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Sexual Harassment Cases and the Law of Evidence: A Proposed Rule

Catherine A. O'Neill†

Introduction

Federal Rule of Evidence 412 eliminates from the jury's consideration during a criminal rape trial evidence of the victim's past sexual experiences in all but a few narrowly drawn circumstances.1 In enacting Rule 412, Congress' primary purpose was to spare victims of rape the degrading and unwarranted intrusions into intimate details of their private lives that had formerly been common practice in the federal courts.2 Congress recognized that evidence of a rape victim's past sexual experiences is rarely relevant and even where it is arguably relevant, it is often only marginally probative, yet highly prejudicial.3 Congress was concerned with two troubling aspects of sexual history evidence: First, evidence of this nature tends to suggest a decision on an improper basis and to obscure the subject of inquiry at trial, thereby thwarting the truth-finding process; second, such evidence harms the victim by permitting unwarranted public intrusions into irrelevant details of her private life. Indeed, this evidence is so minimally probative in most cases that Rule 412 has fared well in the courts, despite initial concerns about potential infringement on Confrontation Clause or Due Process Clause rights of the accused.4

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1 See note 19 for text of Federal Rule of Evidence (FRE) 412.
2 124 Cong Rec H 34,913 (Oct 10, 1978).
4 For the sake of simplicity, and because the majority of sexual harassment plaintiffs are women, the feminine pronoun will be used throughout this comment. See, for example, U.S. Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Is It a Problem? 36 (1981). It should be noted, however, that statistics suggest that 10 to 15 percent of men in the work force complain of homosexual overtures or sexual intimidation by female superiors. Id at 3.
5 US Const, Amend VI (Confrontation Clause) and V (Due Process Clause). Commentators, too, have for the most part since concluded that FRE 412 and similar rape shield statutes would survive any constitutional challenge. Even Professors Tanford and Bocchino, who themselves reach the opposite conclusion, concede: "Almost unanimously, the literature of the last few years has encouraged these laws and attempted to justify any adverse consequences to the defendant by claiming that the state's interest in protecting rape victims is
A civil trial for sexual harassment under Title VII of the Civil Rights Act of 1964 raises considerations analogous to those present in the context of rape. Admitting evidence of the plaintiff's sexual history similarly skews the focus of inquiry and intrudes unnecessarily into her private life. Although several commentators and courts have noted these similarities between criminal rape and civil sexual harassment, the legislature of only one state, California, has enacted a civil counterpart to its rape shield statute. Courts have, instead, admitted or excluded evidence of the sexual harassment complainant's prior sexual history on a case-by-case basis. The consequence of these ad hoc judicial determinations is the admission of evidence in the civil context that Congress has determined to be largely inadmissible in the criminal context, despite the fact that criminal defendants enjoy a relatively greater level of constitutional protection than do civil defendants and would appear to have a stronger claim to the introduction of such evidence.

Part I of this comment discusses the background, structure and rationale of Federal Rule of Evidence 412. Part II argues that the justifications for the enactment of Rule 412 in the context of rape also exist in the context of sexual harassment claims. Part III examines the applicability of Rule 412's exceptions to civil cases of sexual harassment under Title VII and concludes that most exceptions are also warranted in a civil analogue to Rule 412; Part III also proposes an additional exception, one that some have argued should have been included in Rule 412. Finally, this comment concludes that a Federal Rule of Evidence, parallel to Federal Rule 412, should be enacted and in an Appendix proposes such a model Rule of Evidence.
I. Evidentiary Considerations and Federal Rule of Evidence 412

A. Background and Structure

The basic supposition of the Federal Rules of Evidence is that all evidence that is relevant is presumptively admissible. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Yet it has long been recognized that, even in our adversarial system, all of the information that is potentially relevant cannot possibly, indeed should not, be considered at trial. Evidentiary rules have thus been fashioned to constrain the amount and type of information that jurors ought to consider. Although it is generally desirable that jurors obtain all evidence relevant to their decision, countervailing considerations of efficiency, clarity and fairness weigh in the determination of the admissibility of even relevant evidence.

Character evidence in particular is viewed with skepticism. Because of its uncertain reliability and questionable predictive power, the uses of character evidence have been circumscribed in the Federal Rules of Evidence. Rule 404 allows its introduction only in certain exceptional situations. Where such character evi-

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* See FRE 402, which states that "[a]ll relevant evidence is admissible . . . . Evidence which is not relevant is not admissible."
* See FRE 401.
* See FRE 403, which provides: "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." See also McCormick, *Handbook on the Law of Evidence*, § 185 (E. Cleary, 3d ed 1984); 6 J. Wigmore, *Evidence*, § 1864 (Chadbourn Rev., 1976). At common law as well the logical relevance of an item offered as evidence did not guarantee its admissibility. See, for example, Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?,* 41 Vand L Rev 879 (1988).
* See Advisory Committee's Note to FRE 404, quoting the California Law Revision Commission:

Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what happened on the particular occasion. It subtly permits the trier of fact to reward the good man and punish the bad because of their respective characters despite what the evidence in the case shows actually happened.

* See FRE 404 and the accompanying Advisory Committee's Note.

dence is admissible, Rule 405 prescribes particular modes of proof, dividing character evidence into three categories: reputation evidence, opinion evidence, and evidence of specific instances of conduct. The former two methods of proving character are the most troubling because of their dubious reliability, and, in general, their lesser probative worth. The latter method of proving character, while of greater probative value, carries with it an increased risk of prejudicial impact. Character evidence, then, is suspect in any event. Yet, prior to the enactment of Federal Rule of Evidence 412, character evidence of the third type—evidence regarding the victim’s past sexual experience—was traditionally used in rape trials for either or both of two purposes: to call into question the complainant’s credibility, and to facilitate the inference that the complainant acted in conformity with her character regarding the issue of consent.

Both of these purposes for which evidence is sought to be introduced are illegitimate insofar as they are based upon highly questionable logical inferences. Yet, both of these uses of character evidence were routine defense tactics, even under the existing evidentiary rules and their provisions limiting the permissible uses of character evidence. Federal Rule of Evidence 412 was therefore enacted to provide a comprehensive guide for admissibility of character evidence in cases of rape, where additional concerns further suggest restricted and careful use of such evidence.

Federal Rule of Evidence 412 provides that, in a criminal case in which a victim’s past sexual experience is relevant to an issue of consent,

Rule 412. Rape Cases; Relevance of Victim’s Past Behavior
(a) Notwithstanding any other provision of law, in a criminal case in which a
trial for rape, reputation or opinion evidence regarding the victim's prior sexual behavior is not admissible. Furthermore, evidence of specific instances of the victim's prior sexual conduct is likewise inadmissible except in three circumstances. Notable among these exceptions is the allowance of evidence of specific instances of the victim's past sexual behavior with the accused, where the defendant seeks to introduce this evidence as relevant to the issue of a defense of consent. Even in circumstances where the exceptions are applicable, however, the evidence must be scrutinized by the judge in a hearing in chambers to determine whether the evidence is relevant and, if so, whether its probative value outweighs its potential prejudicial effect. The judge may then issue an order detailing the extent to which any such evidence may be offered and delineating areas of permissible examination or cross-examination of the victim.

In nearly every circumstance, then, evidence of the victim's

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person is accused of rape or 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) [Evidence] of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence is—

(1) [Constitutionally] required to be admitted; or
(2) admitted in accordance with subdivision (c) and is evidence of—

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

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c) (1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to enter such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin . . . .

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible . . . .

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term 'past sexual behavior' means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

89 The other exceptions are provided for under subsections (b)(1) and (b)(2)(A). See text of FRE 412, excerpted in note 19.
past sexual behavior is deemed presumptively not relevant. Where evidence of this sort would arguably be relevant, Federal Rule 412 subjects it to the familiar balancing of relevant testimony under Federal Rule of Evidence 403: probative value versus prejudicial effect. In a telling departure from Rule 403, however, Rule 412 provides that in order for relevant evidence to be admissible, the court must determine that "the probative value of such evidence outweighs the danger of unfair prejudice."\(^1\) Under Rule 403, by comparison, evidence may be excluded only when the "probative value is substantially outweighed by the danger of unfair prejudice."\(^2\) The shift in emphasis creates a lower standard for the exclusion of prejudicial evidence in the case of evidence of past sexual history and evinces a legislative intent to "give primacy" to the danger of unfair prejudice.\(^3\)

B. Rationale

The rationale behind Federal Rule of Evidence 412 takes into account several factors, which together point toward the exclusion in nearly every situation of evidence of the victim's sexual history. Sexual history evidence is, in nearly every circumstance, arguably irrelevant: It neither makes more probable nor less probable, on logical grounds, the existence of any material fact for which it is usually offered. Even if it is conceded to be relevant, however, the slight probative value of such evidence is outweighed by several considerations. First, and most importantly, admitting such evi-

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\(^1\) See FRE 412(c)(3).
\(^2\) See FRE 403 (emphasis added).
\(^3\) This difference in emphasis was no mere accident of draftsmanship; rather, it was well noted during the subcommittee hearing on the bill, HR 14666, that was to become Federal Rule of Evidence 412. As Roger A. Pauley pointed out regarding an early draft of the bill, "[t]he standard in the bill would reverse [the presumption applicable under Rule 403] by giving primacy to the danger of unfair prejudices." Hearing Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 94th Cong, 2d Sess 6 (1976) (statement of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division, Department of Justice).

It should be noted that the language of the draft of the bill on which Pauley commented required that in order for evidence to be admitted it must be determined that "the probative value [of the evidence offered by the accused] substantially outweighs the danger of unfair prejudice" (emphasis added). Pauley noted that such a drastic departure from the existing presumption embodied in the standards for relevancy of Rule 403 might be declared unconstitutional, especially in the criminal context, where it could run afoul of the defendant's Sixth Amendment Confrontation Clause protections. While the final version of the bill omitted the word "substantially," it retained the basic syntactical structure of the draft discussed in the hearing, thereby evincing a legislative intent to incorporate at least the shift in emphasis, if not in magnitude, noted by Pauley in Rule 412.
Evidence thwarts the truth-finding process at trial because jurors tend to overvalue this information or use it to draw impermissible inferences. The inquiry at trial is skewed because the admission of evidence concerning the victim’s past sexual behavior shifts the focus of the trial from the question of the defendant’s guilt or innocence to that of the victim’s past sexual experience. Second, where such evidence is admitted, defense counsel is allowed to intrude unnecessarily into intimate details of the victim’s private life and then to air them publicly. The embarrassing courtroom inquiry that commonly ensues upon the admission of such evidence, moreover, deters women from reporting incidences of rape and fully prosecuting rape cases. Finally, permitting evidence of the victim’s past sexual experiences to be routinely admitted as probative either of the victim’s credibility or of the likelihood of consent operates to reinforce sexist attitudes and thereby preclude the educative function of law.

Evidence of a victim’s sexual history is irrelevant to the issues upon which it is typically offered by defense counsel at trial. Evidence of an individual’s sexual experience or lack thereof is unhelpful in determining that individual’s veracity. Similarly, such evidence of past, unrelated behavior makes no more likely and no less likely the existence in any given instance of an individual’s consent to sexual relations. Yet, for these two purposes sexual history evidence was once routinely thought relevant and admitted, at least where the individual concerned was a female, prosecuting a sex offense. The justification for the first use presupposes a logical connection between chastity and veracity; this presupposition is seriously flawed and readily refutable. The justification for the second use, while similarly fraught with difficulties, is not as obviously untenable. The requisite connection, however, between an individual’s consent to sexual relations in the past with a particular person, and the likelihood of that individual’s indiscriminate consent to sexual relations in any other context, with an entirely different person, assumes a fungibility of humans that is absurd.

Regarding the first use of such evidence, it is logically fallacious to argue a connection between an individual’s past choices regarding his or her sexual behavior and the claim that that individual’s testimony under oath is not credible. Chastity is unrelated to veracity; it is not, as formerly thought, a character trait. Knowledge that a person is or is not chaste provides no logical support for a judgment upon aspects of that person’s character for truth-
Two comparisons are instructive. First, cases admitting sexual history evidence for the purpose of impeaching testimony confine the applicability of the underlying rationale to women. “Promiscuous” men could not similarly be impeached; virginal men could not similarly be thought more credible. Second, only in cases of rape were women subject to this sort of impeachment. Female prosecuting witnesses alleging other types of crimes, such as robbery, could never be impeached by evidence of their prior sexual experience. Thus, in the scheme of evidentiary rules, women prosecuting sex offenses were singled out; evidence was deemed logically relevant in this context while correctly recognized in every other to be irrelevant.

It is similarly a questionable proposition that, having consented or not to sexual relations in the past, an individual is more or less likely to consent under entirely different circumstances in the future. The typical statutory elements of the criminal offense of rape are “sexual intercourse (1) ‘by force’ and (2) ‘against the will’ of the woman . . . . ‘[A]gainst the will’ and ‘without the consent’ generally have been treated as synonymous.” Rape, by definition, requires that the sexual relations in question be nonconsensual; consequently, an important defense is that of consent. It is upon this issue of consent that evidence of the victim’s prior sexual behavior has historically been offered. By introducing such evidence, the defense hopes to catalyze the following reaction in the minds of the jurors: The prosecutrix is a “promiscuous” woman who, consistent with this “trait,” is undoubtedly more likely to

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24 For early recognition of the lack of logical relationship between chastity and veracity, see Note, If She Consented Once, She Consented Again: A Legal Fallacy in Forcible Rape Cases, 10 Vaip U L Rev 127, 146-49 (1976).
26 See Wayne R. LaFave and Austin W. Scott, Jr., Criminal Law 478 (West, 2d ed 1986) (“consent by the woman to sexual intercourse negatives an element of the offense”).
27 The sponsors of the bill that eventually became FRE 412 directly repudiated this outmoded justification for admitting evidence of a victim’s prior consensual sexual relations:

There really isn’t any logical relationship between consent in a prior instance and consent in a present instance. This bill takes that position that, except with respect to prior relations between the victim and the defendant, [the] decision on the part of a woman to have a relationship with one man has nothing to do with her decision to have a relationship at another time under different circumstances with a different man.

have consented to any sexual relations that took place.28

This argument presupposes a degree of fungibility among humans that is offensive and rather absurd. The decision to have intimate relations with another person, every time that decision is made, is based on myriad factors that are complexly interrelated. Attempting to sort out these factors in order to reach even a set of common denominators that would have any predictive power is, moreover, futile.29 People—men—are not interchangeable; yet the generalizations of inductive reasoning, the cognitive process upon which a system of evidence depends, require some degree of interchangeability.30 Our confidence in the correctness of the statement resulting from the inductive process is coterminous with this interchangeability. Thus, if we unabashedly asserted the fungibility of all men, evidence of a woman's past consensual conduct with one man would provide useful information about the probability of her present consent with another man. We balk, however, at this requisite assertion. Evidence of past consensual sexual relations with one individual, then, simply fails to suggest meaningful alteration of the apparent probability of the existence of present consent with another.

28 While plainly dubious in the context of stranger or violent rape, this inference is less obviously suspect in the context of acquaintance or marital rape. The exception in FRE 412(b)(2)(B) was incorporated to address this concern.

29 Again, the only situation in which we can undertake this exercise with any degree of confidence is that in which the parties involved have previously engaged in consensual relations with each other. Even in this situation, however, a defensible argument can be made that variables of time and circumstances render improper arguments for present consent with someone from evidence of past consent with that same person. Nonetheless, FRE 412(b)(2)(B) reflects the increased confidence with which our legal system undertakes such arguments.

30 The use of inductive proof upon which the law of evidence is based presupposes that the course of nature continues uniformly. Generally, this presupposition comports with empirical observation, and, although we can conceive of a change in the course of events, the uniformity in the past occurrence of similar events provides no reason for us to believe that such a change will occur. Thus we have the confidence to assert about the nature of A that because A has had relationship R to B's in the past, it is probable that A will have relationship R to a particular B on the occasion in question. In the case of human relationships, however, our confidence in the probability that this inductive leap is correct diminishes. This diminution is due not so much to an increase in our ability to conceive of a change in A's nature but to the recognition that the uniformity of the B's that lends predictive power is absent. Thus, given our reluctance to assume all men are interchangeable, the assertion more closely resembles that because A had relationship R to B in the past, it is probable that A will have relationship R to C on the occasion in question. Clearly, our confidence in such an assertion as a foundation for our evidentiary rules ought to be greatly undermined.

For an elaboration of the uses and limits of inductive reasoning as it is applied to the law of evidence, see A. J. Ayer, Hume's Formulation of the Problem of Induction, The Legacy of Hume, in Probability and Evidence 3-6 (1972).
Some, however, maintain that sexual history evidence is relevant. Although such evidence may only very weakly suggest an alteration of the apparent probability of the material proposition for which it is offered, it is nevertheless relevant in the strict, formal use of that term. Thus, the argument goes, such evidence certainly would survive at least the relatively low hurdle erected by the Federal Rules of Evidence for the determination of relevancy.

Even if the relevancy of sexual history evidence is conceded, however, several countervailing considerations weigh heavily in opposition to its admission. First, information has often been withheld from jurors on the grounds that they will overvalue or misuse the evidence. Although our adversarial system is premised on the theory that truth will prevail as the product of vigorous advocacy on both sides, this does not require the presentation of every shred of evidence marginally related to the issue in controversy. Rather, countervailing considerations—both procedural and substantive—often require that some evidence not be presented to the jury. Thus, evidence may be excluded for reasons of efficiency. It

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31 It is interesting to note that those willing to espouse this view publicly, at least to the extent that the volume of scholarly writing on the subject is indicative, has dwindled significantly in the 1980s.

32 The common law concept of "legal relevancy," that is, "the requirement... of something more than bare logical relevancy," took into account the existence of evidence so weak that, while technically relevant according to the principles of formal inductive logic, failed to meet a minimum threshold for purposes of usefulness in the legal system. See Eric D. Green and Charles R. Nesson, Problems, Cases, and Materials on Evidence 26 (Little, Brown and Company, 1983).

33 This defensible position finds strength in the permissive language of FRE 401: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination..." (emphasis added).

34 See Patrick B. Devlin, Trial By Jury 114 (1956) ("[t]he first object of the [English rules of evidence] was to prevent the jury from listening to material which it might not know how to value correctly"); Imwinkelried, 41 Vand L Rev at 895 (cited in note 10):

[1]he juror ideally should ascribe to an item of evidence only the probative value that the item deserves. Suppose, however, that the judge believes that, realistically, the jury is likely to misestimate and overvalue the probative worth of an item. The judge may fear that the jury will draw a stronger inference than is warranted from the evidence... [T]he judge properly could consider that danger as a factor cutting against admissibility.

35 As Professor Tribe observes:

[Every rule of evidentiary privilege—from the rule excluding certain marital confidences to the rule preserving the sanctity of the confessional—can at times operate to exclude possibly probative evidence... The question is whether the values served by such exclusion warrant the cost of occasionally truncating a potentially relevant inquiry. In the case of rape, those values include protecting the dignity of the victim, encouraging the reporting of violent crime, and minimizing the prejudicial impact of material remarkably easy for any juror to misuse. I am persuaded that achieving these goals warrants the sacrifice of some potentially rele-
is much more important, however, to withhold evidence where the
danger is not merely that it will require excessive time or resources
for the truth to prevail, but that the truth will not prevail, due to
some tendency of the jurors to misuse the information.  

Sexual history evidence, in particular, presents a great oppor-
tunity for jury misuse.  
Jurors tend, for example, to harbor noti-
ions of a brand of contributory fault of sexual assault victims
based upon knowledge of their prior sexual experience.  
The danger of this tendency to the integrity of the outcome at trial can be
conceptualized as an alteration in the standard of proof: Jurors feel
less compunction about mistakenly failing to vindicate a victim's
injury if they know that she was not previously chaste. This knowl-
dge reduces, in their minds, the degree of violation; from this fol-
low the danger of commensurate but inappropriate liberties with
the level of proof required against the defendant.

The potential for illegitimate use of evidence by the jurors in
the context of a rape trial is great given that "[t]he danger of jury
misuse [stems in part] from the extent to which members of our
society have been conditioned to think in sexually stereotypic
terms." Sexual history evidence is not neutral information;
rather, it is value-laden. Evidence of this nature therefore supports
severe moral judgments. These judgments are impermissibly ren-
dered inasmuch as they bypass or preempt the rational decision-

Hearing Before the Subcommittee on Criminal Justice of the Committee on the Judiciary,
House of Representatives, 94th Cong, 2d Sess, 54 (1976) (statement of Laurence Tribe) (em-
phasis in the former instance in the original; emphasis in the latter instance added).

The Advisory Committee's Note to FRE 403 contemplated a continuum of harms to
be weighted accordingly in determining whether or not to exclude relevant evidence. The
risks envisioned ranged "all the way from inducing decision on a purely emotional basis, at
one extreme, to nothing more harmful than merely wasting time, at the other extreme."

For an empirical study that underscores the potential for jury misuse, see Arnie
Cann, Lawrence G. Calhoun and James W. Selby, Attributing Responsibility to the Victim
of Rape: Influence of Information Regarding Past Sexual Experience, 32 Human Relations
57 (1979).

It has been noted that:

Courts have long been aware of the danger of prejudice based on sexual history,
but in a different way: they have never been as willing to allow similar inquiries
into a male defendant's sexual history, precisely because of the prejudice which
might be occasioned in the mind of the jury.

Susan Estrich, Real Rape 49 (Harvard University Press, 1987). See generally Leon Letwin,
"Unchaste Character," Ideology and the California Rape Evidence Laws, 54 S Cal L Rev
35 (1980).


Letwin, 54 S Cal L Rev at 58.
making process. This sort of misuse is problematic precisely because it does not depend on juror use of this evidence that is incorrect on a purely rational level. Consequently, misuse in this way is not remediable simply by the availability to the jurors of more information, whether in the form of additional evidence pointing toward contradictory conclusions or jury instructions cautioning against the overvaluation of the sexual history evidence provided. It is crucial, therefore, to structure carefully the evidentiary rules so as to avoid the jurors' consideration of information which has great potential to influence the outcome in impermissible ways.

A related concern, inasmuch as we are concerned that the truth will be obscured, is that the wide latitude formerly permitted the defense counsel in delving into the victim's sexual history effectively placed the victim on trial. In addition to the obvious harmful effect this has on the victim, it skews the inquiry, thereby thwarting the truth-finding process, by shifting the focus of the trial to questions concerning the victim's sexual experience. The danger that the jurors will be distracted from the main issue of the defendant's innocence or guilt is thereby increased.

Second, one of the primary goals of a rape shield statute is the elimination of the unnecessary invasion of the victim's privacy and the consequent public humiliation endured by the victim at trial. The legislative history of Federal Rule of Evidence 412 underscores this intent: "[T]he principal purpose of this legislation is to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives." Although all trials are invasive to some degree, seldom does the alleged need to secure evidence justify intrusion into such an intimate sphere. Where the evidence to be gained from such intrusion is necessary to the determination of the outcome at trial, the inquiry is more

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40 "[R]ape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt." 124 Cong Rec H 34,913 (Oct, 1978). Noting this danger, Judge Sylvia Bacon, speaking on behalf of the American Bar Association, applauded the anticipated effect of HR 14666: "It [will cause] the trial to focus on the immediate facts and [will minimize] the extraneous issues." Hearing Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 94th Cong, 2d Sess (1976).

41 See McCormick, Handbook on the Law of Evidence, § 185 at 439-40 (cited in note 10) (offering, as one of four reasons for excluding otherwise probative evidence, "the probability that the proof and answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues").

42 Many feminists term the degradation suffered by the victim at trial a "second rape." See generally, Hearing Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 94th Cong, 2d Sess (1976).

43 124 Cong Rec H 34,913 (Oct 10, 1978) (statement of Representative Mann) (emphasis added).
easily justified. Where, as is most often the case with sexual history evidence, it is not necessary, there is no justification for delving into these very personal details. Rape is itself a violent invasion of a woman's privacy and bodily integrity; evidentiary rules that permit the trial process to turn into a further, state-sanctioned invasion of that woman's privacy are intolerable."

The crime of rape is vastly underreported. According to the Uniform Crime Reports of the Federal Bureau of Investigation, 90,434 forcible rapes were reported in 1986, a figure that represented an increase of 58 percent over the preceding decade. Yet many experts believe that even this explosive growth in reported incidences of rape grossly underrepresents the actual number of occurrences. The suspected sources of women's reluctance to report rapes are several. Most women recoil from the stigma associated with being labeled a rape victim; this label is, of course, attached formally and publicly by virtue of her decision to report, prosecute and try the rapist. More importantly, the predictable humiliation that victims expect to suffer in the course of the ensuing trial provides a great disincentive for reporting rape. Given the

"The use of evidentiary rules to effect the policy of protecting a witness from harassment or unwarranted intrusion into her private life is not unprecedented. FRE 611(a)(3) requires the court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . protect witnesses from undue harassment or undue embarrassment."


"This suspicion has recently been reiterated: "Many observers and experts believe the true rate of rape in the United States is at least twice the official rate and may be as much as twenty times as high." Margaret T. Gordon and Stephanie Riger, The Female Fear 33 (The Free Press, 1989). The authors note as an additional matter that even when rapes are reported, police departments often find insufficient evidence to warrant a charge of rape. This practice of "unfounding" a rape was reported to occur in "as many as 50 percent of the charges of forcible rape received." They noted as well that "[u]nfounded rates for other crimes are generally much lower than those for rape." Id at 34 (citing Crime and Violence, Staff Report Submitted to the President's National Commission on the Causes and Prevention of Violence (1967) and W.G. Skogan and A. Gordon, Detective Division Reporting Practices: A Review of the Chicago Police Crime Classification Audit, in Crime in Illinois, 1982 166-82 (1983)). Not only do accounts of this practice support the belief that rape statistics are underrepresentative, but they illuminate one of the possible factors contributing to this statistical infirmity: Women will not report rapes if they know that they will not be believed by the police.

"For an important early article exposing this problem, see Vivian Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum L Rev 1, 4-6 (1977). Berger cited the "system's perceived hostility to the rape complainant, coupled with the singular shame and trauma of sexual assault" for the estimate that actual incidences of rape "range from three and one half to twenty times the reported figure" in the Federal Bureau of Investigation's Uniform Crime Reports.
intrusiveness of the typical rape trial, even those victims who have reported the rape are understandably reluctant to fully prosecute the crime. The social policy of encouraging the reporting and prosecution of crimes of rape is served by restrictions on the admissibility and, consequently, the discoverability, of evidence of the victim's sexual history and on the extent to which the victims may be examined and cross-examined.

Finally, law has an educative role: It is the duty of the law to overturn outmoded and irrational views, especially ones with the potential for such pernicious consequences. Evidentiary rules are somewhat constrained in the extent to which they are capable of performing this educative function, given that they pertain to the description of past events. Further limitations are, of course, presented in the criminal context by the right of the defendant to introduce constitutionally required evidence at trial. Even so confined, however, rules of evidence must be permitted to the extent possible to serve an educative function in order that societal development does not stagnate. Insofar as the rules of evidence are incorporated into the solemn event of the trial, at which observers

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48 Justice Robert Braucher, dissenting in Commonwealth v Manning (Mass Sup Judicial Court, May 2, 1976), chastised the majority for permitting inquiry into the rape victim's reputation and chastity, noting: "The 'established law'... is part of a legal tradition, established by men, that the complaining woman in a rape case is fair game for character assassination in open court. Its logical underpinnings are shaky in the extreme." Citing this excerpt, Judge Sylvia Bacon observed:

Unfortunately, these logically 'shaky' rules have had a far reaching effect on enforcement of the rape laws. Although it is difficult to separate social attitudes, police practices and rules of evidence, many rape victims refuse prosecution because of the potential humiliating inquiry into most personal matters .... The number of occasions on which the United States must dismiss prosecutions because the witnesses are most reluctant to come forward are numerous .... I daily observe the terror with which women come to the witness stand and the experience they have in the courtroom ....


49 Feminists have long made the argument that the "solem respect traditionally displayed toward evidence of 'prior unchastity'... reinfor[es] attitudes of indifference toward the dignity, the freedom of choice, and the bodily safety of the victim." Letwin, 54 S Cal L Rev at 41 (cited in note 37).

It is in some ways unsurprising that such outmoded and harmful societal attitudes persist given that the major treatise on the law of evidence—an area of law that seeks by the selective presentation of only information specifically calculated to bring about a truthful result at trial—depicts females, but not males, who are unchaste as "errant," urges the existence of an "unchaste mentality" that is inherently defective and subject to abnormal instincts, and strongly recommends for every complaining of a sex offense examination by a qualified physician of the woman's "social history and mental makeup." See 3A J. Wigmore, Evidence § 924a at 736-37 (Chadbourn Rev., 1970).
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are made to understand that what occurs there has the official state imprimatur of "truth," rules of evidence have great potential for shaping public attitudes. Admitting evidence of the victim's sexual history permits logically fallacious inferences to determine our legal outcomes, encourages the proliferation of biased standards in our legal system, and reinforces outmoded and sexist views in our society.

II. ANALOGOUS CONSIDERATIONS IN CASES OF SEXUAL HARASSMENT

The rationale behind the enactment of Federal Rule of Evidence 412 for criminal trials holds true in the context of sexual harassment trials. The inquiries in which the court engages regarding these two offenses are obviously not identical; yet, the evidentiary considerations one must take into account are analogous. Although some differences exist between the two offenses and between the respective institutional mechanisms for dealing with each, the benefits of eliminating such evidence, both for the truth-finding process and the victim's personal privacy interests, are the same in sexual harassment trials as they are in rape prosecutions.60

One obvious difference between these two offenses, however, has important constitutional ramifications: Rape is a criminal offense, whereas sexual harassment is a civil offense.61 Procedural guarantees to the defendant are different for these two cases: The rape defendant is protected by, among other things, the Sixth Amendment guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

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60 Both courts and commentators have made this general observation. Regarding the procedural and substantive rules promulgated to protect rape victims from abusive criminal defense tactics, one court stated: "By carefully examining our experience with rape prosecutions, [the] courts and bar can avoid repeating in this new field of civil sexual harassment suits the same mistakes that are now being corrected in the rape context." Priest v Rotary, 98 FRD 755, 762, 73 ALR Fed 736 (N D Cal 1983). See generally Linda J. Krieger and Cindi Fox, Evidentiary Issues in Sexual Harassment Litigation, 1 Berkeley Women's L J 115 (1985).

61 Some would argue that this criminal/civil division for rape and sexual harassment is a somewhat artificial distinction, based on historical development rather than a reasoned designation. Some feminists, for example, would note that both involve uses of power by men to subordinate women: In rape the power relied upon is primarily physical; in sexual harassment the power invoked is that afforded by relative position or situation. Most notably, Professor MacKinnon has defined sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." Catharine A. MacKinnon, Sexual Harassment of Working Women 1 (1979). While the similar applicability of this definition to both rape and sexual harassment is most easily conceived of in the context of quid pro quo type sexual harassment, it is also possible to apply it to a claim of sexual harassment brought on a hostile environment theory.
against him." While the civil defendant is not entirely without rights to a vigorous adversarial trial, these have not been interpreted to provide a constitutional requirement for the same level of evidentiary guarantees that the Confrontation Clause provides in the criminal context.

This civil/criminal distinction is important because the bulk of scholarly criticism of rape shield statutes is directed at the possibility that they might run afoul of the criminal defendant's Sixth Amendment Confrontation Clause rights. Commentators on the federal statute have been preoccupied for the most part with venting their skepticism about the constitutionality of Rule 412's exclusion of potentially probative evidence given the criminal nature of the case. Absent arguments founded upon the Sixth Amendment guarantee, few substantial criticisms can be levelled at the evidentiary provisions of FRE 412. Thus this difference between the two offenses provides a hospitable backdrop for the following arguments supporting the creation of a civil evidentiary provision analogous to that in place under FRE 412.

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58 US Const, Amend VI. The excerpted portion of the Sixth Amendment controls the scope of the defendant's right to cross-examine a witness who testifies against him, including the prosecuting witness.

59 See US Const, Amend V (Due Process Clause) and Amend VII.

64 For a representative and comprehensive critique on Sixth Amendment grounds, see Tanford and Bocchino, 128 U Pa L Rev 544 (cited in note 5).

65 The commentators take two general approaches: (1) They concede limitations on the defendant's Sixth Amendment Confrontation Clause rights, acknowledging that where the probative value of the evidence is outweighed by its prejudicial effect it ought not to be introduced, yet overestimate the probative value of evidence of the prosecutrix' sexual history, often (unknowingly) employing outmoded notions of the logical relationship between a woman's past consensual sexual relations and whether she will be more likely, therefore, to again engage in consensual sexual relations, to the extent that the Sixth Amendment would nearly always require the admission of such evidence despite its prejudicial effect; or (2) they foresee that the structure of FRE 412, with its categorical exclusions, enumerated exceptions and provisions for in camera balancing and procedural requirements, would prohibit evidence on occasion that ought to be admitted; this possibility, they argue, is enough to render FRE 412 unconstitutional.

Note, however, that despite this criticism, FRE 412 and the rape shield statutes of the states have fared well in the courts.

66 Indeed, as the court in Priest v Rotary pointed out:

The courts and Congress have concluded that even in the criminal context, the use of evidence of a complainant's past sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value such evidence may have. Certainly, then, in the context of civil suits for sexual harassment, and absent extraordinary circumstances, inquiry into such areas should not be permitted, either in discovery or at trial.

98 FRD at 762.
A. Title VII Sexual Harassment Theories

The Equal Employment Opportunity Commission (EEOC) and the Supreme Court currently recognize two types of sexual harassment claims under Title VII: "quid pro quo" and "hostile environment." Sexual harassment under the quid pro quo theory is defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" when linked to a grant or denial of an economic quid pro quo. Sexual harassment under the hostile environment theory is defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating a hostile or offensive working environment." The gravamen of a Title VII offense of sexual harassment, then, whether brought under a quid pro quo theory or a hostile environment theory, is the "welcomeness" of the sexual advances.

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57 The Equal Employment Opportunity Commission (EEOC) guidelines on sexual harassment expressly recognize as violative of Title VII both economic sexual harassment ("quid pro quo") and harassment occasioned by hostile working environment. 29 CFR § 1604.11 (1985). In deciding Meritor Savings Bank v Vinson, 477 US 57 (1986), the Supreme Court added its recognition of "hostile environment" sexual harassment to its previous recognition of "quid pro quo" sexual harassment.


59 29 CFR § 1604.11(a)(3); quoted approvingly by the Court in Vinson, 477 US at 65. For an earlier court-formulated definition, see Bundy v Jackson, 641 F2d 934, 944 (DC Cir 1981).

60 See Vinson, 477 US at 68, citing the Equal Employment Opportunity Commission Guidelines. In Vinson, the Court found erroneous the District Court's focus on the "voluntariness" of Vinson's participation in alleged sexual episodes with her employer and stated that the "correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome."

The "welcomeness" test has justifiably come under fire. Harassment is in all other contexts under Title VII—and presumably by definition—unwelcome. Yet in only the sexual harassment context is the burden of proof placed on the plaintiff not only to show that the prohibited conduct occurred, but to demonstrate that she did not welcome such conduct. The court in Bundy, 641 F2d at 946, noted the unfairness and futility of requiring an employee to prove that she resisted or did not welcome the harassment, especially where "the employer demands no response ... other than good-natured tolerance." It has been argued that sexual harassment is different from racial harassment, to which it is often analogized for purposes of Title VII analysis, because in the latter situation, racist epithets, for example, are always unwelcome, whereas in the former context, there exists a "murky area between clear coercion and clear mutuality." It is not clear, however, that this difference, if real, requires the existing standard of proof. Furthermore, it is not inconceivable that, instead, impermissible sexist presumptions underlie the current allocation. Thus, the more enlightened view would be to presume that sexual advances and other conduct prohibited as harassment under Title VII are unwelcome in the workplace.
B. Use of Evidence in Title VII Sexual Harassment Claims

Evidence of the plaintiff's past sexual behavior may be offered in a Title VII sexual harassment suit brought under either of these two theories. It is, therefore, important to consider whether the justifications supporting the rape shield statute in Part I of this comment similarly support the enactment of a victim shield law, applicable to both types of sexual harassment claims in the civil context of Title VII suits. First, it will be useful to examine how a defendant might seek to employ evidence of a plaintiff's sexual history in sexual harassment trials. The attempted use of evidence in cases of quid pro quo sexual harassment more readily permits analogy to such use in cases of rape. The defendant seeks to introduce evidence of the plaintiff's past sexual behavior to demonstrate that she was a "promiscuous" woman and therefore more likely to welcome sexual advances in the workplace.

Although the analogy is less obvious, the defense may also attempt to introduce this sort of evidence in claims of sexual harassment brought under a hostile environment theory. Here, the defendant seeks to introduce evidence of the plaintiff's sexual experience to show that, given her history, she is less likely to have been offended by the defendant's conduct and its effect on the work environment, or, if a particular individual is not alleged to be the cause of the hostile environment, by the general atmosphere at work. Alternately, the defendant might seek to introduce evidence of the plaintiff's lack of sexual experience to demonstrate that, in light of the plaintiff's virginal or prudish history, she is more likely to have been oversensitive and unduly offended by what is actually "harmless" conduct or an unoffensive environment.

1. Relevancy

Whether brought under a quid pro quo theory or a hostile environment theory, the issues into which the court must inquire in

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61 See, for example, *Katz v Dole*, 707 F2d 251 (4th Cir 1983) (where defendant offered evidence at trial that plaintiff had engaged in sexual banter with one of her male co-workers in an effort to demonstrate that the plaintiff had not really been offended by other employees' sexually suggestive behavior; the court refused to find that the latter proposition followed from the fact of the plaintiff's participation in sexual banter).

62 For a case in which the defendant attempted to use evidence of the plaintiff's history, although not sexual history evidence in the traditional sense, similar to that contemplated in the example, see *Jennings v D.H.L. Airlines*, 34 FEP Cases 1423 (BNA) (N D Ill 1984) (where defendant attempted to discover records of the plaintiff's psychotherapist to demonstrate that the plaintiff's sexual harassment complaint resulted from her own "oversensitivity" to sexual conduct).
cases of sexual harassment are technically distinct from those brought in cases of rape: For rape the issue is whether the victim consented, whereas for sexual harassment the issue is whether the plaintiff welcomed the advances. The concepts of consent and welcome are in some sense distinguishable, yet they seem to impose similar volitional requirements on the complainant. It is not obvious that the evidence relevant to the determination of an individual’s consent on a given occasion is the same as that relevant to a determination of whether an individual welcomed advances. In the former case, the court’s inquiry is momentary: whether the complainant consented on this occasion, with this particular individual. In the latter case, however, it seems that the court must look further. “Welcome” implies an affirmative act by an individual demonstrating a receptiveness to and desire for the conduct in question. While the inquiry in cases of sexual harassment remains whether the plaintiff welcomed the overtures in question from this particular individual, the court, in order to determine whether the plaintiff did in fact welcome the advances, might find relevant to its inquiry related indicia in the plaintiff’s past behavior toward the particular defendant. Although it does not appear particularly sensible that anyone judge the welcome of his advances on the basis of whether the object of these advances has welcomed overtures from others in the past, it is quite possible that this knowledge of past “receptiveness,” even to an entirely different man under different circumstances, enters into his calculation of how welcome current advances are likely to be. Thus, where the defendant in a sexual harassment case knew of certain instances of the plaintiff’s past consensual conduct with others, it might have at least been a factor in his determination of whether his advances were likely to be welcomed. Simply that the defend-

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63 The speculative nature of this calculation could of course be greatly reduced for purposes of workplace relations were the law to presume that, in the workplace, sexual advances are not welcome. Once presumptively unwelcome, the woman would have to demonstrate affirmatively to the particular individual that his advances are welcome.

Although beyond the scope of this comment, it is noteworthy that at least one recent case is perhaps moving toward this formulation. In Swentek v USAIR, Inc., 830 F2d 552 (4th Cir 1987), the court found that the trial court had erred in holding that the plaintiff’s “own past conduct and foul language meant that [the defendant’s] comments were ‘not unwelcome’ even though she told [him] to leave her alone.” The Swentek court distinguished the Supreme Court’s holding in Vinson: “Unlike this case, however, the evidence of Vinson’s past conduct bore directly on her contact with the alleged harasser . . . [b]y contrast, there was no evidence in this case that [the defendant] knew of Swentek’s past conduct.” Id at 557.

64 The defendant must actually have had knowledge of the particular instances of the plaintiff’s sexual activity before the alleged advances were made. See, for example, Mitchell
ant bases his decision upon flawed reasoning, however, does not indicate that the court ought similarly to indulge itself. The question that remains is whether this evidence ought to figure in the court’s determination of whether the plaintiff truly welcomed the advances involved.

2. Countervailing Considerations

The nature of the inquiry involved in sexual harassment cases, unlike that of rape cases, might require in a greater number of instances that sexual history evidence be deemed relevant. Again, however, several considerations favor the exclusion of sexual history evidence, as in the context of rape, in nearly every circumstance. First, the claim that the introduction of evidence of the past sexual experiences of a rape victim has an adverse impact on the jurors’ perception of that victim should, by this time, be uncontroversial. Jurors tend to overvalue this sort of information, thereby reaching results by impermissible means. It is logical to presume that an analogous phenomenon occurs upon the admission of sexual history evidence in civil trials for sexual harassment. The jurors’ propensity for overvaluation stems from the nature of the evidence, not from the type of crime or civil action at issue. Thus, given the same sort of information regarding the sexual history of the harassment plaintiff, jurors are likely in this context, as in that of rape, to similarly misuse this evidence and thereby arrive at illegitimate judgments. The danger of this sort of misuse, again, ought not to be underestimated. Of all the countervailing considerations permitted to be weighed against the probative value of the proffered evidence, none is so vital to the correct outcome of the trial as the consideration of jury overvaluation or misuse of evidence.

As in the case of rape, it is imperative to the truth-finding process that the proper focus of the sexual harassment trial be maintained. Introduction of sexual history evidence could hinder the truth-finding process by confusing the jurors as to which behavior supposedly evincing welcomeness on the part of the plaintiff was

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v Hutchings, 116 FRD 481, 484 (C D Utah 1987) (“Evidence of sexual conduct which is remote in time or place to plaintiffs' working environment is irrelevant. [The defendant] cannot possibly use evidence of sexual activity of which he was unaware . . . to support his defense”).

* That this is a generally accepted statement is evidenced by the fact that most of the states and Congress have enacted rape shield statutes in various forms. For a catalogue of forty-six rape shield statutes according to their general approach and specific provisions, see Tanford and Bocchino, 128 U Pa L Rev 544 (cited in note 5) (Appendix: Comparative Tables of Rape Victim Shield Statutes).
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directed toward the defendant in particular and which behavior he merely knew of via the office grapevine. The jurors might become overly concerned with sorting out the plaintiff’s past from her present, eschewing the real issue of the trial. Admission of sexual history evidence, then, has the same dangerous potential of improperly shifting the focus of inquiry from the defendant to the complainant in a sexual harassment trial.

Second, the privacy of a sexual harassment plaintiff will be invaded to the same degree as that of a rape victim if inquiry is permitted into the plaintiff’s sexual background. The predictable intrusiveness permitted by allowing discovery and admission of sexual history evidence is arguably even more dangerous in the context of an ongoing work relationship usually present in Title VII sexual harassment cases, as compared to the typically momentary relationship present in cases of rape because, as Professor MacKinnon observes, the forced silence that results signals to the perpetrator that it is “open season” on anyone who values privacy.66

Just as rape is a notoriously underreported crime, so too, incidences of sexual harassment often go unreported.67 The offense of

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66 Professor MacKinnon explains:

[P]art of the power held by perpetrators of sexual harassment is the threat of making the sexual abuse public knowledge. This functions like blackmail in silencing the victim and allowing the abuse to continue . . . . To add to [victims’] burden the potential of making public their entire personal life, information that has no relation to the fact or severity of the incidents complained of, is to make the law of the area implicitly complicit in the blackmail that keeps victims from exercising their rights and to enhance the impunity of perpetrators. In effect, it means open season on anyone who does not want her entire intimate life available to public scrutiny.


This dilemma facing a potential harassment plaintiff was recognized by the Priest court:

Without . . . protection from the courts, employees whose intimate lives are unjustifiably and offensively intruded upon in the workplace might face the ‘Catch-22’ of invoking their statutory remedy only at the risk of enduring further intrusions into irrelevant details of their personal lives in discovery, and, presumably, in open court.

Priest, 98 FRD at 761.

67 “Research indicates that the problem is quite pervasive. Estimates of the percentage of women who have encountered sexual harassment in the workplace range from 42% to 90%.” David E. Terpstra and Douglas D. Baker, A Hierarchy of Sexual Harassment, 121 J of Psychology 599 (1987).

The discrepancy between the occurrence of sexual harassment, and the number of incidences reported, either via in-house employee grievance procedures or by legal action under Title VII, is marked. In one study, conducted in 1987 by the Bureau of National Affairs (BNA) among members of its Personnel Policies Forum, only 37% of the 156 organizations represented by the respondents reported that at least one sexual harassment claim had been
sexual harassment itself, like that of rape, is degrading for the victim. It is unsurprising, then, that sexually harassed women do not seek to prolong or exacerbate the degradation. As in the case of rape, this reluctance to bring suit is due, in large part, to the victim's fear of the ensuing humiliation caused by the unnecessary scrutiny of details of her private life at trial. In Priest v Rotary for example, the court granted the plaintiff's motion for a protective order to prohibit discovery by the defendant of evidence of the plaintiff's sexual history, noting that "the potential of the requested discovery [was] to . . . discourage the plaintiff in her efforts to prosecute her cause." The court made express reference filed in 1986, and only 17% reported ever having been the subject of legal complaints of sexual harassment filed by an individual. Sexual Harassment: Employer Policies and Problems 16, 18 (Bureau of National Affairs, 1987).

As Professor MacKinnon notes:
Women's feelings about their experiences of sexual harassment are a significant part of its social impact. Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry.
MacKinnon, Sexual Harassment of Working Women at 47 (cited in note 51).

Professor MacKinnon states:
Most victims of sexual harassment, if the incidence data are correct, never file complaints. Many who are viciously violated are so ashamed to make that violation public that they submit in silence, although it devastates their self-respect and often their health, or they leave their job without complaint, although it threatens their survival and that of their families. If, on top of the cost of making the violation known, which is painful enough, they know that the entire range of their sexual experiences, attitudes, preferences, and practices are to be discoverable, few such actions will be brought, no matter how badly the victims are hurt.
MacKinnon, Feminism Unmodified at 114 (cited in note 66).

See Brief for Respondents in Opposition to the Petition for a Writ of Certiorari, Meritor Savings Bank v Vinson, No 84-1979, 28-31 (1984). A related, though slightly different factor contributing to the under-reporting and under-prosecuting of sexual harassment is the cavalier treatment that this offense has traditionally received by the legal system.

The law participates in constructing the balance of risks run in reporting. One reason for a lack of complaints may be the lack of legitimation of these injuries as injuries which an effective legal prohibition would give. Concretely, when nothing helpful is known to be done, complaint becomes an integral part of the social pathology of the problem, a further aggravation of the injury of the incident itself, instead of a potential solution to it. Together with the psychological impact of sexual harassment upon women's socialized sense of self-worth and the confirmation that a legal nonresponse gives to women's apprehensions about the reactions of others, it seems reasonable that incidents might not be reported.

MacKinnon, Sexual Harassment of Working Women at 160 (cited in note 51) (emphasis in the original).

Priest, 98 FRD at 761. The District Court, in granting the plaintiff's motion for a protective order, pointed out that Rule 26(b) of the Federal Rules of Civil Procedure permits discovery only of information "reasonably calculated to lead to the discovery of admissible evidence," and noted that evidence regarding the plaintiff's sexual history would be inadmissible for any of the purposes for which the defendant sought to introduce it. Id at 757. Furthermore, it stated that the plaintiff was entitled to such a protective order where
to the analogous concern for the vast under-reporting and under-prosecution of rape, stating that it was "deeply concerned that civil complaints based on sexual harassment in the workplace will be similarly inhibited, if discovery tactics such as the one used by defendant herein are allowed to flourish." Finally, the educative role of the law is at least as important in the context of sexual harassment as in the context of rape. Perhaps there is even a greater need for the rules to fulfill an educative function regarding sexual harassment, given that many men admittedly do not view some behavior that the average woman would find offensive to be "sexual harassment," whereas the type of conduct that constitutes rape seems more obvious. Were evidence of the plaintiff's sexual history routinely admissible, the message sent to society would be that this evidence is an accurate indicator of a woman's desire to invite or welcome any advances. The "open season" mentality would be discouraged on the other hand, by the recognition in our legal system of the necessity of mutuality in social relationships and by its implicit rejection of the notion that because a woman has previously engaged in consensual relationships she therefore will welcome indiscriminately advances and harassment from everyone else.

72 Note, however, that according to one recent study, earlier research had revealed "significant sex differences in the perception of sexual harassment behavior: The percentage of women defining types of social-sexual behavior as sexual harassment was greater than the percentage of men who did so." David E. Terpstra and Douglas D. Baker, A Hierarchy of Sexual Harassment, 121 J of Psychology 599, 601 (1987) (citing Gutek, Nakamura, Gahart, Handschumacher, and Russell, Sexuality and the Workplace, 1 Basic and Applied Social Psychology 255 (1980)). Yet the results of the Terpstra and Baker study, seven years later, found that "[s]urprisingly, the only behavior for which a significant difference was observed was that involving coarse language . . . . Significantly more women (25%) than men (12%) considered coarse language to be sexual harassment." The report went on to hypothesize that "[t]he current results may reflect recent changes in males' perceptions and awareness of sexual harassment, resulting from the sharp increase in public attention given the issue." Terpstra and Baker at 604.

74 For recognition of the importance of law's educative role, consider the reaction to the Court's decision to admit evidence of the plaintiff's "provocative speech and dress" in Vinson:

That the Court considered this presentation as something other than 'an assassination of character' designed to create the impression that she was the sort of woman 'who would have wanted [to be sexually abused]' suggests that the Court views any expression of sexuality by a woman as an invitation for abuse from men.
C. Necessity for Categorical Exclusion

Critics may urge that, even granting the arguments advanced above, there is no need to enact a separate evidentiary rule in order to accommodate the considerations marshalled in favor of such a rule. They might argue, moreover, that a general presumption exists against such an enactment inasmuch as the law of evidence focuses upon issues common to all trials and does not anticipate the development of different evidentiary rules for each substantive crime or civil cause of action. Yet the very fact of Rule 412's existence within the rubric of the Federal Rules of Evidence undermines this argument. It is apparent from this fact that where exigencies unique to a particular substantive cause of action are sufficiently compelling, the addition of tailored evidentiary provisions to the Federal Rules are acceptable.

Furthermore, the Federal Rules are structured in a manner that anticipates categorical exclusions. In a departure from the common law of evidence, the Federal Rules permissively define relevance in Rule 401 and provide broadly for the admissibility of relevant evidence in Rules 402 and 403, but do so with the intention that these three basic rules of relevance be read in conjunction with nine specific exclusionary rules housed in Rules 404 through 412. The categorical exclusions were developed to accommodate "the frequent recurrence of certain potentially prejudicial situations." The existence of categorical exclusions arguably represents the determination that, based on experience in certain circumstances, the judicial discretion that Rule 403 permits renders it inadequate for the task of properly deciding admissibility. The attempted introduction of the sexual history evidence that would be excluded under the proposed rule of evidence is a circumstance justifying just this sort of determination. Where, as here, experience provides ample reason to suspect that the wide latitude permitted judges under Rule 403 consistently presents great potential for the inadvertent admission of prejudicial material, the development of an

Respondent at 41, Meritor Savings Bank v Vinson, No 84-1979 (emphasis in original).

74 See Tanford and Bocchino, 128 U Pa L Rev at 551 (cited in note 5). The authors advance this criticism with respect to the enactment of FRE 412. Ironically, they cite Wigmore for the proposition that the rape victim ought not to be treated, under the rules of evidence, any differently than the victim in any other criminal case.

appropriately narrow categorical exclusion is warranted.77

III. EXCEPTIONS TO THE PROPOSED RULE OF EVIDENCE

Parts I and II examined how factors important to the determination of the admissibility of sexual history evidence in trials for rape are also present in trials for sexual harassment. This similarity suggests that an evidentiary victim shield rule, similar to FRE 412, is warranted for civil sexual harassment trials. The question left to be explored is whether the analogy between these two offenses holds in every situation, so that the language of FRE 412 ought to be adopted in its entirety. Particularly, the exceptions to Rule 412 shall be examined in order to determine their applicability in the civil context of a Title VII sexual harassment trial.

The first two exceptions to FRE 412's general prohibition of sexual history evidence, 412(b)(1) and 412(b)(2)(A), are not problematic. The first exception is for evidence "constitutionally required to be admitted." This provision is superfluous.78 It is unnecessary given the familiar canon of statutory construction favoring the interpretation of statutes, if at all possible, so as to render them constitutional.79 If it is not reasonably possible to construe the statute to permit the admission of constitutionally required evidence, the mere insertion of a provision such as that found in 412(b)(1) will not save the statute from being declared unconstitutional.

The second exception, often called the "medical exception," permits the introduction of "evidence of 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 victim, the source of semen or injury."80 This exception, or some variation thereupon, is incorporated into most states' rape shield statutes and is rather uncontroversial. Evidence of this nature is generally not offered on the theories discussed above in Parts I and II and the considerations necessitating the exclusion of sexual history evidence, articulated above, are inapplicable here.

77 This argument presumes that judges are not immune to the dangers of incorrect assessment of the proper weight to be assigned to sexual history evidence.


79 See 2A Sutherland, Statutory Construction § 45.11 (Sands, 4th ed 1984).

80 See FRE 412(b)(2)(A).
While it is typically necessary to guard against attempts to circumvent the evidentiary rules' categorical exclusions by introduction under a different guise of the evidence that has been deemed admissible, this is not the concern here. The need for evidence in these instances is legitimate; therefore this exception was included primarily to ensure that FRE 412 was not interpreted too ambitiously. The drafters made clear that medical evidence of this sort, even though it included reference to past sexual activity, was not intended to fall within the ambit of Rule 412's general prohibition. This exception, at least as a precautionary measure, is equally applicable to the context of sexual harassment. The proposed Rule of Evidence for civil suits of sexual harassment, therefore, incorporates a "medical exception" provision, substituting a more explicit enumeration, adopted by several states, of the instances covered by the exception.

The third and most important exception to FRE 412's categorical exclusion of sexual history evidence is for "evidence of past sexual behavior with the accused . . . offered upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the rape or assault is alleged." As discussed in Parts I and II, the argument for the relevance of sexual history in this situation, both in cases of rape and sexual harassment, is more compelling than in situations where the evidence sought to be introduced involves prior sexual conduct with an individual other than the accused. Allowance of sexual history evidence in this situation reflects the substantially increased confidence with which we undertake the required inductive leap. Therefore, the proposed Rule of Evidence for civil suits of sexual harassment incorporates this important exception, making appropriate alterations in the language, including the procedural requirements of 412(c) and the crucial provision in 412(c)(3) for balancing the probative value and the prejudicial effect of even evidence deemed relevant under 412(b)(2)(B).

A possible exception currently not present in FRE 412 is one permitting the introduction of "modus operandi" evidence. A potentially important difference between rape and sexual harassment is the relative incentive to bring false claims in each case. The

81 See FRE 412(b)(2)(B).
82 Two states' statutes incorporate such an exception to their rape shield statues for evidence of past false allegations of rape. See 13 Vt Stat Ann § 3255 (Supp 1979); Wis Stat Ann §§ 971.31 and 972.11 (West Supp 1979-80).
83 Note that two states, Vermont and Wisconsin, have found the danger of false allega-
Title VII sexual harassment plaintiff stands to gain financially in some circumstances whereas the rape victim will receive no pecuniary benefit. Furthermore, it seems correct that the social opprobrium associated with being a rape victim is greater than that connected with being the victim of sexual harassment in the workplace. Perhaps this is because incidences of harassment are so widespread that the plaintiff will not be singled out and ostracized to the extent that a rape victim would be. Whether or not this difference in societal perception of these two harms makes sense, it could indicate a greater willingness on the part of the feared “vindictive woman” to bring a false sexual harassment suit than to

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This financial gain is often realized in only a limited way, for example, in the form of reinstatement to a previously held position, given the restricted remedies available under Title VII. Several commentators have criticized the unavailability under Title VII of punitive damages, and the general inadequacy of the remedies permitted a sexual harassment plaintiff by Title VII. See, for example, Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 Harv L Rev 1449, 1463-66 (1984).

Although relative to a rape prosecutrix, the sexual harassment plaintiff may stand a greater chance to gain financially, it is not at all clear that the potential “gains” are substantial or that the prospect of obtaining them would in any event lead many women to fabricate claims of sexual harassment. Professor MacKinnon surmises:

With sexual harassment 'false reporting is unlikely: women have more to lose than to gain from it.' Given women's feelings of humiliation and intimidation from the incident, together with the condescension, ridicule, and reprisals that women who report sexual harassment suffer . . . it seems unlikely that significant numbers of reports would be fabricated. It is even arguable that most women have more to lose, on an individual basis, from reporting and pursuing true incidents than from attempting to ignore them and forget the whole thing. The total cost in terms of reputation, energy, distress, legal fees, and employment opportunities would seem to present sufficient disincentives to pure fabrication as to make the risk worth taking that the legal system would expose prevaricators.

MacKinnon, Sexual Harassment of Working Women at 97 (cited in note 51). Consider the possibility, however, left open by Professor MacKinnon, that a woman might fabricate a sexual harassment claim, not for expected gain "on an individual basis," but to advance a particular agenda or cause, and the argument that she is more likely under this motivation to fabricate a charge of sexual harassment than a charge of rape.

See P.M. Mazelan, Stereotypes and Perceptions of the Victims of Rape, 5 Victimology 121, 129-30 (1982) ("most of the women thought that becoming a rape victim had changed their own and others' perception of them").

The extent to which this fear of false charges of rape by the notorious “vindictive woman” has historically shaped evidentiary considerations is demonstrated by Professor Wigmore's assertions in his treatise on evidence. See note 49. As described by Mary Ann Largen, former National Organization of Women National Rape Task Force Coordinator, in Hearing Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 94th Cong, 2d Sess 33 (1976).
conjure up a false charge of rape.

Thus this difference between the incentives in place in the case of rape and the case of sexual harassment, and perhaps even between the ease with which each charge could be fabricated, suggests the need for an additional exception to a Rule of Evidence in the sexual harassment context. Moreover, several critics have objected that one of the shortcomings of FRE 412, even as it applies to rape, is its failure to provide an exception for evidence showing a pattern of falsely alleging rape. Thus the criticism of the existing FRE 412, combined with the additional arguments for such an exception in the context of sexual harassment, supports the inclusion of an exception for evidence demonstrating a pattern of falsely bringing sexual harassment suits in the proposed Rule of Evidence.

**Conclusion**

Several important considerations prompted Congress to enact Federal Rule of Evidence 412, prescribing guidelines for the admissibility of evidence of the rape victim's prior sexual experience. The most important reason was to avoid thwarting the truth-finding process by permitting the jurors to hear information likely to be overvalued and to skew the focus of the inquiry. Another primary goal of the Rule was to eliminate unnecessary intrusion into the private affairs of the victim. Additional policy considerations bolstered the argument for enacting Rule 412, including the need to encourage reporting and prosecution of rapes, and the duty of the law to discourage logically insupportable and sexist views in society.

Considerations similar to those necessitating the enactment of Federal Rule of Evidence 412 are present in the context of a civil

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false rape charges might result in the conviction of innocent men. Underlying this fear is the basic assumption that women can induce rape convictions solely by virtue of fabricated reports. Though such assumptions have remained consistently undocumented or analyzed, nevertheless they have produced and sustained laws and attitudes overly protective of the defendant and overly invasive of the privacy of the victim. Wigmore, for example, strongly asserts that men are often falsely convicted of rape. Despite the lack of evidentiary support for his conclusions, Wigmore is often quoted to substantiate the contention that fabricated stories may lead to convictions in rape cases.

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trial for sexual harassment. Yet under the existing scheme of the Federal Rules of Evidence, sexual harassment plaintiffs are deprived of the tailored evidentiary protections afforded the rape complainant. Instead, they are at the mercy of judicial discretion and the interplay of Rules of Evidence inadequate for the task. The determination of the admissibility of evidence of the sexual history of a plaintiff in a Title VII sexual harassment claim ought not to be left to ad hoc judicial evaluation. Because judges may unknowingly harbor the same outmoded attitudes that pervade society, legislative guidance is necessary. Thus, the proposed Federal Rule of Evidence governing the standards for admissibility of evidence of a plaintiff's prior sexual experience in Title VII sexual harassment claims should be enacted.

APPENDIX

Model Rule of Evidence
Sexual Harassment Cases; Relevance of Victim’s Past Behavior

(a) In a civil action in which a person is charged with sexual harassment, reputation or opinion evidence of the past sexual behavior of the victim of such sexual harassment is not admissible.

(b) In a civil action in which a person is charged with sexual harassment, 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 subdivision (c) and is evidence of—

(A) past sexual behavior with the defendant and is offered by the defendant upon the issue of whether the plaintiff welcomed defendant's sexual advances; or

(B) past sexual behavior which formed the basis of a prior false charge of sexual harassment, offered by the defendant upon the issue of the plaintiff's credibility in bringing the instant action; or

(C) past sexual behavior with persons other than the defendant, offered by the defendant upon the issue of whether the defendant was or was not, with respect to the plaintiff, the source of semen, pregnancy, disease or injury.

(c) Procedures for Admission

(1) If the person charged with sexual harassment intends to offer under subdivision (b) evidence of specific instances of the plaintiff's past sexual behavior, the defendant shall make a written motion to offer such evidence not later than fifteen days before the
date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates had newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the plaintiff.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order an in camera hearing to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the defendant seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the in camera hearing or at a subsequent in camera hearing scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine each issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the defendant seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the plaintiff may be examined or cross-examined.

(d) For purposes of this rule, the term 'past sexual behavior' means sexual behavior other than sexual behavior with respect to which sexual harassment is charged.

Comment to Proposed Rule of Evidence

It is intended that this Rule will serve as a model for the States.

The exception found in Federal Rule of Evidence 412(b)(1), for any evidence that "is constitutionally required to be admitted," is omitted because it is superfluous. For criticism of the drafters of Rule 412 in this regard, see Michael H. Graham, Evidence and Trial Advocacy Workshop: Relevancy and Exclusion of Relevant Evidence—The Federal Rape Shield Statute, 18 Crim L Bulletin 513, 522 (1982); and Paul F. Rothstein, Evidence Workshop: New Federal Evidence Rule 412 on Sex Victim's Character, 15 Crim L Bulletin 353, 354 n 3 (1979). The Rule, therefore, in subsection (b) endeavors to enumerate those situations in which exceptions might
be required, whether for constitutional or other policy considerations.

The Rule recognizes that there may be instances where co-workers develop various types of social relationships, against which backdrop of mutuality sexual advances may be presumed by those individuals involved to be welcome. Thus, (b)(1)(A) provides an exception for evidence of the plaintiff’s past sexual behavior with the defendant in cases where the welcomeness of his sexual advances is in issue.

The Rule recognizes the concern that in some circumstances, however rare, a plaintiff may bring repeated, unfounded suits for sexual harassment. Akin to instances calling for admission of evidence to demonstrate a type of “modus operandi,” the defendant may wish to show that the particular charge of sexual harassment at bar is but one in a series of actions brought by the plaintiff under similar circumstances. This concern has been articulated by several critics of Rule 412 as one of its shortcomings. See, for example, Hearing Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 94th Cong, 2d Sess 64-65 (1976) (statement of Dovey Roundtree on Behalf of the American Civil Liberties Union); Rothstein, 15 Crim L Bulletin at 360-62. Note that Rothstein’s proposed alternative statute to Rule 412 would include an exception for evidence of specific instances of sexual conduct that “is part of a definite pattern of conduct which, in the circumstances of the case, is substantially probative of consent,” and that the suggested statute “is not confined to cases of rape and assault with intent to commit rape” but applies to “sex offenses.” Rothstein is, however, unclear as to whether “sex offense” includes sexual harassment. Provision (b)(1)(B) anticipates this objection and allows an exception for such evidence where the plaintiff’s past sexual behavior has formed the basis for prior false charges of sexual harassment in similar circumstances. Because modus operandi evidence refers to a particularized and repetitive kind of conduct, it is therefore likely to be a more reliable predictor of subsequent conduct than character evidence in general. Moreover, modus operandi evidence is not couched in the rhetoric of moral judgment and is thus less likely to invite jurors to form their decisions on illegitimate bases. For comments on the modus operandi exception to rape shield statutes, see Leo Letwin, “Unchaste Character,” Ideology, and the California Rape Evidence Laws, 54 S Cal L Rev 35, 74-75 (1980). Note that some states have already incorporated similar exceptions to their rape shield statutes for the alleged victim who has a history of
falsely reporting sexual assault. See, for example, 1976 Colo Rev Stat § 18-3-407.

Finally, it bears emphasis that evidence offered under any of the possible exceptions, enumerated under subsection (b), is not automatically admissible, but must conform to the procedural requirements and undergo the balancing determination by the court provided for in subsection (c). Thus a double safeguard is envisioned: it is anticipated that the traditional judicial evidentiary balancing coupled with legislative guidance for evidence of a particular nature will best effect the goals of this Rule. Moreover, the protections afforded by the requirement of a hearing would be undermined if that hearing or the record thereof were to be made public; therefore, it is intended that the proceedings be in camera and off the record, or that the record be sealed, and that the public and the press be denied access to these proceedings. Regarding the concern that the extent of these protective measures was not made clear either by the language of Federal Rule of Evidence 412 or by its legislative history, see Rothstein, Evidence Workshop: New Federal Evidence Rule 412 on Sex Victim’s Character, 15 Crim L Bull at 355 and n 5. Finally, it is anticipated that defense counsel will not be able to delve into the plaintiff’s sexual history under the guise of discovery. Discovery of evidence to be used at trial will of course be limited according to Federal Rule of Civil Procedure 26(b). Furthermore, it is intended that defense counsel will not be permitted to avail themselves of broad discovery of the plaintiff’s private life even when the evidence sought is to be presented during the in camera hearings. As Professor Tribe noted in discussing Rule 412’s protective limitations on discovery, “most of the considerations counseling against the allowance of such assaults upon the victim in open court likewise argue against its allowance even in camera.” Hearing Before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives, 94th Cong, 2d Sess 55 (1976).