EVIDENTIARY HURDLES IN DEFENDING SEXUAL HARASSMENT SUITS: AMENDED RULE 412 AND RULE 415 OF THE FEDERAL RULES OF EVIDENCE

Kevin C. Klein†

For years women suffered through a "double standard" in American society. Now the tide has turned; Congress has singled out a group of men as the target of certain legal "double standards."[1] *And as is often the case when the legislature attempts to right a legal wrong, the pendulum has swung too far in the other direction. In 1994, Congress enacted two rules of evidence that reshaped the standard for admissibility in sexual harassment suits.*[2] *Amended Rule 412 provides that evidence of an alleged victim's prior sexual behavior or sexual predisposition will not be admitted unless the probative value substantially outweighs* the risk of undue prejudice.[3] *Conversely, Rule 415 provides that evidence of the accused's prior misconduct is* admissible.[4] *While this new plaintiff-friendly evidentiary standard may be "politically correct," it is fundamentally unfair to defendants and flies in the face of 200 years of American jurisprudence. This article examines the implications of Amended Rule 412 and Rule 415 and argues for their revision.*

---

† Associate at Husch & Eppenberger, LLC, Kansas City, Missouri. Managing Editor, Cornell Journal of Law and Public Policy 1999-2000; J.D. 2000, Cornell University; A.B. 1997, Brown University. Mr. Klein practices labor and employment law.

1 *See* Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848 (1st Cir. 1998). In this case, the defendants complained of a "double standard" because the district court had admitted evidence "introduced by [the] plaintiff while excluding evidence introduced by [the] defendant." *Id. at 856.* In response the First Circuit stated: "[A]s to the excluded evidence, FED. R. EVID. 412 required the district court to apply a stricter standard with regard to admission of evidence of plaintiff's sexual history than to the evidence admitted under the more liberal standard of FED. R. EVID. 402 & 403." *Id.* at 857.

2 *See* Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, § 40141, 108 Stat. 1796, 1918 (1994); *see also* Jacqueline H. Sloan, *Extending Rape Shield Protection to Sexual Harassment Actions: New Federal Rule of Evidence 412 Undermines* Meritor Savings Bank v. Vinson, 25 Sw. U. L. REV. 363 (1996).

3 *See* FED. R. EVID. 412.

4 *See* FED. R. EVID. 415.

INTRODUCTION

"Whoever fights monsters should see to it that in the process he does not become a monster."[5]

The Federal Rules of Evidence generally provide a liberal standard for the admissibility of evidence.[6] Rule 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."[7] Rule 403 sets out a balancing test to determine when relevant evidence may be held inadmissible.[8] Rule 403 states: "Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."[9]

There are situations, however, when the presumption of admissibility is not applicable. One exception is Rule 404 of the Federal Rules of Evidence, which lays out a general ban on character evidence.[10] Rule 404 bars the admission of character evidence to show conformity therewith except in three narrow circumstances: (1) evidence of an accused's character may be offered by the accused, or by the prosecution to rebut character evidence presented by the accused; (2) evidence of the victim's character may be offered by the accused, or by the prosecution to rebut the same; and (3) evidence of the character of a witness may be offered as provided by Rules 607, 608, and 609.[11]

Amended Rule 412 of the Federal Rules of Evidence ("amended Rule 412")[12] provides another exception to the general presumption of admissibility.[13] Rule 412 states: "In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its proba-

---

5 Joelle Anne Moreno, *Whoever Fights Monsters Should See to it That in the Process He Does not Become a Monster: Hunting the Sexual Predator With Silver Bullets – Federal Rules of Evidence 413-415 – and a Stake Through the Heart – Kansas v. Hendricks*, 49 FLA. L. REV. 505 (1997) (quoting Friedrich W. Nietzsche, Beyond Good and Evil 89 (Walter Kaufmann trans., 1989)).

6 *See generally* Michael Graham, NAT'L INST. FOR TRIAL ADVOCACY, MODERN STATE AND FEDERAL EVIDENCE: A COMPREHENSIVE REFERENCE TEXT (1989).

7 FED. R. EVID. 402.

8 *See* FED. R. EVID. 403.

9 *Id.* (emphasis added).

10 *See* FED. R. EVID. 404.

11 *See* FED. R. EVID. 404(a).

12 Throughout this article, the amended version of Rule 412 of the Federal Rules of Evidence will be referred to as "amended Rule 412." The prior version will be referred to as "original Rule 412." Citations to original Rule 412 refer to the text of the 1988 version of Rule 412. Citations to amended Rule 412 refer to the version of the rule applicable after the 1994 amendments.

13 *See* FED. R. EVID. 412.

tive value *substantially outweighs* the danger of harm to any victim and of unfair prejudice to any party."[14] In essence, Rule 412 is an exception to the second exception to Rule 404. Under Rule 404, evidence of an alleged victim's character would be admissible if the *probative value is not substantially outweighed by the potential harm* from its introduction; whereas, under Rule 412 evidence of an alleged victim's character will not be admitted unless the *probative value of the proffered evidence substantially outweighs the potential harm* from its introduction.[15] Instead of a presumption of admissibility, Rule 412 creates presumption of inadmissibility that may be overcome only by a showing that the probative value of the evidence in question *substantially* outweighs the potential harm from its introduction.[16]

While amended Rule 412 carves out an exception to Rule 404, it is consistent with the general premise behind Rule 404 — that character evidence is suspect.[17] In contrast to these rules limiting character evidence is Rule 415 of the Federal Rules of Evidence, ("Rule 415"), which states: "[E]vidence of [an alleged harasser's] commission of another offense or offenses of sexual assault . . . *is* admissible."[18] Rule 415 makes evidence of an alleged *harasser's* prior sexual misconduct *presumptively admissible*; whereas, evidence of an alleged *victim's* sexual behavior and predisposition is *presumptively inadmissible*.[19]

The combined effect of amended Rule 412 and Rule 415 is a fundamental unfairness for defendants.[20] Rule 412 places a unique burden on

---

14 *Id.* (emphasis added).

15 *Compare* FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence)ë *with* FED. R. EVID. 412(b)(2) ("[E]vidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."). *See also* FED. R. EVID. 609 (evidence of a prior criminal conviction is not admissible if more than 10 years old "unless the Court determines . . . that the probative value substantially outweighs its prejudicial effectë).

16 *See* FED. R. EVID. 412.

17 *See* David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORD. URB. L.J. 305, 332 (1995). Rule 412 did "not fundamentally change long-held assumptions about character evidence except insofar as they reject the generalization that a person's prior consensual sexual experience makes her more likely to have consented in the present situation." *Id.* The rape shield rules follow the general view that "character evidence should be admitted only in the most limited circumstances." *Id.*

18 FED. R. EVID. 415.

19 *See* FED. R. EVID. 415; FED. R. EVID. 412(b).

20 *See* Coates v. Wal-Mart, 976 P.2d 999, 1013 (N.M. 1999) (Franchini, J., dissenting) ("In a court of law . . . evidence offered to show that a defendant must have done a particular act on a particular occasion because it conforms to his alleged character is highly suspect and generally inadmissible."); *see also* Letter from Chief Justice William H. Rehnquist to the Honorable John F. Gerry, Chair of the Executive Committee of the Judicial Conference of the United States (April 29, 1994), *reprinted in* communication from the Chief Justice, the Su-

the accused by establishing a presumption of inadmissibility regarding relevant and otherwise admissible evidence.[21] Conversely, Rule 415 makes evidence of the accused's prior sexual misconduct presumptively admissible.[22] As Federal District Court Judge Susan Weber Wright stated: "Rules 412 and 415 have arguably weighed evidence in favor of alleged victims and against alleged perpetrators.ï"[23]

The purpose of this Note is to discuss the implications of these evidentiary standards and argue for their revision. This discussion will focus on the implications of Rules 412 and 415 in the context of sexual harassment cases. Part I of this article will briefly outline sexual harassment case law and discuss the "welcomenessï" standard. Under the welcomeness standard, if the alleged harasser can show that the behavior in question was welcome, a sexual harassment claim will not stand. Part II details the origin and evolution of Rules 412 and 415 of the Federal Rules of Evidence. Part III analyzes judicial interpretation of Rule 412 and Rule 415. Part IV presents arguments for a proposed correction of the evidentiary dilemma posed by Rules 412 and 415 and Part V presents suggestions for remedying this evidentiary quandary.

I. THE WELCOMENESS STANDARD IN SEXUAL HARASSMENT CASES

"A plaintiff who participates fully in the sexual banter, exchanges mutual crudities, or encourages and condones the employer's conduct cannot claim that her working environment is inhospitable."[24]

---

preme Court of the United States, Transmitting an Amendment to the Federal Rules of Evidence as Adopted by the House of Representatives, pursuant to 28 U.S.C. § 2076, HOUSE DOCUMENT 103-250 (1994) [hereinafter Letter from Chief Justice Rehnquist](the Court, under the Rules Enabling Act, withheld approval of "[t]hat portion of the proposed amendments to Rule 412 which would apply that Rule to civil cases . . . .").

21 *See* Meritor Sav. Bank v. Vinson, 457 U.S. 57 (1986). The court writes:

> While "voluntarinessë in the sense of consent is not a defense to such a claim [of sexual harassment], it does not follow that a complainant's sexually provocative speech or dress is not relevant as a matter of law in determining whether he or she found particular sexual advances welcome. To the contrary, such evidence is obviously relevant.

Id. at 69.

22 *See* FED. R. EVID. 415.

23 The Honorable Susan Weber Wright, *Uncertainties in the Law of Sexual Harassment*, 33 U. RICH. L. REV. 11, 28 (1999).

24 MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 253 (1988); *see also* BARBARA LINDEMAN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 505 (1992) ("If a defendant can show that the plaintiff who complains of vulgar comments and other conduct by a supervisor or co-worker was also sexually aggressive or engaged in sexually explicit conduct, the sexual advances may not meet the 'unwelcome' criteria.").

There are presently two forms of sexual harassment actionable under Title VII of the Civil Rights Act of 1964.[25] The first occurs when the employer conditions advancement or job security upon engaging in a sexual or social relationship with the employer.[26] This is commonly referred to as "quid pro quo" discrimination because employment opportunities are given or withheld as the quid pro quo for a sexual relationship.[27] The second type of harassment, referred to as "hostile work environment" discrimination, involves unwanted behavior that does not affect economic benefits, but creates a hostile or abusive work environment.[28]

A. QUID PRO QUO HARASSMENT

In order to establish a case of sexual harassment under the quid pro quo theory, a plaintiff must show that he or she was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors and that "submission to the unwelcome advances was an expressed or implied condition for receiving job benefits, or that refusal to submit to a superior's demands resulted in a tangible job detriment."[29] Additionally, the alleged victim must show that "the condition of sexual favors is not imposed on employees of the opposite sex."[30]

B. HOSTILE WORK ENVIRONMENT HARASSMENT

Hostile work environment harassment involves

> "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" . . . whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.[31]

In *Meritor Savings Bank v. Vinson*, the Supreme Court held that "[t]he gravamen of any sexual harassment claim is that the alleged sexual

---

[25] *See* PLAYER, *supra* note 24, at 199; Jana Howard Carey, *Defending Sexual Harassment Claims*, *in* AVOIDING AND LITIGATING SEXUAL HARASSMENT CLAIMS 1998, at 9 (PLI Litig & Admin. Practice Course, Handbook Series No. H0-0017 (1998)).

[26] *See* PLAYER, *supra* note 23, at 249.

[27] *See id.*

[28] *See* Carey, *supra* note 24, at 9.

[29] *Id.* at 10.

[30] PLAYER, *supra* note 24, at 250.

[31] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

advances were 'unwelcome.'"[32] The Court stated that "the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turn largely on credibility determinations . . . ."[33] The Court went on to hold that "[t]he correct inquiry is whether the [alleged victim] by her conduct indicated that the alleged sexual advances were unwelcome . . . ."[34]

Since *Meritor Savings Bank* established welcomeness as the controlling element in a sexual harassment suit, "many attorneys have successfully defended sexual harassment cases by proving that the alleged misconduct was not 'unwelcome.'"[35] Thus "[t]he plaintiff's invitation to or provocation of the alleged harassment [became] a focal point of the [defense]."[36] In particular, evidence of the plaintiff's past sexual conduct with the alleged harasser was generally considered highly probative of welcomeness.[37] In most cases, therefore, defense attorneys could offer legitimate evidence of the plaintiff's conduct toward the alleged harasser and her co-workers to establish welcomeness.[38]

Seven years later, the Supreme Court introduced the "totality of circumstances" test to determine welcomeness.[39] Under the totality of the circumstances test, courts are allowed to review the alleged victim's past conduct in determining whether the accused's behavior constitutes sexual harassment.[40]

The Eighth Circuit recently applied the aforementioned standard in *Scusa v. Nestle U.S.A. Co.*[41] The court held that to be actionable as hostile work environment sexual harassment, "the conduct at issue must be 'unwelcome' in that the plaintiff neither solicited it nor invited it and regarded the conduct as undesirable or offensive."[42] The court stated: "The proper inquiry is whether [the alleged victim] indicated by [her] conduct that the alleged harassment was unwelcome."[43] The court held that the plaintiff did not create a genuine issue of material fact on the question of whether the alleged harassment was unwelcome where the

---

32 *Id.* at 68.

33 *Id.*

34 *Id.*

35 Carey, *supra* note 25, at 50.

36 *Id.*; *see also* PLAYER, *supra* note 24, at 505 (When defending a sexual harassment case, "[t]he examiner should . . . explore the complainant's social and sexual conduct to undercut the claim that the advances were unwelcome.").

37 *See* PLAYER, *supra* note 24, at 505.

38 *See id.*

39 *See* Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

40 *See* LINDEMAN & KADUE, *supra* note 24, at 505.

41 *See* 181 F.3d 958 (8th Cir. 1999) (upholding summary judgment where the plaintiff could not show that the alleged behavior was "unwelcome").

42 *Id.* at 966 (referring to Meritor Sav. Bank. v. Vinson, 477 U.S. at 68.).

43 *Id.* (quoting Quick v. Donaldson Co., 90 F.3d 1372, 1387 (8th Cir. 1996)).

undisputed evidence showed that the plaintiff engaged in behavior similar to that which she claimed was unwelcome and offensive.[44]

II. THE EVOLUTION OF EVIDENTIARY STANDARDS IN SEXUAL HARASSMENT CASES

During the first 35 years of their existence, the Federal Rules of Evidence represented a fairly conservative codification of the common law.[45] For the most part, the drafters simply adopted common law rules.[46]

A. RULE 404 – GENERAL BAN ON CHARACTER EVIDENCE

To understand the implications of Rules 412 and 415, it is necessary to understand the general ban on character evidence, which has been a part of American jurisprudence for nearly 200 years.[47] The adoption of the Federal Rules of Evidence in 1975 greatly expanded the approved uses of prior-misconduct evidence.[48] But, up until 1994, use of character evidence for the purpose of showing propensity remained forbidden.[49] Rule 404 of the Federal Rules of Evidence codifies the common law's general ban on character evidence. Rule 404 reads:

> (A) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
> (1) CHARACTER OF ACCUSED. Evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same;
> (2) CHARACTER OF VICTIM. Evidence of a pertinent trait of character of the victim of the crime offered by an accused . . . .
> ****
> (B) OTHER CRIMES, WRONGS, ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

---

44 *See id.* (the plaintiff "admitted that she had used the 'f' word in front of both men and women . . .and that she had told off-color jokes at work and teased other employees").

45 *See* Leonard, *supra* note 17, at 312.

46 *See id.* at 313.

47 *See* Jeffrey G. Pickett, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-415 and the Use of Other Sexual-Offense Evidence in Washington*, 70 WASH. L. REV. 883, 885 (1995).

48 *See id.* at 885-86.

49 *See id.* at 886.

> preparation, plan, knowledge, identity, or absence of mistake or accident . . . .[50]

As is obvious from reading Rule 404, character evidence is disfavored.[51] Evidence of the alleged victim's character to prove propensity is barred, with a few narrow exceptions.[52] Evidence of the accused's character to prove propensity is *absolutely* barred, unless he or she puts character "in issue."[53]

B. ORIGINAL RULE 412

It appears that Congress now sees the Federal Rules as an opportunity to make social policy.[54] The first example of substantive change in the Federal Rules was the passage of Rule 412 (commonly known as "the Rape Shield Law") in 1978.[55] Rule 412, however, did very little to alter the law or structure of evidentiary rules and did "not fundamentally change long-held assumptions about character evidence except insofar as [it] reject[ed] the generalization that a person's prior consensual sexual experience makes her more likely to have consented in the present situation."[56] Original Rule 412 followed the general view that character evidence should be admitted in only certain limited circumstances.[57]

In its original form, Rule 412 was applicable *only* in criminal cases.[58] It spelled out when, and under what conditions, evidence of a rape victim's prior sexual behavior would be admitted.[59] Original Rule 412 provided that a court could not admit evidence of specific instances of a rape victim's prior sexual conduct except in three narrowly defined circumstances:

> (1) where the Constitution requires that the evidence be admitted [;]
> (2) where the defendant raises the issue of consent and the evidence is of sexual behavior with the defendant [;] and
> (3) where the evidence is of behavior with someone other than the defendant and is offered by the defendant

---

50 FED. R. EVID. 404.
51 *See id.*
52 *See id.*
53 *See id.*
54 *See* Leonard, *supra* note 17.
55 *See id.* at 327-33.
56 *Id.* at 331-32.
57 *See id.*
58 *See* GLEN WEISENBERGER, FEDERAL EVIDENCE 170 (3d ed. 1998).
59 *See id.*

> on the issue of whether he was the source of semen or injury.[60]

Congressman Mann of South Carolina, one of the bill's sponsors, stated that the principle purpose of Rule 412 was "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives."[61]

C. THE 1994 AMENDMENT TO RULE 412

In the summer of 1993, Congress proposed a number of changes to the Federal Rules of Evidence, one of which would make Rule 412 applicable to civil cases.[62] As published for comment, the proposed amendment contained two alternate exceptions for civil cases:

> (1) evidence of sexual behavior or predisposition would be admissible if it were essential to a fair and accurate determination of a claim or defense or [(2) evidence of sexual behavior or predisposition would be admissible] if its probative value substantially outweighs the danger of unfair prejudice to the parties and harm to the victim.[63]

Despite heavy criticism from commentators, the Advisory Committee decided on the second option, the balancing test.[64]

On October 25, 1993, the proposed changes were sent to the United States Supreme Court so that it could make its own rules of conduct and procedure pursuant to the Rules Enabling Act.[65] The Court approved the proposed changes and forwarded them to Congress, with one exception; the Court withheld approval of section (b)(2) of Rule 412.[66] Chief Justice Rehnquist stated "some Justices [of the Supreme Court] expressed concern that the proposed amendment [to Rule 412] might encroach on the rights of defendants."[67]

---

60 FED. R. EVID. 412 (1978) (amended 1994).

61 124 CONG. REC. H11944 (daily ed. Oct. 10, 1978) (statement of Rep. Mann), *quoted in* FED. R. EVID. 412 Historical Note (West 1994)).

62 *See* 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, 1172 (1995).

63 *Id.* at 1174 (citing Proposed FED. R. EVID. 412(b)(4)).

64 *See id.* at 1174-75.

65 *See* Letter from Chief Justice Rehnquist, *supra* note 20.

66 *See id; see also* FED. R. EVID. 412(b)(2)("In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to the victim or unfair prejudice to any party.").

67 *See* Letter from Chief Justice Rehnquist, *supra* note 20.

On August 25, 1994, the House of Representatives and Senate passed Amended Rule 412 as part of the Violent Crime Control and Law Enforcement Act of 1994 ("1994 Crime Act"), *over the Supreme Court's objection.*[68] The 1994 Crime Act contained a provision that amended Rule 412 to make it applicable to civil actions involving alleged sexual misconduct.[69] Amended Rule 412, in relevant part, reads:

> (a) EVIDENCE GENERALLY INADMISSIBLE. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
> (2) Evidence offered to prove any alleged victims sexual predisposition.
> (b) EXCEPTIONS
> ****
> (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victims reputation is admissible only if it has been placed in controversy by the alleged victim.
> (c) PROCEDURE TO DETERMINE ADMISSIBILITY.
> (1) A party intending to offer evidence under subdivision (b) must:
> (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
> (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
> (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim

---

[68] *See* Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, § 40141, 108 Stat. 1796, 1918 (1994); *see also* Letter from Chief Justice Rehnquist, *supra* note 20.

[69] *See* Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, § 40141, 108 Stat. 1796, 1918 (1994); *see also* FED. R. EVID. 412 Advisory Committee's Note ("Rule 412 applies to any civil case in which a person claims to be the victim of sexual misconduct, such as sexual battery or harassment.").

> and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.[70]

The Advisory Committee Notes describe the term "sexual behavior" as "all activities that involve actual physical conduct, i.e., sexual intercourse or sexual contact."[71] The Committee went on to state "the word 'behavior' should be construed to include activities of the mind, such as fantasies or dreams."[72] "Sexual predisposition" is defined as "evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder."[73] Thus, "evidence such as that relating to the alleged victim's mode of dress, speech, or lifestyle will not be admissible."[74]

D. THE ADDITION OF RULE 415

Another change in the evidentiary landscape resulting from the 1994 Crime Act was the addition of Rule 415 to the Federal Rules of Evidence.[75] Rule 415 addresses the issue of what evidence of similar sexual activity the alleged victim may introduce to show a pattern on the part of the accused.[76]

The importance of Rule 415 is that it replaces Rule 404 of the Federal Rules of Evidence as the applicable standard for admitting character evidence of a sexual nature. Rule 415 provides a specific admissibility standard in civil sexual misconduct cases, replacing Rule 404's general ban on the admission of character evidence.[77]

Essentially, Rule 415 is a codification of the "lustful disposition" exception to the general ban on character evidence, which allows admission of evidence "showing a passion for unusual or abnormal sexual gratification."[78] One version of the lustful disposition exception restricts use of prior sexual-misconduct evidence to cases where the victim of the uncharged and the charged crimes is the same person.[79] The evidence is thus probative of the defendant's actions toward the particular victim.[80]

---

70 FED. R. EVID. 412.

71 FED. R. EVID. 412 Advisory Committee's Note.

72 *Id.*

73 *Id.*

74 *Id.*

75 *See* Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, § 40141, 108 Stat. 1796, 1918 (1994).

76 *See* FED. R. EVID. 415.

77 *See* United States v. Roberts, 88 F.3d 872, 876 (10th Cir. 1996).

78 Pickett, *supra* note 47, at 889.

79 *See id.*

80 *See id.*

A more inclusive version of the lustful disposition rule focuses not on the victim, but on the defendant's general sexual deviance or aggressiveness.[81] As one commentator has described the broad exception: "Uncharged-sexual-offense evidence will be admissible to prove that the defendant suffers from a general compulsion for sexual deviance, *even where the charged crime is quite different from the prior misconduct.*"[82] This version of the lustful disposition rule is similar to Rule 415. In relevant part, Rule 415 states:

> In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault . . ., evidence of that party's commission of another offense or offenses of *sexual assault* . . . is admissible and may be considered as provided in Rule 413 . . . .[83]

Section (d) of Rule 413 defines sexual assault for the purposes of Rule 415 as:

> (1) any conduct proscribed by Chapter 109A of Title 18, United States Code;
> (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
> (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
> (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or, an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).[84]

Prior to the passage of Rules 415, an alleged harasser could prevent character evidence from being admitted under Rule 404.[85] Rule 415 enlarges the admissibility of evidence of past sexual conduct that was formerly restricted by rule 404.[86] Under Rule 404, "evidence of past wrongs is admissible for limited purposes, including proof of motive of knowledge, but not to allow an inference of conduct in conformance with

---

81 *See id.*

82 *Id.* at 890 (emphasis added).

83 FED. R. EVID. 415 (emphasis added).

84 FED. R. EVID. 413(d). The importance of this definition is that it can be construed to include such innocuous acts as a baseball coach slapping a player on the rear-end as he rounds third base.

85 *See* FED. R. EVID. 404; *see also* Cleveland v. KFC Nat'l Mgmt. Co., 948 F. Supp. 62, 65 (N.D. Ga. 1996).

86 *See* WEISENBERGER, *supra* note 63, at 184-85.

the past wrong."[87] The new rules are designed to change this, so that evidence of the bad character of the offender may be admitted for any relevant purpose.[88]

While Rule 403 should still apply to evidence admitted under Rules 415, the new rules will affect how courts apply the Rule 403 balancing test.[89] Rule 415 allows the trier of fact to consider evidence of other instances of sexual assault *for any matter* to which it is relevant.[90] Rule 415, therefore, "imbue[s] the evidence with more probative value than it would have under Rule 404."[91] The evidence can be considered for its probative value establishing the defendant's propensity to engage in such conduct *in addition to* its probative value in establishing motive, knowledge, or intent.[92] Because of the greater weight given to such evidence, the evidence is less likely to be excluded under Rule 403.[93]

III. JUDICIAL INTERPRETATION OF RULES 412 AND 415

A. RULE 412

Since the 1994 amendment to Rule 412, relatively few courts have devoted significant time to Rule 412's application to civil cases. This section will discuss the diverging philosophies courts have employed when applying Rule 412 to civil actions.

First, Rule 412 bars the admission of "evidence offered to prove that any alleged victim engaged in other sexual behavior."[94] Sexual behavior is defined to include "all activities, other than those 'intrinsic' to the alleged misconduct, that involve sexual intercourse or sexual contact, or that imply such physical conduct."[95] Additionally, Rule 412 "precludes the introduction of evidence 'offered to prove any alleged victim's sexual predisposition.'"[96] Rule 412 is designed to prevent the defendant from offering "evidence 'relating to the alleged victim's mode of dress, speech, or lifestyle,' and other evidence that. . .the proponent believes may have a sexual connotation for the factfinder."[97]

---

87 *Id.* at 185.

88 *See id.*

89 *See id.*

90 *See id.*

91 *Id.*

92 *See id.* at 184-85.

93 *See id.*

94 FED. R. EVID. 412(a)(1).

95 Truong v. Smith, 183 F.R.D. 273, 274 (D.Colo. 1998) (citing FED. R. EVID. 412 Advisory Committee's Note).

96 *Id.* (citing FED. R. EVID. 412(a)(2)).

97 *Id.* (citing FED R. EVID. 412 Advisory Committee's Note).

1. *In the Context of Discovery*

a. Protective Orders

In *Herchenroeder v. Johns Hopkins University Applied Physics Laboratory*, the plaintiff alleged that she was sexually harassed by her former supervisor.[98] She also alleged that the supervisor defamed her by accusing her of having sexual relations with another employee.[99] During the defendant's deposition of the plaintiff, the defendant asked the plaintiff if she had ever discussed engaging in sexual activity with the co-worker.[100] The court recognized that in determining whether discovery is appropriate, it must look to both Rule 26 of the Federal Rules of Civil Procedure and Rule 412 of the Federal Rules of Evidence.[101] After determining that the questions posed to the alleged victim were relevant under Rule 26 of the Rules of Civil Procedure, the court held that "the requested discovery should [not] be permitted without an appropriate *protective order/confidentiality agreement* as contemplated by Rule 412.[102]

In *Sanchez v. Zabihi,* the court held that since the employer was raising the defense that the alleged victim was the sexual aggressor, the alleged victim was required to respond to the defendant's interrogatory regarding the alleged victim's past history of making sexual or romantic advances towards other employees, within parameters established by the judge.[103] The court determined that the appropriate question is whether the information sought was "reasonably calculated to lead to the discovery of admissible evidence in light of the parties claims and defenses, while remaining mindful of the policy underlying Rule 412 that protects victims of sexual misconduct from undue embarrassment and intrusion into their private affairs. "[104] The court limited the defendant's interrogatory to "matters occurring three years before the alleged incidents of sexual harassment."[105] The inquiry was further tailored such that the alleged victim was "not required to answer about any matter involving the co-worker who later became her spouse.[106] Additionally, the plaintiff's answers were subject to a protective order barring anyone but the defendant's attorney from reviewing them.[107]

---

98 *See* 171 F.R.D. 179, 180 (D.Md. 1997).
99 *See id.*
100 *See id.*
101 *See id.* at 182.
102 *Id.* (emphasis added).
103 *See* 166 F.R.D. 500,502 (D.N.M. 1996).
104 *Id.*
105 *Id.*
106 *Id.*
107 *See id.*

In contrast, the court in *Weber v. Multimedia Entertainment, Inc.* stated that the plaintiff "is not a 'victim of sexual misconduct' and thus, even if Federal Rule of Evidence 412 controlled the scope of pretrial discovery, *which it does not*, she is not entitled to the protection of Rule 412 . . t. ."[108]

b. Precluding Discovery

Unlike the *Weber* court, the court *Barta v. City and County of Honolulu* found that Rule 412 applied to discovery.[109] In *Barta*, the court held Rule 26 of the Federal Rules of Civil Procedure, which generally governs discovery, is limited by the Rules of Evidence.[110] The court stated: "Although Rule 412 is a rule controlling the admissibility of evidence rather than its discoverability, Rule 412 must inform the proper scope of discovery . . . ."[111]

The court noted: "[A] central purpose of Rule 412 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 fact-finding process.'"[112] The court, therefore, imposed "restrictions on discovery to preclude inquiry into areas which will clearly fail to satisfy the balancing test of Rule 412(b)(2)."[113] Ultimately the court allowed discovery of evidence concerning the alleged victim's conduct on-duty at work and with the named defendants, but protected evidence as to her sexual conduct while she was away from work was from discovery.[114]

2. *Punishing Defendants*

In *Sheffield v. Hilltop Sand & Gravel Co., Inc.*, the court was presented with the issue of how to prove welcomeness in a sexual harassment suit in light of Rule 412.[115] However, the court did not reach the issue of admissibility under Rule 412; instead, the court chose to sanction the defendant for its disregard of the procedures articulated in Rule 412(c).[116]

---

108 1997 WL 729039 (S.D.N.Y.) (emphasis added).

109 *See* 169 F.R.D. 132 (D.Hawaii 1996).

110 *See id.* at 135; *see also* FED. R. CIV. PROC. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . which appears reasonably calculated to lead to the discovery of admissible evidence.").

111 *Id.*

112 *Id.* (internal citations omitted).

113 *Id.*

114 *See id.* at 135-36.

115 *See* 895 F. Supp. 105, 109 (E.D. Va. 1995).

116 *See id.*

The evidence sought to be offered by the defendant included the plaintiff's description of her sexual relations with her husband, and the plaintiff's use of vulgar language in the workplace.[117] The defendant argued "that the proffered evidence concern[ed] the extent to which the plaintiff was involved in sexually explicit discussions in the workplace."[118] The defendant contended that such evidence went to welcomeness and therefore should be governed by Rule 403.[119] Thus, the defendant did not request that the motion they filed be placed under seal in accordance with Rule 412(c).[120]

The court concluded "that the disputed evidence endeavors to establish the plaintiff's sexual behavior and her predisposition to engage in such conduct."[121] Accordingly, the court determined that Rule 412 must govern the admissibility of such evidence.[122] The court stated: "The overarching purpose of Rule 412, and of the procedures outlined in subdivision (c), is to protect alleged victims against 'the invasion of privacy, potential embarrassment, and sexual stereotyping that is associated with public disclosure of intimate sexual details.'"[123] The court found that "[b]y ignoring the express requirements of Rule 412(c), the defendant frustrated Rule 412's objectives and presumptively inflicted harm upon the plaintiff."[124] The court determined that it would hear testimony from the alleged harasser, but would exclude all other testimony on the issue of the plaintiff's conduct in the workplace.[125]

3. *In the Context of Admissibility*

Courts differ in their determination of whether or not evidence of prior sexual conduct is precluded by Rule 412. Courts look to the potential harm, relevance, and context in which the past behavior took place.

In *Rodriguez-Hernandez v. Miranda-Velez*, the court stated: "Rule 412 . . . reverses the usual approach of the Federal Rules of Evidence on admissibility by requiring that the evidence's probative value 'substantially outweigh' its prejudicial effect."[126] In that case, the defendants complained of a "double standard" because the district court had admitted evidence introduced by the plaintiff while excluding evidence introduced by the defendant.[127]

---

117 *See id.*
118 *Id.*
119 *See id.* at 108.
120 *See id.*
121 *Id.*
122 *See id.*
123 *Id.* at 109 (internal citations omitted).
124 *Id.*
125 *See id.*
126 132 F.3d 848, 856 (1st Cir. 1998).
127 *See id.*

In response, the First Circuit stated: "[A]s to the excluded evidence, Fed. R. Evid. 412 required the district court to apply a stricter standard with regard to admission of evidence of plaintiff's sexual history than to the evidence admitted under the more liberal standard of Fed. R. Evid. 402 & 403."[128] Ultimately, the court held that the district court struck an acceptable balance between the danger of undue prejudice and the need to present the jury with relevant evidence:

> The district court [held] that evidence concerning the plaintiff's moral character or promiscuity and the marital status of her boyfriend was inadmissible under Rule 412. But the court allowed [the] defendants to introduce evidence directly relevant to their theory that plaintiff's relationship distracted her from [her] work. The court also held that evidence concerning plaintiff's allegedly flirtatious behavior toward Miranda, [the alleged harasser,] was admissible to determine whether Miranda's advances were in fact [unwelcome].[129]

Perhaps the best example of an evidentiary ruling that contradicts common sense is in *Socks-Brunot v. Hirschvogel Inc.*[130] In discussing the welcomeness standard in light of Rule 412, the court stated that "evidence of the plaintiff's speech, lifestyle, sexual behavior, or predisposition is inadmissible" *even if it goes to welcomeness,* if Rule 412(b)(2) is not satisfied.[131]

In that case, the defense offered testimony to show that the alleged victim had "flirted with" the individual who allegedly created a hostile work environment by making sexually suggestive comments.[132] The defendant argued that such conduct was "relevant to the issue of welcomeness and was therefore beyond the scope of Rule 412."[133] The court determined that "[e]vidence that a plaintiff in a sexual harassment case may have flirted with the alleged harasser is clearly within the type of conduct described as 'sexual behavior' or 'sexual predisposition' in Rule 412."[134]

The court stated that "[w]hile relevant evidence is generally admissible under Federal Rule of Evidence 403, evidence subject to Rule 412 is presumptively inadmissible, *even* when offered to disprove 'un-

---

128 *Id.* at 857.

129 *Id.*

130 *See* 184 F.R.D. 113 (S.D. Ohio 1999)

131 *Id.* at 118 (citing Sheffield v. Hilltop Sand & Gravel Co. 895 F. Supp. 105 (E.D. Va. 1995)).

132 *Id.* at 122.

133 *Id.* at 118.

134 *Id.* at 122.

welcomeness' in a sexual harassment case."[135] The court held that "such evidence could not meet the standard set forth in Rule 412(b)(2) in that the probative value is weak and the potential harm or prejudice to the alleged victim is strong."[136] The court was concerned that "[s]uch testimony could improperly paint the plaintiff as having invited sexual harassment . . e."[137] The court ultimately determined that admitting such evidence at the trial court level was in error and granted the plaintiff a new trial.[138]

In contrast is the court's analysis in *Fedio v. Circuit City*.[139] In *Fedio*, the court determined that evidence of the plaintiff's workplace demeanor "is highly probative of how little [she] would be offended by [the alleged harasser's] sexual innuendoes when she in fact felt comfortable publicizing information regarding her sex life."[140] The plaintiff argued that the following evidence should have been excluded:

> (1) her statement at work that she was going to wear a finger ring until she "got laid," and the fact that she subsequently removed the ring; (2) her statement about keeping a delivery driver waiting outside her apartment while she engaged in sexual intercourse with her roommate; and (3) the fact that she had been the victim of a date rape prior to obtaining employment with the defendant.[141]

The plaintiff cited case law indicating that a plaintiff's "sexual conduct occurring outside of the workplace should be excluded while similar conduct occurring inside the workplace is generally admissible."[142] However, the court ultimately admitted the evidence.

The court determined that although some of the incidents the plaintiff wished to exclude occurred outside of the workplace, the fact that she boasted about them in the workplace "ma[de] them relevant to [the court's] proceedings."[143] The court further stated that admitting the aforementioned evidence was necessary to effectuate the rule's underlying purpose.[144] The court stated: "Case law and relevant doctrine speak of the need to shelter alleged victims of sexual misconduct by disallowing others the opportunity to dig into their past and make known their

---

135 *Id.* at 119 (emphasis added).
136 *Id.* at 122.
137 *Id.*
138 *See id.* at 124.
139 *See* 1998 WL 966000 (E.D. Pa. 1998).
140 *Id.* at *6.
141 *Id.* at *5.
142 *Id.* at *6, n.7.
143 *Id.*
144 *See id.*

most intimate secrets.'"[145] However, in the instant case, the plaintiff had volunteered information to her co-workers regarding her sexual behavior and predisposition.[146] The court reasoned that allowing the plaintiff to publicly "flaunt her sexual behaviors and yet remain protected by Rule 412 would be tantamount to a complete disregard of the rule's purpose."[147]

In *Janoupoulos v. Harvey L. Walner & Associates*, the court held that Rule 412 does not preclude evidence of the plaintiff's prior marital history.[148] The court found that although marital history and sexual behavior "are necessarily related, Rule 412 does not give [the] court the authority to exclude evidence of past marriages, only past sexual *behavior*."[149] However, the court excluded evidence relating to plaintiff's marital history pursuant to Rules 401 and 402, finding that the proffered evidence was not relevant and thus not admissible.[150]

In *Meyer-Dupis v. Thompson Newspapers, Inc.*, the Court of Appeals upheld the district court's decision to admit evidence of what plaintiff said in situations where there was no reasonable expectation of privacy (company meetings, informal get-togethers in the "smoke-room," or comments to co-employees that were made in the general workplace with other employees present) and disallow all other evidence of sexually provocative speech.[151] The court ruled that the testimony in which a co-worker of the alleged victim described a sexual conversation between the alleged victim and several other co-workers, and the testimony of the alleged harasser in which he described similar conversations, was properly admitted.[152] The court stated: "Although the [district] court did not follow the procedure stated in the rule, both parties were aware of the testimony before its presentation and had ample opportunity to be heard regarding its admissibility."[153]

---

145 *Id.* (citing FED. R. EVID. 412 Advisory Committee's Note (1994 amend.)) ("The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details . . . .'); *see also* Sanchez v. Zabihi, 166 F.R.D. 500, 502 (D.N.M. 1996) (stating that "Rule 412 . . . protects victims of sexual misconduct from undue embarrassment and intrusion into their private affairs").

146 *Fedio*, 1998 WL 966000, at *6.

147 *Id.*

148 *See* 1995 WL 107170 (N.D. Ill. 1995).

149 *Id.* (emphasis added).

150 *See id.*

151 *GET FULL CITE*

152 *See id.*

153 *Id.*

B. RULE 415

1. *Rule 415 Replaces Rule 404's General Ban on Character Evidence*

Evidence of prior-misconduct has been prohibited in Anglo-American jurisprudence for nearly 200 years.[154] The adoption of the Federal Rules of Evidence in 1975 greatly expanded the approved uses of prior-misconduct evidence.[155] But up until 1994, use of such evidence for the purpose of showing propensity remained forbidden.[156] Rule 404(a), which had previously governed the admissibility of character evidence, reads: "Evidence of a person's character or a trait of character is *not* admissible for the purpose of proving action *in conformity therewith* on a particular occasion . . t ."[157]

The new rules of evidence provide that such evidence "may be considered for its bearing on any matter to which it is relevant.i'[158] The congressional sponsors of rule 415 made clear that relevant uses of prior-sexual-offense include proving that a defendant "acted in conformity with his or her character;" a use which was contrary to Rule 404(b).[159]

Under the new rules prosecutors or plaintiffs are not restricted to conclusive evidence.[160] In fact, they "are free to use even unproven (and perhaps false) allegations of sexual misconduct.i'[161] As one commentator suggested, "antagonistic accusers with stale, uncertain, and possibly false allegations can easily come out of the woodwork after it becomes widely known that an accused rapist is heading for trial on either civil or criminal charges.i'[162]

---

154 *See* Pickett, *supra* note 47, at 885.

155 *See id.*

156 *See id.* at 886.

157 FED. R. EVID. 404(a) (emphasis added).

158 FED. R. EVID. 413-15.

159 140 CONG. REC. H8968-01 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari). Prior to the adopting of these rules, FED. R. EVID. 404(b) governed character evidence. Rule 404(b) states:

> (b) OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial. . . .

160 *See* James Joseph Duane, *The New Federal Rules of Evidence of Prior Acts of Accused Sex Offenders*, 157 F.R.D. 95, 109 (1994).

161 *Id.*

162 *Id.*

2. *Applied Against the Backdrop of Rule 403*

The Second Circuit held in *United States v. Larson* that a Rule 403 analysis of evidence offered under Rule 414 is consistent with congressional intent.[163] Later, in *United States v. Sumner*, the court cited *Larson* in holding that Rule 403 applies to Rule 413-415 decisions.[164] Both courts relied on the statements of Senator Dole and Representative Molinari, the principal congressional sponsors of Rules 413-415: "[T]he general standards of the rules of evidence will continue to apply, including . . . the court's authority under Evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect.]"[165]

However, note that the application of Rule 403 in this context is colored by the new rules. In other words, courts applying Rule 403 in this situation look to Rules 413-415 for guidance. As the court stated in *United States v. Mound*, "[i]n considering evidence offered under Rules 413, 414, and 415, a trial court must still apply Rule 403, though in such a way as 'to allow [the new rules their] intended effect.'"[166] Additionally, in *United States v. Mann*, the court stated that the unique nature of character evidence requires that the trial court "make a reasoned, recorded statement of its 403 decision when it admits evidence under Rules 413-415.]"[167]

3. *Constitutionality of Rules 413-415*

Several courts have passed on the issue of whether Rules 413-415 violate the constitutional rights of defendants. Courts addressing this issue have uniformly rejected the idea that these rules violate the Constitution.[168] They have, however, recognized that the new rules present serious constitutional concerns.[169]

For example, in *United States v. Enjady*, the Tenth Circuit stated: "Rule 413 [which is cut from the same cloth as Rule 415] raises a serious constitutional due process issue."[170] The court noted that the rule was passed by a Congress that *overrode* the concern of "the Judicial Conference and its Advisory Committee on the Federal Rules of Evidence and

---

163 *See* 112 F.3d 600, 604 (2d. Cir. 1997).

164 *See* 119 F. 3d 658, 662 (1997).

165 *Id.*; *see also Larson*, 112 F.3d 604, (both citing 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (Statement of Sen. Dole); 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (Statement of Rep. Molinari)).

166 149 F.3d 799, 800 (internal citations omitted).

167 145 F.3d 1347 (10th Cir. 1998).

168 *See e.g.*, United States v. Enjady, 134 F.3d 1427, 1431-32 (10th Cir. 1998).

169 *See id.* at 1430.

170 *Id.*

its Advisory Committee on the Federal Rules of Civil Procedure."[171] The court also noted that "[a] number of commentators have expressed views on [the new Rule's] constitutionality, several arguing that it is unconstitutional."[172]

In *Enjady*, the court determined that Rule 413, subject to the protections of Rule 403, did not violate the Due Process Clause.[173] The court stated that although the practice of excluding evidence of prior bad acts is ancient, that "does not mean that it is embodied in the Constitution."[174]

The *Enjady* court relied on *Spencer v. Texas*,[175] a Supreme Court decision upholding a Texas statute which allowed the admission of prior convictions for certain offenses.[176] In *Spencer*, the Supreme Court stated: "[I]t has never been thought that [Due Process fundamental fairness] cases establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure."[177] Discussing the *Spencer* decision, the *Enjady* court noted that although "most federal procedural rules are promulgated under the auspices of the Supreme Court and the Rules Enabling Act[,] . . . Congress has the ultimate power over the enactment of rules. . it."[178]

Congressional sponsors have indicated, and the courts have reiterated, that Rule 403 is still to be used to determine whether evidence of the accused's prior sexual misconduct is admissible.[179] However, the legislature has performed most of the 403 calculus, determining that evidence of an accused's prior misconduct is highly probative. For example, Representative Molinari stated that evidence of an alleged harasser's prior sexual conduct is "typically relevant and probative:"

> The practical effect of the new rules is to put evidence of uncharged offenses in sexual assault and child molestation cases [and sexual harassment cases] on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule. The presumption is of admission. *The underlying legislative judgment is that the evidence admissible pursuant to the proposed rule is typically relevant and probative and that its pro-*

---

171 *Id.*
172 *Id.*
173 *See id.* at 1433.
174 *Id.* at 1432.
175 *See* 385 U.S. 554 (1967).
176 *See Enjady*, 134 F.3d at 1432.
177 *Spencer*, 385 U.S. at 564.
178 *Enjady*, 134 F.3d at 1432.
179 *See supra* Part III.B.2.

> *bative value is normally not outweighed by any risk of prejudice or other adverse effects.*[180]

The Congressional Record also states:

> Another ground for consideration is probability. For example, consider a rape case in which the defense attacks the victim's assertion that she did not consent, or represents that the whole incident was made up by the victim. If there is conclusive evidence that the defendant had previously engaged in similar acts—such as a prior conviction of the defendant for rape—then the defense's claim of consent of fabrication would normally amount to a contention that the victim made up a false charge of rape against a person who just happened to be a rapist. *The inherent improbability of such a coincidence gives similar crimes evidence a high degree of probative value, and supports its admission in such a case.*[181]

The court in *Cleveland v. KFC National Management Co.*, citing the above passage, set out a low hurdle for admissibility of an alleged harasser's prior misconduct.[182] The court stated that there were "ample allegations of sexual harassment . . . includ[ing] the touching of plaintiff's body in a overt sexual manner."[183] The court held that "[i]f plaintiff wants to enter evidence of past sexual misconduct, it would corroborate her story and thus be probative."[184] The court went on to state, "[U]nder Rule 415, evidence of past misconduct that supports plaintiff's story should be admitted.ï"[185]

IV. THE ARGUMENT FOR REVISION

These rules have been heavily criticized by commentators.[186] What is the combined effect of the 1994 amendments to a defendant in a sexual

---

180 United States v. Sumner, 119 F.3d 658, 662 (8th Cir. 1997) (citing 140 CONG. REC. H8992 (daily ed. Aug. 21 1994) (statement of Rep. Molinari)) (emphasis added).

181 Cleveland v. KFC Nat'l Mgmt. Co., 948 F. Supp. 62, 65 (N.D. Ga. 1996) (citing 137 CONG. REC. S4925, 4928 (daily ed. April 24, 1991)(statement of Sen. Dole)) (emphasis added). Note also that the new rules do not require "conclusive evidence.ë

182 *See id.* at 65.

183 *Id.* at 64.

184 *Id.*

185 *Id.*at 65. What are we to take from the above passage? It appears that any evidence corroborating the plaintiff's story is admissible. The question is what evidence of an alleged harasser's prior misconduct does not support a plaintiff's story?

186 *See e.g.*, STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 561 (6th ed. 1994) ("There is no doubt that . . . Rule [412] is well intentionedë [but] "there are good reasons to wonder about the wisdom of certain portions of the rule.ë); Pickett, *supra* note 47, at 884 ("When submitted to scholars, attorneys, and judges for comment, the vast majority of responses criticized the new rule [415].ë).

harassment suit? What do the new rules mean for litigants? The balance has been tipped too far in favor of plaintiffs in these actions.

First, with the amendment of Rule 412, "the ability of defense attorneys to use plaintiff's prior conduct [to prove welcomeness] has been limited."[187] Second, Rule 415 allows the sexual history of the accused to be mined for damaging incidents."[188] The end result is that defendants in sexual harassment suits now face *two* hurdles: (1) they are presumptively precluded from presenting evidence that may show the allegedly harassing behavior was not "unwelcome"; *and* (2) unrelated evidence of the accused's prior sexual history may be used to smear him or her. This section examines some of the arguments supporting the revision of one or both of these rules.

A. THE DIFFERENCE IN BURDENS OF PROOF BETWEEN CRIMINAL AND CIVIL CASES

Rule 412 was originally designed to apply only to criminal cases.[189] However, as previously noted, the Violent Crime Control and Law Enforcement Act of 1994 made Rule 412 applicable to civil cases.[190] There is, however, an important distinction between criminal and civil cases with respect to the burden of proof. In a criminal trial, the due process clause of the United States Constitution requires the prosecutor to persuade the factfinder *beyond a reasonable doubt* of every fact necessary to constitute the crime charged.[191] In a civil trial, however, the plaintiff must show only that the facts essential to his case were established by a "*preponderance of the credible evidence . . . .*"[192]

These definitions are not self-explanatory. Beyond a reasonable doubt "[i]s that state of the case, which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."[193] Thus, in a criminal case, the jury must have an abiding conviction, *to a moral certainty* of the defendant's guilt in order to convict.[194]

---

187 Carey, *supra* note 25, at 50.

188 *See* FED. R. EVID. 415.

189 *See* WEISENBERGER, *supra* note 63, at 170.

190 *See* Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, § 40141, 108 Stat. 1796, 1918 (1994); *see also supra* Part II.C.

191 *See* In re Winship, 397 U.S. 358, 363-64 (1970) (emphasis added).

192 COMMITTEE ON PATTERN JURY INSTRUCTIONS, ASS'N. OF SUP. CT. JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS – CIVIL 1:23 (2d ed. 1974) [hereinafter NEW YORK PATTERN JURY INSTRUCTIONS] (emphasis added).

193 Commonwealth v. Webster, 59 Mass. (1 Cush.) 295, 320 (1850).

194 *See id.* (emphasis added).

A preponderance of the evidence requires that the evidence that supports the plaintiff's claim appeal to the jurors "as more nearly representing what took place than that opposed to his claim."[195] Simply stated, preponderance of the evidence means the greater part of the credible evidence.[196]

Because only a preponderance of evidence is required in civil cases, it is a huge step to import an evidentiary standard designed *only* for use in criminal cases to the civil context. In this instance, it is fundamentally unfair to the defendant to exclude relevant evidence that would weigh in his or her favor (under Rule 412) while including evidence that weighs against him (under Rule 415). It is for this reason that members of the Supreme Court expressed concern that the proposed amendment would encroach on the rights of defendants and refused to extend Rule 412 to civil cases.[197]

B. CHARACTER EVIDENCE IS BARRED FOR A REASON

"In a court of law . . . evidence offered to show that a defendant must have done a particular act on a particular occasion because it conforms to his alleged character is highly suspect and generally inadmissible."[198]

During everyday life, we often use character reasoning. It makes perfect sense to take someone's past behavior into account when trying to determine how he or she will behave in the future.[199] In fact, many say that past behavior is the best indicator of future behavior. So the bar on character evidence cannot be rationalized on the ground that it is not "relevant," for it may make a fact at issue "more probable or less proba-

---

195 NEW YORK PATTERN JURY INSTRUCTIONS *supra* note 203.

196 *See id.*

197 *See* Letter from Chief Justice Rehnquist, *supra* note 20 (the Court, under the Rules Enabling Act, withheld approval of "that portion of the proposed amendments to Rule 412 which would apply that Rule to civil cases . . . ."); *see also supra* notes 70-72 and accompanying text.

198 Coates v. Wal-Mart, 976 P.2d 999, 1013 (N.M. 1999) (Franchini, J., dissenting).

199 *See* Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment off on the Right Foot*, 22 FORDHAM URB. L. J. 285, 289 (1995). The author states:

> Outside the courtroom, laypersons routinely rely on character reasoning. 'It is perfectly logical to take past performance into account in making all kinds of important personal decisions.' The character evidence prohibition cannot be defended on the ground that evidence of an accused's other crimes is logically irrelevant . . .e However, both at common law and under the Federal Rules of Evidence, evidence that is technically logically relevant may be excluded when realistically, the evidence poses probative dangers that outweigh its probative worth.

Id. (citations omitted).

ble" as required by Rule 401 of the Federal Rules of Evidence.[200] The problem with character evidence is that people give it too much weight and use it for the wrong reasons.

One ironic aspect of the 412t– 415 conundrum is that the arguments advanced in support of Rule 412 cut against the application of Rule 415. As one court stated in excluding evidence of an alleged victim's prior sexual behavior pursuant to Rule 412:

> [E]vidence that a sexual assault victim has engaged in . . . sexual relations with the defendant in the past under similar conditions may have some logical relevance to the question of consent to the act charged, and evidence of prior sexual activity with the defendant under dissimilar circumstances may also have some logical relevance, but "(w)hen both identity of persons and similarity of circumstances are removed, probative value all but disappears.i"[201]

For the same reasons that Rule 412 has some merit, Rule 415, which allows for evidence of a defendant's prior conduct, is bad law and bad policy.

1. *Character Evidence is Overvalued*

One of the biggest dangers with character evidence is that persons tend to "overvalue" it.[202] An illustrative example of overvaluation is a jury's evaluation of scientific evidence.[203] Jurors give the proffered expert testimony too much weight because it possesses "a posture of mystic infallibility.i"[204] Expert testimony is obviously probative, but it may not be as probative as the jury considers it.

a. Low Probative Value of Character Evidence

Rule 415 is based on a view of sexual offender behavior that does not mesh well with psychological and sociological evidence.[205] The new rules are based on arguments that the probative value of prior-sexual-

---

200 *See* FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of the action more probable or less probable than it would be without the evidence.").

201 Truong v. Smith, 183 F.R.D. 273, 275 (D.Colo., 1998) (quoting Abraham P. Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 106 (1977)) (emphasis added).

202 *See* Imwinkelried, *supra* note 210, at 290.

203 *See id.*

204 *Id.* (internal citations omitted).

205 *See* Pickett, *supra* note 47, at 899.

offense evidence is extremely high.[206] Proponents describe this type of evidence as "exceptionally illuminating" on questions of later actions.[207]

As one State Supreme Court Justice stated: "[H]owever influential on popular opinion, evidence of other wrongful behavior is generally considered non-probative and irrelevant in a court of law . . . ."[208] In fact, the general prohibition on using uncharged-misconduct evidence (Rule 404) to prove propensity exists largely because most "uncharged-misconduct evidence is only *weakly* relevant to the issue of a defendant's action at a later date."[209] In short, evidence of a defendant's character is a poor indicator of his or her conduct on a specific occasion.[210]

Psychological research confirms the common law's suspicion that character evidence is overvalued.[211] Studies show that people tend to overestimate the predictive value of character evidence.[212] These studies show that, given *some* information about another person's behavior (i.e., evidence of an individual's prior misconduct), people tend to conclude that a person's later behavior will accord with the information they have been given.[213]

The problem is that "it is generally accepted in the scientific community that predictions of future dangerousness are, at best, only one-third accurate."[214] A series of psychological studies at U.C.L.A. indicate that most behavior is dependant on highly specific situational stimuli.[215] This research dispels the widely-held view that people behave in a manner consistent with their character traits.[216] Yet, ability to predict future activity from past misconduct is central to the justification the congressional sponsors gave for Rules 413-415.[217]

Evaluating charges of sexual misconduct against the backdrop of allegations of past misconduct will lead the jury to overestimate the future dangerousness of the accused. Acts of violence or aggression are

---

206 *See id.*

207 137 CONG. REC. S3240 (daily ed. Mar. 13, 1991) (statement of Sen. Thurmond introducing section 801 analysis) ("In general, the probative value of such evidence is strong, and is not outweighed by any overriding risk of prejudice.").

208 Coates v. Wal-Mart, 976 P.2d 999, 1013 (N.M. 1999) (Franchini, J., dissenting).

209 Pickett, *supra* note 47, at 886 (citing EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:18 (1994)) (emphasis added).

210 *See* Miguel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 U.C.L.A. L. REV. 1003, 1052 (1984).

211 *See id.* at 1044.

212 *See id.*

213 *See id.*

214 Moreno, *supra* note 5, at 550.

215 *See id.*

216 *See id.* ("at least 66% of all positive predictions of future violence will be mistaken and these so-called 'dangerous' individuals will not commit the predicted future crimes").

217 *See supra* notes 191-92 and accompanying text.

much more likely to be triggered by situational variables than by a consistent character trait.[218] To this end, Justice Blackmun once stated: "[T]he unanimous conclusion of professionals in this field [is] that psychiatric predictions of long-term future violence are wrong more often than they are right."[219]

The empirical evidence does not support the congressional sponsor's assumption that future sex offenses can be accurately predicted based on allegations of prior sexual misconduct.[220] The overwhelming majority of sociological and psychological evidence suggests that past misconduct is a poor indicator of future dangerousness.[221] As one author stated in response to the passage of Rules 413-415: "[N]othing in the modern study of psychology would suggest any need or justification for [the] wholesale rejection of . . . common law rules in . . . a particular subset of trials."[222]

b. Low Probative Value of Prior Sexual Misconduct

In addition to character evidence (in general) being weakly probative as to future conduct, past sexual misconduct (in particular) is even less probative as to future conduct.[223] In fact, "the recidivism rate for sexual offenses is lower than the rate for other serious crimes."[224] For example, the recidivism rate for burglary (31.9%) is four times higher than that for rape (7.7%).[225]

Several Federal Bureau of Investigation studies confirm that the rate of recidivism for sex offenses is quite low when compared to that of other serious crimes.[226] Recidivism rates also vary radically among types of sex offenses.[227] As one author has stated: "[I]t is silly to generalize about . . i the recidivism of sex offenders as a broad category."[228]

---

218 *See* Mendez, *supra* note 221, at 1044.

Moreno, *supra* note 5, at 551 (citing Barefoot v. Estelle, 463 U.S. 880 (1983)).

220 *See id.* at 550.

221 *See id.* at 550-51.

222 Leonard, *supra* note 17, at 305.

223 *See* Imwinkelried, *supra* note 210, at 297.

224 *Id.* at 297-98 (citing Thomas J. Reed, *Reading Goal Revisited: Admission of Uncharged Misconduct in Sex Offender Cases*, 21 AMER. J. CRIM. L. 127, 149-50 (1993)).

225 *See id.* at 298 (citing David P. Bryden and Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 572 (1994)).

226 *See* Leonard, *supra* note 17, at 339 (citing EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 4.16, at 45 (1984)).

227 *See id.*

228 *Id.*

c. High Intuitive Value

1. Character Evidence in General

The Supreme Court's rationale for the historical ban on prior bad-act evidence is as follows:

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. *The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.* The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to *prevent confusion of the issues, unfair surprise and undue prejudice.*[229]

The psychological community considers character traits to be fairly weak predictors of future conduct.[230] The problem, however, is that character evidence carries a very high intuitive value, which means that the jury may "greatly *overvalue* character evidence as a predictor of conduct and make an inaccurate assessment of the facts."[231]

People attribute behavior too much to the personal attributes of the actor and too little to the context of the actions.[232] Psychologists call this phenomenon the "fundamental attribution error."[233] When attempting to attribute the cause of behavior to a specific source, people tend to "overestimate the importance of personal or dispositional factors relative to environmental influences."[234] When presented with character evidence, juries are likely to make broad determinations and expect "consistency in behavior or outcomes across widely disparate situations and contexts."[235]

---

229 United States v. Enjady, 134 F.3d at 1430 (citing Michelson v. United States, 335 U.S. 469, 475-76 (1948)) (emphasis added).

230 See Leonard, *supra* note 17, at 311.

231 *Id.* (emphasis added).

232 *See* Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173 (1977), *reprinted in* COGNITIVE THEORIES IN SOCIAL PSYCHOLOGY 337 (L. Berkowitz ed., 1978).

233 *See id.*

234 *Id.* at 184.

235 *Id.*

ii. Bad Character Evidence – Devil's Horns

Particularly troubling is that jurors give *greater* weight to evidence of misconduct and dishonesty than to evidence of good conduct or behavior.[236] If presented with two pieces of information that are equally probative, one good and one bad, people will give more weight to the bad piece of information.[237] As one author stated: "[A] single negative trait is more prepotent than its opposite positive.[238]

The factor that most induces jurors to overestimate the probative value of character evidence is what psychologists call the "halo effect."[239] In the context of evidence of prior misconduct by the accused, however, it might be more aptly called the "devil's horns effect.[240] This term refers to the propensity of people to judge others on the basis of one "bad" quality.[241]

In one of the best-known studies of jury decision-making, Harry Kalven and Hans Zeisel studied a series of trials in which defendants had engaged in sexual behavior that fell short of the legal definition of a particular crime.[242] In each of the cases, the jury was so outraged by the defendant's conduct that it ignored distinctions of law and found him or her guilty.[243] As one commentator stated: "[B]ad thoughts tend to drive out good thoughts, and sexual thoughts tend to drive out all other thoughts entirely.[244]

In a sexual harassment case, "the use of remote allegations and evidence, which raise the specter of prejudice, due process violations, and mistake, presents a significant threat to the fundamental principles of fairness and impartiality underlying our criminal justice system.[245] Therefore, even though both sides may introduce evidence as to the accused's character, the jury is likely to place more weight on evidence of bad conduct or untrustworthiness.[246]

---

236 *See* Mendez, *supra* note 221, at 1045.

237 *See id.* at 1045-46 ("Psychologists have found that people give greater weight to unfavorable, unpleasant or socially derogatory information about a person than to information of equal intensity but of a positive dimension.").

238 *Id.* at 1046.

239 *See id.* at 1047.

240 *See id.*

241 *See id.*

242 *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 160-61, 178-79 (1966).

243 *See id.*

244 Jeffrey Rosen, *Jurisprurience: Graphic sexual evidence tends to get people's attention, as lawyers (including President Clinton) knew even in the pre-Monica era*, NEW YORKER, Sept. 28, 1998, at 34, 37. The author later states "By its very nature, explicit sexual material overwhelms all other arguments and ideas . . . ." *Id.* at 37.

245 Moreno, *supra* note 5, at 551-52 (1997).

246 *See id.*

2. *Character Evidence is Misused*

Another danger with character evidence is the risk of "misdecision" or "prejudice."[247] Rule 415 was intended to protect the public against those who commit offenses such as sexual harassment. However, as it widens both the scope of evidence that may be admitted and the purposes for which evidence may be considered, Rule 415 creates the distinct danger of convicting defendants based solely on past behavior.[248]

One example of "misdecision" is considering a defendant's liability insurance in a personal injury case.[249] The defendant's liability insurance has nothing to do with his or her fault in the case at bar, but the jury may be tempted to consider the defendant's insurance for two reasons. First, the jury may believe that the defendant would not purchase liability insurance unless he or she planned to engage in risk-seeking activity. Second, the jury will likely speculate that the defendant will not "actually" pay the damages, his or her insurance will. In either case, the jury is "misusing" the existence of the defendant's liability insurance.[250]

As it turns out, Congress has chosen to single out the offenses that are "most likely to trigger the risk of misdecision."[251]

a. Punishing Defendants Who "Got Off"

Where the defendant has a history of bad actions for which he was not charged or not convicted, the jury may convict the defendant based solely on the fact that he or she "got away with it."[252] The jury is tempted to punish the defendant for prior misconduct rather than the charge at hand.[253] Research "indicates that admission of a defendant's prior bad acts significantly increases the chances that a jury will find liability or guilt."[254] As one author stated:

> When jurors are advised that an accused has a record of prior sexual offenses, including perhaps some for which he had never previously been charged or convicted, the danger is *not* merely that they will take that evidence as

---

247 Imwinkelried, *supra* note 210, at 290.

248 *See id.*

249 *See id.*

250 *See id.*

251 *Id.* at 297.

252 *Id.* at 291 (citing Dowling v. United States, 493 U.S. 342, 361-62 (1990) (Brennan, J., dissenting) ("One of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense. This danger is particularly great where . . . the extrinsic evidence was not the subject of a conviction; the jury may feel that the defendant should be punished for that activity even if he is not guilty of the offense charged.")).

253 *See* Pickett, *supra* note 47, at 887.

254 *Id.* (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 160-61, 178-79 (1966)).

> a decisive reason to believe he is guilty now. On the contrary, such evidence has widely been presumed to carry the risk of unfair prejudice because of the grave possibility that the jurors, even if they do not conclude that the defendant is guilty of the crime charged beyond a reasonable doubt, will be inclined to convict him (at least in part) on the basis of their disapproval of his prior crimes, or their hunch that he has committed other crimes for which he was never caught, or their fear of letting him remain on the streets to commit future crimes—especially if he was never punished or the jurors feel that he was not punished enough.[255]

b. Punishing Defendants Based on Morality

In addition to punishing someone who "got off," jurors are likely to punish someone whose behavior, while not illegal, does not conform to their idea of morality. As one author stated: "The risk of misdecision is greatest when the jury is likely to find the character of the accused's uncharged misconduct repugnant or revolting."[256] As it so happens, Congress has chosen to single out the most morally repugnant subset of cases. The Washington Supreme Court has observed: "[T]he potential for prejudice is at its highest . . . in sex cases."[257]

The widespread contempt with which the public views suspected sexual offenders will lead juries to punish defendants regardless of evidence pointing toward guilt or innocence.[258] The "devil's horns effect" discussed above, coupled with the jury's inclination to punish defendants based on morality, makes evidence of prior misconduct particularly dangerous.[259]

C. OBJECTIONS SPECIFIC TO RULE 412

The reason for admitting evidence of the alleged victim's prior sexual conduct at work seems commonsensical. The Supreme Court has determined that to maintain a claim for hostile work environment sexual harassment, the alleged victim must show that the conduct was "unwelcome."[260] The general approach for proving welcomeness is showing

---

255 James Joseph Duane, *supra* note 170, at 110.

256 Imwinkelried, *supra* note 210, at 296.

257 *Id.* at 296 (citing State v. Coe, 684 P.2d 668, 673 (Wash. 1984)).

258 *See* Pickett, *supra* note 47, at 901.

259 *See supra* Part IV.B.1.c.ii.

260 *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986); *see also supra* Part I.B.

that the alleged victim solicited or invited the conduct.[261] Without evidence of the complainant's behavior, the factfinder cannot determine whether the actions were unwelcome. In essence, if the alleged victim is cracking dirty jokes with the guys, she cannot come back later and say that she was offended by the banter.

Based on the welcomeness standard, "[c]omplainants have had difficulty establishing that sexual conduct was unwelcome where they have contributed to a sexually charged workplace."[262] For example, in *Reed v. Shepard*, a hostile work environment claim failed because the alleged victim welcomed the sexual high jinks engaged in by her co-workers.[263] The Court noted that the alleged victim took part in the allegedly offensive activities.[264] She contributed to the sexually charged work environment by using offensive language, engaging in exhibitionistic behavior, participating in sexual horseplay, and participating in sexual gift-giving.[265]

1. *Courts Were Reaching the Same Result*

Even before 412 was applicable in civil cases, courts were limiting the admissibility of evidence of the alleged victim's character.[266] For example, in *Mitchell v. Hutchings*, the court excluded evidence of the plaintiff's sexual conduct that was remote in time or place.[267] The court held that while evidence of sexual conduct in the workplace is relevant to the Title VII analysis, unlimited discovery and presentation of sexual conduct evidence was not required:

> [The defendant] cannot possibly use evidence of sexual activity of which he was unaware or which is unrelated to the alleged incidents of sexual harassment as evidence to support his defense . . . Given the annoying and embarrassing nature of this discovery, the court holds, as a matter of law, that Rule 26 of the Federal Rules of Civil Procedure preponderates against its discoverability.[268]

---

261 *See* BARBARA LINDEMAN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 39 (1997 Supp.) (citing Cronin v. United Serv. Stations, 809 F. Supp. 922, 929 (M.D. Ala 1992).

262 *Id.*

263 *See* Reed v. Shepard, 939 F.2d 484, 491-92 (7th Cir. 1991).

264 *See id.* at 486.

265 *See id.* In another example, the alleged victim used foul language, asked co-workers about their sexual activity, molded and displayed figures with large genitals, and was involved in an incident where her supervisor's pants were pulled down. Her claim failed. *See* Marshall v. Nelson Electric, 776 F. Supp. 1018, 1023 (N.D.Okla 1991).

266 *See* ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE 266 (1st ed. 1994).

267 *See* 116 F.R.D. 481 (D.Utah 1987).

268 *Id.* at 484.

Thus, although amended Rule 412 explicitly addresses this problem, "courts likely possess the power to exclude much of this evidence under other provisions."[269]

2. *The Evidentiary Bar Has Been Raised Twice*

The amendment to Rule 412 was predicated on the assumption that evidence introduced by the defendant to prove welcomeness is highly prejudicial and has little or no probative value.[270] If this is the case, most evidence intended to show welcomeness would be excluded by the balancing test set forth in Rule 403. Under Rule 403, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."[271]

In the years preceding Rule 412's Amendment, judges were excluding evidence that the defense bar attempted to introduce to show welcomeness when its probative value was lacking. As one author stated: "There is a good argument that under Rule 403 Federal Trial Judges would have reached results that are very similar to those reached under 412 . . . ."[272]

This suggests that trial judges' attitudes with respect to the probative value of evidence intended to prove welcomeness was, and is, in line with the drafters of New Rule 412. Consequently, when evaluating evidence under the new standard, judges will exclude too much relevant evidence. In stating that this evidence is highly prejudicial, is extremely harmful to the alleged victim, and has a low probative value, Congress has in effect raised the bar. In stating that the proffered evidence may be admitted only if the probative value greatly outweighs the potential harm, Congress has raised the bar again.

V. SUGGESTIONS – SAMPLE LANGUAGE

While the difficulties presented by Rules 412 and 415 are substantial, the solution is simple. A minor modification to the Rules' language would remove the evidentiary hurdles to defending sexual harassment suits.

There are several ways to correct the problem. One way is to make evidence of character admissible against both parties. Alternatively, character evidence could be inadmissible against either party. Whatever

---

269 Leonard, *supra* note 17, at 332.

270 *See* Monnin, *supra* note 67, at 1178 ("The probative value of the plaintiff's sexually-related conduct is nearly always suspect . . . .").

271 FED. R. EVID. 403.

272 SALTZBURG ET AL., *supra* note 197, at 567.

the solution, the key is to make the Rules *consistent*, so that they apply *equally* to both parties.

As discussed above, there are many reasons why character evidence is disfavored in our legal system.[273] Thus, it is advisable to presumptively exclude character evidence of *both* parties.[274] Sample language can be found in the Advisory Committee's alternate language for Rule 412, which commentators favored.[275] The new Federal Rule of Evidence would read: "In a civil suit, evidence of sexual behavior or predisposition is admissible *against either party* if necessary for a fair and accurate determination of a claim or defense."[276]

The Advisory Committee's Comments could further define what "necessary for a fair and accurate determination of a claim or defense" means.[277] The Comments should state that in a civil suit evidence of sexual behavior or predisposition is admissible if its probative value substantially outweighs the danger of undue prejudice and unfair harm to the alleged victim *or* the accused.

VI. CONCLUSION

Rule 412 unduly restricts the admissibility of relevant and otherwise admissible evidence that the defendant can present in a sexual harassment case.[278] Conversely, Rule 415 provides that highly prejudicial evidence of a defendant's prior sexual history is presumptively admissible.[279]

In support of Amended Rule 412, one author stated: "Because introduction of proof of welcomeness distorts the fact-finding process by infusing often irrelevant and highly prejudicial information into sexual harassment proceedings, an affirmative limitation on the use of such information is necessary."[280] Perhaps. The question then is why does this rule not apply with equal force to defendants?

The effect under the current evidentiary scheme is to allow evidence of the accused's sexual behavior while excluding such evidence with respect to the alleged victim. Although Congress has found an unpopular group to target, the effect is still a fundamental unfairness to defendants

---

273 *See supra* Part IV.B.

274 Members of the defendant's bar will likely argue that character evidence is necessary to prove "welcomeness." A happy medium is desired so that the defendant can address this element of sexual harassment without mining the alleged victim's sexual history for irrelevant and prejudicial evidence.

275 *See* Monnin, *supra* note 67, at 1170.

276 *Id.* at 1174 (citing Proposed FED. R. EVID. 412(b)(4))(emphasis added).

277 *Id.* (citing Proposed FED. R. EVID. 412(b)(4))(emphasis added).

278 *See* FED. R. EVID. 412.

279 *See* FED. R. EVID. 415.

280 Monnin, *supra* note 67, at 1170.

accused of sexual harassment. In an effort to right past legal wrongs, Rules 412 and 415 swing the pendulum too far the other way. The interests of justice and consistency demand that this wrong be remedied so that all are treated fairly before the law.