"Whoever Fights Monsters Should See to It That in the Process He Does Not Become a Monster"†: The Necessity of Maintaining and Narrowing the Welcomeness Requirement in Sexual Harassment Suits

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I. INTRODUCTION

In 1986, the Supreme Court ruled that a hostile work environment was an actionable claim in sexual harassment suits.[1] Analogizing discrimination based on sex to that of discrimination based on race, the Court reasoned that "'a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.'"[2] As a result, conduct that does not constitute quid pro quo sexual harassment but that is equally severe may constitute discrimination under Title VII.[3] The Supreme Court adhered to the Equal Employment Opportunity Commission ("EEOC") Guidelines[4] in defining actionable sexual harassment, stating that such harassment must be "'[u]nwelcome.'"[5] In determining what evidence will demonstrate a plaintiff's welcomeness, the Court declared that "provocative speech or dress . . . is obviously relevant."[6]

This distinction between conduct that is deemed welcoming of sexual advances and conduct that demonstrates the advances were unwelcome is important primarily because, depending on how district courts rule on the evidentiary issue of that conduct, the outcome of the case could hinge on the admissibility of such evidence. Not only does the admissibility issue determine the "simple" outcome (that is, whether the plaintiff or the defendant wins), it is also determinative of whether the "correct," or deserving, party will ultimately prevail.

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† Inspiration for title from Joëlle Anne Moreno, *"Whoever Fights Monsters Should See to It That in the Process He Does Not Become a Monster": Hunting the Sexual Predator with Silver Bullets—Federal Rules of Evidence 413-415 — and a Stake Through the Heart—*Kansas v. Hendricks, 49 FLA. L. REV. 505, 505 (1997) (quoting FRIEDRICH W. NIETZSCHE, BEYOND GOOD AND EVIL 89 (Walter Kaufmann trans., Vintage Books 1989) (1886)).

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1. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-66 (1986).
2. *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).
3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, 2000e-2 (2001); *see also Meritor*, 477 U.S. at 65.
4. 29 C.F.R. § 1604.11 (1985).
5. *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)).
6. *Id.* at 69.

In addition to affecting the outcome of the trial, admitting evidence of provocative speech and dress presupposes that sexual desire is an essential element of sexual harassment, raising deeper, competing policy issues. Just as in rape trials, admitting evidence of provocative behavior and dress will infuse the trial with the issue of sexual desire, shifting the focus away from the heart of the issue—was the workplace so hostile as to discriminate—and placing blame on the plaintiff.[7] Similarly, just as in rape trials, the defendant of a sexual harassment suit has an interest in defending against the claim by presenting evidence of the victim's conduct that would prove consent. Whether the correct logical analysis and policy determinations are being made in ruling on these evidentiary and admissibility matters will affect the answers to all of these issues.

Courts have misconstrued the welcomeness requirement, adding subjectivity prongs and analysis that tend to channel the inquiry into issues of sexual desire and promiscuity. As a result, some commentators have advocated abolishing the welcomeness requirement altogether. This Note will argue that not only is that unnecessary, but it would not achieve just results for all parties involved. Rather, the welcomeness requirement, as set out in *Meritor Savings Bank v. Vinson*,[8] and the "subjectively offended" requirement, as set out in *Harris v. Forklift Systems Inc.*,[9] when properly construed and limited so as to avoid the confusion of sexual desire and implication of a workplace code of conduct, would achieve the most just results.

Part II.A. of this Note examines the underlying principle for the Court's decision in *Meritor*, outlining the mandate and rationale behind the welcomeness requirement as an evidentiary issue. Part II.B. looks at the Federal Rules of Evidence, discussing the enactment and subsequent amendments to Rule 412, also known as the Rape Shield Rule, and the policy goals behind that enactment. Part III then analyzes cases that were decided after both *Meritor* and the amendments to Rule 412, looking at the impact of both welcomeness and Rule 412 on sexual harassment suits and how these two competing objectives are interpreted and implemented by federal district courts. More specifically, in looking at those district court decisions, this Note will examine what questions the courts are attempting to address in asking whether to admit evidence pertaining to a plaintiff's dress or sexual behavior and what effect those questions have on the outcome of each case. Part III also looks at the more recent Supreme Court decision in *Harris* and discusses how the addition of the subjectively offended requirement interplays with welcomeness and reasons that while those are the correct questions to ask, the manner in which the courts are asking them is incorrect. Finally, this Note will argue that continuing to address the issue of welcomeness is compatible, and in fact, desirable, when attempting to shift the focus away from sexual desire.

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7. *See* Paul N. Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155, 1156 (1995) ("'They want to show that the plaintiff is a nut or a slut.'" (quoting Ellen E. Schultz & Junda Woo, *The Bedroom Ploy*, WALL ST. J., Sept. 19, 1994, at A1 (quoting attorney Phillip Kay)).

8. 477 U.S. 57 (1986).

9. 510 U.S. 17 (1993).

II. BACKGROUND INFORMATION

In 1986, the Supreme Court decided *Meritor Savings Bank v. Vinson*,[10] incorporating the welcomeness requirement into the sexual harassment analysis. Part II.A. of this Note outlines the Court's ruling in that case. Part II.B. analyzes how the Federal Rules of Evidence interplay with the Court's holding, especially after the enactment of, and subsequent amendments to, the Rape Shield Rule.

A. Meritor *and the Gravamen of Sexual Harassment*

During her four years of employment with Meritor Savings Bank, plaintiff Michelle Vinson ("Vinson") claimed that "she had 'constantly been subjected to sexual harassment' by [her supervisor] in violation of Title VII."[11] Specifically, Vinson stated that her supervisor repeatedly requested that she engage in sexual intercourse with him, requests which she initially refused.[12] After some period of time, however, "she eventually agreed" to sexual intercourse.[13] In addition to the requests for sexual intercourse, Vinson's supervisor "fondled her in front of other employees, followed her into the women's restroom ... exposed himself to her, and eveu forcibly raped her on several occasions."[14] She further "testified that because she was afraid of [her supervisor] she never reported his harassment to any of his supervisors and never attempted to use the bank's complaint procedure."[15]

In evaluating Vinson's Title VII claim of sexual harassment, the district court denied relief, stating that if there was "an intimate or sexual relationship" between Vinson and her supervisor, that relationship was voluntary and had nothing to do with her employment at the bank.[16] The D.C. Circuit reversed the district court's decision, stating that if Vinson's supervisor "'made Vinson's toleration of sexual harassment a condition of her employment,' her voluntariness 'had no materiality whatsoever.'"[17] The court went on to say that "'the voluminous testimony regarding Vinson's dress and persoual fantasies' ... 'had no place in [the] litigation.'"[18]

In acknowledging the new hostile environment sexual harassmeut cause of action, the Supreme Court stated that in order to have a cause of action, the conduct "must be sufficiently severe or pervasive [as] 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[19] As such, single, "[i]solated or casual occurrences alone," will not suffice.[20] Rather, the conduct must be judged from "the totality of [the] circumstances, such as the nature of the sexual

10. 477 U.S. 57 (1986).
11. *Id.* at 59.
12. *Id.* at 60.
13. *Id.*
14. *Id.*
15. *Id.* at 61.
16. *Id.* (quoting Vinson v. Taylor, 1980 WL 100, *7 (D.D.C. 1980)).
17. *Id.* at 62-63 (quoting Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985)).
18. *Id.* at 63 (quoting Vinson, 753 F.2d at 146 n.36).
19. *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
20. Casey J. Wood, Note, *"Inviting Sexual Harassment": The Absurdity of the Welcomeness Requirement in Sexual Harassment Law*, 38 BRANDEIS L.J. 423, 425 (2000).

advances and the context in which the alleged incidents occurred."[21] As a result, "'[t]he workplace that is actionable is the one that is 'hellish.'"[22]

The Court, however, did not end its discussion with the totality of the circumstances. Rather, it went on to state that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome,'" as opposed to being voluntary.[23] The Court stated that the district court's emphasis on the voluntariness of the conduct, "in the sense that the complainant was not forced to participate against her will," was erroneously placed.[24] While it is not entirely clear based on the text of the opinion exactly what the Court had in mind while making this distinction between welcome and voluntary conduct, it appears that the Court was concerned with allowing claims of sexual harassment for situations that fell short of rape[25] while still allowing for a defense to the situation in which the plaintiff welcomed or wished to engage in the complained of sexual conduct.

While the Court conceded that this requirement of welcomeness[26] would present "difficult problems of proof," it offered no solutions regarding what evidence should be admitted in the determination, except to state that "a complainant's sexually provocative speech or dress . . . is *obviously* relevant."[27] Some might think that "if . . . the employee demonstrates by word or deed that the 'harassment' is welcome," then it cannot be said to be harassment at all.[28] As a result, the question of what constitutes actionable harassment appears deceptively simple. However, "[the] courts are still provided with little to no guidance in determining exactly *what evidence* will conclusively establish welcomeness."[29] Despite this lack, or perhaps, as a result of this lack of guidance, Title VII sexual harassment cases continue to turn specifically on the issue of welcomeness.

B. The 1994 Amendments to the Federal Rules of Evidence

In dealing with evidentiary matters and determining the admissibility of key evidence, the Federal Rules of Evidence "place explicit discretion with the trial judge

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21. *Meritor*, 477 U.S. at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)).

22. Wood, *supra* note 20, at 425 (quoting Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1013 (7th Cir. 1997) (quoting Baskerville v. Culligan Int'l, 50 F.3d 428, 430 (7th Cir. 1995))).

23. *Meritor*, 477 U.S. at 68.

24. *Id.*

25. The term "rape" is used here to indicate the presence of physical compulsion. Arguably, allowing a defense of a plaintiff having "voluntarily" engaged in the conduct would exclude the vast majority of sexual harassment cases, as many plaintiffs will engage in the conduct of their own free will out of a fear of retaliation for not doing so. That raises the question of whether such conduct can truly be called "voluntary," but that issue is beyond the scope of this Note.

26. The welcomeness requirement, as interpreted by the courts, would be more accurately described as the *un*welcomeness requirement, since it requires the plaintiff to affirmatively prove that she did not welcome harassment. However, since the courts refer to it as the welcomeness requirement, I will continue to use that term.

27. *Meritor*, 477 U.S. at 68-69 (emphasis added).

28. Carr v. Allison Gas Turbine Div., General Motors Corp., 32 F.3d 1007, 1008-09 (7th Cir. 1994) (citing Reed v. Shepard, 939 F.2d 484, 486-87 (7th Cir. 1991)).

29. Wood, *supra* note 20, at 427 (emphasis added).

to determine specific issues."[30] At a bare minimum, the trial judge must determine that the evidence sought to be admitted is relevant to the case at hand,[31] as "[e]vidence which is not relevant is not admissible."[32] In order to be relevant, the evidence must "[have] 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."[33] Thus, the standard under which evidence is to be admitted is if the fact to be proven is "more . . . probable than it would be without the evidence."[34] This is an exceedingly low standard, such that "[a]lmost anything that a rational lawyer would attempt to offer into evidence would be 'relevant' within the meaning of [the] Rule."[35] Because of this extreme leniency, Rule 403 imposes a balancing test for all relevant evidence.[36] Under this general rule, "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."[37] While Rule 403 is considered the "universal 'fall-back'"[38] for excluding evidence, it is still slanted to admitting evidence, as any prejudice must substantially outweigh the probative value.[39]

In 1978, Congress amended Rule 412 of the Federal Rules of Evidence, also known as the Rape Shield Rule, which served to substantially reduce the kind of evidence that could be admitted in a rape trial.[40] Specifically, legislators wanted to limit the evidence of a victim's prior sexual conduct that was being admitted for the purpose of demonstrating a propensity towards such conduct, and thus making it more likely than not that the victim consented.[41] This rule, however, only dealt with criminal trials, "[spelling] out when, and under what conditions, evidence of a rape victim's prior sexual behavior would be admitted."[42] The "principal purpose of Rule 412 was 'to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives.'"[43] Civil actions involving sexual misconduct were not included anywhere in the rule.

In 1994, Congress amended the Federal Rule of Evidence 412 to include civil actions. The amendments sought "to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual

30. ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS § 1.04, at 12 (1998).

31. *See* FED. R. EVID. 401.

32. FED. R. EVID. 402.

33. FED. R. EVID. 401.

34. *Id.*

35. PARK, *supra* note 31, § 5.01, at 124.

36. FED. R. EVID. 403.

37. *Id.*

38. PARK, *supra* note 31, § 5.04, at 129.

39. *See* FED. R. EVID. 403.

40. *See* Kevin C. Klein, *Evidentiary Hurdles in Defending Sexual Harassment Suits: Amended Rule 412 and Rule 415 of the Federal Rules of Evidence*, 9 CORNELL J.L. & PUB. POL'Y 715, 723 (2000).

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

42. Klein, *supra* note 40, at 723.

43. *Id.* at 724 (quoting 124 Cong. Rec. H11,944 (daily ed. Oct. 10, 1978) (statement of Rep. Mann of South Carolina) *quoted in* FED. R. EVID. 412 advisory committee's note).

misconduct,"[44] as well as to prevent the type of evidence from being admitted that had previously been admitted under the pure welcomeness standard in sexual harassment suits.[45] This amended version of Rule 412 was passed despite objections by the Supreme Court, which was concerned that the amended version would "'encroach on the rights of defendants'"[46] by preventing them from presenting a complete defense to claims of sexual misconduct.

The stated goals of Rule 412 are "to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding [sic] process."[47] Adding sexual harassment and civil cases generally to the purview of Rule 412 helps further these policy goals, regardless of the nature of the sexual offense.

Thus, in deciding the admissibility of dress and conduct evidence in a sexual harassment suit, Rule 401[48] applies as an initial gatekeeper,[49] but the balancing established in Rule 403[50] is reversed and supplanted by Rule 412. Rule 412(a) states that "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior [or]... to prove any alleged victim's sexual predisposition" is inadmissible unless it falls under the exceptions stated in subpart (b).[51] Subpart (b)(2) states that

> evidence offered to prove the sexual behavior[52] or sexual predisposition of any

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

45. Andrea A. Curcio, *Rule 412 Laid Bare: A Procedural Rule That Cannot Adequately Protect Sexual Harassment Plaintiffs from Embarrassing Exposure*, 67 U. CIN. L. REV. 125, 126-27 (1998).

46. Klein, *supra* note 40, at 724 (quoting Letter from Chief Justice William H. Rehnquist to the Honorable John F. Gerry, Chair of the Executive Committee of the Judicial Conference of the United States (Apr. 29, 1984), *reprinted in* COMMUNICATION FROM THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES, TRANSMITTING AN AMENDMENT TO THE FEDERAL RULES OF EVIDENCE, AS ADOPTED BY THE HOUSE OF REPRESENTATIVES, PURSUANT TO 28 U.S.C. § 2076, H.R. DOC. NO. 103-250 (1994)). Nevertheless, Congress passed the amendment, and Rule 412 now covers both criminal and civil proceedings. In fact, the Notes of the Advisory Committee specifically state that sexual harassment will be covered under Rule 412(b)(2) and (c). *See* FED. R. EVID. 412 advisory committee's note.

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

48. Rule 401 of the Federal Rules of Evidence governs relevancy and states that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

49. If the evidence sought to be admitted is not relevant to the issue at hand, the inquiry never advances to the Rule 412 analysis. *See, e.g.*, Howard v. Historic Tours of Am., 177 F.R.D. 48, 51-53 (D.D.C. 1997) (holding that "the defendants fail[ed] the first test imposed by [Rule 412(b)(2)], establishing that plaintiff's sexual behavior with other employees is 'otherwise admissible,' i.e., relevant under [Rule 401]").

50. Rule 403 of the Federal Rules of Evidence governs the exclusion of relevant evidence based on unfair prejudice and states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." FED. R. EVID. 403.

51. FED. R. EVID 412(a)(1)-(2).

52. "Behavior" is defined in the Notes of the Advisory Committee as "all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact," or that imply

> alleged victim is admissible if it is *otherwise admissible* under these rules *and* its *probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.* Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.[53]

The Rule's balancing test is the opposite of that required by Rule 403. Under Rule 412, in civil cases *the party seeking to admit* evidence of the sexual predisposition of the alleged victim must demonstrate that the probative value of the evidence outweighs any unfair prejudice.[54] In contrast, under Rule 403, the party opposing the entry of evidence must show that the unfair prejudice substantially outweighs the probative value.[55] According to the drafters, these amendments to Rule 412 were to make the requirements for admission "more stringent than in the original rule,"[56] and perhaps be used to avoid disturbing decisions, such as the Seventh Circuit's in *Reed v. Shepard*.[57]

In *Reed*, the plaintiff was employed with a county sheriff's department as a "'civilian jailer.'"[58] The atmosphere of her employment was described by the Seventh Circuit as "[resembling] a combination of a modern version of TV's *Barney Miller*, with the typically raunchy language and activities of an R-rated movie, and the antics imagined in a high-school locker room."[59] In addition to what the court described as an "unprofessional atmosphere," the plaintiff asserted

> that she was handcuffed to the drunk tank and sally port doors, that she was subjected to suggestive remarks . . ., that conversations often centered around oral sex, that she was physically hit and punched in the kidneys, that her head was grabbed and forcefully placed in members laps, and that she was the subject of lewd jokes and remarks. She testified that she had chairs pulled out from under her, a cattle prod with an electrical shock was placed between her legs, and they frequently tickled her. She was placed in a laundry basket, handcuffed inside an elevator, handcuffed to the toilet and her face pushed into the water, and maced.[60]

To all of this, the court responded by stating that "[b]y any objective standard, the behavior . . . was, to say the least, repulsive."[61] The court, however, found that it did

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sexual intercourse or sexual contact. FED. R. EVID. 412 advisory committee's note. "In addition, the word 'behavior' should be construed to include activities of the mind, such as fantasies or dreams." *Id.*

53. FED. R. EVID. 412(b)(2) (emphasis added).

54. *Id.*

55. FED. R. EVID. 403.

56. FED. R. EVID. 412 advisory committee's notes.

57. 939 F.2d 484, 491-92 (7th Cir. 1991) (finding that the plaintiff welcomed extreme physical and sexual harassment because she engaged in sexual banter and gift giving).

58. *Id.* at 485.

59. *Id.* at 486.

60. *Id.*

61. *Id.*

not constitute sexual harassment under Title VII because "[Reed] was a willing and welcome participant."[62] Her use of sexual banter, vulgar vocabulary, and occasionally not wearing a bra under her t-shirt[63] showed that the "language and sexually explicit jokes were used around [her] because of her personality rather than her sex,"[64] indicating that not only had she welcomed or invited such behavior, but also that the harassment could not have been "based on 'sex.'"[65]

If the 1994 Amendments to Rule 412 had been in place at the time of this decision, perhaps a different result would have been reached. However, even while claiming "to diminish some of the confusion ... [and] expand the protection afforded to alleged victims of sexual misconduct,"[66] the Notes of the Advisory Committee to the 1994 Amendments of the Federal Rules of Evidence admit that "[i]n an action for sexual harassment, . . . some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant."[67] As a result, Rule 412 would have served to restrict the amount and type of evidence admitted, but it would not have answered the question—for what purpose that evidence was being used—thus leaving loopholes for defendants. If the court in *Reed* had used Rule 412 in conjunction with a narrower version of *Meritor*'s welcomeness requirement, it would have been able to focus on the conduct specifically between the plaintiff and the defendant, and thereby could reasonably conclude that the plaintiff, despite her flirtations, did not welcome her harassers' abusive conduct.

III. THE CASES: POST-*MERITOR* AND AMENDED RULE 412

After the Supreme Court decision in *Meritor* and the amendments to Rule 412, there is still a need for guidance to the lower courts in determining what constitutes "welcomeness" in hostile work environment sexual harassment suits and how to determine what evidence is admissible and what is not. Rule 412 does provide some guidelines for determining what evidence is admissible and for what purpose. The Rule states that in civil cases evidence is admissible to prove sexual predisposition, and as a result, welcomeness.[68] Beyond this, however, the Rule provides little guidance, and thus the lower courts are all over the spectrum with respect to what is deemed relevant and, therefore, admissible. Determining what behavior clearly establishes unwelcomeness is as murky as ever, and there is anything but a national consensus on the matter.

A. The Extreme Cases: Pretending Rule 412 Does Not Exist

There are two basic types of cases at this end of the continuum. First, there are cases that indirectly ignore Rule 412 by improperly applying the balancing test. Second, there are those that directly ignore Rule 412 by simply admitting all evidence

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62. *Id.* at 487, 491.
63. *Id.* at 487.
64. *Id.* at 491-92.
65. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).
66. FED. R. EVID. 412 advisory committee's note.
67. *Id.* (citing Burns v. McGregor Elec. Indus., 989 F.2d 959, 962-63 (8th Cir. 1993)).
68. FED. R. EVID. 412(b)(2).

about plaintiffs' sexual behavior or workplace antics that passes the bare minimum of relevancy requirements under Rules 401 and 402.[69] In both instances, these courts admit evidence under the theory that the admitted evidence will demonstrate whether the plaintiff was in fact subjectively offended[70] or whether she actually welcomed the defendant's harassing behavior.

The first type of case (indirectly ignoring Rule 412), for example, is illustrated by *Sublette v. Glidden Co.*[71] In this case, the plaintiff filed a motion in limine to exclude certain evidence pertaining to her sexual conduct.[72] Specifically, the plaintiff sought to exclude her general workplace conduct, such as her use of vulgar language, her discussions of "her intimate relations with her husband," use of sexual innuendo, and provocative touching of other male coworkers.[73] There was no indication that her conduct in anyway involved or was directed at the particular coworkers and supervisors (named in her complaint) who repeatedly requested her to perform oral sex on them, "made comments about her breasts, disparaged the work performance of female workers, and [claimed] that a sketch of [her] performing oral sex was etched in the men's bathroom."[74]

In relying on a Fourth Circuit decision, the court determined that it was the plaintiff's burden to demonstrate the advances were in fact unwelcome, and that *any* "evidence of alleged sexual conduct of the [p]laintiff [was] relevant . . . [in order to] form a basis for finding that the [p]laintiff welcomed the conduct complained of."[75] In considering under Rule 412 the evidence regarding plaintiff's workplace behavior with other coworkers, the court stated that "[l]imiting evidence to the conduct involving the alleged harassers *or conduct which the alleged harassers could have taken as welcoming their advances* . . . would undermine the *Meritor* holding that a trier of fact should consider the whole picture."[76] Thus, according to this court's rationale, the inquiry does not stop with whatever conduct on the part of the plaintiff the harassers could perceive as welcoming their sexually harassing conduct. Instead, it gives defendants free reign to introduce any evidence that, while tending to show welcomeness between plaintiff and another person, has no relevance to demonstrate welcomeness with respect to the alleged harasser himself. The rationale behind this ruling essentially ignores the mandates of Rule 412 while purporting to apply it.

The same court in *Fedio v. Circuit City Stores, Inc.*,[77] in ruling on a motion for new trial, reasoned that having admitted evidence regarding the plaintiff's past sexual history was proper because the plaintiff won the trial.[78] The manager of the store in which the plaintiff worked made comments such as "women who are old enough to bleed are young enough to butcher."[79] Additionally, the manager made repeated

69. FED. R. EVID. 401, 402.

70. *See infra* Part IV.C.

71. No. CIV.A.97-CV-5047, 1998 WL 964189, at *1 (E.D. Pa. Oct. 1, 1998).

72. *Id.*

73. *Id.* at *1-2.

74. *Id.* at *2.

75. *Id.* at *3 (citing Swintek v. U.S. Air, Inc., 830 F.2d 552 (4th Cir. 1987)).

76. *Id.* (emphasis added).

77. No. CIV.A.97-5851, 1998 WL 966000, at *6 (E.D. Pa. Nov. 4, 1998).

78. *Id.*

79. *Id.* at *1.

comments about oral sex, told the plaintiff that "her skirt was not short enough[,] ... that [she probably] taste[d] great," and that she should pose as a centerfold in a magazine.[80] In her posttrial motion, the plaintiff asserted that evidence concerning her sexual relations outside of the workplace, an isolated statement made at work that "she was going to wear a finger ring until she 'got laid,'" and that she had been a victim of date rape prior to her employment with the defendant should have been excluded under Rule 412.[81] In ruling on the plaintiff's motion, the court concluded that the evidence was in fact admissible because not only did "the probative value of such evidence substantially outweigh[ ] [any] prejudicial effect on the [p]laintiff," but the "[p]laintiff ultimately prevailed in [the] litigation," something which, according to the court, demonstrated that it was in fact correct in its balancing.[82] The court went on to note that "[t]o allow an alleged victim to publicly flaunt her sexual behaviors and yet remain protected by Rule 412 would be tantamount to a complete disregard of the [R]ule's purpose."[83] The court apparently believed that, because the plaintiff discussed "her sexual proclivities"[84] with her coworkers on a few occasions, she was no longer entitled to the protection of Rule 412, or even to the more narrow inquiry of welcomeness as opposed to the determination of how offended she actually was.[85]

After admitting all of the evidence damaging to the plaintiff, the court proceeded to consider the admissibility of the plaintiff's evidence. In particular, the plaintiff had sought to introduce evidence of a rumor that one of her coworkers circulated about the plaintiff, saying that she wore "short dresses with no undergarments and exposed herself to coworkers."[86] The plaintiff had hoped to introduce evidence of this rumor to demonstrate the overall hostility of the workplace.[87] The court ruled the evidence of the rumor was inadmissible because "the alleged source of the rumor... had no supervisory authority over [the] [p]laintiff."[88] The court also noted that because the rumor "was a one-time occurrence[,] and therefore not 'pervasive and regular,'" it could not be admitted into evidence.[89] Not only does it appear that the court applied a double standard, but the logic seems to run contrary to the mandates in both *Meritor*[90] and *Harris*[91]—mandates that the issues of welcomeness and overall hostility be judged by the "totality of the circumstances," to include minor, isolated incidents,

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80. *Id.*

81. *Id.* at *5.

82. *Id.* at *6.

83. *Id.*

84. *Id.*

85. The court notes later in the opinion that the correct inquiry is not how offended the plaintiff actually was, but rather whether or not "the discrimination would detrimentally affect a reasonable person of the same sex in that position." *Id.* at *7 (citing Bonenberger v. Plymouth Township, 132 F.3d 20, 25 (3d Cir. 1997)).

86. *Id.* at *2.

87. *Id.* at *5.

88. *Id.* at *7.

89. *Id.*

90. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986) (holding that "the trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances'") (citing 29 C.F.R. § 1604.11(b) (1985)).

91. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) ("[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances.").

that, while insufficient alone, are quite significant when considered in the aggregate.[92]

While the court did purport to use Rule 412 and the plaintiff did ultimately prevail in her claim, the logic the court used to determine the admissibility of the evidence is unsettling for a number of reasons. First, questions of admissibility do not turn on who wins or loses the case. If the evidence had a more damaging effect on the plaintiff's case, the court would not have ruled any differently on its admissibility. Interestingly enough, while the court rested its laurels on the fact that "the [p]laintiff ultimately prevailed in [the] litigation"[93] as justification for the admissibility of damaging evidence, the jury actually found that the plaintiff had *not* proven "a gender-based hostile work environment."[94] Rather, the plaintiff prevailed because the jury found that the defendant had retaliated against the plaintiff for having "[made] complaints about [the defendant's] sexually-hostile conduct in the workplace."[95] In reaching this conclusion, the jury considered the very evidence the court claimed had no prejudicial effect on the plaintiff in allowing her to win the case.

Second, and perhaps more important, this opinion will set a precedent for other courts to follow, as both persuasive and binding authority. Even if the opinion is only followed for its logic as representative of how hostile work environment sexual harassment cases should be decided, the effect will be damaging to plaintiffs, who are justified in bringing such suits, but perhaps have engaged in willing sexual banter with employees other than the alleged harasser. Thus, if courts do follow this line of logic, the focus will be on evidence of plaintiffs' behavior having no bearing on whether or not they welcomed the particular complained-of harassing conduct. This will have the result of deterring plaintiffs from bringing legitimate Title VII sexual harassment suits out of fear of in-depth inquiries into their private sexual conduct.

The second line of cases at this end of the spectrum are those that simply reverse the balancing prescribed by Rule 412, effectively ignoring the Rule altogether, and follow the reversed balancing test as set out in Rule 403, so that the unfair prejudice must substantially outweigh the probative value.[96] In *Beard v. Flying J., Inc.*,[97] the court correctly notes that evidence "is admissible if it is otherwise admissible under [the] rules [sic] and its *probative value substantially outweighs the danger* of harm to any victim and of unfair prejudice to any party."[98] However, when the court discussed the admissibility of the evidence in question, namely "issues of workplace sexual conduct," the court admitted the evidence because "the *probative value* of this

92. *See, e.g.*, Gallagher v. Delaney, 139 F.3d 338, 347 (2d Cir. 1998) (overruling a motion for summary judgment for the defendant because "*[a]ll* of the circumstances must be considered") (emphasis added); Woodard v. Metro I.P.T.C., No. IP 98-646-C H/G, 2000 WL 684101, at *10 (S.D. Ind. March 16, 2000) ("[T]he issue 'should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all of the circumstances.'' This analysis includes considering 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" (internal citations omitted)).

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

94. *Id.* at *2.

95. *Id.*

96. *See supra* notes 37-40 and accompanying text.

97. 116 F. Supp. 2d 1077 (S.D. Iowa 2000).

98. *Id.* at 1084 (quoting FED. R. EVID. 412(b)(2)) (emphasis added).

evidence *was not substantially outweighed* by any harm or prejudice that may have resulted."[99] In other words, the court ignored Rule 412, reverting to a straight Rule 403 inquiry, asking if the harm substantially outweighed the probative value instead of vice versa. The court asserted that because the plaintiff claimed "that [the defendant] created an 'unwanted' sexually offensive environment, [the plaintiff] has placed in controversy [the] issues of workplace sexual conduct."[100] Specifically, the court maintained that the "evidence was relevant to the claim of a sexually hostile work environment."[101]

Under this reasoning, any time a plaintiff brings forth a claim of hostile work environment sexual harassment, simply by filing the initial complaint, the plaintiff would be deemed to have placed her reputation into controversy, thus completely subverting the protections of Rule 412, and thrusting the inquiry back to the very basics of *Meritor* and welcomeness. The fact that the evidence in *Beard* did not extend beyond the workplace is of little comfort given the court's rationale.[102] The court did give lip service to the notion of relevance by citing *Burns v. McGregor Electric Industry*, for the proposition that "posing nude for a magazine outside work hours is not relevant to the issue of unwelcome sexually harassing conduct at work."[103] However, given the court's reversal of Rule 412's balancing requirements and seemingly nonchalant treatment of what constitutes placing the plaintiff's reputation into controversy, this citation does not instill much confidence.[104] It is not difficult to imagine a situation in which evidence of the plaintiff's reputation, based on incidents that occurred outside of the workplace, would be entered into the record as evidence of the plaintiff's willingness and welcoming of the harasser's sexual advances.

B. The More Balanced Approach—Focusing on the Conduct Between Plaintiff and Defendant

While no court excludes all evidence pertaining to welcomeness under Rule 412,[105] the courts that fall more in the middle have placed severe restrictions on what may be admitted and what must be excluded. Perhaps the most determined in its protection of sexual harassment plaintiffs was the court in *Howard v. Historic Tours of*

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99. *Id.* at 1085-86 (emphasis added). The plaintiff had made a motion for a new trial, in part, on the grounds that certain evidence should have been excluded under Rule 412. *Id.* The court said that the admission of the evidence was "harmless error," and even if it "were to reach the merits of Plaintiff's Rule 412 argument, the [c]ourt would not order a new trial," as she placed some of the evidence in controversy herself. *Id.*

100. *Id.* at 1085 (citing FED. R. EVID. 412(b)(2)) ("Evidence of an alleged victim's reputation is admissible only if it has been placed into controversy by the alleged victim.") (internal citations omitted).

101. *Id.* at 1086.

102. *Id.* ("[T]he admission of evidence was limited solely to certain instances of Plaintiff's workplace conduct, and did not extend to her non-workplace behavior.").

103. *Id.* (citing Burns v. McGregor Elec. Indus., 989 F.2d 959, 962-63 (8th Cir. 1993)).

104. *Id.* at 1085-86.

105. Such an exclusion would arguably constitute the opposite extreme end of the continuum.

America.[106] In *Howard*, the court was asked to rule on whether the plaintiffs could be compelled to answer certain interrogatories during discovery.[107] The interrogatories pertained to whether the plaintiffs had sexual relations with any of the defendant's employees, regardless of whether or not those sexual relations were with someone who had harassed them or whether the alleged harassers knew of the sexual relations.[108] The defendant's "[t]heory of [a]dmissibility"[109] centered on the notion that "they [had] the right to present evidence [about] the plaintiffs' voluntary sexual affair with [other] coworkers ... so that the jury [could] determine whether the named employees reasonably believed that their sexual advances were welcome."[110]

In evaluating that claim, the court pointed out that sexual behavior between the plaintiffs and employees other than the alleged harassers could "be construed as welcoming the harassing conduct complained of only if the harassing employees knew of it."[111] Without limiting the information defendants sought to obtain to that which the harassers could have reasonably known of or construed to be welcoming, "it is impossible for the information sought to be relevant, (or lead to relevant evidence),"[112] and therefore would fall outside of the scope of discovery. The court speculated that even if the "defendants were to narrow the question and ask [the] plaintiffs only if they engaged in sexual conduct with other employees and had reason to believe that the harassing employees knew of that behavior," the information sought wonld still be irrelevant.[113] According to the court, "[s]uch proof has probative force ouly if the proposition that their knowledge that she engaged in such behavior made it more reasonable for them to conclude that she would welcome their sexual advances becomes easier to accept than it would be without that proof."[114] The court continued:

> To so conclude one would have to say that knowledge of a woman's engaging in a consensual relationship with a co-worker makes reasonable the perception that she welcomed other sexual advances at her place of employment .... While such a perception might have been justified in Victorian England and Wharton's "Age of Innocence" in America, when men discriminated between the women they married and the women they slept with, it has nothing to do with America in 1997.[115]

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106. 177 F.R.D. 48 (D.D.C. 1997). The plaintiffs in *Howard* sued under the D.C. Human Rights Act, D.C. Code § 2000e-2(a)(1). *Id.* at 51. The court, however, noted that the D.C. Human Rights Act is similar to Title VII and analyzed the evidence issues according to Supreme Court doctrine in Title VII cases. *Id.*

107. *Id.* at 48-49.

108. *Id.* at 50.

109. *Id.* at 51. In order to conduct discovery under Federal Rule of Civil Procedure 26(e), the information sought must "be reasonably calculated to lead to the discovery of *admissible* evidence, even if the information itself is not admissible at trial." *Id.* at 50 (emphasis added).

110. *Id.* at 51.

111. *Id.*

112. *Id.*

113. *Id.* at 52.

114. *Id.*

115. *Id.*

According to the court, unless "the harassing employees knew or had reason to know" of certain behavior or interactions, the information sought by the defendants "[could not] possibly be relevant to whether those employees thought the plaintiffs would welcome their advances."[116] Even if the harassers knew of the behavior, then it would still not be relevant, because "the probative force" would be based on the same "illogical" premises quoted above.[117] As a result, the ouly type of evidence admissible under this court's logic would be evidence of interactions directly between the plaintiff and the alleged harassers.

Another district court arrived at a similar conclusion in its analysis, though ultimately reaching a different result, in *Woodard v. Metro Indianapolis Public Transportation Corp.*[118] In *Woodard*, the plaintiff claimed that she had been subjected to sexual harassment by coworkers and supervisors alike, allegedly leading to her being fired in retaliation for having filed complaints.[119] In evaluating the plaintiff's complaints, the court looked at the conduct specifically between the plaintiff and the alleged harasser[120] in determining whether that conduct was welcome.[121] In so doing, the court noted that "[t]he record contain[ed] extensive undisputed evidence of [the plaintiff's] own initiation of and participation in sexual banter and teasing, and even [described] her efforts while on the job at Metro to attract other Metro employees as customers for her private $40 'lingerie shows,'" some of which were specifically targeted at the alleged harasser.[122] As a result, looking only at the evidence of conduct that occurred between the alleged harasser and the plaintiff, it is not unreasonable to conclude that the plaintiff welcomed the very harassing behavior of which she complained. The court stated that prior to her affirmatively stating that she no longer welcomed such sexual banter, "[the defendant did not act] unreasonably in failing to distinguish . . . between conduct that [the plaintiff] initiated or at least found welcome, and . . . conduct she found unwelcome."[123]

Both *Howard* and *Woodard* share one main focal point. Both cases focus primarily on the relationship between the alleged harasser and the plaintiff, as opposed to conduct generally or conduct that would have no bearing on that relationship. While the court in *Woodard* did consider far more "damaging" evidence than did the court in *Howard*, this difference is explained by the fact that the plaintiff in *Woodard* injected her sexuality into the workplace in a far more extreme manner. In fact, the plaintiff in *Woodard* went so far as to circulate nude photos of herself, specifically

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116. *Id.* at 53.

117. *Id.*

118. No. IP 98-646-C H/G, 2000 WL 684101, at *1 (S.D. Ind. March 16, 2000) (ruling for defendants in a motion for summary judgment and noting that the "case presents truly meritless allegations of sexual harassment").

119. *Id.*

120. Originally, there were several individual defendants listed as having allegedly harassed the plaintiff. *Id.* at *2. However, some of the defendants were not named in the requisite EEOC complaint, and as a result, were not considered as part of the suit. *Id.* Of the other named defendants, only the conduct of one was deemed to have risen to the level of being objectively sexually hostile. *Id.* at *11. As a result, it is only with that one remaining defendant that the issue of welcomeness was seriously at issue.

121. *Id.* at *13.

122. *Id.* at *12-13.

123. *Id.* at *13.

showing these photos to her alleged harassers.[124] Also in alignment with *Howard*, the court in *Woodard* considered the plaintiff's method of dress.[125] Even though the focus is on the conduct between the plaintiff and the alleged harasser, "one supposes . . . all the employees [including the alleged harassers] could see" extremely provocative dress, and therefore could make the rational assumption, however erroneous it may be, that the plaintiff would not be opposed to sexual banter or advances.[126]

It is one thing to be a sexual being in the workplace in the sense that a plaintiff chooses to engage in sexual banter with one person in particular or even some coworkers, generally. It is another to then make the assumption that based on a plaintiff's interactions with those specific persons, she then necessarily accepts the advances and harassment of all. If that sexual behavior is with the actual defendant, however, the competing policy interests tip in favor of the defendant,[127] something that was clearly evident in *Woodard*.[128]

IV. THE CONFUSION OF WELCOMENESS AND SUBJECTIVITY

Some commentators assert that the welcomeness requirement is "intrusive, irrelevant, damaging, and needlessly discourages legitimate sexual harassment claims."[129] Others claim that while welcomeness should be maintained, the burden of proof should be shifted from the plaintiff to the defendant.[130] A careful understanding of the multiple issues, as well as the underlying harms of sexual harassment, however, supports the conclusion that the inquiry into welcomeness, without shifting the burden of proof, is necessary in order to maintain fairness to defendants and allow for a more equitable adjudication.

A. The Anti-Welcomeness Camp

The primary objection to the welcomeness requirement is that "courts have made liberal use of a complainant's 'general character and past behavior towards others' despite . . . [the fact] that this kind of evidence has 'limited, if any probative

124. *Id.* at *7-8.

125. *Id.* at *9; *see also Howard*, 177 F.R.D. at 53.

126. *Howard*, 177 F.R.D. at 53.

127. FED. R. EVID. 412(b)(2). Rule 412(b)(2) states that "evidence offered to prove the sexual ... predisposition ... is admissible if ... its probative value substantially outweighs ... [the] unfair prejudice to any party." *Id.* The balancing test portion of Rule 412 applies to civil cases and can be read in light of Rule 412(b)(1)(B) which states that in criminal cases, evidence of conduct between the defendant and alleged victim "*is admissible* ... to prove consent." *Id.* (emphasis added).

128. *Woodard*, 2000 WL 684101, at *7 (explaining that evidence of the plaintiff's repeated outward manifestation at the workplace of her sexual proclivity should be admitted, because excluding it "would not 'comport with [Rule 412's] underlying purpose' of protecting a plaintiff's privacy.") (quoting Fedio v. Circuit City Stores, Inc., No. 97-5851, 1998 WL 966000, at *6 (E.D. Pa. Nov. 4, 1998)).

129. Joan S. Weiner, Note, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform*, 72 NOTRE DAME L. REV. 621, 621 (1997).

130. *See, e.g.*, Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 526 (1994).

value,'"[131] which has the effect of "putting the sexual harassment plaintiff on trial."[132] In doing so, women who have engaged in any kind of sexual banter in the workplace, even if done in an attempt to blend into a male-dominated work force, "are deemed to have incited and prompted any sexual harassment they suffer."[133] This inquiry also encourages the courts to think about sexual harassment in terms of sexual desire, ignoring the fact that in many instances the woman will be in a politically and economically disadvantaged position.[134] Thus, the power relations would prevent her from being able to expressly decline such advances.[135] As a result, welcomeness has the added "effect of teaching harassers that they may do or say anything sexual to anyone until they are told to stop."[136]

Other critics of welcomeness have suggested that, if not eliminated altogether, "welcomeness [should] be characterized as an affirmative defense rather than as an element of the plaintiff's prima facie case."[137] Such a step would shift the burden of proof from the plaintiff to the defendant. In so doing, the defendant would have to prove the plaintiff *welcomed* his advances, as opposed to the plaintiff proving the advances were *unwelcome.* The major proponent of this theory argues that this is necessary as a bare minimum, because proving a legal negative is far more difficult than proving the opposite.[138]

The majority of the anti-welcomeness camp, however, would rather eliminate the requirement. According to this view, continuing to "[impose] a duty to warn of unwelcomeness . . . reinforces the conventional, repressive view of women's sexuality that pervades the law of sexual harassment."[139] These commentators suggest that since "Title VII is not a 'fault-based tort scheme[,]' . . . [o]nly evidence relating to the cause and effect of the [defendant's] conduct is probative to the issue. The defendant's belief that his conduct was welcome . . . should be irrelevant[,]"[140] thus doing away with the inquiry altogether.

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131. Weiner, *supra* note 129, at 628 (quoting EEOC, *Policy Guidance on Current Issues of Sexual Harassment,* EEOC Notice No. 915-035 (Oct. 25, 1998)).

132. *Id.* at 626.

133. *Id.* at 631.

134. *See infra* note 165 and accompanying text. This is one of the arguments in favor of shifting the burden of proof of welcomeness from the plaintiff to the defendant. *See* Radford, *supra* note 130. In quid pro quo sexual harassment cases, the employer is strictly liable for supervisors who sexually harass employees, something which implicitly takes into account the power relations of the workers. Whatever the merits of that argument might be, it does not necessarily follow that the burden of proof should be shifted in all sexual harassment claims. As a practical matter, in enforcing sexual harassment policies in the workplace, one could deal with the power issue and not change the burden of proof by requiring the "scared" employee to complain or talk to someone, and that someone can give the notice.

135. Weiner, *supra* note 129, at 634.

136. *Id.* at 649.

137. Radford, *supra* note 130, at 525.

138. *Id.* at 526.

139. Monnin, *supra* note 7, at 1191.

140. Ann C. Juliano, Note, *Did She Ask for It?: The "Unwelcome" Requirement in Sexual Harassment Cases,* 77 CORNELL L. REV. 1558, 1591 (1992).

B. Guarding Against Ourselves as Monsters—Narrowing and Maintaining the Welcomeness Inquiry

While the welcomeness inquiry does shift the focus back to the plaintiff's conduct, such a result is desirable when limited in scope and aided by Rule 412. Using *Howard* and *Woodard* as examples of the correct application of both the welcomeness standard and Rule 412, the inquiry is properly focused on the personal dynamics between the harasser and the plaintiff. This approach seems to provide a more equitable solution to all involved. The defendants must be able to refute the elements of the claim, and the plaintiff must be shielded from unnecessary and overly intrusive inquiries into her past sexual conduct.

Doing away with the welcomeness requirement would have the effect of creating a workplace code of conduct, an outcome outside the scope of Title VII. In order to shield themselves from claims of sexual harassment, even if the conduct were in fact *welcomed*, coworkers and employees would have to monitor interactions with each other and adhere to a judicially enforced "civility code."[141] While the Supreme Court was quick to emphasize in its decision in *Oncale v. Sundowner Offshore Services., Inc.*,[142] that it was in fact *not* creating a workplace code of conduct, stating that Title VII did not extend its reach to "innocuous" behavior,[143] that conclusion does not resonate: "[T]he opinion [in *Oncale*] is nothing less than notice to employers that if employees behave badly enough, the federal judiciary will take on the role of manners police."[144] While in theory this may not seem like such a bad idea, given how litigious our society is, coupled with the inherent messiness of sexual harassment suits, employees and coworkers would be coerced into policing their speech and behavior, lest they should face the policing effects of a law suit.[145] In some ways, this concern of a workplace code of conduct is the fundamental concern of Title VII: it governs private interactions between private parties, and the ultimate question is how far do we entangle the judiciary into what some may see as that purely private sphere.[146]

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141. Dabney D. Ware & Bradley R. Johnson, Oncale v. Sundowner Offshore Servs., Inc.: *Perverted Behavior Leads to a Perverse Ruling*, 51 FLA. L. REV. 489, 504, 508-09 (1999); *see also* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81-82 (1998).

142. 523 U.S. 75 (ruling that same-sex sexual harassment is actionable). For a more detailed discussion of same-sex sexual harassment and the various approaches of the courts as well as potential approaches, see Dr. Arjun P. Aggarwal & Madhu M. Gupta, *Same-Sex Sexual Harassment: Is it Sex Discrimination?: A Review of Canadian and American Law*, 27 MAN. L.J. 333 (2000); Brian Lehman, *The Equal Protection Problem in Sexual Harassment Doctrine*, 10 COLUM. J. GENDER & L. 125 (2000); Shelby Jean, Comment, *Peer Sexual Harassment Since* Oncale *and* Davis: *Taking the "Sex" Out of "Sexual Harassment,"* 2000 DET. C.L. REV. 485; Miguel Nieves, Comment, Joseph Oncale v. Sundowner Offshore Services, Inc.: *Redefining Workplace Sexual Harassment to Include Same-Sex Sexual Harassment and the Effect on Employers*, 34 NEW ENG. L. REV. 941 (2000).

143. *Id.* at 81.

144. Ware & Johnson, *supra* note 141, at 490.

145. *Cf. infra* note 160 and accompanying text.

146. *Cf.* Robert Brookins, *A Rose by Any Other Name . . . The Gender Basis of Same-Sex Sexual Harassment*, 46 DRAKE L. REV. 441, 494 (1998) ("[T]he Court forecasted that it will narrowly construe 'because of sex' to avoid converting Title VII into a 'general civility code' that *sanctions 'acceptable' conduct*, as well as conduct in the 'twilight zone' of the permissible

Maintaining and narrowing the welcomeness inquiry, coupled with the evidentiary guidance of Rule 412, serves the interests of maintaining equity for the defendant, shielding the plaintiff from unnecessary intrusion, and avoiding a workplace code of conduct. The inquiry becomes simply whether the plaintiff welcomed the complained-of conduct. In analyzing what evidence may be admitted to determine that inquiry, courts will necessarily be guided by the balancing of Rule 412.

The question, "Were the advances welcome?" does not necessarily have to focus exclusively on the sexual aspect of the advances, unlike in *Reed*.[147] Perhaps the plaintiff in *Reed* did engage in sexual banter, and even welcomed a minimum amount, but that does not mean that she welcomed the level of harassment that she received.[148] As a result, in focusing on the welcomeness requirement, the courts will have to distinguish between what the plaintiff reasonably anticipated in return and what was actually received.

A strict interpretation of Rule 412 would ask exactly what evidence should be admitted that goes to show the interactions between the plaintiff and the harasser. In interpreting when the "probative value substantially outweighs the danger of harm,"[149] the courts should be guided by the language of Rule 412 that deals with criminal trials: "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent"[150] shall be admissible. This statutory guidance would focus the probative value inquiry on the relationship between the plaintiff and the alleged harasser and tend to exclude all other sexual behavior as either irrelevant or highly prejudicial.

If the plaintiff engaged in friendly sexual banter with the harasser, and the harasser reciprocated in kind, then the harassment cannot be said to be unwelcome, as a person could reasonably mistake such banter as inviting the like in return. However, if the plaintiff engages in friendly sexual banter with the harasser and the harasser responds with physical advances or banter escalated in nature, then the question of welcomeness is more complex. At this point the duty could reasonably fall on the plaintiff to inform the harasser that such escalated behavior is neither welcome nor wanted. In no situation could a harasser reasonably rely on conduct that did not involve him directly or on conduct occurring outside of the workplace, because to do so would assume that because an individual welcomed the advances and sexual conduct of one person she necessarily welcomed the sexual advances of all.[151]

In contrast, looking at the plaintiff's behavior outside of the context of the specific relationship under the guise of serving the policy goals of Rule 412 seems disingenuous.[152] When the courts talk about undermining the purpose of Rule 412 by

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and impermissible.") (emphasis added) (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)).

147. Reed v. Shepard, 939 F.2d 484, 486-87 (7th Cir. 1991).

148. *See also* Monnin, *supra* note 7, at 1179-80 ("By resorting to violence, the defendant belies any claim that his sexual advances were welcome.").

149. FED. R. EVID. 412(b)(2).

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

151. *See* Howard v. Historic Tours of Am., 177 F.R.D. 48, 52-53 (D.D.C. 1997).

152. *See* Fedio v. Circuit City Stores, Inc., No. Civ.A.97-5851, 1998 WL 966000, at *6 (E.D. Pa. Nov. 4, 1998) ("To allow an alleged victim to publicly flaunt her sexual behaviors

"[allowing] an alleged victim to publicly flaunt her sexual behaviors and [still retain the protection of] Rule 412,"[153] they are punishing anyone who dares to be a sexual being in the workplace towards specific individuals yet spurns the advances of one or two.[154] If the sexual banter is between the plaintiff and the alleged harasser, then its probative value outweighs any potential for harm or unfair prejudice.[155] In fact, it is highly relevant to what the two individuals were thinking[156] and perceiving as welcomed behavior. Beyond that immediate relationship, not only does examining sexual banter in the workplace generally not provide the requisite level of probative value that must be had to meet the rigors of Rule 412, it also does not comply with sound reasoning.[157] Allowing the courts to examine workplace conduct generally imposes an unrealistic expectation of purity[158] upon plaintiffs and has the effect of creating a workplace code of conduct, something that courts are neither equipped nor well suited to do.[159]

Another benefit under this analysis is that the sexual aspect of the hostile work environment is minimized, and the inquiry is simply whether the plaintiff welcomed the complained-of conduct. Thus, courts are forced to acknowledge and analyze the personal dynamics and power relations on a micro level, and to avoid the problems of creating a workplace "code of conduct."[160] Instead, the code of conduct would be enforced only as between the plaintiff and the harasser, and it would be up to the plaintiff to have established clear boundaries and set her own limits with that particular individual, leaving the possibility that she may welcome and wish to engage in a sexual dialogue with other people in the workplace. Using *Reed* as an example, the plaintiff did engage in and welcome some sexual banter with some of her coworkers.[161] In so doing, however, she did not necessarily welcome the behavior that

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and yet remain protected by Rule 412 would be tantamount to a complete disregard of the rule's purpose.").

153. *Id.*

154. *See e.g.*, Reed v. Shepard, 939 F.2d 484 (7th Cir. 1991) (finding that the plaintiff welcomed extreme physical and sexual harassment because she engaged in sexual banter and gift giving); *supra* notes 62-66 and accompanying text. *But see Howard*, 177 F.R.D. at 52.

155. *Cf.* FED. R. EVID. 412(b)(1)(B) (stating that in criminal cases "evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent" is admissible).

156. Or it could be probative of what they were *not* thinking, depending on your level of cynicism.

157. *See Howard*, 177 F.R.D. at 53 (referring to as "hopelessly illogical" the proposition that because a woman welcomes the advances of one person she necessarily welcomes the advances of all).

158. *See e.g.*, Gallagher v. Delaney, 139 F.3d 338 (2d Cir. 1998). In perhaps the most chaste sexual harassment suit to date, the alleged harasser purchased for his secretary roses, teddy bears, "and a book about angels." *Id.* at 344. While it could be argued that if all sexually charged work atmospheres were this benign and chaste, working relations might improve, that is probably a highly unrealistic expectation or accurate portrait of what actually occurs in the workplace.

159. *Id.* at 342 ("A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations.").

160. *See supra* notes 142-47 and accompanying text.

161. Reed v. Shepard, 939 F.2d 484, 486-87 (7th Cir. 1991); *see also supra* notes 59-67 and

she received in return from the defendants. By failing to narrow the inquiry to the specific conduct between the plaintiff and the alleged harassers, the court erroneously focused on the sexual desire aspect of sexual harassment. Forcing courts to focus exclusively on welcomeness limits the relevance of sexual desire.

Most hostile work environment sexual harassment claims are not about sexual desire. Rather, they illustrate how sexuality can be used as a tool of power "to hurt people physically, to denigrate or humiliate people, to deny them their equal opportunity in employment, or otherwise to make an environment hostile or uncomfortable."[162] Thus, focusing *exclusively* on conduct that occurs between the plaintiff and the defendant, it should become apparent that "[w]elcomeness is not an issue when [sexually aggressive] conduct occurs[,] because it is purely reflective of power."[163] This is not to say that there is no element of desire in some cases. However, when the focus of the judicial investigation becomes the specific actions of the plaintiff and the defendant with respect to each other, the natural elements of power should become more evident. This also makes the focus on welcomeness that much more important. One can imagine that if the alleged harasser were the plaintiff's supervisor, then the plaintiff might not be as readily able to clearly state that she does not welcome the harasser's advances. A court, looking at whether the defendant's aggressive conduct was welcomed, should examine the power relations between the two parties, in addition to examining the plaintiff's failure to clearly state her lack of receptivity.[164] In the situation in which the alleged harasser is a coworker, the court will also examine the parties' respective power relations, and more than likely will conclude that the plaintiff in that situation will have a greater duty to affirmatively state her lack of receptiveness.

Additionally, simply maintaining the welcomeness inquiry and shifting the burden of proof from the plaintiff to the defendant is simply not feasible.[165] Because workplace sexual relations, whether they are welcomed or not, can often be subtle and complex, even if the defendant had to prove welcomeness (as opposed to unwelcomeness), there would still be the problems contemplated by Rule 412: the defendant would seek to admit evidence of the plaintiff's sexually provocative behavior, regardless of whether the plaintiff's behavior was directed specifically at him. Having the defendant prove the welcomeness of his sexually suggestive conduct would not in any meaningful way detract from the damaging nature of the evidence he will try to introduce to the court. In addition, this would most certainly create a workplace "code of conduct" in which the defendant must specifically ask and receive permission for every comment or gesture that might have any sexual

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accompanying text.

162. Radford, *supra* note 130, at 542.

163. Monnin, *supra* note 7, at 1179-80.

164. Maintaining the welcomeness requirement as it is would arguably require the plaintiff to affirmatively state her disapproval to any would-be harassers. Radford, *supra* note 130, at 546. That argument is based on the assumption that plaintiffs are completely powerless in controlling their situations. *See id.* at 539. However, if courts were to take into account differing levels of power and control, as they presumably already do in quid pro quo suits, this would not be an insurmountable problem.

165. *But see* Radford, *supra* note 130, at 526.

overtones.[166]

With Rule 412, the ultimate burden of proving unwelcomeness lies with the plaintiff, and any evidence that the defendant wishes to introduce that would rebut the plaintiff's accusation would fall under Rule 412, and for that specific evidence, the defendant would have to prove the prescribed balancing test.[167] Thus, the overall burden of proving unwelcomeness would still lie with the plaintiff. This serves to protect the interests of the plaintiff, limiting the admissible evidence under Rule 412 to the relevant conduct that occurred specifically between the plaintiff and defendant only, while also requiring the plaintiff to take a more affirmative role in her workplace environment.[168] In so placing and maintaining this overall burden of proof with the plaintiff, the element of subjective offensiveness, which some courts have interpreted as a subcomponent of welcomeness, must be reanalyzed.

C. The "Subjectively Offended" Requirement

In *Harris v. Forklift Systems*,[169] the Supreme Court held that plaintiffs in sexual harassment cases need not demonstrate psychological or other serious injury in order to state an actionable claim under Title VII.[170] The Court stated that the standard was one that "takes a middle path between making actionable any conduct which is merely offensive and requiring the conduct to cause a tangible psychological injury."[171] The Court continued, however, stating that "if the victim [did] not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditious of the victim's employment, and there is no Title VII violation."[172] As a result of this decision, many lower courts have adopted a second prong within the welcomeness inquiry: Was the plaintiff subjectively offended by the alleged harasser's actions?[173]

1. Defining the "Subjectively Offended" Requirement

In answering the question posed in *Harris*, the Court stated that Title VII required a middle-ground approach, reasoning that harassment that does *not* rise to the level of psychological injury can affect the terms and conditions of employment.[174] The

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166. *See supra* notes 142-47 and accompanying text. Fear of liability drove at least one institution of higher learning to implement just such a policy for dealing with sexual harassment. *See, e.g.*, Daphne Patai, *1990's Faculty Fundamentalism and Academic Freedom: There Ought to be a Law*, 22 WM. MITCHELL L. REV. 491 (1996) (discussing the current trend to cleanse and sanitize culture in conjunction with the University of Massachusetts—Amherst's proposed sexual harassment policy).

167. *See supra* notes 52-55 and accompanying text.

168. While there is some valid concern that "[i]f a woman does indeed lodge a complaint with her employer ... she may risk further harassment or retaliation," such retaliation is covered under Title VII and beyond the scope of this Note. Monnin, *supra* note 7, at 1179.

169. 510 U.S. 17 (1993).

170. *Id.* at 21.

171. *Id.*

172. *Id.* at 21-22.

173. *See, e.g.*, Fedio v. Circuit City Stores, Inc., No. Civ.A.97-5851, 1998 WL 966000, at *6 (E.D. Pa. Nov. 4, 1998).

174. *Harris*, 510 U.S. at 22.

Court stressed, however, the fact that the conduct complained of cannot simply be offensive. Rather, it must rise to the level of affecting the terms and conditions of employment, *and* the plaintiff must find it subjectively offensive. In determining whether the plaintiff was subjectively offended, the Court was not asking whether the plaintiff was offended by the *words or actions* used. Instead, the Court was concerned that the plaintiff demonstrate that she was offended by the conduct *as directed at her*: that she did not welcome the conduct. Finding the complained-of conduct unwelcome *and* having it rise to the level of affecting a term or condition of her employment will necessarily involve some level of subjective offensiveness, regardless of whether the *specific* conduct used offended her moral sensibilities.

2. Why Being Subjectively Offended Is an Erroneous Inquiry

The result of "[creating] a two-part standard for unwelcome sexual conduct . . . [defining] unwelcome sexual conduct as conduct that the employee did not solicit or incite, *and* that is undesirable or offensive to the [plaintiff]"[175] is that courts are failing to realize that whether the plaintiff was subjectively *offended* is irrelevant to whether the plaintiff welcomed the defendant's sexual advances. It is entirely possible that a plaintiff would not be subjectively offended by crude sexual remarks, and may even engage in such conduct herself with *other* coworkers, and yet may still perceive such remarks from the defendant as being unwelcome, even if she does not find them offensive.

A prime example of the misinterpretation of *Harris*' subjectively offended criteria is *Fedio v. Circuit City Stores, Inc.*[176] Despite the circular logic[177] the court applied in deciding the case, it is disturbing that a court would allow a hostile work environment sexual harassment case to turn on how much or "how little [the] [p]laintiff would be *offended* by . . . alleged sexual innuendos,"[178] as opposed to looking at the greater issue of whether those advances were *welcomed* and how they affected the plaintiff's status and performance in the workplace. While the welcomeness requirement is also a subjective inquiry to a degree, the "subjectively offended requirement" looks at whether the plaintiff was *offended* by the *conduct*, not whether the conduct was *welcomed*. If the welcomeness requirement is warped into a "subjectively offended requirement," sexual harassment suits would be defeated any time a particular plaintiff had previously engaged in sexual banter with someone other than the defendant using similar language or actions.[179] The real issue is whether the defendant's conduct was welcomed, not whether the plaintiff was subjectively offended by the remarks in and of themselves. In asking that question of a defendant,

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175. Monnin, *supra* note 7, at 1164-65 (citing Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (emphasis added)). While the decision in *Henson* was prior to both *Meritor* and the 1994 Amendments to the Federal Rules of Evidence, some courts have continued to follow this approach. *See Fedio*, 1998 WL 966000, at *6; *see also supra* notes 174-75 and accompanying text.

176. No. Civ.A.97-5851, 1998 WL 966000 (E.D. Pa. Nov. 4, 1998).

177. *See supra* text accompanying notes 82, 93-95.

178. *Fedio*, 1998 WL 966000, at *6 (emphasis added).

179. This is so because at that point in time, it could not be said that the plaintiff was subjectively offended by the words or actions used by the defendant.

however, it will rarely, if ever, be answered in the negative. As a result, the question, out of necessity, must shift back to the plaintiff, as well as the defendant, and focus on their interactions together, excluding subjective perceptions of offensiveness. If the complained of conduct was not welcomed by the plaintiff and that conduct rises to the level of affecting a term or condition of employment, then the subjectively offended prong will naturally be satisfied, thus avoiding the potential pitfalls in irrelevant and highly prejudicial evidence.

V. CONCLUSION

To the extent the courts think sexual harassment is about sexual desire, it is understandable that there would be confusion over what evidence is admissible to demonstrate a plaintiff's welcomeness. However, this emphasis on sexual desire coupled with all-out inquiries into a plaintiff's past sexual conduct to prove unwelcomeness is not correct. While many commentators would do away with the welcomeness requirement completely, such conclusions are a little rash and would not satisfactorily balance all of the competing policy interests. Simply because some courts have "done a bad job of differentiating welcome from unwelcome sexual conduct,"[180] we need not declare all conduct unwelcome or abandon the welcomeness requirement altogether.

There are many problems with the standard as it is currently being employed in certain courts. While Rule 412 was amended, in part, to add clarity and guidance to an area of law that desperately needed it after *Meritor*, it has provided little such guidance.[181] Instead, it has validated the relevance of general workplace conduct of plaintiffs and has left the decision of admissibility where it had been initially: in the trial judge's discretion.[182]

Nevertheless, some courts, with the help of Rule 412 are taking steps in the correct direction. These courts are focusing only on the conduct between the plaintiff and the defendant, looking at whether the plaintiff targeted her alleged welcoming behavior specifically at the defendant, so that he could later reasonably perceive his sexually aggressive conduct as having been invited. In so doing, the courts will not only be able to get a better sense of the power relations that exist between the plaintiff and her aggressors, but will be able to avoid creating a workplace "code of conduct," something which is not only undesirable, but also unrealistic.

180. Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691, 746 (1997).

181. *See supra* Part II.

182. FED. R. EVID. 412 advisory committee's note (citing Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962-63 (8th Cir. 1993)).