Progress_Continuing_Challenges_253661.pdf.

307. Willness, et al., *supra* note 301, at 128.

308. Feldblum & Lipnic, *supra* note 299, at 24.

309. *Id.*

310. Bruce L. Haller, *Sexual Harassment in the Workplace: Legal Attempts to Resolve a Cultural Problem*, NORTHEAST BUS. & ECON. ASS’N PROCS. 102 (2018).

311. Deborah J. Vagins & Mary Gatta, *Limiting our Livelihood: The Cumulative Impact of Sexual Harassment on Women’s Careers*, AM. ASS’N OF UNIV. WOMEN 18 (November 2019), <https://www.aauw.org/resources/research/limiting-our-livelihoods/>.

312. McDonald, *supra* note 10, at 9.

313. Feldblum & Lipnic, *supra* note 299, at 24.

314. *Id.* at 3.

315. Brennan, *supra* note 305, at 5.

Workplace sexual harassment causes significant economic and psychological harm to victims and detrimentally impacts employers. Meta-analyses of research data on sexual harassment confirm the psychological, social, and economic harm caused by sexual harassment. Data indicates harassed employees receive less satisfaction from their work, see a decrease in job performance, and an increase in absenteeism and job turnover.³¹⁶ Significantly, this impacts women's career trajectories resulting in an increase in financial stress and a decrease in earnings.³¹⁷ In terms of psychological impact, the data reflects victims experience lower self-esteem, increased depression and anxiety, and PTSD.³¹⁸ Sexual harassment also negatively impacts employers because it results in higher employer turnover, increased legal costs, increased sick leave, increased absenteeism, and decreased productivity.³¹⁹

B. *"Welcome Sexual Harassment is an Oxymoron"*³²⁰

The legislative history of the Rule shows the centrality of *Meritor* and the "unwelcomeness requirement" on the structure and content of the civil exception. As a result, evidence involving sexual stereotypes has been considered relevant to show "welcomeness" and admitted into evidence under the civil exception. The false premise that women "welcome" or "invite" harassment requiring plaintiffs to prove "unwelcomeness" is belied by social science data and common sense. First, as discussed above, a significant percentage of working women have been sexually harassed in the workplace. These women report experiencing sexually harassing behavior, not desired sexual contact. Second, social science data shows the significant psychological and financial harm caused by sexual harassment. With such intense harm, it is inconceivable that women "welcome" harassment. Third, one of the arguments supporting the "unwelcomeness" requirement is that consensual sexual conduct in the workplace needs to be protected, and

316. Darius K-S. Chan, Shu Fai Cheung, Suk Yee Chow, Chun Bun Lam, *Examining the Job-Related, Psychological, and Physical Outcomes of Workplace Sexual Harassment: A Meta-Analytic Review*, 32 PSYCH. WOMEN Q. 362 (2008); see also Heather McLaughlin, Christopher Uggen, Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 J. GENDER & SOCIETY 333, 352 (2017).

317. McLaughlin, et al., *supra* note 316, at 352.

318. Chan, et al., *supra* note 316, at 363; see also Willness, et al., *supra* note 301, at 149.

319. Willness, et al., *supra* note 301, at 137.

320. Carr v. Gen. Motors Corp., 32 F.3d 1007, 1008 (7th Cir. 1994).

therefore plaintiffs must show that the behavior is “unwelcome.”³²¹ But sexual harassment is about power and gender systems rather than consensual sexual behavior.³²² In fact, as the Seventh Circuit stated in *Carr v. Allison Gas Turbine Div., General Motors Corp.*, “welcome sexual harassment is an oxymoron.”³²³ In that case, the plaintiff, Mary Carr, was the only woman working in GM’s gas turbine division as a tinsmith apprentice.³²⁴ Carr’s co-workers made derogatory, sexually explicit comments to her daily, cut out the seat of her overalls, posted pictures and graffiti of offensive sexual characters in the workplace, exposed themselves to her, and threw a burning cigarette at her.³²⁵ Carr repeatedly complained about the conduct, but her employer refused to take action, so she quit.³²⁶

The district court found that even if the behavior were harassing, Carr “invited” it, and therefore it was not unwelcome.³²⁷ The district court found that Carr “provoked the misconduct of her co-workers” with her “unladylike” behavior, such as using profanity.³²⁸ In other words, if she had been “ladylike,” she would not have been harassed; her conduct caused the harassment rather than being the responsibility of the harasser.³²⁹ The Seventh Circuit rejected this view and stated:

Even if we ignore the question why “unladylike” behavior should provoke not a vulgar response but a hostile, harassing response, and even if Carr’s testimony that she talked and acted as she did in an effort to be “one of the boys” is (despite its plausibility) discounted, her words and conduct cannot be compared to those of the men and used to justify their conduct and exonerate their employer. The asymmetry of positions must be considered. She was one woman; they were many men. Her use of terms like “fuck head” could not be deeply threatening, or her placing a hand on the thigh of one of her macho coworkers intimidating; and it was not she who brought the pornographic picture to the “anatomy lesson.” We have

321. Larsa K. Ramsini, *The Unwelcome Requirement in Sexual Harassment: Choosing a Perspective and Incorporating the Effect of Supervisor-Subordinate Relations*, 55(5) WM. & MARY L. REV. 1961, 1968 (2014).

322. Heather McLaughlin, Christopher Uggen, & Amy Blackstone, *Sexual Harassment, Workplace Authority, and the Paradox of Power*, 77(4) AM. SOCIO. REV. 625, 626 (2012); see also Christopher Uggen & Amy Blackstone, *Sexual Harassment as a Gendered Expression of Power*, 69 AM. SOCIO. REV. 64, 88 (2004).

323. *Carr*, 32 F.3d 1007, 1008 (7th Cir. 1994).

324. *Id.* at 1009.

325. *Id.* at 1009-10.

326. *Id.* at 1010.

327. *Id.*

328. *Id.* at 1011.

329. *Id.*

trouble *imagining* a situation in which male factory workers sexually harass a lone woman *in self-defense* as it were; yet that at root is General Motors' characterization of what happened here. It is incredible on the admitted facts.³³⁰

The Seventh Circuit noted that “welcome” sexual harassment should not be considered. The only questions before the court were: (1) whether the plaintiff was subjected to hostile, intimidating, degrading behavior that adversely affected the conditions where she worked and; (2) if so, was the defendant's response to that behavior negligent.³³¹ The Seventh Circuit reversed and remanded with instructions to enter judgment for the plaintiff and proceed to damages.³³²

The reliance on this premise, that women “welcome” sexual harassment, and the “unwelcomeness” requirement itself highlight continued embedded judgments of female sexuality. As Susan Estrich explains in *Sex at Work*, requirements already exist to prove that “sex is harassment.”³³³ In terms of *quid pro quo* cases, where the plaintiff must show a link between sexual advances or favors and “a job benefit or loss,” Estrich argues that “welcomeness” in this context is irrelevant because free will cannot exist in that circumstance and Title VII does not afford protection to that employer.³³⁴ In hostile work environment claims, the plaintiff must show the workplace is objectively hostile and, as Estrich notes, the “subjective welcomeness inquiry” is “at odds” with that requirement.³³⁵

C. Sexual Predisposition Evidence and Sexual Behavior Evidence with Individuals Other than the Defendant Are Not Probative

Even if the “unwelcomeness” requirement were valid, sexual predisposition evidence and sexual behavior evidence with individuals other than the defendant are not probative of “inviting” sexual harassment or “unwelcomeness” to be admissible. Such evidence is only relevant and probative if viewed through the lens of sexual stereotypes. Rule 412's general prohibition is meant to exclude this type of evidence.

Some courts have agreed. For example, in *Smith v. Ergo Solutions, LLC*, the plaintiff, Twila Smith, alleged sexual harassment at Ergo Solutions.³³⁶

330. *Id.* (citations omitted).

331. *Id.* at 1009.

332. *Id.* at 1012-13.

333. Estrich, *supra* note 7, at 830-31.

334. *Id.* at 831.

335. *Id.* at 833.

336. No. 14-382 (JDB), 2019 WL 3068293 at *1 (D.D.C. July 12, 2019).

Smith filed a pre-trial motion in limine to exclude two emails with video attachments.³³⁷ One video was titled “And you Think You Have Balls,” showing a man’s enlarged testicles.³³⁸ The other video was titled “Nasty.”³³⁹ That video showed a monkey urinating in its own mouth.³⁴⁰ The emails and attachments were sent to two co-workers who planned to testify that the emails and attached videos were typical sexual videos that plaintiff sent them while she worked at Ergo and would show she “willingly engaged in a ‘sexual type of horseplay at the office,’” and therefore, she welcomed the alleged harassment and was not harassed.³⁴¹

Citing *Meritor*, the district court found the videos “at least minimally relevant” to welcomeness.³⁴² The plaintiff did not dispute the videos had a sexual connotation.³⁴³ The court noted that because Smith emailed the videos and the alleged perpetrator, Brownlee (a managing partner at Ergo), was aware of that fact; it could be argued that Smith engaged in “sexually-charged conduct in the workplace” and thus the videos might arguably be relevant to welcomeness.³⁴⁴

Although the court found the videos arguably relevant, the court granted Smith’s motion in limine and found the videos and accompanying testimony inadmissible under the civil exception to Rule 412.³⁴⁵ Applying the civil exception balancing test, the court found this sexual predisposition evidence highly prejudicial.³⁴⁶ The district court explained that this evidence was offered to highlight Smith’s “‘lewd behavior rife’ with ‘sexual references’” and that she contributed to “sexual horseplay” at the office.³⁴⁷ The court noted that the “value to the defense of these exhibits and testimony lies in their ability to evoke “a sexual connotation for the factfinder” and was precisely the type of sexual behavior or sexual predisposition evidence prohibited under the Rule unless the civil exception applied.³⁴⁸ The court found that the exhibits, even if relevant, were “barely probative” of the

337. *Id.* at *2.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at *3-4.

346. *Id.*

347. *Id.*

348. *Id.* at *3.

relationship between Smith and Brownlee and whether Brownlee's conduct was welcome.³⁴⁹ According to the district court, "[s]ending crude videos by email to one or more people at her place of employment — but, notably, not to her alleged harasser" — did not make it more likely that the plaintiff welcomed Brownlee's sexual advances.³⁵⁰ The meager probative value and clear prejudicial effect of the evidence led the court to find the evidence inadmissible under Rule 412.³⁵¹

Another rationale behind admitting this type of evidence under the civil exception is the importance of such evidence in combatting the plaintiff's claims regarding damages. Commentators have argued that restricting evidence related to claims for compensatory or punitive damages may violate a defendant's rights.³⁵² But some courts recognize such evidence is not probative. For example, in *Wolak v. Spucci*, the plaintiff, a nationally recognized K-9 officer, brought a Title VII hostile work environment claim against the police chief, mayor, and the village where she worked.³⁵³ She was the only female police officer to serve in that village.³⁵⁴ According to the plaintiff, she did not receive backup from fellow officers.³⁵⁵ She also alleged, and defendants did not dispute, that police officers routinely brought pornography into the police station.³⁵⁶ Officers put pornography posters up in the men's locker room that the plaintiff had to go through to get to the kitchen and bathroom.³⁵⁷ Even when ordered to take the pornographic posters down, they went right back up.³⁵⁸ The police chief's notes suggested the pornography was meant for the plaintiff.³⁵⁹ The jury found a hostile work environment but also found that it did not injure the plaintiff.³⁶⁰ The plaintiff appealed, arguing the district court erred by admitting evidence of the plaintiff's sexual behavior or sexual predisposition outside of work.³⁶¹

349. *Id.*

350. *Id.* at *4.

351. *Id.*

352. Andrea A. Curcio, *Rule 412 Laid Bare: A Procedural Rule That Cannot Adequately Protect Sexual Harassment Plaintiffs from Embarrassing Exposure*, 67 U. CIN. L. REV. 125, 169 (1998).

353. 217 F.3d 157, 158 (2d Cir. 2000).

354. *Id.*

355. *Id.* at 159.

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* at 158.

361. *Id.* at 159.

The district court allowed the defense to ask the plaintiff about two parties she attended where pornographic videos were shown while she was present and a couple of other occasions when she watched pornographic sex acts outside of work.³⁶² The court, at a pre-trial hearing, revealed its view that plaintiff's private sexual behavior or sexual predisposition was relevant to damages.³⁶³ It stated, "[a]t least for the purposes of computing her damages for shame and humiliation and the like, no plaintiff should be permitted to portray herself to the trial jury falsely, as some sort of shrinking violet or as a novice in a nunnery."³⁶⁴ In other words, if the plaintiff watched pornography, how could she have been offended by pornography in the workplace directed at her?

The Second Circuit held that Rule 412 applied to sexual harassment claims and, further, that responses to defense counsel's questions should not have been admitted under the Rule because pornography was sexual behavior or sexual predisposition evidence prohibited under the Rule.³⁶⁵ The court explained that "welcomeness" does not depend on the private sexual behavior of the plaintiff.³⁶⁶ The court stated that "[e]ven if a woman's out-of-work sexual experiences were such that she could be expected to suffer less harm from viewing run-of-the-mill pornographic images displayed in the office, pornography might still alter her status in the workplace, causing injury, regardless of the trauma inflicted by the pornographic images alone."³⁶⁷ At bottom, sexual predisposition evidence or sexual behavior evidence with individuals other than the defendant is not sufficiently probative to be admitted.

VI. SAFEGUARDING VICTIMS AND PROTECTING RATIONAL VERDICTS

Much scholarly work has been devoted to critiques of the "unwelcomeness" requirement in sexual harassment law. Far less has been written on the civil exception to Rule 412, allowing litigants to admit "welcomeness" evidence. Two scholars, Andrea Curcio and Jane Aiken, have written on the civil exception to Rule 412, and each argues that the

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.* at 160.

366. *Id.*

367. *Id.* at 160-61.

exception does not effectuate its purpose and proposed amending the Rule.³⁶⁸

Curcio explains that Rule 412 has not achieved its stated purpose because (1) courts have not applied the rule to civil discovery;³⁶⁹ (2) procedural rules allowing expert testimony and psychological examinations allow otherwise inadmissible evidence to be admissible (such as the bases for the expert's opinion); and (3) judges' gender bias.³⁷⁰ Curcio argues that the rule inevitably fails because the "unwelcomeness" element requires defendants to present "welcomeness" evidence.³⁷¹

368. Curcio, *supra* note 352, at 125-183; *see also* Jane H. Aiken, *Protecting Plaintiff's Sexual Pasts: Coping with Preconceptions Through Discretion*, 51 EMORY L. J. 559-586 (2002).

369. Curcio *supra* note 352, at 143. Curcio effectively outlines the "differing goals" of discovery rules and rules of evidence. Discovery may allow defense counsel to expansively inquire into the plaintiff's sexual history, sexual behavior, and sexual predisposition, even if such evidence is not admissible at trial under Rule 412. The discovery problem has been compounded by the unpredictability of admissible evidence under Rule 412 because of the balancing test. Aiken, *supra* note 368, at 585. This Article addresses the admission of evidence under FED. R. EVID. 412 and does not address discovery under the Federal Rules of Civil Procedure. However, admissibility of evidence under the Rules directly impacts what is discoverable. Although discoverable information need not be admissible to be discoverable, it must be relevant to the claim. Fed. R. Civ. P. 26 (b)(1). An expansive view of admissibility of sexual predisposition and sexual behavior evidence under the civil exception to the Rule allows expansive discovery, even though the Advisory Committee Note explains that courts should enter appropriate discovery orders consistent with the rationale behind the Rule. *See* FED. R. EVID. 412 advisory committee's note to 1994 amendment. For example, in *Miller v. Sweetheart Corp.*, No. 1:96cv00111, 1997 WL 33153107, at *1 (N.D. Ga. Oct. 15, 1997), the district court found refused to quash subpoenas to women's clinics to determine if the plaintiff had an abortion. The defense sought these subpoenas because the plaintiff allegedly confided in the defendant that she was pregnant and planned to have an abortion. *Id.* at *1. The defendant did not argue that he and the plaintiff had sexual intercourse. Rather, the defendant argued that this evidence showed that he and the plaintiff had a close relationship because she confided in him and thereby was evidence of "welcomeness." *Id.* at 7. The plaintiff testified under oath that she did not have an abortion and only told the defendant that she was pregnant so that he would leave her alone. *Id.* at 8. Even though the district court found that Fed. R. Civ. P. 26 governs discoverability, Rule 412 informs the scope of discovery. *Id.* at *7. Nonetheless, the district court found that the information, even though sensitive, "is reasonably calculated to lead to the discovery of admissible evidence and could help establish a viable defense to the plaintiff's claim of sexual harassment." *Id.* Thus, because of the breadth of the civil exception, the district court found that a women's alleged abortion, where the alleged pregnancy had no connection to the defendant, was information that could lead to admissible evidence.

370. Curcio, *supra* note 352, at 128, 140-43, 151-165.

371. *Id.* at 183.

To effectuate the Rule's purpose, Curcio proposed amending the civil exception to bar evidence "of plaintiff's conduct with any person other than the alleged harasser."³⁷² She explains that admitting evidence of the harassers' perception of the victim based on her consensual sex with others is not relevant to "welcomeness," just as a woman's prior sexual behavior with other individuals is not relevant to consent in the criminal context.³⁷³ She advocates limiting this amendment to sexual harassment cases because the Rule would potentially limit admissibility of relevant evidence in cases such as *Judd v. Rodman*,³⁷⁴ where the plaintiff alleged she contracted genital herpes from Dennis Rodman and Rodman sought to introduce evidence of her prior sexual history to show she contracted this condition from someone else.³⁷⁵ As a caveat to her proposed rule, she noted that this restrictive evidentiary rule addresses the problem as it existed when her article was written and may not address changes in sexual harassment law.³⁷⁶ Curcio also pointed out that a more restrictive rule may unfairly hamper a defendant's defense regarding damages.³⁷⁷ She asserted, for example, that if the plaintiff claims "extraordinary emotional distress damages and extraordinary medical expenses, it would be unfair, unprecedented, and perhaps a due process violation to prohibit the defendant from attempting to prove those damages are attributable to some other exclusive cause."³⁷⁸ She also advocated a catch-all constitutional provision similar to the criminal provision.³⁷⁹

Jane Aiken looked at the civil exception through a slightly different lens. She focused on the discretionary aspect of the civil exception and the resulting unpredictability of its application because of judicial discretion.³⁸⁰

372. *Id.* at 167.

373. *Id.* at 167-68.

374. 105 F.3d 1339, 1342-43 (11th Cir. 1997). Judd also argued that the district court improperly allowed evidence of prior employment as a nude dancer was "probative as to damages."

375. *Id.* at 1340.

376. Curcio, *supra* note 352, at 168. This is the same rationale employed by the drafters of the rule and the Advisory Committee to incorporate a balancing test in the civil exception. That rationale, the concern about the developing law, is unfounded in terms of amending the statute. Developing sexual harassment law has not been hampered by the rule, nor has there been evidence that a more restrictive rule would hamper such developments.

377. *Id.* at 169.

378. *Id.*

379. *Id.* at 170; *id.* at 172-183 (advocating for a more restrictive discovery rule and additional education for lawyers and judges about gender bias).

380. Aiken, *supra* note 368, at 559-60, 570-72, 576-81.

Aiken, like Curcio, also highlighted the dissonance between Rule 412 and discovery rules.³⁸¹ To address the problem of judicial discretion, Aiken proposed eliminating the balancing test and providing two specific circumstances for admissibility under the civil exception:

(A) evidence of specific instances of sexual behavior by the alleged victim with respect to the alleged perpetrator; and

(B) evidence of specific instances of sexual behavior by the alleged victim after an *in camera* showing by the proponent that such sexual conduct was the actual cause of the severe and emotionally devastating harm alleged in the plaintiff's complaint.³⁸²

Aiken explained the rationale for eliminating the balancing test, *i.e.*, “because the effectiveness of Rule 412 in the civil setting depends mostly on the judge assigned the case” and therefore victims “receive less protection than Congress intended.”³⁸³

Aiken's Section A addresses admissibility for “welcomeness” purposes and only allows such evidence if the defendant shows the sexual behavior was directed at the defendant.³⁸⁴ It is unclear if behavior, as defined in Section A above, includes sexual fantasies and dreams and the scope of the definition of sexual behavior. Section B addresses the admissibility of sexual behavior not limited to sexual behavior with the defendant if offered to show that the defendant caused harm to the plaintiff. Aiken argues that plaintiff's sexual behavior may be relevant to this determination.³⁸⁵ Aiken notes that the plaintiff must only show that damages were substantially caused by the harasser's conduct; she does not need to show that such conduct was the sole cause.³⁸⁶ Significantly, she places the burden on the proponent of the evidence for admissibility.

My proposal is more restrictive than Curcio's or Aiken's and mimics the structure and substance of the criminal exception. The legislative history shows that the stated intent was for the Rule to apply equally in civil and criminal cases. Safeguarding victims and protecting rational verdicts requires that sexual predisposition evidence is excised from the civil exception. Further, the exception should not allow the admission of sexual behavior evidence with individuals other than the defendant. Admissible evidence is limited to two circumstances under the proposed civil exception:

381. *Id.* at 560.

382. *Id.* at 582.

383. *Id.* at 583.

384. *Id.*

385. *Id.* at 584.

386. *Id.*

The court may admit the following evidence in a civil case:

- (A) evidence of specific instances of victim's sexual behavior, if offered to prove that someone other than the alleged perpetrator was the source of physical injury; and
- (B) evidence of specific instances of a victim's sexual behavior with respect to the alleged perpetrator of sexual misconduct.

Section A intends to address situations such as that in *Judd v. Rodman*, where Rodman claimed another individual was responsible for plaintiff's physical injury.³⁸⁷ Section B addresses the mainspring of sexual harassment and sexual misconduct cases and allows evidence of specific instances of sexual behavior between the victim and the defendant. Such evidence would need to be relevant under Rule 401 to be admissible.

There are substantive differences between the civil and criminal exceptions, providing the rationale for separate provisions. First, Rule 412(b)(2)(B) is substantively different from Rule 412(b)(1)(B), the criminal consent exception. As Professor Berger pointed out in the Solutions Memo, the criminal consent exception suggests that the evidence may be admissible when the accused raises the consent defense, whereas in the civil context, there may be additional issues as to whether the conduct was sexual behavior and further whether such behavior was "with" the alleged perpetrator.³⁸⁸ Second, the proposed civil exception does not include a constitutional exception because certain constitutional rights implicated in criminal cases do not apply to civil cases or the government is not a party to each case.³⁸⁹

In addition to amending the Rule itself, the Advisory Committee Note should be amended to clearly define sexual behavior and sexual predisposition evidence. In terms of the definition of sexual behavior evidence, it should not include "activities of the mind, such as fantasies or dreams" because fantasies and dreams "are not behavior in any meaningful sense," and their admission as sexual behavior is contrary to the purpose of the Rule.³⁹⁰ The current definition in the Note would be acceptable as long as the language related to sexual fantasies and dreams as sexual behavior is

387. 105 F.3d 1339, 1340 (11th Cir. 1997).

388. Berger, Solutions Memo, *supra* note 135 at 6. In the criminal consent exception context, whether the conduct constitutes sexual behavior may be an issue. Sexting would be a perfect example and whether certain speech constitutes sexual behavior.

389. For example, Sixth Amendment Confrontation Clause concerns would not be implicated in civil cases. And, in the civil context, procedural due process means that "notice and a hearing must ordinarily proceed any governmental deprivation of a liberty or property interest." Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y. REV. 1, 8 (2006).

390. Albin, *supra* note 11, at 659-60.

excised. That definition reads as follows:

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 . . .³⁹¹

That clause, “that imply sexual intercourse or sexual contact,” would potentially allow speech by the victim directed toward the defendant that implies sexual contact. In other words, the definition is sufficiently broad enough to allow not just sexual contact between the defendant and the victim but also activities that imply sexual behavior.

In terms of the definition of sexual predisposition evidence, the Note should read as follows:

~~The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude~~ **Sexual predisposition evidence connotes** 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.³⁹²

The Note should then state examples of evidence that may be offered to prove sexual predisposition evidence such as dress, lifestyle, speech, and thoughts. The definitions in the Note should clearly outline the distinction between sexual predisposition and sexual behavior evidence to provide guidance to the courts.

Under the proposed Rule, assuming “unwelcomeness” continues to be a requirement under sexual harassment law, the defense would be able to introduce evidence of sexual behavior between the victim and the alleged perpetrator. The defendant would no longer be able to introduce evidence of sexual predisposition or sexual behavior with individuals other than the defendant — evidence that relies upon sexual stereotypes for any relevance or probative value.

VII. CONCLUSION

The civil exception to Rule 412 allows the admission of sexual predisposition evidence and sexual behavior evidence with individuals other than the defendant subject to a balancing test. The substance and structure of the exception embeds stereotypes of female sexuality that place the victim’s conduct on trial. This approach, adopted in the civil exception, was

391. FED. R. EVID. 412 advisory committee’s note to 1994 amendment.

392. *Id.*

rejected by Congress when it first enacted Rule 412, the federal rape shield law, in 1978 because Congress recognized the harm that perpetuation of these stereotypes imposes on victims and the legal process.³⁹³ In 1976, during her testimony to the House Committee holding hearings on Rule 412, Judge Patricia Boyle testified as follows:

The judgments about female sexuality that are represented in the present evidentiary approach to this issue, Mr. Chairman, were made by male jurists 50 to 100 years ago and they represent existing social perspectives about female sexuality. They are not imaginary. Their tenacity, their long life indicates that they represent existing views about the nature of women and the nature of female sexuality.³⁹⁴

Fifty years after Judge Boyle testified, the same embedded stereotypes she referenced are at the core of the civil exception to Rule 412. Those stereotypes result in the admission of evidence that fails to protect victims, infuses sexual innuendo into the trial, and endangers rational verdicts.

393. *Id.*

394. *Hearings*, *supra* note 18, at 81 (statement of J. Patricia Boyle).