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A Crack in the Armor?: How the Reforms to the New York State Human Rights Law May Expose Weaknesses in Civil Rape Shield Laws

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A CRACK IN THE ARMOR?: HOW THE REFORMS TO THE NEW YORK STATE HUMAN RIGHTS LAW MAY EXPOSE WEAKNESSES IN CIVIL RAPE SHIELD LAWS

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Civil rape shield laws exist to protect victims of sexual misconduct from unwarranted intrusions into their private lives as they litigate their claims. Gaps in current federal and New York State civil rape shield laws, however, mean that victims of sexual misconduct still experience significant privacy intrusions during litigation. These intrusions may have the effect of deterring victims from coming forward. Part of the reason that these gaps exist, however, is to ensure that defendants are given a fair opportunity to assert defenses.

In 2019, New York revised the New York State Human Rights Law to make it easier for victims to bring sexual harassment claims. The revisions included the elimination of two commonly asserted defenses to sexual harassment claims. The defenses that survived the revisions, however, may force defendants to probe into plaintiffs' private sexual histories more than was necessary when more defenses were available. The reforms to the New York State Human Rights Law, therefore, may have the unintended consequence of increasing the use of tactics that deter victims from coming forward.

This Note argues that New York should enact a civil rape shield statute to better protect the privacy of sexual harassment plaintiffs, without further limiting the defenses available to sexual harassment defendants, and proposes the appropriate mechanisms for doing so.

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INTRODUCTION

"In July of 2013, I was raped by Charles Payne . . . . In July of 2017, I was raped again by Fox News. Since then, I have been living an absolute hell."[1] These are the words of a woman who filed a sexual harassment claim against Charles Payne and Fox News.[2] In response to her allegations, Fox News employed a tactic frequently used by sexual harassment defendants, known colloquially as the "she's crazy" or "she wanted it" defense.[3] This strategy seeks to shift the blame from the accused to the accuser.[4] Fox News leaked a story to the media about an affair between the plaintiff and Mr. Payne,[5] claimed that the plaintiff pursued a sexual relationship with Mr. Payne to advance her career,[6] and sought sexual videos and photographs of the plaintiff from men with whom the plaintiff had previously had romantic relationships.[7] These tactics can be traumatizing for victims[8] of sexual harassment who are brave enough to come forward[9] and may deter others from coming forward at all.[10] New York State recently revised article 15 of the Executive Law, the New York State Human Rights Law (NYSHRL), to make it "easier for workplace sexual harassment claims to be brought forward."[11] But are the revisions enough to combat the deterrent effects of the "she's crazy" and "she wanted it" defenses?

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1. Emily Steel, *Woman Says Fox News Banned Her After She Accused Charles Payne of Rape*, N.Y. TIMES (Sept. 18, 2017), https://www.nytimes.com/2017/09/18/business/media/fox-news-lawsuit-charles-payne.html [https://perma.cc/R2AZ-FJ4W].

2. *See id.*

3. *See* Symposium, *2018 Symposium Panel Discussion: Sexual Harassment in the Workplace in the #MeToo Era*, 22 RICH. PUB. INT. L. REV. 45, 50 (2019); *infra* Part II.A.1.

4. *See* Symposium, *supra* note 3, at 50.

5. *See* Steel, *supra* note 1.

6. *See* Hughes v. Twenty-First Century Fox, Inc., 327 F.R.D. 55, 57 (S.D.N.Y. 2018).

7. *See id.* at 56–57; *see also* Memorandum of Law in Support of Plaintiff's Motion to Quash the Fox Defendants' Non-Party Subpoenas *Duces Tecum* at 3, *Hughes*, 327 F.R.D. 55 (No. 17-cv-7093(WHP)), ECF No. 38 [hereinafter *Hughes* Memorandum].

8. This Note uses the term "victim," rather than "survivor," to refer to individuals who have experienced sexual harassment because the term "victim" is used in the legal literature and statutes concerning sexual harassment. *See, e.g.*, FED. R. EVID. 412. In addition, the term "victim" may capture the diverse range of experiences of individuals who have been sexually harassed. *See* Danielle Campoamor, Opinion, *I'm Not a Sexual Assault "Survivor"—I'm a Victim*, HARPER'S BAZAAR (May 21, 2018), https://www.harpersbazaar.com/culture/features/a20138398/stop-using-survivor-to-describe-sexual-assault-victims/ [https://perma.cc/A7ZJ-9H3W] ("'Survivor' isn't indicative of how I feel on any given day."). This Note also uses the terms "victim" and "plaintiff" interchangeably.

9. *See* Symposium, *supra* note 3, at 50.

10. *See* Jane H. Aiken, *Protecting Plaintiffs' Sexual Pasts: Coping with Preconceptions Through Discretion*, 51 EMORY L.J. 559, 562–63 (2002); Catherine A. O'Neill, Comment, *Sexual Harassment Cases and the Law of Evidence: A Proposed Rule*, 1989 U. CHI. LEGAL F. 219, 232 n.48.

11. *See* Dan M. Clark, *Sweeping Reform of NY Sexual Harassment Law Is Signed by Gov. Cuomo*, N.Y.L.J. (Aug. 12, 2019), https://www.law.com/newyorklawjournal/2019/08/12/

This Note examines how current rape shield laws fail to adequately protect sexual harassment plaintiffs in a manner that undermines the aims of the recent revisions to the NYSHRL and how the revisions themselves may inadvertently exacerbate this issue. Part I discusses the development of rape shield laws to protect victims of sexual misconduct in both criminal and civil cases before detailing the recent changes to the NYSHRL. Part II examines (1) the ways in which New York's current rape shield jurisprudence fails to adequately protect sexual harassment plaintiffs and (2) how these failures persist beyond the NYSHRL reforms—and ultimately undermine the purpose of the reforms. Part II also addresses the legitimate reasons why a sexual harassment defendant might seek evidence regarding a plaintiff's sexual history or predisposition, especially in light of the reforms. Part III then proposes that New York should develop its own civil rape shield statute to better protect the privacy interests of sexual harassment plaintiffs without infringing on the ability of sexual harassment defendants to defend themselves.

I. TWO SIDES OF THE SAME SHIELD: PROTECTING SEXUAL HARASSMENT VICTIMS THROUGH RAPE SHIELD LAWS AND CIVIL RIGHTS REFORMS

This Part discusses the development and current state of civil rape shield laws and also describes the NYSHRL reforms. Part I.A discusses the development of the federal rape shield law, its expansion to civil cases, and its application in civil cases. Part I.B then explains New York State's civil rape shield jurisprudence. Finally, Part I.C details the NYSHRL reforms.

A. The Federal Rape Shield Law

Criminal rape shield laws protect the victims in prosecutions involving sex offenses.[12] These laws shield victims of sex offenses by preventing a defendant from revealing details about a victim's past sexual conduct.[13] The general purpose of these laws is to protect victims from unnecessary intrusions of privacy.[14]

Prior to the enactment of rape shield laws, it was common practice for criminal defendants to present evidence regarding a victim's prior sexual conduct during trial.[15] Admitting such evidence, however, misdirected the focus of the case and resulted in unnecessary intrusions into the private lives of the victims.[16] In addition, this practice discouraged victims from coming forward.[17] Recognizing that sexual history evidence has minimal probative

sweeping-reforms-to-ny-sexual-harassment-law-is-signed-by-cuomo/ [https://perma.cc/SJ7Y-BZ7M].

12. *See* 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman).

13. *See id.* This Note uses the terms "sexual conduct," "sexual history," "sexual predisposition," and "sexual behavior" interchangeably. *See infra* notes 30–32 and accompanying text.

14. *See* O'Neill, *supra* note 10, at 219.

15. *See id.*

16. *See id.*

17. *See id.* at 225.

value and may result in prejudice to the victims,[18] Congress enacted Federal Rule of Evidence 412 ("Rule 412") to protect victims of rape from unwarranted intrusions into their private lives.[19]

Rule 412 makes evidence of victims' sexual history presumptively inadmissible.[20] However, because the Constitution grants criminal defendants the right to present evidence and confront witnesses, Rule 412 allows admission of sexual history evidence in criminal cases in certain express circumstances.[21]

1. Expanding the Federal Rape Shield Law to Civil Cases

In 1994, over ten years after the enactment of Rule 412, Congress extended federal rape shield protections to civil plaintiffs.[22] Like that of the original rule, the purpose of extending Rule 412 to civil cases was to narrow the inquiry, protect plaintiffs' privacy, and encourage victims to come forward with civil rape or sexual harassment claims.[23] Rule 412 aims to safeguard victims in sex offense cases "against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with the public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process."[24] These protections are meant to encourage "victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders."[25] As in the criminal context, Rule 412 now makes sexual history evidence presumptively inadmissible in civil cases.[26]

2. Applying the Federal Rape Shield Law in Civil Cases

Courts conduct a two-step analysis in determining whether evidence sought to be introduced by the defendant is admissible in civil cases pursuant to Rule 412.[27] During the first stage of the analysis, the court determines whether Rule 412 applies to the type of evidence in question.[28] Rule 412 governs the admissibility of two types of evidence, namely "(1) evidence offered to prove that a victim engaged in other sexual behavior; or (2)

18. *See id.* at 224–25; *see also* Patrick J. Hines, Note, *Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings*, 86 NOTRE DAME L. REV. 879, 883 (2011).

19. *See* O'Neill, *supra* note 10, at 219.

20. *See* FED. R. EVID. 412(a) (prohibiting sexual history evidence in the first instance but allowing for its admission pursuant to certain exceptions).

21. *See* Hines, *supra* note 18, at 884.

22. *See* Laura E. Diss, Note, *Whether You "Like" It or Not: The Inclusion of Social Media Evidence in Sexual Harassment Cases and How Courts Can Effectively Control It*, 54 B.C. L. REV. 1841, 1859 (2013).

23. *See id.* at 1859–60.

24. FED. R. EVID. 412 advisory committee's note to 1994 amendment.

25. *Id.*

26. *Id.* r. 412(a).

27. *See* Wolak v. Spucci, 217 F.3d 157, 160 (2d Cir. 2000) (determining, first, that the evidence at issue was subject to Rule 412 and then that the evidence at issue was inadmissible pursuant to the Rule's criteria).

28. *See id.*

evidence offered to prove a victim's sexual predisposition."[29] The advisory committee's notes establish that "sexual behavior" refers to all activities that involve actual physical conduct, such as sexual intercourse or sexual contact.[30] The terms "sexual predisposition" and "sexual behavior" are meant to be interpreted broadly, however, and may also encompass such evidence as "'fantasies or dreams,' 'use of contraceptives,' the 'birth of an illegitimate child,' and evidence that 'may have a sexual connotation for the factfinder,' even if such evidence 'does not directly refer to sexual activities or thoughts.'"[31] The term "sexual predisposition" also refers to evidence "relating to the alleged victim's mode of dress, speech, or life-style."[32] If the court determines that the evidence sought to be admitted by the defendant fits into either of these two categories, then Rule 412 applies and the evidence is presumptively inadmissible.[33] If the evidence does not fit into either of these two categories, however, then the evidence is governed by Federal Rule of Evidence 403, and the evidence will be presumed admissible, unless the plaintiff can justify its exclusion.[34]

If the court determines that Rule 412 applies, it proceeds to the second stage of analysis.[35] During this stage, the court will determine whether to override the presumption of inadmissibility.[36] The evidence in question will be deemed admissible if "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."[37] This balancing test is a fact-dependent inquiry and whether the evidence in question is deemed admissible will vary from case to case.[38]

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29. FED. R. EVID. 412.

30. *id.* 412 advisory committee's note to 1994 amendment.

31. Glazier v. Fox, No. 2014-106, 2016 WL 827760, at *4 (D.V.I. Mar. 2, 2016) (quoting FED. R. EVID. 412 advisory committee's note to 1994 amendment).

32. FED. R. EVID. 412 advisory committee's note to 1994 amendment.

33. *See Wolak*, 217 F.3d at 160.

34. FED. R. EVID. 412 advisory committee's note to 1994 amendment (explaining that Rule 412 "reverses that usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence").

35. *See Wolak*, 217 F.3d at 160.

36. *See id.*

37. *See id.* (quoting FED. R. EVID. 412(b)(2)). This reverses the usual presumption that relevant evidence is admissible and will be excluded if its probative value is substantially outweighed by a danger of unfair prejudice. *See* Chamblee v. Harris & Harris, Inc., 154 F. Supp. 2d 670, 680 (S.D.N.Y. 2001) (citing FED. R. EVID. 403). The exceptions to the presumptive inadmissibility of sexual history evidence are different in the civil context than they are in the criminal context. *See* FED. R. EVID. 412(b)(1)–(2). In the criminal context, Rule 412 precludes the admission of plaintiffs' past sexual conduct or predisposition except in certain expressly delineated circumstances. *See* Aiken, *supra* note 10, at 560. In the civil context, however, Rule 412 grants the court the discretion to determine "whether the probative value of the proffered evidence substantially outweighs the prejudice to a party or the harm to the victim." *Id.*

38. *See* Aiken, *supra* note 10, at 585. Note that Rule 412 governs the admissibility of evidence at trial, whereas Rule 26 of the Federal Rules of Civil Procedure governs the discovery of evidence. *See* Holt v. Welch Allyn, Inc., No. 95–CV–1135 (RSP/GJD), 1997 WL 210420, at *7 (N.D.N.Y. Apr. 15, 1997). The standard governing the admissibility of evidence pursuant to Rule 412 is narrower than the standard governing the discoverability of evidence

B. New York State's Civil Rape Shield Jurisprudence

New York does not have its own statutory code of evidence.[39] Instead, New York derives its evidence rules from judicial decisions, statutes, and court rules.[40] While New York's penal code does include a criminal rape shield statute,[41] the state's civil rape shield jurisprudence is not very developed.[42] In determining the admissibility of sexual history evidence in civil cases, New York courts have, therefore, looked to federal case law for guidance.[43] In *Bumpus v. New York City Transit Authority*,[44] for example, the Kings County Supreme Court cited a federal district court case that applied Rule 412 and set forth "the standard" that "[i]n a sexual harassment case, evidence offered to prove the plaintiff's sexual behavior generally is inadmissible unless its probative value substantially outweighs the danger of harm to the victim and of unfair prejudice to any party."[45] In *Bumpus*, the plaintiff, a transgender woman, sued the New York City Transit Authority under the New York City Human Rights Law (NYCHRL), alleging that she had been verbally harassed by a transit employee.[46] The plaintiff alleged that the harassment had caused emotional distress, which negatively affected her relationship with her partner.[47] The defendants deposed the plaintiff's partner and inquired about his sexual orientation and the types of sexual acts in which he and the plaintiff had engaged.[48] Applying "the standard" from federal case law, the court held that this line of questioning was impermissible and that "[a]ny probative value of the proposed inquiry . . .

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pursuant to Rule 26. *See* Hughes v. Twenty-First Century Fox, Inc., 327 F.R.D. 55, 58 (S.D.N.Y. 2018) ("Rule 26's relevance requirement permits the discovery of information that 'need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.'" (quoting Montesa v. Schwartz, No. 12 Civ. 6057 (CS)(JCM), 2015 WL 13016354, at *1 (S.D.N.Y. Nov. 3, 2015))). However, in order to carry out the purpose of Rule 412, courts tend to restrict discovery to prohibit inquiry into areas that will not survive the Rule 412 balancing test. *See id.*; Barta v. City of Honolulu, 169 F.R.D. 132, 135 (D. Haw. 1996).

39. *See* William C. Donnino, *New York's Evidence Guide: The Court System's 'Best Kept Secret*,*'* N.Y.L.J. (Sept. 10, 2019), https://www.law.com/newyorklawjournal/2019/09/10/new-yorks-evidence-guide-the-court-systems-best-kept-secret/ [https://perma.cc/6N2H-H7J5].

40. *See id.*

41. *See* N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2020).

42. *See* Bumpus v. N.Y.C. Transit Auth., No. 3512/07, 2009 WL 1141401, at *3 (N.Y. Sup. Ct. Apr. 28, 2009) (noting that "[n]either the parties nor the Court were able to find New York State precedent addressing the issue" of whether the defense could inquire about the sexual orientation and sexual activities of a third-party witness in a transgender discrimination case).

43. *See id.*; *see also* Rivera v. United Parcel Serv., Inc., 49 N.Y.S.3d 690, 692 (App. Div. 2017) (citing Wolak v. Spucci, 217 F.3d 157, 160–61 (2d Cir. 2000)).

44. No. 3512/07, 2009 WL 1141401 (N.Y. Sup. Ct. Apr. 28, 2009).

45. *Id.* at *3 (quoting Fitzpatrick v. QVC, Inc., No. 98-CV-38156, 1999 WL 1215577, at *2 (E.D. Pa. Dec. 7, 1999)).

46. *See id.* at *1.

47. *See id.*

48. *See id.*

[was] far outweighed by the invasion of this non-party witness' privacy interest as well as the possible prejudicial impact of such testimony."[49]

Similarly, in *Rivera v. United Parcel Service, Inc.*,[50] the Bronx County Supreme Court cited several federal court of appeals decisions in holding that "private sexual relationships are essentially irrelevant in sexual harassment cases, and that a plaintiff's private sexual behavior does not change his or her expectations or entitlement to a workplace free of sexual harassment."[51] In *Rivera*, the plaintiff sued her employer, United Parcel Service (UPS), for sexual harassment under NYCHRL.[52] In preparing its defense, UPS sought information about the plaintiff's consensual sexual relationship with a coworker that took place after the plaintiff's employment had been terminated.[53] The court held that this evidence was inadmissible, quoting a Second Circuit decision for the proposition that the welcomeness[54] of a sexual advance "does not turn on the private sexual behavior of the alleged victim, because a woman's expectations about her work environment cannot be said to change depending upon her sexual sophistication."[55]

C. The NYSHRL Reforms

In August 2019, New York State made several sweeping changes to the NYSHRL, which reformed the state's sexual harassment laws.[56] Spurred by "dozens of high profile incidents" and the #MeToo[57] and Time's Up[58] movements, the justification for these reforms was to "abandon the protection of those who would discriminate and sexually harass in the workplace and recognize and serve victims of discrimination."[59]

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49. *Id.* at *4.

50. No. 303092/2008, 2015 WL 13345524 (N.Y. Sup. Ct. Dec. 24, 2015), *aff'd*, 49 N.Y.S.3d 690 (App. Div. 2017).

51. *Id.* at *4 n.3.

52. Verified Complaint at 12, *Rivera*, 2015 WL 13345524 (No. 303092/2008).

53. *Rivera*, 2015 WL 13345524, at *4 n.3.

54. *See infra* Part II.B.1.

55. *Rivera*, 2015 WL 13345524, at *4 n.3 (quoting Wolak v. Spucci, 217 F.3d 157, 160 (2d Cir. 2000)).

56. *See* Clark, *supra* note 11.

57. The #MeToo movement is a social justice initiative against sexual assault and harassment that was originally created in 1997, as the "Me Too" movement, by Tarana Burke. *See* Nora Stewart, Note, *The Light We Shine into the Grey: A Restorative #MeToo Solution and an Acknowledgment of Those #MeToo Leaves in the Dark*, 87 FORDHAM L. REV. 1693, 1698 n.18 (2019). The initiative was renewed in 2017, as the "#MeToo" movement, in the wake of widespread publicity regarding film producer Harvey Weinstein's long history of predatory behavior toward women. *See id.* at 1698; *see also* Pooja Bhaskar, Note, Milkovich, *#MeToo, and "Liars": Defamation Law and the Fact-Opinion Distinction*, 88 FORDHAM L. REV. 691, 693 n.2 (2019).

58. The "Time's Up" movement is a social justice initiative that was formed in 2018 by female actors, agents, writers, directors, producers, and entertainment executives to fight systemic sexual harassment in the entertainment industry as well as in blue-collar workplaces nationwide. *See* Cara Buckley, *Powerful Hollywood Women Unveil Anti-harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018), https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html [https://perma.cc/8A6S-ABV4].

59. MEMORANDUM IN SUPPORT OF LEGISLATION, Assemb. 08421, 2019–2020 Leg., Reg. Sess. (N.Y. 2019) (enacted).

The NYSHRL reforms made a number of important changes to the state's sexual harassment laws. To make it "easier for workplace sexual harassment claims to be brought forward," the New York State Legislature (1) eliminated the "severe or pervasive" standard traditionally required to sustain a sexual harassment claim;[60] (2) removed the *Faragher-Ellerth* defense as an affirmative defense;[61] and (3) expanded the definition of employer to include all employers regardless of size.[62] Parts I.C.1 though I.C.3 discuss each of these reforms, respectively.

1. Eliminating the Severe or Pervasive Standard

Prior to the NYSHRL reforms, New York followed Title VII of the Civil Rights Act of 1964[63] ("Title VII") in requiring harassing conduct to be "severe or pervasive" in order to be actionable.[64] Under that standard, courts look at the frequency and severity of the harassing conduct to determine whether the plaintiff has an actionable sexual harassment claim.[65] To be sufficiently severe, the conduct at issue must be "physically threatening or humiliating" as opposed to "a mere offensive utterance," and it must unreasonably interfere with the plaintiff's work performance.[66] If not sufficiently severe, the conduct at issue must be sufficiently pervasive to be actionable.[67] To be sufficiently pervasive, the conduct must be "more than episodic,"[68] must be "sufficiently continuous and concerted,"[69] and must be "repeated."[70] "[I]solated acts or occasional episodes will not merit relief."[71]

60. *See* Clark, *supra* note 11.

61. *See id.* (noting that employers will still be able to offer the *Faragher-Ellerth* defense, but it will no longer be determinative).

62. *See* Russell Penzer, *New York Breaks from Federal Sexual Harassment Standards*, N.Y.L.J. (Oct. 4, 2019), https://www.law.com/newyorklawjournal/2019/10/04/new-york-breaks-from-federal-sexual-harassment-standards/ [https://perma.cc/2EGH-VE9R].

63. 42 U.S.C. §§ 2000e–2000e-17 (2018).

64. *See* Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 30 (App. Div. 2009) (affirming the decision to dismiss the plaintiff's NYSHRL claim on the basis that it was not sufficiently severe or pervasive); Palmer v. Cook, 108 N.Y.S.3d 297, 311 (Sup. Ct. 2019) (noting that a plaintiff must show that the alleged conduct was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" to state a claim under the NYSHRL for sexual harassment (quoting Jones v. Mayflower Int'l Hotel Grp., Inc., No. 15-CVJ4435 (WFK), 2018 WL 3999586, at *6 (E.D.N.Y July 3, 2018))). Title VII requires the harassing conduct to be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)).

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

66. *See id.*

67. *See* Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) ("[T]he required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct."); *Palmer*, 108 N.Y.S.3d at 311.

68. Carrero v. N.Y.C. Hous. Auth., 890 F.2d 569, 577 (2d Cir. 1989).

69. *Id.*

70. Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992).

71. *Id.*

The "severe or pervasive" standard does not capture a broad range of conduct that falls between what might be considered "severe or pervasive" and what might be considered a "petty slight or trivial inconvenience."[72] This high bar makes it difficult for sexual harassment plaintiffs to prevail on their claims.[73] In one case, for example, a circuit court held that three isolated incidents over the course of nine months were not sufficiently severe or pervasive to establish actionable harassment.[74] In this case, the plaintiff's harasser: asked the plaintiff to watch pornographic movies and masturbate; suggested that the plaintiff would advance professionally if he caused the harasser to orgasm; kissed the plaintiff on the mouth; grabbed the plaintiff's buttocks; brushed the plaintiff's groin; reached for the plaintiff's genitals; and gripped the plaintiff's thigh.[75]

The revised NYSHRL proscribes harassment "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims."[76] In abandoning the "severe or pervasive" standard, the revised NYSHRL makes it an affirmative defense "that the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences."[77] This "petty slights or trivial inconveniences" standard, a lower standard than the "severe or pervasive" standard, is applied under NYCHRL.[78] The "petty slights or trivial inconveniences" standard is intended to capture the "broad range of conduct that falls between 'severe or pervasive' on the one hand and a 'petty slight or trivial inconvenience' on the other."[79] Therefore, a broader range of conduct is actionable under the revised NYSHRL than was actionable under the prior NYSHRL or is actionable under federal law.

2. Eliminating the *Faragher-Ellerth* Defense

Prior to the NYSHRL reforms, New York also followed federal Title VII jurisprudence by making the *Faragher-Ellerth* affirmative defense available to employers in sexual harassment cases.[80] The *Faragher-Ellerth* defense

72. *See* Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 41 (App. Div. 2009).

73. *See id.* at 36 ("The rule (and its misapplication) has routinely barred the courthouse door to women who have, in fact, been treated less well than men because of gender."); Sandra F. Sperino & Suja A. Thomas, Opinion, *Boss Grab Your Breasts?: That's Not (Legally) Harassment*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html [https://perma.cc/6HFD-R43Q]; *see also* Deborah L. Rhode, *#MeToo: Why Now?: What Next?*, 69 DUKE L.J., 377, 385 n.38 (2019) (collecting cases).

74. *See* LeGrand v. Area Res. for Cmty. & Human Servs., 394 F.3d 1098, 1103 (8th Cir. 2005).

75. *See id.* at 1100.

76. Assemb. 08421, 2019–2020 Leg., Reg. Sess. (N.Y. 2019) (enacted).

77. *Id.*

78. *See Williams*, 872 N.Y.S.2d at 41.

79. *See id.*

80. *See* Zakrzewska v. New Sch., 928 N.E.2d 1035, 1039 (N.Y. 2010) (noting that the NYCHRL, unlike the NYSHRL at that time, precluded the application of the *Faragher-Ellerth* defense); Poolt v. Brooks, No. 110024/09, 2013 WL 323253, at *8 (N.Y. Sup. Ct. Jan. 18,

applied when the employer could be held vicariously liable for the sexual harassment conduct committed by the employer's supervisory employee[81] that did not result in the victim suffering a tangible employment action.[82] In those cases, if the employer exercised reasonable care to prevent and rectify any sexual harassment conduct and the plaintiff-employee unreasonably failed to take advantage of the corrective opportunities provided by the employer or failed to otherwise avoid harm, then the employer could avoid vicarious liability.[83] The employer could exercise reasonable care by, for example, maintaining an antiharassment policy with a complaint procedure.[84] The plaintiff would be said to have unreasonably failed to take advantage of the corrective opportunities provided by the employer or to otherwise avoid harm if, for example, the plaintiff unreasonably failed to use the employer's complaint procedure.[85] Therefore, under the prior NYSHRL, an employer could completely avoid liability for sexual harassment committed by a supervisory employee merely by establishing an antiharassment policy with a complaint procedure, if the alleged victim failed to report the harassment using that procedure.[86] Under the revised NYSHRL, however, the fact that an employee did not report sexual harassment through the employer's complaint procedure "shall not be determinative" of whether the employer may be held liable.[87] Therefore, it will be more difficult for sexual harassment defendants to avoid liability under the revised NYSHRL than under the prior New York or federal law.

3. Expanding the Definition of Employer

The NYSHRL reforms expanded the definition of employer to include all employers regardless of size.[88] Prior to the reforms, the NYSHRL excluded employers with fewer than four employees from its definition of employer.[89] Similarly, Title VII does not apply to employers who have fewer than fifteen

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2013) ("Under federal and state law, an employer vicariously liable for the discriminatory conduct of a managerial or supervisory employee may elude liability by asserting the so-called *Faragher-Ellerth* defense.").

81. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 744 (1998). A supervisory employee is an employee "empowered by the employer to take tangible employment actions against the victim." Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).

82. *See Ellerth*, 524 U.S. at 765. A tangible employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *See id.* at 761.

83. *See id.* at 745.

84. *See id.*

85. *See id.*

86. Many victims of sexual harassment refrain from reporting misconduct through internal complaint procedures because of fear of retaliation and because of inadequate protections against retaliation. *See* Kate W. Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN ST. L. REV. 463, 477–88 (2018).

87. Assemb. 08421, 2019–2020 Leg., Reg. Sess. (N.Y. 2019) (enacted).

88. *See* Penzer, *supra* note 62.

89. *See* Assemb. 08421.

employees.[90] Therefore, under the revised NYSHRL, plaintiffs will be able to pursue claims against employers who could not be sued under the prior law and cannot be sued under Title VII.

II. HOW THE NYSHRL REFORMS MAY EXPOSE GAPS IN THE CIVIL RAPE SHIELD LAWS AND WHY THOSE GAPS MIGHT BE DIFFICULT TO FIX

The purpose of civil rape shield laws is to protect alleged victims of sexual misconduct from the "invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process" and to encourage "victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders."[91] Rule 412 and New York common law seek to achieve these objectives in civil cases by barring evidence offered to prove the alleged victim's sexual behavior or sexual predisposition, unless the probative value of such evidence significantly outweighs the possible harm to the victim.[92] Despite these laws, however, many plaintiffs in civil sexual misconduct cases continue to experience invasions of privacy as their claims are litigated.[93] To that end, Part II.A examines how gaps in Rule 412 and New York's civil rape shield jurisprudence prevent sexual harassment plaintiffs from securing full protection. Part II.B then discusses why these shortcomings may be unavoidable if defendants are to be given a fair trial. Finally, Part II.C examines how the NYSHRL reforms might exacerbate the dueling interests of (1) fully protecting sexual harassment plaintiffs from privacy invasions in order to encourage victims to come forward and (2) providing sexual harassment defendants with a fair trial.

A. How Current Rape Shield Laws Fail to Adequately Protect Sexual Harassment Victims

This section discusses how gaps in current rape shield laws fail to adequately protect sexual harassment victims. Part II.A.1 discusses how the shortcomings of Rule 412 prevent sexual harassment plaintiffs from securing full protection. Part II.A.2 discusses how the shortcomings of New York's civil rape shield common law prevent sexual harassment plaintiffs from securing full protection.

90. 42 U.S.C. § 2000e(b) (2018).

91. FED. R. EVID. 412 advisory committee's note to 1994 amendment.

92. *See id.*; Bumpus v. N.Y.C. Transit Auth., No. 3512/07, 2009 WL 1141401, at *3 (N.Y. Sup. Ct. Apr. 28, 2009) (citing Fitzpatrick v. QVC, Inc., No. 98–CV–3815, 1999 WL 1215577, at *3 (E.D. Pa. Dec. 7, 1999)).

93. *See infra* Part II.A.

1. The Weaknesses of Rule 412

In *Hughes v. Twenty-First Century Fox, Inc.*,[94] the plaintiff, a female guest television contributor, sued Twenty-First Century Fox, Inc. (Fox) and Charles Payne, among others, under Title VII, the NYSHRL, and the NYCHRL.[95] The crux of the plaintiff's allegations was that Mr. Payne had sexually harassed her.[96] The defendants argued that the plaintiff and Mr. Payne had had a consensual relationship and that this relationship was consistent with the plaintiff's history of pursuing conservative media figures and politicians who she believed could advance her career.[97] To bolster this defense, the defendants subpoenaed four men formerly involved in affairs with the plaintiff, seeking evidence of the plaintiff's purported pattern of pursuing men to boost her career.[98] The subpoenas sought "sexual or romantic communications between [the plaintiff] and each of the men, information regarding [the plaintiff's] personal background and reputation, and media files of a sexual or romantic nature depicting [the plaintiff]."[99] In response, the plaintiff moved to quash the subpoenas, arguing that none of the subpoenaed men had ever been employees of Fox; they did not have any information pertaining to the plaintiff's claims against the defendant; and the real, and only, purpose of the subpoenas was to harass, humiliate, and punish the plaintiff.[100]

Applying Rule 412, the court granted the plaintiff's motion to quash the subpoenas, concluding that "the prejudice arising from [the plaintiff's] prior sexual history with other men would outweigh what little relevance [such evidence] may bring to [the] case."[101] The court reasoned that the plaintiff's sexual relationships with nonparties who had no connection to claims of the case would distract the parties, as well as a jury, from the real issues in the case.[102] Further, the court noted that the "[d]efendants' purported strategy is superficially appealing, but advances a boorish, reductive narrative that [the plaintiff] was predisposed to engaging in self-serving sexual relationships" and that the plaintiff's "prior sexual history [had] no relevance to her claims against [Mr.] Payne, or [to] the defense that she used [Mr.] Payne to advance her career at Fox."[103]

In *Hughes*, the plaintiff successfully invoked Rule 412 to block the defendants from obtaining, among other things, "[s]exual or romantic communications" between the plaintiff and "persons other than her husband" and "[v]ideos, audios or photos" of the plaintiff "of a sexual or romantic

94. 327 F.R.D. 55 (S.D.N.Y. 2018).
95. *See id.* at 57; *Hughes* Memorandum, *supra* note 7, at 2.
96. *See Hughes* Memorandum, *supra* note 7, at 1.
97. *See Hughes*, 327 F.R.D. at 57; *see also Hughes* Memorandum, *supra* note 7, at 1.
98. *See Hughes*, 327 F.R.D. at 57.
99. *Id.* at 56–57.
100. *See Hughes* Memorandum, *supra* note 7, at 1.
101. *Hughes*, 327 F.R.D. at 58.
102. *See id.*
103. *Id.*

nature" from third parties.[104] In that respect, Rule 412 achieved its purpose by protecting the plaintiff from the significant invasion of privacy that would result from the third-party production of such sensitive materials.[105] The Rule did not, however, protect the plaintiff from the invasion of privacy that attended the third-party subpoenas themselves, or that resulted from having to oppose the subpoenas.[106] Regardless of its ultimate success in obtaining the requested materials, a subpoena served on a sexual harassment victim's prior sexual partners seeking sexual videos and photos of the victim may in itself constitute an invasion of privacy.[107] The plaintiff in *Hughes* made clear in her motion to quash the subpoenas that she viewed the subpoenas as an attempt to "humiliate" and "shame" her.[108] This type of embarrassment could have the effect of deterring victims of sexual harassment from pursuing their claims.[109] The traumatic impact it had on the plaintiff in *Hughes* was evident in her statement that she felt attacked by Fox News.[110] This statement reflects the effect that the third-party subpoenas had on the plaintiff, even though the subpoenas were ultimately quashed on Rule 412 grounds, suggesting that Rule 412 did not fully achieve its purpose in *Hughes*.[111]

2. The Weaknesses of New York Common Law

Because New York State's civil rape shield jurisprudence derives from Rule 412 case law,[112] it follows that New York State's civil rape shield common law suffers from shortcomings similar to those of Rule 412. These shortcomings are illustrated in *Rivera v. United Parcel Service, Inc*.

The plaintiff in *Rivera* sued her employer, UPS, for sexual harassment under the NYCHRL.[113] The plaintiff alleged that her supervisor at UPS sexually harassed her by, among other things, stating that the plaintiff sexually aroused him and that he wanted to have sex with the plaintiff, making comments about the plaintiff's genitalia, and showing up drunk at the plaintiff's house in the middle of the night on several occasions.[114] In defense, UPS sought information regarding a consensual sexual relationship that the plaintiff had with a UPS employee after the plaintiff's employment with the company had been terminated.[115] The apparent purpose of this

104. *Hughes*, 327 F.R.D. at 58; *Hughes* Memorandum, *supra* note 7, at 2.
105. *See supra* Part I.A.1.
106. *See Hughes* Memorandum, *supra* note 7, at 5–6.
107. *See id.*
108. *See id.*
109. *See* Aiken, *supra* note 10, at 562–63.
110. *See* Steel, *supra* note 1.
111. *See Hughes*, 327 F.R.D. at 58.
112. *See supra* Part I.B.
113. Verified Complaint, *supra* note 52, at 12.
114. *See id.* at 3.
115. Rivera v. United Parcel Serv., Inc., No. 303092/2008, 2015 WL 13345524, at *3 n.3 (N.Y. Sup. Ct. Dec. 24, 2015), *aff'd*, 49 N.Y.S.3d 690 (App. Div. 2017).

evidence was to blame[116] the plaintiff for her supervisor's alleged conduct by showing that the plaintiff was generally welcoming of such conduct.[117] The court granted the plaintiff's motion for a protective order, in part, thereby prohibiting UPS from deposing the UPS employee with whom the plaintiff had had a consensual sexual relationship.[118]

The New York State common law, as derived from federal case law on Rule 412,[119] successfully protected the plaintiff in *Rivera* from the significant invasion of privacy that would result from responding to inquiries about her private sexual relationships and the prejudice that would result from admitting such evidence.[120] As in *Hughes*, however, the law did not fully protect the plaintiff in *Rivera* from the invasion of privacy that attended such discovery tactics.[121] Regardless of the ultimate success in obtaining the requested information, an inquiry into a sexual harassment victim's private sexual relationships may in itself constitute an invasion of privacy.[122] The plaintiff's counsel in *Rivera* made clear in the motion for a protective order that the plaintiff viewed such discovery tactics as "[an attempt] to smear her reputation," and that the plaintiff found these tactics to be "extremely upsetting," "demean[ing] and humiliat[ing]."[123] This type of humiliation could have the effect of deterring victims of sexual harassment from pursuing their claims.[124] In *Rivera*, this was noted in the plaintiff's motion for a protective order, which stated, "to leave every sexual harassment plaintiff vulnerable to an . . . assault on their personal lives in an effort to portray her personal life as somehow welcoming sexual harassment, risks chilling all sexual harassment victims from complaining."[125] This statement reflects the deterrent effect that invasive discovery tactics, such as those used by UPS in *Rivera*, can have on sexual harassment plaintiffs, even when the court ultimately rules that the defendant is not entitled to such discovery. This suggests that New York State's common law does not adequately protect the privacy interests of sexual harassment victims.

116. Affirmation in Support of Order to Show Cause for a Protective Order & in Opposition to Defendant's Motion at 3, *Rivera*, 2015 WL 13345524 (No. 303092/2008) [hereinafter *Rivera* Affirmation].
117. *See id.* at 5.
118. *See* Rivera v. United Parcel Serv., Inc., 49 N.Y.S.3d 690, 692 (App. Div. 2017).
119. *See supra* Part I.B.
120. *See Rivera*, 49 N.Y.S.3d at 692.
121. *See supra* Part II.A.1.
122. *Rivera* Affirmation, *supra* note 116, at 3–4.
123. *See id.*
124. *See* Aiken, *supra* note 10, at 562–63.
125. *Rivera* Affirmation, *supra* note 116, at 5.

B. Limiting Civil Rape Shield Laws to Preserve Defendants' Substantive Legal Rights

Critics of civil rape shield laws have argued that the exclusion of sexual history evidence deprives defendants of their substantive legal rights.[126] If, for example, a defendant is prohibited from presenting evidence to establish welcomeness, it will be easier for a plaintiff to establish a prima facie case[127] of sexual harassment.[128] Because civil rape shield laws do not categorically bar defendants from accessing essential evidence, however, they do not deprive defendants of their substantive legal rights.[129]

Civil rape shield laws do not categorically bar defendants from accessing essential evidence but instead ban evidence only when defendants cannot show that the probative value of the evidence substantially outweighs the danger of harm to the victim or unfair prejudice to any party.[130] Because civil rape shield laws will allow defendants access to evidence if the defendants can make the required showing, civil rape shield laws do not deprive defendants of their substantive legal rights.[131] This section describes two common scenarios in which courts tend to hold that the probative value of the evidence sought outweighs the harm to the sexual harassment plaintiff. Part II.B.1 discusses the scenario in which the defendant argues that the plaintiff welcomed the alleged harassing conduct. Part II.B.2 discusses the scenario in which the plaintiff seeks compensation based on mental anguish. Both scenarios exemplify why allowing defendants to delve into certain private aspects of an alleged sexual harassment victim's sexual history is sometimes essential to preserve the substantive legal rights of sexual harassment defendants.

1. Proving Welcomeness

To establish a prima facie case of sexual harassment under either Title VII or the NYSHRL, plaintiffs must show that they were subject to "unwelcome" sexual advances.[132] Defense lawyers use this element of a plaintiff's prima facie case to discover and admit evidence regarding the victim's prior sexual behavior in order to show that the victim invited or provoked the alleged conduct.[133] This is similar to the defense asserted in *Hughes*.[134] There, the

126. Paul Nicholas Monnin, Special Project, *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, 1183–84 (1995).

127. *See infra* Part II.B.1.

128. *See* Monnin, *supra* note 126, at 1183–84.

129. *See id.*

130. *See* FED. R. EVID. 412(b)(2); Bumpus v. N.Y.C. Transit Auth., No. 3512/07, 2009 WL 1141401, at *3 (N.Y. Sup. Ct. Apr. 28, 2009).

131. *See* Monnin, *supra* note 126, at 1184.

132. *See* N.Y. EXEC. LAW § 296-b(2)(a) (McKinney 2020) ("It shall be an unlawful discriminatory practice for an employer to . . . engage in unwelcome sexual advances . . . to a . . . worker . . . ."); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (noting that the "gravamen" of sexual harassment claims is that harassing conduct is unwelcome).

133. *See* Monnin, *supra* note 126, at 1156.

134. *See* Hughes v. Twenty-First Century Fox, Inc., 327 F.R.D. 55, 58 (S.D.N.Y. 2018).

defendants essentially argued that Mr. Payne's conduct was not unwelcome but rather that the plaintiff had pursued Mr. Payne to advance her career.[135] Where a defendant raises such a defense, the court may have to allow the defendant to delve into some aspects of an alleged sexual harassment victim's sexual history or behavior, if necessary to show that the victim actually incited or invited the conduct. In *Hughes*, for example, although the court granted the plaintiff's motion to quash the third-party subpoenas, the court noted that the defendants could seek discovery from the plaintiff, Mr. Payne, and others at Fox, instead of obtaining evidence from third parties, to show that the plaintiff had used Mr. Payne to advance her career.[136] The court noted that evidence pertaining to the plaintiff's sexual history with other men was off limits because the prejudice arising from such evidence would outweigh what little relevance it would bring to the case.[137] However, because the plaintiff had acknowledged that rumors that she engaged in "self-aggrandizing conduct with other men" had "'long dogged her career,'" the defendants could directly depose the plaintiff regarding her reputation for engaging in such conduct.[138] In addition to highlighting the shortfalls of Rule 412's protections,[139] therefore, *Hughes* also exemplifies why defendants must sometimes be allowed to delve into certain aspects of an alleged sexual harassment victim's sexual history in order to exercise their substantive legal rights and put forth a defense.

Hughes is something of an exception to the general rule that "evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant," whereas "non-workplace conduct will usually be irrelevant."[140] In general, "evidence of the victim's sexual conduct 'on-duty, at the workplace, and with named defendant' may be discoverable, while other evidence, such as non-workplace conduct, is irrelevant and inadmissible."[141] This is consistent with the well-settled principle that the welcomeness of a sexual advance "does not turn on the *private* sexual behavior of the alleged victim."[142] In the interest of fairness to defendants, however, courts will allow discovery of evidence regarding the plaintiff's conduct "on-duty, at the workplace, and with . . . named [d]efendants."[143]

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135. *See id.*
136. *See id.*
137. *See id.*
138. *See id.*
139. *See supra* Part II.A.1.
140. FED. R. EVID. 412 advisory committee's note to 1994 amendment. *But see id.* r. 412(b)(2) (allowing the admission of evidence regarding a victim's reputation, if the victim has placed it in controversy).
141. *See* Chamblee v. Harris & Harris, Inc., 154 F. Supp. 2d 670, 680 (S.D.N.Y. 2001) (citations omitted) (quoting FED. R. EVID. 412 advisory committee's note to 1994 amendment) (collecting cases).
142. Rivera v. United Parcel Serv., Inc., No. 303092/2008, 2015 WL 13345524, at *3 n.3 (N.Y. Sup. Ct. Dec. 24, 2015) (emphasis added) (citing Wolak v. Spucci, 217 F.3d 157, 160 (2d Cir. 2000)), *aff'd*, 49 N.Y.S.3d 690 (App. Div. 2017).
143. Barta v. City of Honolulu, 169 F.R.D. 132, 135 (D. Haw. 1996).

In *Wilson v. City of Des Moines*,[144] for example, the plaintiff sued her employer for sexual harassment under Title VII, alleging that her supervisor had "subjected her to repeated, vulgar workplace discussions that were sexually offensive and that he touched her inappropriately on a number of occasions."[145] The court admitted evidence to prove welcomeness—that the plaintiff herself had engaged in sexually explicit language and conduct in the workplace, including talking about vibrators and men's sex organs.[146] In allowing the evidence, the court reasoned that, although "an alleged victim's private sexual behavior does not change her expectations about her work environment," the "evidence of an alleged victim's particular behavior in the workplace may be probative of welcomeness."[147]

2. Damages Based on Mental Anguish

Sexual harassment plaintiffs often seek compensation for emotional distress as part of their claims for damages.[148] In order to preserve defendants' legal rights in such cases, courts will often permit some inquiry by defendants into the private sexual histories of these plaintiffs.[149] In allowing this inquiry, courts have noted that discovery of a plaintiff's personal sexual history may be an intrusion of privacy and may deter some plaintiffs from proceeding with their claims, but this inquiry may be warranted where a plaintiff seeks compensation for mental anguish.[150] The rationale for allowing this inquiry is that it would be unfair to permit a plaintiff claiming emotional distress to block discovery of evidence that may show whether (1) "any emotional distress actually was suffered," (2) "any emotional distress that did occur had a serious impact on the plaintiff's life," and (3) "any emotional distress was attributable, either in whole or in part, to circumstances other than the alleged conduct of the defendant."[151] In other words, where a plaintiff seeks to prove that he or she suffered emotional distress as a result of the sexual harassment, the defendant has a right to show that the plaintiff's emotional distress was caused, at least in part, by other events or circumstances.[152]

In *Zakrzewska v. New School*,[153] for example, the plaintiff brought a sexual harassment claim under NYCHRL against her employer, a university,

144. 442 F.3d 637 (8th Cir. 2006).
145. *Id.* at 640.
146. *See id.* at 639, 643.
147. *See id.* at 643.
148. *See, e.g.*, Zakrzewska v. New Sch., No. 06 Civ. 5463(LAK), 2008 WL 126594, at *1 (S.D.N.Y. Jan. 7, 2008); *Barta*, 169 F.R.D. at 133; Bumpus v. N.Y.C. Transit Auth., No. 3512/07, 2009 WL 1141401, at *2 (N.Y. Sup. Ct. Apr. 28, 2009); Affirmation of Richard J. Rabin at 2, Rivera v. United Parcel Serv., Inc., No. 303092/2008, 2015 WL 13345524 (N.Y. Sup. Ct. Dec. 24, 2015).
149. *See, e.g.*, *Zakrzewska*, 2008 WL 126594, at *1; Rivera v. United Parcel Serv., Inc., No. 303092/2008 (N.Y. Sup. Ct. Oct. 23, 2009) (discovery order).
150. *See Zakrzewska*, 2008 WL 126594, at *2.
151. *See id.*
152. *See id.*
153. 928 N.E.2d 1035 (N.Y. 2010).

alleging that her supervisor "subjected her to sexually harassing e-mails and conduct."[154] The only damages that the plaintiff sought were for emotional distress on the grounds that her supervisor's alleged unwanted advances changed the "plaintiff's life markedly for the worse and seriously debilitated her for a substantial period of time."[155] The plaintiff claimed that, as a result of the alleged sexual harassment, she "lost interest in going out and participating in social activities" and "experienced difficulty trusting men."[156] The defendants sought to discover entries from the plaintiff's diary from the period during which the sexual harassment allegedly took place.[157] In support of their discovery demands, the defendants argued that the diaries were discoverable because of the likelihood that the diaries contained evidence pertaining to the plaintiff's claims regarding the impact that the alleged harassment had on her quality of life.[158] Specifically, the defendants argued that the diaries may have contained evidence (1) of intimate relationships in which the plaintiff "divulged the sources of any emotional turmoil she claims to have suffered," (2) that the plaintiff responded to an internet advertisement that sought sex with a "non-pro" in return for payment, and (3) that the plaintiff engaged in electronic communications with an unidentified male in which the plaintiff arguably offered to engage in sex with a stranger in exchange for a meal in a "nice and glamorous" restaurant.[159] Such information, the defendants argued, would refute the plaintiff's claims.[160] The plaintiff argued that discovery of her diaries should be barred pursuant to Rule 412.[161] While the court noted that "[i]ndividuals' privacy interests in such circumstances are important and deserving of protection" and that "there is a risk that permitting such discovery would deter some individuals from pursuing meritorious claims," the court ultimately allowed the discovery in the interest of fairness to the defendants.[162] The court reasoned that, where a plaintiff seeks to prove that he or she suffered emotional distress as a result of the sexual harassment, the defense has a right to inquire into the plaintiff's private sexual conduct in order to show that the plaintiff's emotional distress was caused, at least in part, by other events and circumstances.[163]

Similarly, in *Rivera*, the plaintiff evidently sought six million dollars in damages for pain and suffering that allegedly resulted from having been sexually harassed by her supervisor.[164] In defending the claim, UPS sought documents and information related to the plaintiff's marital troubles and experiences with domestic violence on the grounds that such discovery was

154. *Id.* at 1036.
155. *Zakrzewska*, 2008 WL 126594, at *1.
156. *Id.*
157. *See id.*
158. *See id.*
159. *See id.* at *1–2.
160. *Id.* at *1.
161. *See id.* (citing FED. R. EVID. 412 advisory committee's note to 1994 amendment).
162. *See id.* at *2.
163. *See id.*
164. Affirmation of Richard J. Rabin, *supra* note 148, at 3.

necessary to ascertain other causes of the plaintiff's alleged pain and suffering.[165] The court denied the part of the plaintiff's motion that sought to preclude such discovery and ordered that the plaintiff produce information regarding domestic violence matters between the plaintiff and her husband.[166]

C. How the NYSHRL Reforms May Exacerbate the Conflict Between the Interests of Plaintiffs and Defendants

Because the reformed NYSHRL weakened two commonly used defenses in sexual harassment cases, the "severe or pervasive" standard and the *Faragher-Ellerth* defense, sexual harassment defendants will have to turn to alternative means of defending against sexual harassment claims brought under the NYSHRL with greater frequency.[167] Two defenses that remain available to sexual harassment defendants under the revised NYSHRL, which may be relied on more heavily by sexual harassment defendants in the wake of the NYSHRL reforms, include proving welcomeness and challenging damages based on mental anguish.[168] Part II.C.1 and Part II.C.2 discuss how these defenses may result in a greater intrusion of a sexual harassment plaintiff's privacy relative to the severe or pervasive standard and the *Faragher-Ellerth* defense, respectively.

Given the expected increase in privacy intrusions flowing from the elimination of the severe or pervasive standard and the *Faragher-Ellerth* defense, one would likewise expect to see an increase in litigation over the discovery and admissibility of sexual harassment plaintiffs' sexual history evidence. However, NYCHRL eliminated the "severe or pervasive" standard and the *Faragher-Ellerth* defense in 2009[169] and 2010[170] respectively, and there has been no apparent increase in litigation over the discovery and admissibility of sexual harassment plaintiffs' sexual history evidence under the NYCHRL. Part II.C.3 concludes by discussing why the NYCHRL has not seen an increase in such litigation and why the same may not hold true under the revised NYSHRL.

1. The Severe or Pervasive Standard: High Bar, Low Intrusion

Prior to the NYSHRL reforms, the application of the "severe or pervasive" standard to sexual harassment claims under the NYSHRL made it relatively easy for defendants to dispose of sexual harassment claims.[171] The assertion that the conduct in question was not sufficiently severe or pervasive to sustain a plaintiff's claim did not require an inquiry into the plaintiff's prior sexual

165. *See id.* at 6, 8.
166. Rivera v. United Parcel Serv., Inc., No. 303092/2008 (N.Y. Sup. Ct. Oct. 23, 2009) (discovery order).
167. *See supra* Part I.C.
168. *See supra* Part II.B.
169. *See* Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 38 (App. Div. 2009).
170. *See* Zakrzewska v. New Sch., 928 N.E. 2d 1035, 1036 (N.Y. 2010).
171. *See supra* Part I.C.1.

history or behavior.[172] Instead, defendants could assert the defense that the conduct at issue was not sufficiently severe or pervasive to sustain a sexual harassment claim merely by comparing the conduct at issue to conduct that the court had held to be insufficiently severe or pervasive in prior cases.[173]

Because the NYSHRL reforms eliminated the "severe or pervasive" requirement and made a broader range of conduct actionable under the revised NYSHRL, it will be more difficult for defendants to dispose of sexual harassment claims by merely showing that the conduct at issue does not fall within the universe of what the court considers actionable conduct.[174] As a result, defendants may instead have to turn to other defenses to dispose of or mitigate sexual harassment claims, such as proving that the conduct at issue was welcomed by the plaintiff or, where the plaintiff claims damages based on mental anguish, that the plaintiff's emotional distress was caused at least in part by other events and circumstances. Both of these defenses may require the defendant to seek evidence regarding the private sexual history of the plaintiff that would not be necessary to support a defense based on the "severe or pervasive" standard.[175]

2. The *Faragher-Ellerth* Defense: No Liability, No Intrusion

Prior to the NYSHRL reforms, the applicability of the *Faragher-Ellerth* defense to sexual harassment claims under the NYSHRL enabled an employer to avoid vicarious liability in certain circumstances if the employer exercised reasonable care to prevent and promptly correct any sexually harassing conduct, and the plaintiff-employee unreasonably failed to take advantage of the corrective opportunities provided by the employer or to otherwise avoid harm.[176] The assertion that the employer exercised reasonable care to prevent and promptly correct any sexually harassing conduct did not require an inquiry into the sexual history or behavior of the plaintiff.[177] Similarly, the assertion that the plaintiff-employee unreasonably failed to take advantage of the corrective opportunities provided by the

172. Note, however, that New York followed Title VII jurisprudence in requiring the conduct at issue to be sufficiently severe or pervasive to alter conditions of the plaintiff's employment and create a hostile working environment. *See* Palmer v. Cook, 108 N.Y.S.3d 297, 392 (Sup. Ct. 2019). Under this requirement, the harassing conduct must create both a subjectively and objectively hostile work environment. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993). The subjective requirement has led defendants to seek evidence regarding plaintiffs' prior sexual history or behavior, in order to show that a given plaintiff was not subjectively offended by the conduct in question and that the conduct, therefore, did not create a subjectively hostile work environment. *See* Wolak v. Spucci, 217 F.3d 157, 160 (2d Cir. 2000).

173. *See* Benson v. Solvay Specialty Polymers, USA, LLC, No. 1:16-CV-04638-CAP, 2018 WL 5118601, at *6 (N.D. Ga. Sept. 7, 2018) (finding that the plaintiff failed to state a claim for sexual harassment under Title VII and citing "a number of cases in which similar if not more egregious conduct was found to be insufficiently severe or pervasive").

174. *See supra* Part I.C.1.

175. *See supra* Part II.B.

176. *See supra* Part I.C.2.

177. *See, e.g.*, Pace v. Odgen Servs. Corp., 692 N.Y.S.2d 220, 223 (App. Div. 1999).

employer, or to otherwise avoid harm, did not require an inquiry into the sexual history or behavior of the plaintiff.[178]

Because the *Faragher-Ellerth* defense will "not be determinative" of the employer's liability under the revised NYSHRL,[179] employers will not be able to dispose of sexual harassment claims under the revised NYSHRL by merely showing that the plaintiff failed to take advantage of the corrective opportunities provided by the employer. Instead, employers may have to turn to other defenses to dispose of or mitigate sexual harassment claims, such as proving that the conduct at issue was welcomed by the plaintiff or, where the plaintiff claims damages based on mental anguish, that the emotional distress was caused at least in part by other events and circumstances. Both of these defenses may require the defendant to seek evidence regarding the private sexual history of the plaintiff that would not be necessary to support a defense were the *Faragher-Ellerth* defense still available.[180]

3. Comparison to the NYCHRL

One factor that might explain why there has been no apparent increase in litigation over the admissibility of plaintiffs' sexual histories under the NYCHRL is the availability of mandatory, confidential arbitration or prelitigation settlements under the NYCHRL.[181] Scholars have noted that these forms of alternative dispute resolution have led to a "shuttling of claims out of the public court system."[182] For example, Fox News, which is headquartered in New York and subject to the NYCHRL, paid millions of dollars to settle harassment claims against Bill O'Reilly.[183] The majority of these claims were not filed in court.[184] This "shuttling"[185] may explain why there has not been an increase in litigation over the discovery and admissibility of evidence relating to the sexual histories of sexual harassment plaintiffs under the NYCHRL.

The NYSHRL reforms, however, prohibit mandatory arbitration clauses with respect to claims of discrimination.[186] This may reduce the frequency with which claims are shuttled out of the public court system. Consequently, the missing increase in litigation over the discovery and admissibility of evidence relating to the sexual histories of sexual harassment plaintiffs may materialize under the revised NYSHRL. That said, the NYSHRL reforms' prohibition of mandatory arbitration clauses may be preempted by the

178. *See, e.g.*, Poolt v. Brooks, No. 110024/09, 2013 WL 323253, at *9 (N.Y. Sup. Ct. Jan. 18, 2013).
179. *See supra* Part I.C.2.
180. *See supra* Part II.B.
181. *See* Nuñez, *supra* note 86, at 506.
182. *See id.*
183. *See id.*
184. *See id.*
185. *See id.*
186. *See* Assemb. 08421, 2019–2020 Leg., Reg. Sess. (N.Y. 2019) (enacted). Note that the NYSHRL reforms expressly make sexual harassment a form of discrimination. *Id.*

Federal Arbitration Act.[187] If the NYSHRL reforms' prohibition of mandatory arbitration clauses is not enforceable, then sexual harassment claims may continue to be settled or arbitrated out of court. Thus, the predicted increase in litigation over the discovery and admissibility of evidence relating to the sexual histories of sexual harassment plaintiffs may not materialize under the revised NYSHRL.

III. HOW NEW YORK CAN ENCOURAGE SEXUAL HARASSMENT VICTIMS TO COME FORWARD BY ENACTING ITS OWN CIVIL RAPE SHIELD STATUTE

A primary aim of the NYSHRL reforms is to make it "easier for workplace sexual harassment claims to be brought forward."[188] This aim is congruous with that of Rule 412, which seeks to protect alleged victims of sexual misconduct from an "invasion of privacy, potential embarrassment and sexual stereotyping" and to encourage "victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders."[189] Reconciling these objectives with the needs of defendants to delve into certain aspects of victims' sexual histories in order to put forth a defense may be an impossible task. Some of the shortcomings of current civil rape shield laws can be addressed, however, to provide more protections to sexual harassment victims without impinging on defendants' substantive legal rights. This Part proposes that to further the goals of the NYSHRL reforms, New York State should enact its own civil rape shield statute that eliminates some of the gaps that plague Rule 412 and New York's civil rape shield common law. Part III.A explains why New York can depart from Rule 412 case law. Part III.B discusses why enacting a civil rape shield statute is the best way to increase the protections of plaintiffs without depriving defendants of substantive legal rights. Part III.C then discusses the specific provisions that this Note proposes should be included in New York's civil rape shield statute.

A. Why New York Need Not Apply Rule 412 in Civil Cases

The New York State Legislature has signaled its intention to diverge from federal civil rights laws by expressly stating in the revised NYSHRL that "the provisions of this article shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed."[190]

187. *See* Penzer, *supra* note 62. In *Latif v. Morgan Stanley & Co.*, the court held that a nearly identical provision in a 2018 New York State bill that declared mandatory arbitration provisions unenforceable with respect to sexual harassment claims was preempted by the Federal Arbitration Act. No. 18-cv-11528 (DLC), 2019 WL 2610985, at *3–4 (S.D.N.Y. June 26, 2019).

188. *See* Clark, *supra* note 11.

189. FED. R. EVID. 412 advisory committee's note to 1994 amendment.

190. Assemb. 08421, 2019–2020 Leg., Reg. Sess. (N.Y. 2019) (enacted).

Given this divergence from federal law, New York can likewise diverge from federal Rule 412 precedent if the Rule does not sufficiently aid in the accomplishment of the remedial purpose of the revised NYSHRL. A New York State civil rape shield statute would govern sexual harassment claims filed in state courts.

Because the NYSHRL reforms have caused the NYSHRL to differ from Title VII in several ways,[191] plaintiffs can bring claims under the revised NYSHRL that cannot be brought under Title VII. Specifically, a plaintiff may have an actionable sexual harassment claim under NYSHRL for harassing conduct that would not be sufficiently severe or pervasive to sustain a claim under Title VII.[192] Similarly, while a plaintiff cannot sue an employer for sexual harassment under Title VII if that employer has fewer than fifteen employees, that plaintiff will be able to sue that employer under NYSHRL because the revised NYSHRL applies to employers regardless of size.[193] For these reasons, a plaintiff may bring a sexual harassment claim in New York State court that cannot be brought in federal court. Consequently, in litigating such claims, Rule 412 need not apply, and the New York State courts could instead apply a New York State civil rape shield law, if the legislature were to enact one.

B. Why a State Civil Rape Shield Statute Is the Best Solution

A New York civil rape shield statute is not the only possible solution to closing the gaps in current civil rape shield laws without infringing on defendants' substantive legal rights. New York currently follows federal Rule 412 precedent. Both Rule 412 and New York's civil rape shield common law suffer from the same shortcomings.[194] One solution to these shortcomings, therefore, might be to amend Rule 412. However, amending the Federal Rules of Evidence is a difficult endeavor.[195] Therefore, enacting a state civil rape shield statute is the superior solution.

The enactment of a civil rape shield statute is also a superior solution relative to waiting for New York's common law to further develop. With little state law precedent, the state courts have been forced to turn to federal Rule 412 case law for guidance.[196] However, given the New York State Legislature's intention to diverge from federal civil rights laws,[197] it makes little sense to wait for a rule to develop through federal cases concerning Title VII. To give the NYSHRL reforms full effect, therefore, this Note proposes that the New York State Legislature should enact a civil rape shield statute.

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191. *See supra* Part I.C.
192. *See supra* Part I.C.1.
193. *See supra* Part I.C.3.
194. *See supra* Part II.A.
195. Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. REV. 1873, 1876 (2019).
196. *See supra* Part I.B.
197. *See supra* Part III.A.

C. How a New York Civil Rape Shield Statute Can Better Protect Sexual Harassment Plaintiffs Without Stepping on Defendants' Rights

New York can enact a civil rape shield law that provides more effective procedural safeguards and enforcement mechanisms than those of Rule 412 without impinging on the rights of defendants to a fair trial. Part III.C.1 discusses how New York can improve the procedures of Rule 412 by making sexual history evidence presumptively inadmissible regardless of purpose. Part III.C.2 discusses how New York can adapt the procedures of Rule 412 so that they apply to defendants seeking to discover evidence, in addition to defendants seeking the admission of evidence. Finally, Part III.C.3 discusses how New York can expressly provide for sanctions against defendants who do not comply with the proposed procedural safeguards.

1. Making Sexual History Evidence Presumptively Inadmissible Regardless of Purpose

Rule 412 includes specific procedures that are designed to "assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible."[198] Under these procedures, a party seeking to offer evidence subject to Rule 412 is required to "file a motion that specifically describes the evidence and states the purpose for which it is to be offered."[199] Before the court may admit the evidence, it must conduct an in camera hearing, during which the victim and parties have a right to attend and be heard.[200] This motion, as well as any related materials and the record of the hearing, must be sealed unless the court orders otherwise.[201] These procedural requirements prevent a defendant from filing a motion, which describes the evidence it seeks to introduce in detail, such that these private materials automatically become a matter of public record.[202] Once part of the public record, anyone can obtain and/or disseminate the private contents of those materials and invade a plaintiff's privacy before the court has had the opportunity to determine whether the evidence is admissible.[203] Entering such intimate details into the public record may deter victims from coming forward with sexual harassment claims.[204] The Rule 412 procedures do not impinge on the defendant's ability to raise a defense but merely protect the alleged victim's privacy as the court determines whether the evidence sought is admissible.

The Rule 412 procedures are not completely effective in protecting the alleged victim's privacy, however. In *Hughes*, for example, despite the Rule

198. FED. R. EVID. 412 advisory committee's note to 1994 amendment.
199. *Id.* r. 412(c)(1)(A).
200. *Id.* r. 412(c)(2).
201. *Id.*
202. *See* Sheffield v. Hilltop Sand & Gravel Co., 895 F. Supp. 105, 109 (E.D. Va. 1995).
203. *See id.*; *supra* Part I.A.2.
204. *See* Zakrzewska v. New Sch., No. 06 Civ. 5463(LAK), 2008 WL 126594, at *2 (S.D.N.Y. Jan. 7, 2008) ("[T]here is a risk that permitting such discovery would deter some individuals from pursuing meritorious claims.").

412 procedures, the plaintiff's affairs with four men became a part of the public record even though the court ultimately ruled that Rule 412 barred the defendants from subpoenaing the four men for information related to those affairs.[205]

The inadequacy of the Rule 412 procedures in protecting the alleged victim's privacy is partially attributable to the text of the rule. Rule 412 prohibits the use of evidence (1) "*offered to prove* that a victim engaged in other sexual behavior" or (2) "*offered to prove* a victim's sexual predisposition."[206] Although the purpose of this Rule is to encourage "victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders,"[207] the narrow wording of the text limits the ability of the rule to fully achieve its purpose. Because the text prohibits evidence based on what it is being "offered to prove," many defendants argue that evidence pertaining to a victim's sexual behavior or predisposition is admissible if it is offered to prove something else.[208] In *Hughes*, for example, the defendants arguably did not seek evidence pertaining to the plaintiff's romantic affairs to prove that the plaintiff engaged in other sexual behavior or to prove the plaintiff's sexual predisposition.[209] Instead, the defendants sought evidence pertaining to the plaintiff's romantic affairs to prove that the plaintiff had actually pursued her alleged sexual harasser in order to advance her career.[210] Under Rule 412, if the evidence is not being offered to prove that the victim engaged in other sexual behavior or to prove the victim's sexual predisposition, but is instead offered to prove something else, such as welcomeness or damages, it is not obvious that the evidence is subject to Rule 412 at all.[211] It is, therefore, not apparent that the Rule 412 procedures apply, and the defendant might not take the necessary steps to prevent sensitive materials from automatically becoming a matter of

205. *See* Hughes v. Twenty-First Century Fox, Inc., 327 F.R.D. 55, 58 (S.D.N.Y. 2018).

206. FED. R. EVID. 412(a)(1)–(2) (emphasis added).

207. *Id.* 412 advisory committee's note to 1994 amendment.

208. *See, e.g.*, Socks-Brunot v. Hirschvogel, Inc., 184 F.R.D. 113, 119 (S.D. Ohio 1999) ("Throughout these proceedings, the defendant has maintained that Rule 412 is inapplicable to any evidence relating to 'unwelcomeness.' It argues that evidence relating to any prior sexual conduct which [plaintiff] discussed at work is admissible, not as evidence of sexual predisposition or other sexual behavior, but as direct evidence that she welcomed or even created the sexually-charged environment.").

209. *See Hughes*, 327 F.R.D. at 58.

210. *See id.*

211. *See Socks-Brunot*, 184 F.R.D. at 119. It is now well settled in some courts, including the court in *Socks-Brunot*, that evidence relating to prior sexual conduct is subject to Rule 412 even if it is offered to prove welcomeness. *See id.*; *see also* Sheffield v. Hilltop Sand & Gravel Co., 895 F. Supp. 105, 108 (E.D. Va. 1995). However, the applicability of Rule 412 to sexual history evidence offered to prove welcomeness has been less clear to other courts. *See* Wilson v. City of Des Moines, 424 F.3d 637, 643 (8th Cir. 2006) (finding that the district court erred in mischaracterizing sexual history evidence offered to prove welcomeness as "non-Rule 412" evidence). Although, in *Wilson*, the Eighth Circuit ultimately ruled that evidence offered to prove welcomeness was subject to Rule 412, the lower court's error exemplifies the lack of clarity among trial courts in determining the applicability of Rule 412 to evidence offered to prove welcomeness. *See id.*

public record before the court even determines whether the evidence is admissible in the first place.[212]

This Note proposes that New York should enact a civil rape shield statute that makes sexual history evidence presumptively inadmissible regardless of what the evidence is being offered to prove. The statute can achieve this by adopting language similar to Rule 412, but dropping the words "offered to prove" such that all evidence regarding a victim's sexual behavior or predisposition is presumptively inadmissible, regardless of the reason that the defendants are seeking to introduce such evidence. Then, by incorporating the Rule 412 procedures, there will be little doubt that when defendants seek evidence pertaining to a plaintiff's sexual behavior or predisposition, the defendants must take steps to ensure that such evidence does not become a part of the public record before the court determines whether the evidence is admissible.

2. Extending the Rule 412 Procedures from Admissibility to Discovery

The Rule 412 procedures "do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases."[213] Instead, Federal Rule of Civil Procedure 26 governs the procedures in such cases and "courts should enter appropriate orders pursuant to Fed. R. Civ. P. 26(c) to protect the victim against unwarranted inquiries and to ensure confidentiality."[214] Rule 26 provides that "any person from whom discovery is sought may move for a protective order in the court where the action is pending."[215] Thus, while a sexual harassment defendant has an affirmative obligation to file a motion under seal when seeking to admit evidence of the plaintiff's sexual history,[216] the obligation is on the sexual harassment plaintiff to request a protective order when the defendant is seeking to discover, rather than admit such evidence.[217] As a result, intimate details of the private lives of civil plaintiffs in sexual harassment cases are frequently made public when a defendant is seeking the discovery, rather than the admission, of such evidence. This was the case in *Hughes*, where the plaintiff's extramarital affairs became a part

212. *See Sheffield*, 895 F. Supp. at 109; *see also Wilson*, 442 F.3d at 642–43 (noting that the defendant did not follow the Rule 412 procedures).

213. FED. R. EVID. 412 advisory committee's note to 1994 amendment.

214. *Id.* The advisory committee's commentary on Rule 412 advises that, to avoid undermining the purpose of Rule 412, courts should enter appropriate orders pursuant to Rule 26 "to protect the victim against unwarranted inquiries and to ensure confidentiality." *Id.* The advisory committee's commentary further notes that courts should "presumptively issue protective orders barring discovery, unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery." *Id.* For example, in a sexual harassment case, some evidence regarding the victim's sexual behavior in the workplace may be relevant, whereas evidence regarding the victim's conduct outside of the workplace will usually be irrelevant. *See* Hughes v. Twenty-First Century Fox, Inc., 327 F.R.D. 55, 58 (S.D.N.Y. 2018).

215. FED. R. CIV. P. 26(c)(1).

216. *See supra* Part III.C.1.

217. FED. R. CIV. P. 26(c)(1).

of the public record, even though the court ultimately ruled that Rule 412 barred the defendants from subpoenaing the four men for information related to those affairs.[218] *Zakrzewska* is similarly illustrative.[219] There, the defendants sought to discover portions of the plaintiff's diary and the plaintiff moved for a protective order pursuant to Rule 412 and Rule 26.[220] In opposition to the plaintiff's motion for a protective order, the defendants revealed intimate details about the plaintiff's sexual relations with third parties.[221] Although the court ultimately ruled that the diary entries were discoverable,[222] details about the plaintiff's sexual relations with third parties became a part of the public record before the court ruled on the discoverability of the evidence.

The likely publicity of such intimate details may deter victims from coming forward with sexual harassment claims,[223] which undermines the purpose of the NYSHRL reforms to make it "easier for workplace sexual harassment claims to be brought forward."[224]

This Note proposes that New York should enact a civil rape shield law that expressly incorporates the Rule 412 procedures any time a party seeks to discover evidence regarding the victim's sexual behavior or predisposition in civil cases. By applying these procedures to the discovery of evidence pertaining to an alleged sexual harassment victim's sexual history, in addition to the admission of such evidence, the legislature can increase the protections afforded to sexual harassment victims without impinging on the defendant's right to a fair trial. These procedures will have no impact on the defendant's ability to discover potentially critical evidence, but they will prevent intimate details about the victim's private life from becoming a part of the public record, in the event that the discovery does not lead to admissible evidence.

3. Sanctions

This Note proposes that New York should enact a civil rape shield law that also explicitly provides for sanctions against a party or attorney who fails to follow the protective procedures described in Parts III.C.1 and III.C.2. In order to be effective, the protective procedures must be accompanied by an

218. *See Hughes*, 327 F.R.D. at 58.

219. Zakrzewska v. New Sch., No. 06 Civ. 5463(LAK), 2008 WL 126594, at *2 (S.D.N.Y. Jan. 7, 2008).

220. *See id.* at *2.

221. Theodore L. Blumberg's Declaration in Opposition to Plaintiff's Motion for a Protective Order at 8, *Zakrzewska*, 2008 WL 126594 (No. 06 Civ. 5463(LAK)), ECF No. 35.

222. *See Zakrzewska*, 2008 WL 126594, at *2.

223. *See id.* ("[T]here is a risk that permitting such discovery would deter some individuals from pursuing meritorious claims.").

224. *See* Clark, *supra* note 11.

enforcement mechanism.[225] Sanctions that punish defendants for violating the protective procedures can serve as such an enforcement mechanism.[226]

In *Sheffield v. Hilltop Sand & Gravel Co.*,[227] for example, the court sanctioned the defendant for "its callous disregard of the procedural safeguards articulated in Rule 412(c)" where the defendant filed a motion regarding sensitive information about the plaintiff without requesting that the motion be filed under seal.[228] The defendant sought to introduce evidence that the plaintiff, an alleged victim of sexual harassment, had frequently participated in sexually provocative discussions and activities in the workplace to show that the plaintiff welcomed her alleged harasser's sexually suggestive behavior.[229] Because the defendant did not follow the Rule 412 procedures, however, the court sanctioned the defendant by excluding all testimony regarding the plaintiff's alleged participation in sexually provocative discussions and activities in the workplace, other than the testimony of the plaintiff's alleged harasser.[230] By allowing the alleged harasser's testimony on this issue, the court noted that the defendant would not be deprived of a fair trial.[231] By excluding evidence that might be relevant to the defendant's defense, however, the court was able to punish the defendant for violating the Rule 412 procedures.[232]

Where the court cannot exclude evidence as a sanction for a defendants' failure to comply with the protective procedures described in Parts III.C.1 and III.C.2 without depriving the defendant of a fair trial, the court may instead issue a fine as the appropriate sanction.[233]

CONCLUSION

By eliminating the "severe or pervasive" standard and the *Faragher-Ellerth* defense, the NYSHRL reforms may have increased the frequency with which defendants turn to defenses that threaten plaintiffs' privacy. This may consequently deter victims of sexual harassment from coming forward. Such a deterrent effect undermines the purposes of the NYSHRL reforms, which sought to make it easier for victims of sexual harassment to bring claims. New York's current rape shield jurisprudence does not sufficiently protect sexual harassment plaintiffs in order to counteract this deterrent effect. The state should enact a civil rape shield statute that better protects sexual harassment plaintiffs without further limiting defendants' ability to

225. *See* Sheffield v. Hilltop Sand & Gravel Co., 895 F. Supp. 105, 109 (E.D. Va. 1995).

226. *See id.* (noting that, "[b]ecause of the strong public policy concerns underlying [the Rule 412 procedures], a flagrant violation of the [Rule 412 procedures] cannot go unpunished").

227. 895 F. Supp. 105 (E.D. Va. 1995).

228. *See id.* at 109.

229. *See id.*

230. *See id.*

231. *See id.*

232. *See id.*

233. *See* Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848, 857–58 (1st Cir. 1998) (fining the defense counsel in the amount of $500 for failing to follow the Rule 412 procedures).

defend against sexual harassment charges. Such a statute should (1) make sexual history evidence presumptively inadmissible regardless of what it is being offered to prove, (2) include protective procedures that apply to both the admissibility and discovery of sexual history evidence, and (3) expressly provide for sanctions against defendants who fail to comply with the statute.