

**TIME TO FINE-TUNE
MILITARY RULE OF EVIDENCE 412**

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There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim.¹

In our zeal . . . it is important that we keep in mind the constitutional rights of the defendant to a fair trial. . . . The bill clearly permits the defendant to offer evidence where it is constitutionally required.²

I. Introduction

“How many men did you have sex with before this alleged rape?” “So you have serviced 95% of the battalion?”³ “You enjoy sexual intercourse, don’t you?” “How many times have you had premarital sex?” “You have cheated on your spouse quite a few times, haven’t you?” Prior to the enactment of The Privacy Protection for Rape Victims

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¹ FED. R. EVID. 412 advisory committee’s note (1994).

² 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden).

³ A similar question was asked at an Article 32 prior to the enactment of The Privacy Protection for Rape Victims Act of 1978. See *Privacy of Rape Victims: Hearing on H.R. 14666 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 94th Cong. 56 (1976) [hereinafter *Privacy Hearings*] (testimony of Sergeant Deborah Lieberman, U.S. Marine Corps) (referencing the defense counsel, she stated “he asked me if I had serviced 95% of the battalion . . .”).

Act of 1978, which amended the Federal Rules of Evidence (FRE) to include Rule 412, questions such as these were permissible in federal court and deemed an appropriate manner in which to question a victim's veracity in a rape trial.⁴ Federal Rule of Evidence 412 ended this trial tactic and generally gave victims protection from these forms of embarrassing questions concerning their sexual history.⁵

Military Rule of Evidence 412, derived from FRE 412 with some minor modifications,⁶ attempts to shields victims of nonconsensual sexual offenses⁷ from degrading examination and cross-examination questions during courts-martial by generally excluding any evidence of

⁴ 124 CONG. REC. 36,256 (statement of Sen. Bayh) (noting that “[i]n Federal court and most State courts, the trial judge is free to decide on a case-by-case basis, whether a victim can be cross-examined indiscriminately as to her past sexual relationships. Unfortunately, in many instances such questioning has degenerated into a public humiliation of the victim herself”); *id.* (statement of Sen. Biden) (“The enactment of this legislation will eliminate the traditional defense strategy, too often permitted by our laws, of placing the victim and her reputation on trial [t]his legislation will end the practice . . . wherein rape victims are bullied and cross-examined about their prior sexual experiences.”).

⁵ *See id.* at 34,912 (statement of Rep. Mann) (“The new rule provides that reputation or opinion evidence about a rape victim’s prior sexual behavior is not admissible.”); *id.* at 34,913 (commenting that “the principal purpose of this legislation is to protect rape victims from the degrading and embarrassing disclosure of intimate details”).

⁶ *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412 analysis, at A22-35 (2008) [hereinafter MCM]. “Although substantially similar in substantive scope to Federal Rule of Evidence 412, the application of the Rule has been somewhat broadened and the procedural aspects of the Federal rule have been modified to adapt them to military practice.” *Id.* One stark difference between MRE 412 and FRE 412 is that the federal rule was amended in 1994 to eliminate the unique balancing test retained in MRE 412. *Compare id.* MIL. R. EVID. 412(c)(3) (requiring the military judge to apply the MRE 412 balancing test to defense proffered evidence), with Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, subtit. A, ch. 4, § 40141(b), 108 Stat. 1796 (eliminating the balancing test in FRE 412), and FED. R. EVID. 412. For a discussion on why MRE 412 retained the balancing test see *infra* note 102; for a discussion on why MRE 412 should eliminate its unique balancing test see *infra* Section IV.

⁷ Though “nonconsensual sexual offense” remains the terminology in the rule, it is no longer required to protect a victim. *See* United States v. Banker, 60 M.J. 216, 220 (2004) (“M.R.E. 412 is not limited to nonconsensual sexual offenses . . . following the 1998 amendments, the applicability of M.R.E. 412 hinges on whether the subject of the proffered evidence was a victim of the alleged sexual misconduct and not on whether the alleged sexual misconduct was consensual or nonconsensual.”). Since the term “nonconsensual sexual offense” remains in the title of MRE 412, this article uses the term throughout.

the victim's prior sexual history.⁸ Similar to the federal rule, MRE 412 extensively limits defense evidence in nonconsensual sexual crime prosecutions.⁹ Specifically, MRE 412 will not allow "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior" or "[e]vidence offered to prove any alleged victim's sexual predisposition."¹⁰ The rule, however, does not act as an absolute bar to the defense entering evidence of the victim's past behavior. Military Rule of Evidence 412 offers three exceptions where the victim's past sexual behavior may be introduced:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) 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 or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.¹¹

If a party intends to offer evidence under any of the three exceptions, certain procedural requirements must be met.¹² If all procedural requirements are satisfied, the military judge will conduct a closed hearing where the parties may call witnesses, the victim may be present, all members will be absent, and the motion, related papers, and record of

⁸ See MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35-36 (analyzing MRE 412); *Banker*, 60 M.J. at 219.

⁹ See *Banker*, 60 M.J. at 221. *Banker* highlights the broadening scope of MRE 412. *Id.* Over time, through amendments to FRE 412 and assimilation of those amendments to the military rule, the scope and applicability of MRE 412 has been broadened. See generally *id.* Further, the rule has shifted from focusing on the nature of the sexual misconduct to determining the presence of a victim and protecting that victim. See *id.* at 220.

¹⁰ MCM, *supra* note 6, MIL. R. EVID. 412(a)(1)(2).

¹¹ *Id.* MIL. R. EVID. 412(b)(1)(A)(B)(C).

¹² See *id.* MIL. R. EVID. 412(c)(1)(A)(B) (requiring the party intending to offer the evidence under the exception to "file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing during trial"; to serve the motion on the opposing party, military judge; and to notify the alleged victim.).

the hearing will remain sealed.¹³ After the hearing the military judge will determine if the evidence offered by the accused is “relevant and that the probative value of such evidence outweighs the danger of unfair prejudice.”¹⁴ If the evidence passes this threshold, then the evidence may be offered subject to any limitations set by the military judge.¹⁵

Federal Rule of Evidence 412 was enacted to “protect rape victims from degrading and embarrassing disclosure of intimate details” without “sacrificing any constitutional right possessed by the defendant.”¹⁶ Military Rule of Evidence 412 was adopted with a similar goal of “shield[ing] victims of sexual assault from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses” while still recognizing the right of the accused “to present relevant defense evidence.”¹⁷ The Federal Rule, and consequently the Military Rule, has been amended since its inception,¹⁸ but the intent has remained clear: protect the victim of a sexual crime without ignoring the compelling constitutional rights of an accused.¹⁹

Military Rule of Evidence 412, much like its federal counterpart, has generally been successful in meeting the intent behind its enactment.²⁰ The rule has typically balanced these equally compelling, yet competing interests in a fair manner. However, as with any rule, unforeseen situations arise and unintended consequences can require refining the rule to comply with congressional intent.²¹ As currently drafted, and in application, the rule creates complications for both the Government and

¹³ *Id.* MIL. R. EVID. 412(c)(2).

¹⁴ *Id.* MIL. R. EVID. 412(c)(3).

¹⁵ *Id.* MIL. R. EVID. 412(c)(3). “Such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.” *Id.*

¹⁶ 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann).

¹⁷ MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35; *see* United States v. Sanchez, 44 M.J. 174, 178 (1996).

¹⁸ *See infra* Section II (discussing the legislative history of FRE 412 and MRE 412).

¹⁹ *See* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35; 124 CONG. REC. 36,256 (1978).

²⁰ *See* MCM, *supra* note 6, MIL. R. EVID. 412, at A22-35.

²¹ *See* Pub. L. No. 100-690, tit. VII, subtit. B, § 7046(a), 102 Stat. 4400 (1988); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, subtit. A, ch. 4, § 40141(b), 108 Stat. 1796 (1994) (examples of recent amendments to FRE 412).

defense in nonconsensual sexual act cases which violate the spirit and intent behind MRE 412.²²

Due to the current form of the rule, the Government may find that evidence offered to prosecute a nonconsensual sexual offense is excluded, thus unfairly prejudicing a victim. Military Rule of Evidence 412 excludes all testimony of the victim's other sexual behavior or sexual predisposition unless a stated exception applies, regardless of which party is offering the evidence.²³ In certain sexual offense prosecutions, in particular those involving child victims, the Government must rely on other sexual behavior evidence²⁴ and expert testimony to prove that a nonconsensual sexual offense was committed upon the victim.²⁵ Yet, a plain reading of MRE 412 coupled with a timely objection from defense counsel will most likely result in the exclusion of the Government-offered "other sexual behavior" evidence. Military Rule Evidence 412 therefore acts as an unintended shield for the accused by excluding any testimony concerning the victim's sexual behavior that is not with the accused, even if offered by the Government. This unforeseen use of MRE 412 as a defense tool to counteract the Government's prosecution violates the intent behind the rule and frustrates prosecution of nonconsensual sexual offenses.²⁶

²² For a discussion on the unintended, collateral consequences of MRE 412 for Government prosecutions see *infra* Section III. For a discussion on how an accused is unfairly prejudiced by the current form of the rule see *infra* Section IV.

²³ MCM, *supra* note 6, MIL. R. EVID. 412(a)(b).

²⁴ "Other sexual behavior" includes sexual acts with others besides the accused, masturbation, inappropriate language for a child that age, sexual obsession, or uncommon sexual knowledge. See Telephone Interview with Ms. Helen Swan, SRS Forensic Interview Specialist and past Program Director at Sunflower House, in Kansas City, Mo. (Dec. 10, 2007). For a more in-depth discussion on Ms. Swan's qualifications as an expert see *infra* note 115.

²⁵ See, e.g., *Frenzel v. State*, 849 P.2d 741, 749 (Wyo. 1993) (holding that a qualified expert may testify concerning Child Sexual Abuse Accommodation Syndrome (CSAAS) to explain why a child victim testifies inconsistently, delays reporting, exhibits strange behavior, or accommodates sexually); *United States v. Hadley*, 918 F.2d 848, 852-53 (9th Cir. 1990) (noting that expert testimony is admissible to explain the general behavioral characteristics that are exhibited by sexually abused children); Thomas D. Lyon & Jonathon J. Koehler, *The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases*, 82 CORNELL L. REV. 43, 59 (1996) (stating that "sexual behavior [by a child] is quite relevant for proving that abuse occurred.").

²⁶ Besides simply protecting victims of nonconsensual sexual offenses from humiliation, the rule has the ancillary benefit of encouraging victims to come forward and report the offense. See FED. R. EVID. 412 advisory committee's note (1994) ("By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to

Military Rule of Evidence 412 also contains an unnecessary and potentially unfair hurdle to the defense in nonconsensual sexual offenses. The accused may only admit evidence of the victim's sexual behavior or sexual predisposition if a stated exception to the rule is met, the evidence is deemed relevant, and the unique MRE 412 balancing test is satisfied.²⁷ The defense has the burden of establishing that an exception applies and explaining how the evidence falls within the exception.²⁸ If the defense is capable of articulating a narrow and compelling reason why the victim's other sexual behavior or sexual predisposition is necessary for a defense, it is extremely unlikely that a military judge could justify excluding the evidence.²⁹ Yet, despite this unlikelihood, the defense-offered evidence is further filtered by the MRE 412 balancing test.³⁰ This is particularly troubling when the accused attempts to enter evidence that is constitutionally required under MRE 412(b)(1)(C).³¹ Requiring the defense to comply with the MRE 412 balancing test creates an unnecessary additional step that is contrary to the congressional intent behind the rule.

The unintended use of the rule by defense to exclude a child victim's inappropriate sexual behavior is clearly contrary to Congress's intent to protect the interests of the victim.³² Congressional intent to protect the

institute and to participate in legal proceedings against alleged offenders."); *United States v. Banker*, 60 M.J. 216, 219 (2004) (quoting *Notes of Advisory Committee on Proposed 1994 Amendment*, FRE 412, 28 U.S.C. App. 412, at 87).

²⁷ See *supra* notes 14–15 and accompanying text. The MRE 403 balancing test also applies to evidence that satisfies MRE 412. See *Banker*, 60 M.J. at 223 n.3; *United States v. One Feather*, 702 F.2d 736, 739 (8th Cir. 1983) (holding that the district court did not err by excluding evidence that satisfied an FRE 412 exception under FRE 403). See *infra* note 228 for a discussion on the differences between the MRE 403 and MRE 412 balancing tests.

²⁸ *United States v. Moulton*, 47 M.J. 228, 229 (1997).

²⁹ See *Cal. v. Trombetta*, 467 U.S. 479, 485 (1984) (holding that a criminal defendant has a constitutional right to a "meaningful opportunity to present a complete defense"); *Sandoval v. Acevedo*, 996 F.2d 145, 149 (7th Cir. 1993) ("[A] rape shield statute cannot constitutionally be employed to deny the defendant an opportunity to introduce vital evidence . . .").

³⁰ "If the military judge determines . . . that the evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible . . ." MCM, *supra* note 6, MIL. R. EVID. 412(c)(3).

³¹ *Id.* MIL. R. EVID. 412(b)(C) (stating that one exception to the general inadmissibility of the victim's other sexual behavior would be "evidence the exclusion of which would violate the constitutional rights of the accused.").

³² For a discussion on congressional intent to protect the interests of victims of nonconsensual sexual offenses, see *infra* notes 66–96 and accompanying text.

constitutional rights of the accused to a fair trial and a complete defense is also contravened by the unnecessary MRE 412 balancing test.³³ The unforeseen use of MRE 412 as a defense shield and the unnecessary nature of the MRE 412 balancing test were most likely never envisioned by the legislation's drafters. Thus, to address these shortcomings and to ensure MRE 412 complies with Congress's intent, the rule must be amended.

To support this proposition this article is divided into five sections. Section I introduces the basic tenets of MRE 412 and the current issues with the rule. Section II examines the legislative history of MRE 412 to illustrate the congressional intent behind the rule. Section III explains how MRE 412 may result in unintended protections for an accused in specific types of prosecutions and why a fourth exception to the rule is needed to end this unforeseen practice. The unique MRE 412 balancing test and why it should be eliminated is discussed in Section IV. Finally, Section V concludes that only by adopting these proposals will MRE 412 comply with the drafter's intent.

II. Legislative History

To illustrate the need for these changes, it is important to appreciate the legislative history of FRE 412 and MRE 412. Specifically, the unintended collateral consequences of MRE 412 for Government prosecutions as well as the unnecessary additional hurdles the rule imposes on an accused are contrary to congressional intent. By understanding the historical background of FRE 412 and MRE 412 the current problems become evident and the necessity to amend the rule to correct these issues becomes apparent.

³³ See 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (commenting on the need to protect and not overlook the constitutional rights of the accused); for further discussion on the congressional intent to ensure the accused's constitutional rights are not impeded by FRE 412 see *infra* notes 55–65 and accompanying text.

A. Background

Prior to 1978, in sexual assault cases the federal court system³⁴ allowed an accused to present evidence of a victim's sexual history in his defense.³⁵ This often led to humiliating cross-examination questions concerning the victim's prior sexual history in which the trial became "inquisitions into the victim's morality, not trials of the defendant's innocence or guilt."³⁶ These sexual assault trials yielded "evidence of at best minimal probative value with great potential for distraction and incidentally discourage[d] both the reporting and prosecution of many sexual assaults."³⁷ Pressure from law enforcement and women's organizations to end the use of a victim's sexual history³⁸ coupled with

³⁴ Numerous state laws protecting victims of sexual assaults were enacted prior to the passage of The Privacy Protection for Rape Victims Act of 1978. The first state to pass "rape-shield" legislation was Michigan in 1974. See MICH. COMP. LAWS ANN. § 750.520(j) (LexisNexis 2007); Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765 n.3 (1986) (noting that Michigan passed the first rape-shield law in 1974 and by 1976 "over half of the states had enacted rape-shield statutes in some form") (citing Vivian Berger, *Man's Trial, Women's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 32 (1977)). State statutes foreshadowed the need for federal attention and led to congressional action. See 124 CONG. REC. 34,912 (1978) (statement of Rep. Mann) ("[T]he States have taken the lead to change and modernize their evidentiary rules about evidence of a rape victim's prior sexual behavior. The bill before us similarly seeks to modernize the Federal evidentiary rules.").

³⁵ See MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35 (noting that prior to MRE 412, the defense was allowed to introduce "evidence of the victim's 'unchaste' character regardless of whether he or she has testified."); 124 CONG. REC. 34,912 (1978) (statement of Rep. Mann) (stating "for many years in this country, evidentiary rules have permitted the introduction of evidence about a rape victim's prior sexual conduct."); see also Richard A. Wayman, *Lucas Comes to Visit Iowa: Balancing Interests Under Iowa's Rape-Shield Evidentiary Rule*, 77 IOWA L. REV. 865, 869 (1992) ("Rape shield laws reversed the long-standing common-law doctrine which allowed defendants in rape prosecutions to reveal the 'character of unchastity' of any rape victim.").

³⁶ 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman); see also *id.* at 36,256 (statement of Sen. Biden). Referring to the evidentiary rules prior to FRE 412, Senator Biden stated "[t]hese rules of evidence add to the shock and horror of rape by allowing the victim of the rape to be treated as if she somehow encouraged the rape." *Id.*

³⁷ MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

³⁸ See Galvin, *supra* note 34, at 767-68 ("Police and prosecutors, seeking to remove obstacles to the apprehension and conviction of offenders, joined forces with women's groups; together they pushed reform measures through legislatures with remarkable rapidity and political acumen"); Wayman, *supra* note 35, at 869-73 (discussing the alliance between law enforcement and women's organizations to eliminate the traditional admittance of the victim's sexual history by a defendant).

legislative recognition of the limited relevance of such evidence³⁹ led Congress to enact The Privacy Protection for Rape Victims Act of 1978 which amended the Federal Rules of Evidence to include Rule 412.⁴⁰

Testimony before Congress and the ensuing debates concerning The Privacy Protection for Rape Victim's Act highlighted two competing interests: the victim's right to not disclose intimate personal information and the accused's right to a fair trial.⁴¹ Those in support of the legislation argued that protecting a victim's privacy was necessary to "eliminate the traditional defense strategy . . . of placing the victim and her reputation on trial in lieu of the defendant."⁴² Legislation was needed to discourage "irrelevant and irresponsible foraging into a victim's unrelated past sexual relationships"⁴³ especially since discussing the victim's sexual history was simply a manner in which to embarrass and

³⁹ See 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann) ("Such evidence quite often serves no real purpose and only results in embarrassment to the rape victim and unwarranted public intrusion into her private life."); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35; see also Major Kevin D. Smith, *Navigating the Rape Shield Maze: An Advocate's Guide to MRE 412*, ARMY LAW., Oct./Nov. 2002, at 1, stating:

Such evidence, after all, sometimes strained even the traditional definition of relevance; it often had only a tenuous connection to the circumstances of the offense being tried. Practitioners and courts observed that the evidence often served no real purpose and needlessly embarrassed victims. At best, it was often of minimal probative value. At worst, it was likely to confuse and distract the fact-finders, discourage the reporting of sexual assaults, and unnecessarily waste the court's time.

Id.

⁴⁰ See Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046, 2046 (1978). The Act amended the federal rules of evidence to protect the privacy of rape victims by adding Rule 412 to the federal rules of evidence on 28 October 1978.

Id.

⁴¹ See *Privacy Hearings*, *supra* note 3, at 1-2 (statement of Rep. Hungate) ("the issues presented by [this] legislation raise sensitive questions involving not only the rape victim's right of privacy, but also the accused's right to a fair trial."); 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (noting that the bill would require an in camera hearing to determine the admissibility of evidence offered by the defense "without harm to the privacy rights of victim or the constitutional rights of the accused"); *id.* at 34,913 (statement of Rep. Mann) ("The bill before us fairly balances the interests involved—the rape victim's interest in protecting her private life from unwarranted public exposure; the defendant's interest in being able adequately to present a defense by offering relevant and probative evidence . . .").

⁴² 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden).

⁴³ See *Privacy Hearings*, *supra* note 3, at 48 (statement of Cheryl Robinson, Volunteer Supervisor, Rape Victim Companion Program, Alexandria, Va.).

smear the victim in court.⁴⁴ Victim's advocates felt that if enacted, the act would end the defense tactic of eliciting evidence of minimally probative value on cross-examination with the intent of prejudicing a jury against the victim.⁴⁵ To further support the legislation, proponents presented vignettes and statistics to illustrate how presenting the victim's sexual history in open court directly resulted in the reduction of sexual assault reporting throughout the country due to victims' desire to avoid the degrading aspects of a trial.⁴⁶ To victim advocates, the privacy of the victim, and more generally the interest of the victim, was of paramount importance.⁴⁷

In contrast, defense advocates argued that an over-emphasis on the victim's rights would strip the accused of "a fair trial; to confrontation of his accuser; to present all relevant evidence in his defense; and the right to be presumed innocent until guilt is proven beyond a reasonable

⁴⁴ See *id.* at 48–50. Ms. Robinson also noted that "[i]n our trial monitoring and in the cases in which we have assisted victims in court, we have seen glaring examples of misleading questioning that does affect the jury. . . . Jurors on these cases have later confirmed our observations." *Id.* at 49; *id.* at 41 (testimony of Mary Ann Largen on behalf of the National Organization of Women (NOW)) ("To limit the admittance of this evidence would, of course, take away from defendants in rape cases an opportunity, unavailable to defendants of any other criminal charge—that of escaping punishment by the stratagem of smearing the victim's reputation . . ."); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

⁴⁵ See *Privacy Hearings, supra* note 3, at 48–50 (statement and testimony of Cheryl Robinson, Volunteer Supervisor, Rape Victim Companion Program, Alexandria, Va.); 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann) (commenting on the Federal Rules prior to FRE 412, Representative Mann noted that "the Federal evidentiary rules permit a wide ranging inquiry into the private conduct of a rape victim, even though that conduct may have at best a tenuous connection to the offense for which the defendant is being tried."); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

⁴⁶ See *Privacy Hearings, supra* note 3, at 49 (statement of Cheryl Robinson, Volunteer Supervisor, Rape Victim Companion Program, Alexandria, Va.) (discussing situations where victims of sexual assaults almost did not cooperate with prosecutors due to the possible questioning concerning their sexual history); *id.* at 3 (statement of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division on behalf of the Department of Justice) ("There is no question that victims of sex crimes, predominantly women, fail to report large numbers of these crimes because they believe the ensuing legal proceedings will subject them to an ordeal more onerous than the sexual assault itself. Their perceptions are honest and, unhappily, quite valid.")

⁴⁷ See 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann); *Privacy Hearings, supra* note 3, at 3 (statement of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division on behalf of the Department of Justice) ("We want to see an end to hostile, callous, and degrading 'processing' of victims of sex crimes.")

doubt after thorough examination of all the evidence.”⁴⁸ Opponents of the legislation conceded that a victim’s privacy was a legitimate concern but argued that the accused’s right to a fair trial trumped the victim’s interest in privacy.⁴⁹ Defense advocates noted that the victim’s right to privacy and the accused’s right to a fair trial were often in direct conflict, usually could not be reconciled, and were typically “irresolvable.”⁵⁰ The perceived inability to reconcile these competing interests led opponents of the legislation to argue that the proposed bill had overreaching protections for the victim which came at the expense of the accused’s right to a fair trial.⁵¹ To defense advocates, the restriction on the accused’s constitutional rights proposed in the legislation could not be supported, regardless of the compelling nature of the victim’s right to privacy.⁵² Opponents of the legislation argued that the proposed bill inadequately recognized the constitutional concerns of the accused⁵³ and failed to protect the sanctity of the trial as a forum to gather the truth.⁵⁴

B. Congressional Intent

1. Congressional Intent to Protect the Accused

Recognizing these equally compelling, yet competing interests,⁵⁵ Congress attempted to formulate a compromise that dealt with the

⁴⁸ *Privacy Hearings*, *supra* note 3, at 62 (statement of Dovey Roundtree on behalf of the American Civil Liberties Union (ACLU)).

⁴⁹ *Id.* (“[T]he right to a fair trial should not be qualified, no matter how compelling the countervailing concerns.”) (Ms. Roundtree, during her testimony, quoting from a Policy Statement adopted by the board of directors of the ACLU in 1976). Ms. Roundtree agreed with victims’ advocates that in rape trials cross-examination could often be “humiliating, degrading, and brutal.” *Id.* at 69. However, Ms. Roundtree noted that the questioning was not pointless since “the defense counsel may have had no other opportunity to attack the complainant’s story or even to learn many of the details of the story.” *Id.*

⁵⁰ *Id.* at 68.

⁵¹ *Id.*

⁵² *Id.* at 62.

⁵³ *Id.* (“[T]he present legislation does not adequately [e]nsure the defendant’s right to a fair trial . . .”).

⁵⁴ *Id.* (“The keeping of the trial as a vehicle to discover the truth should not be lost.”).

⁵⁵ The congressional decision to support the legislation, but with modification, was initially proposed during subcommittee testimony of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division, speaking on behalf of the Department of Justice. *See id.* at 4. Mr. Pauley noted that the Department of Justice

concerns of both proponents and opponents of the bill.⁵⁶ To address the constitutional questions raised by opponents to the legislation, the Subcommittee on Criminal Justice of the House Committee on the Judiciary added a third exception allowing for the introduction of a victim's sexual history at trial.⁵⁷ The original bill presented by Representative Elizabeth Holtzman before the subcommittee only allowed for the introduction of evidence of a victim's sexual history if there was a past sexual relationship with the accused and consent was at issue or if the accused presented evidence that another individual caused the physical harm to the victim.⁵⁸ In recognition of the constitutional concerns raised by opponents of the original bill and their specific argument that these two exceptions were inadequate protections for an accused,⁵⁹ the subcommittee allowed for the introduction of evidence if it was "constitutionally required."⁶⁰

The "constitutionally required" exception added by the subcommittee and eventually included in the enacted legislation, illustrated Congress's intent to fully protect the constitutional right of the

generally supported the legislation, but serious constitutional concerns were raised including defendants' Sixth Amendment right to confront witnesses and the right to call witnesses in their support. *See id.* at 5. Mr. Pauley offered very specific modifications that the Department of Justice felt would adequately address these constitutional issues. *See id.* at 5-7. Congress did not implement the specific amendments suggested by the Department of Justice and instead decided to adopt the more general and vague "constitutionally required" third exception as an attempt to address all of these concerns without multiple modifications. *See infra* notes 205-19 and accompanying text (discussing the third exception to MRE 412).

⁵⁶ *See* 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman) ("The bill provides that neither the prosecution nor the defense can introduce any reputation or opinion evidence about the victim's past sexual conduct. It does permit, however, the introduction of specific evidence about the victim's past sexual conduct in three very limited circumstances."); *see also* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

⁵⁷ The third exception was included by the subcommittee out of concern for the accused constitutional rights. *See* 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman); *see also infra* notes 61-64 and accompanying text.

⁵⁸ *See Privacy Hearings, supra* note 3, at 2 (statement of Rep. Holtzman).

⁵⁹ Ms. Dovetree, speaking on behalf of the ACLU, stated "we do not believe that the two exceptions to admissibility are sufficient to take account of all situations in which prior sexual conduct may be relevant." *Id.* at 72 (testimony of Dovey Roundtree).

⁶⁰ *See* 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman) ("[T]he evidence can be introduced if it is constitutionally required. This last exception, added in subcommittee, will [e]nsure that the defendant's constitutional rights are protected."). *See infra* notes 205-19 and accompanying text for a discussion on the meaning of "constitutionally required."

accused.⁶¹ Despite numerous commentators' statements during the committee hearing that the original bill's two specific exceptions allowing for the introduction of the victim's sexual history were sufficient,⁶² Congress clearly rejected these arguments.⁶³ The addition of the third exception coupled with explicit language during debates⁶⁴ illustrated Congress's desire to adequately protect the accused's constitutional rights. Clearly, Congress intended with The Privacy Protection for Rape Victims Act of 1978 and FRE 412 to provide the accused with access to all relevant and probative evidence, a fair trial, and an avenue to enter any constitutionally required evidence.⁶⁵

2. Congressional Intent to Protect Victims

Concern for the constitutional rights of the accused, however, did not change congressional intent to offer extensive privacy protections for victims of sexual assaults during trial.⁶⁶ Congress agreed with the arguments offered by proponents of the bill that the time had come to

⁶¹ See *id.*; MCM, *supra* note 6, MIL. R. EVID. 412, at A22-35 ("The Rule recognizes . . . the fundamental right of the defense under the Fifth Amendment of the Constitution of the United States to present relevant defense evidence by admitting evidence that is 'constitutionally required to be admitted.'").

⁶² See, e.g., *Privacy Hearings*, *supra* note 3, at 81 (testimony of Judge Patricia Boyle, Detroit Recorder's Court, Detroit, Mich.) (stating that she believed that the two exceptions proposed in the original bill were adequate to address the concerns of the accused); *id.* at 41 (testimony of Mary Ann Largen on behalf of NOW) (urging the subcommittee to vote for the original bill without any amendments or alterations).

⁶³ See 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman).

⁶⁴ See, e.g., *id.* (statement of Rep. Mann) (noting that no constitutional rights of the defendant are to be compromised); *id.* at 36,256 (statement of Sen. Biden) (arguing that the constitutional rights of the accused cannot be forgotten); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

⁶⁵ See 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) ("[T]his bill has been carefully drafted to keep the reform within constitutional limits. The bill clearly permits the defendant to offer evidence where it is constitutionally required."); *id.* at 34,913 (statement of Rep. Mann) (noting that the bill provides the accused with a defense by allowing him to offer relevant, probative evidence).

⁶⁶ See 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35. Initially, the focus of the original bill was to protect the privacy of the victim. *Id.* Through subsequent amendments to FRE 412 and MRE 412 the rule became broader and protected not only the privacy of the victim, but the general interests of the victim. See *infra* 83-96 and accompanying text.

severely limit introduction of the victim's sexual history into trial.⁶⁷ Though this was a radical change from common law and previous federal procedure,⁶⁸ the general elimination of evidence concerning a victim's "unchaste"⁶⁹ character from trial was viewed by Congress as a requirement to halt the practice of questioning a rape victim's veracity by introducing minimally probative, inflammatory, and embarrassing evidence.⁷⁰ The result envisioned by Congress was a "fairer and more effective prosecution of rape crimes"⁷¹ by eliminating jury access to the victim's private sexual history.⁷² In addition, Congress agreed with proponents of the legislation that protecting a victim's privacy during trial would have the desired secondary effect of encouraging victims to report sexual offenses and participate in prosecutions of rape.⁷³

To implement its intent, Congress crafted the legislation to generally exclude from evidence any discussions concerning the victim's prior sexual history in rape or an assault with intent to commit rape.⁷⁴ Only by meeting the criteria expressed in one of the three enumerated exceptions could an accused expose the victim's sexual history to the jury.⁷⁵ The legislation added further scrutiny by requiring defense-offered evidence of the victim's prior sexual history, under one of the three exceptions, to

⁶⁷ See 124 CONG. REC. 34,912 (1978) (statement of Rep. Mann) (noting that the Federal Rules of Evidence needed to be modernized to generally exclude inquiries into the private conduct of victims).

⁶⁸ For a discussion on the evolution of the chastity requirement in rape law and the eventual rejection of this approach in favor of the current state and federal rape shield laws, see generally Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002).

⁶⁹ "Chastity" traditionally referred to a woman's abstention from extramarital sexual intercourse. See *State v. Bird*, 302 So. 2d 589, 592 (La. 1974); see also Galvin, *supra* note 34, at 765-66 (stating that character for unchastity refers to a woman's "propensity to engage in consensual sexual relations outside of marriage.").

⁷⁰ See 124 CONG. REC. 36,255 (1978) (statement of Sen. Thurmond) (stating "it is unconscionable when rape cases are tried that they can go back and try to attack a woman's veracity, her virtue, and so forth.").

⁷¹ *Id.* at 36,256 (statement of Sen. Bayh).

⁷² See *id.* at 34,913 (statement of Rep. Mann); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

⁷³ See 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (discussing the lack of reporting and willingness to cooperate with prosecutors by victims due to previous rules of evidence).

⁷⁴ See *id.* at 34,912 (statement of Rep. Mann) (moving to amend the Federal Rules of Evidence to exclude evidence of a rape victim's prior sexual behavior).

⁷⁵ *Id.*

be screened by a judge at an in camera review.⁷⁶ At this review the defense was required to present the evidence before the judge and articulate why the evidence should go before the jury.⁷⁷ After reviewing the evidence and hearing arguments from the Government and defense, the judge would determine whether the evidence was “relevant and that the probative value of such evidence outweigh[ed] the danger of unfair prejudice”⁷⁸ If the judge determined that the evidence met these thresholds and was admitted, he still had the option to limit the defense use of such evidence by placing an order in which he specified how the evidence could be offered and the areas in which the victim could or could not be cross-examined.⁷⁹

The general exclusion of a victim’s sexual history and the stringent procedures required for defense to admit evidence under a stated exception demonstrated clear congressional intent to protect rape victims.⁸⁰ Congress’s concern for the victim’s privacy interest was further illustrated by its willingness to dramatically alter the legal landscape by not giving defense the unfettered ability to raise and explore a victim’s “chastity” at trial.⁸¹ However, this radical shift towards limiting jury exposure to a victim’s sexual history through the enactment of The Privacy Protection for Rape Victims Act of 1978 and the implementation of FRE 412 was narrowly focused on specifically providing protection to victims of rape.⁸²

⁷⁶ “[T]hat is, a proceeding that takes place in the judge’s chambers out of the presence of the jury and the general public.” *Id.* at 34,913.

⁷⁷ *Id.* Rep. Mann noted “[t]he purpose of the in camera hearing is twofold. It gives the defendant an opportunity to demonstrate to the court why certain evidence is admissible and ought to be presented to the jury. At the same time, it protects the privacy of the rape victim” *Id.* The in camera review also allowed the victim “maximum notice of the questioning that may occur.” *Id.* at 36,256 (statement of Sen. Bayh).

⁷⁸ *Id.* at 34,912 (statement of Rep. Mann).

⁷⁹ *Id.*

⁸⁰ *See, e.g., id.* at 34,913 (statement of Rep. Holtzman) (noting that the passage of the proposed bill would “protect women from both injustice and indignity”); FED. R. EVID. 412 advisory committee’s note (1994) (referring to reasoning behind the enactment of FRE 412, the advisory committee noted that “[t]he rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.”).

⁸¹ *See supra* notes 68–69.

⁸² *See* Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046, 2046 (1978). The Act applied only to those criminal cases “in which a person is accused of rape or of assault with intent to commit rape” *Id.*; *see also* *Privacy Hearings, supra* note 3, at 1 (statement of Rep. Hungate) (introducing the bill before subcommittee as applying specifically to federal rape trials).

Congress began to broaden the definition of “victim” and the protections provided to victims through a 1988 amendment to FRE 412 and the Violent Crime Control and Law Enforcement Act of 1994, which also amended the rule.⁸³ The 1988 amendment widened the applicability of FRE 412 to all sexual offenses versus simply applying to scenarios involving rape and demonstrated a desire to broaden the protections offered by the rule.⁸⁴ The Violent Crime Control and Law Enforcement Act of 1994 amended the rule in an even more expansive manner and illustrated congressional concern for the general interest of all victims or alleged victims of sexual offenses.⁸⁵ The changes enacted by the 1994 amendment⁸⁶ furthered Congress’s original intent 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” while “also encourag[ing] victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.”⁸⁷ The subsequent amendments also clarified and explicitly noted that Congress intended to support a “strong social policy

⁸³ See Pub. L. No. 100-690, tit. VII, subtit. B, § 7046(a), 102 Stat. 4400 (1988); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, subtit. A, ch 4, § 40141(b), 108 Stat. 1796 (1994). See also Anderson, *supra* note 68, at 93 n.219 for a brief chronology and discussion on the subsequent amendments to The Privacy Protection for Rape Victims Act of 1978.

⁸⁴ See Pub. L. No. 100-690, tit. VII, subtit. B, § 7046(a), 102 Stat. 4400 (1988). The amendment made numerous changes including: striking the word “rape” in the heading of the rule and replacing it with “sex offense;” in subdivisions (a) and (b) of the rule replacing the words “rape or of assault with intent to commit rape” with “an offense under chapter 109A of title 18, United States Code;” in subdivision (a) replacing the words “rape or assault” with “offense;” replacing the words “rape or assault with intent to commit rape” with “an offense under chapter 109A of title 18, United States Code” in all places that they appeared, in subdivision (b)(2)(B), replacing the words “rape or assault” with “such offense;” and finally replacing the word “rape” with “sex offense” in the table of contents at the beginning of the Federal Rules of Evidence. *Id.* § 7046(a), 102 Stat. 4400-01.

⁸⁵ See generally § 40141(b), 108 Stat. at 1796. “Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct.” FED. R. EVID. 412 advisory committee’s note (1994). For a complete discussion and commentary on the expansive nature of the changes see generally *id.*

⁸⁶ One notable change enacted by the Violent Crime Control and Law Enforcement Act of 1994 was the elimination of the unique FRE 412 balancing test in all criminal proceedings while retaining the test in civil proceedings. See § 40141(b), 108 Stat. at 1796. For discussion on the reasoning behind eliminating the balancing test, see *infra* notes 173-81 and accompanying text.

⁸⁷ FED. R. EVID. 412 advisory committee’s note.

in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim.”⁸⁸

The initial debates concerning The Privacy Protection for Rape Victim’s Act of 1978 implied concern for not only the victim’s privacy, but also the victim’s willingness to report, the victim’s willingness to participate in the proceeding,⁸⁹ a desire for the victim to view the trial as fair,⁹⁰ and a need to increase the effectiveness of rape prosecutions.⁹¹ The subsequent amendments to FRE 412, in particular the 1994 amendment, expanded the protections offered by the rule by demonstrating greater concern for the victim’s general interests.⁹² Advisory committee notes to the 1994 amendment explicitly commented on the need to protect not only a victim’s right to privacy, but also a right to participate in the proceeding without humiliation, a desire to encourage reporting, and a need to punish sexual offenders.⁹³ The reasoning behind FRE 412, coupled with the broadening of the protections provided to victims of nonconsensual sexual offenses,⁹⁴ clarified Congress’s intent to protect a victim’s privacy in hopes of creating a fair, minimally intrusive trial that would not be stymied or subverted by a defense tactic.⁹⁵ Clearly, Congress envisioned FRE 412 as a tool to protect a victim, thus ensuring reporting, participation, and equity in a sexual assault trial.⁹⁶

⁸⁸ *Id.*

⁸⁹ See 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (commenting that by passing the legislation, victims would be encouraged to report rapes and participate in proceedings).

⁹⁰ See *id.* (statement of Sen. Bayh) (discussing how the legislation would increase the fairness of rape trials).

⁹¹ *Id.* (“The practice of subjecting rape victims to such interrogation has been clearly shown to act as a deterrent on effective law enforcement for the crime of rape.”).

⁹² See FED. R. EVID. 412 advisory committee’s note.

⁹³ *Id.* (“By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.”).

⁹⁴ The protections offered by the rule extend to not only those victim’s of nonconsensual sexual offenses but to all victims of alleged sexual misconduct. See *United States v. Banker*, 60 M.J. 216, 220 (2004).

⁹⁵ Senator Biden noted that a common defense tactic allowed under the previous rule was to “plac[e] the victim and her reputation on trial in lieu of the defendant” thus effectively reducing prosecutions of rape. 124 CONG. REC. 36,256 (1978).

⁹⁶ The advisory committee notes clearly refer to and articulate the social policies behind the enactment of FRE 412. See, e.g., FED. R. EVID. 412 advisory committee’s note (discussing the strong social policies protecting the victim’s privacy, encouraging victim’s to report sexual assaults, punishing those who commit sexual misconduct, and providing relief to the victim). The analysis to MRE 412 also refers to the social policies

C. FRE 412 and MRE 412

Military Rule of Evidence 412 “is substantially similar in substantive scope to Federal Rule of Evidence 412” and exists for the same reasons that FRE 412 was enacted.⁹⁷ Under MRE 1102, the military adopted FRE 412 into the military rules of evidence as MRE 412.⁹⁸ Military Rule of Evidence 412 has some notable differences from its federal counterpart due to the unique nature of the military environment and practice.⁹⁹ In particular, MRE 412 deletes all references to civil proceedings “as these are irrelevant to courts-martial practice,” tailors the federal rules procedures to “military practice,” and replaces the in camera review with a closed hearing in which the victim “is afforded a reasonable opportunity to attend and be heard.”¹⁰⁰ Military Rule of Evidence 412 also retains the unique balancing test¹⁰¹ originally included in FRE 412 but later omitted in federal criminal trials by the Violent Crime Control and Law Enforcement Act of 1994.¹⁰² Despite these

that were the foundation for the rule’s enactment, stating “[t]here is thus no justification for limiting the scope of the Rule, intended to protect human dignity and to ultimately encourage the reporting and prosecution of sexual offenses” MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35. By referring to these social policies, the 1994 amendment clarified Congress’s intent and resolved any lingering confusion concerning the reasoning behind the enactment of The Privacy Protection for Rape Victim’s Act of 1978. *See supra* note 85.

⁹⁷ MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35.

⁹⁸ “Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence eighteen months after the effective date of such amendments, unless action to the contrary is taken by the President.” *Id.* MIL. R. EVID. 1102(a); *see also* United States v. Sanchez, 44 M.J. 174, 177 n.4 (1996) (“By operation of MRE 1102, the military has now adopted the new version of FRE 412 which became effective December 1, 1994”).

⁹⁹ *See generally* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35–36. Also of note is that in 1993 “[Rules for Courts-Martial] 405(i) and Mil. R. Evid. 1101(d) were amended to make the provisions of Rule 412 applicable at pretrial investigations” to comply with congressional intent to protect victims of “nonconsensual sex crimes at preliminary hearings as well as at trial” *Id.* MIL. R. EVID. 412 analysis, at A22-36.

¹⁰⁰ *Id.*

¹⁰¹ *See* MCM, *supra* note 6, MIL. R. EVID. 412(c)(3).

¹⁰² *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, subtit. A, ch 4, § 40141(b), 108 Stat. 1796 (1994). In 1998, by operation of MRE 1102, MRE 412 was revised to assimilate the majority of the changes made to FRE 412 by the Violent Crime Control and Law Enforcement Act of 1994. *See* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-36 (“The revisions to Rule 412 reflect changes made to the Federal Rule of Evidence 412 by section 40141 of the Violent Crime Control and Law Enforcement Act of 1994”); *see also* Sanchez, 44 M.J. at 177 n.4. Unlike the other differences between MRE 412 and FRE 412 following the 1994 amendment, *see supra* text and accompanying notes 97–100, the reason the MRE 412 balancing test was retained was not explained in the Analysis to the rule. *See, e.g.*, MCM, *supra* note 6,

differences, MRE 412 mirrors FRE 412's general intent to protect victims from degrading trial practices, exclude evidence of minimally probative value, encourage both the reporting and prosecution of sexual assaults, and hold accountable those that commit sexual misconduct.¹⁰³ Similarly, MRE 412 recognizes that the rule does not act as an absolute bar to the admission of defense evidence and that an accused has a constitutional right to "present relevant defense evidence" if it falls within one of the stated exceptions.¹⁰⁴

Despite peripheral differences, the federal rule and the military rule are based upon the same social policies and the congressional intent remains the same for both.¹⁰⁵ Through these rules Congress intends to "protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives, to encourage reporting of sexual assaults, and to prevent wasting time on distracting collateral and irrelevant matters."¹⁰⁶ Hindering a sexual assault trial through the misuse

MIL. R. EVID. 412 analysis, at A22-36 (discussing the reasons for the differences between FRE 412 and MRE 412 following the 1994 amendment without mentioning the retention of the balancing test in the military rule). When considering the changes made to FRE 412 and their application to MRE 412 following the 1994 amendment, The Joint Service Committee on Military Justice (JSC) Working Group, noted that "[a]lthough the federal rule doesn't have detailed instructions for the military judge to follow in balancing the needs of the accused and the victim, our current rule does. Consequently, I've left MRE 412(c)(3) as is. There seems to be no good reason to delete it." Memorandum, JSC Working Group, to Working Group Members, subject: MRE 412 Amendments (29 Nov. 1994) (on file with author). In an interview, Colonel (COL) (Retired) Borch stated that the JSC Working Group recommended to the JSC to leave the rule unchanged out of an abundance of caution. *See* Interview with COL (Retired) Frederic L. Borch III, U.S. Army Representative and senior officer on the JSC Working Group 1994–1996, in Charlottesville, Va (Mar. 6, 2008). Colonel Borch noted that following the 1994 amendment to FRE 412 the JSC wanted to ensure military judges understood they were required to balance the victim's and accused's interests. *Id.* At the time, it was unclear whether MRE 403 applied to MRE 412; therefore, to give clear guidance to military judges that some form of balancing was required and to avoid appellate litigation on the issue, retaining the MRE 412 balancing test was recommended. *Id.*

¹⁰³ MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35; *see also* United States v. Banker, 60 M.J. 216, 220 (2004) (discussing the 1998 amendment to MRE 412, which adopted most of the changes in the 1994 amendment to FRE 412, in which the focus of the rule became more about protecting the victim than determining if there was sexual misconduct).

¹⁰⁴ *Banker*, 60 M.J. at 220.

¹⁰⁵ *Compare* FED. R. EVID. 412 advisory committee's note (1994) (stating the intent behind FRE 412), *with* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35 (stating the intent behind MRE 412).

¹⁰⁶ United States v. Torres, 937 F.2d 1469, 1472 (9th Cir. 1991); *see also* Michigan v. Lucas, 500 U.S. 145, 150 (1991) (finding that the Michigan rape shield law was a valid

of MRE 412 is clearly contrary to the intent envisioned by Congress¹⁰⁷ and contravenes the strong social policies of encouraging victim reporting, participation in prosecutions, and equity in sexual assault trials.¹⁰⁸ Congress also did not intend to use MRE 412 as an unreasonable bar to the admission of defense evidence¹⁰⁹ and fully intended that an accused retain his constitutional right to “a meaningful opportunity to present a complete defense.”¹¹⁰

III. The Unintended Consequences of MRE 412

Military Rule of Evidence 412 generally excludes “evidence offered to prove that any alleged victim engaged in other sexual behavior” and “evidence offered to prove any alleged victim’s sexual predisposition.”¹¹¹ The offering party is irrelevant¹¹² and only evidence that falls within a stated exception may be admitted.¹¹³ The universal applicability of the rule has created an unforeseen opportunity for defense counsel in sexual assault trials involving victims unwilling or unable to testify. This is particularly problematic for Government prosecutions of child sexual abuse.¹¹⁴

legislative determination that rape victims “deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy”).

¹⁰⁷ See, e.g., 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (noting that one reason for the legislation is to correct the underreporting and prosecution of sex crimes); *id.* (statement of Sen. Bayh) (discussing the need to encourage victim reporting and participation thus improving law enforcement in the area of sexual crimes); FED. R. EVID. 412 advisory committee’s note (commenting on need to ensure that prosecution of those that commit sexual misconduct).

¹⁰⁸ See *supra* note 96.

¹⁰⁹ See 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (commenting on the need to remember the constitutional rights of the accused); *id.* at 34,913 (statement of Rep. Holtzman) (referencing the desire to protect the accused’s constitutional rights).

¹¹⁰ *Cal. v. Trombetta*, 467 U.S. 479, 485 (1984).

¹¹¹ MCM, *supra* note 6, MIL. R. EVID. 412(a)(b).

¹¹² *But see* PROFESSOR ANTHONY BOCCHINO, COMMENTARY, RULE 412: SEX OFFENSE CASES; RELEVANCE OF ALLEGED VICTIM’S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION, NATIONAL INSTITUTE FOR TRIAL ADVOCACY (LexisNexis 2008) (stating that there are “four situations where specific instances of conduct as evidence of sexual behavior or sexual predisposition of the victim may be admissible . . .” with the fourth exception being that the “sexual conduct of the victim may be admissible when it is offered by the prosecution.”).

¹¹³ MCM, *supra* note 6, MIL. R. EVID. 412(a)(b).

¹¹⁴ See *infra* notes 115–43 and accompanying text.

A. The Need for a Fourth Exception

Typically, child sexual abuse cases are extremely difficult to prosecute due to a lack of physical evidence, delayed reporting, and no eyewitnesses.¹¹⁵ Many of these trials hinge on the testimony of the child, yet child victims often have difficulty testifying in sexual abuse trials or discussing in open court the sexual misconduct of an accused.¹¹⁶ It is not uncommon for a child victim to refuse to testify, or in some situations, not to remember the abuse.¹¹⁷ Though these child victims may be unwilling or unable to testify, there are other indicators that may demonstrate that abuse has occurred that the Government may rely upon

¹¹⁵ See Telephone Interview with Ms. Helen Swan, SRS Forensic Interview Specialist and past Program Director at Sunflower House in Kansas City, Mo. (10 Dec. 2007) [hereinafter Swan Interview] (Ms. Swan noted that child sex abuse cases are notoriously difficult to prosecute); see also Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027, 2028 (1994) (stating “[u]nlike other prosecutions, child sexual abuse prosecutions rarely are supported by physical or medical evidence or a nonparticipant eyewitness to the crime.”). Ms. Swan is a social worker who specializes in the area of child sexual abuse and is the supervisor of the child advocacy center forensic interviewing program at the Sunflower House in Kansas City, Missouri. Ms. Swan is a well recognized expert in the field of child sexual abuse and has conducted over 2300 forensic interviews of children who were allegedly sexually abused. Ms. Swan has numerous publications, including: *Dear Elizabeth: Diary of an Incest Survivor* (1993) and *Alone After School (Prevention Manual for Latchkey Children)* (1985). The Kansas Supreme Court has stated that Ms. Swan,

who is licensed as a clinical specialist, with a master's degree in social work, years of experience in the field of child sexual abuse and with world-wide recognition in the field of child sexual abuse, is imminently qualified as an expert to testify as to common patterns of behavior resulting from child sexual abuse

State v. Reser, 767 P.2d 1277 (Kan. 1989).

¹¹⁶ See Swan Interview, *supra* note 115.

¹¹⁷ *Id.* During the interview, Ms. Swan stated that children, in particular boys, will often not testify due to embarrassment, negative connotations concerning homosexual behavior, or out of concern that their testimony may have negative consequences for their family or the accused. See *id.* Though much less common, some children will repress or push away memories of the abuse as a defense mechanism. *Id.*; see also R. Christopher Yingling, Note, *The Ohio Supreme Court Sets the Statute of Limitations and Adopts the Discovery Rule for Childhood Sexual Abuse Actions: Now It Is Time for Legislative Action!*, 43 CLEV. ST. L. REV. 499, 502–05 (1995) (noting that most cases of child sexual abuse go unreported for multiple reasons including fear of consequences, personal safety concerns, and repression of memories); Askowitz & Graham, *supra* note 115, at 2033–34 (commenting on the numerous reasons why children victims have difficulty testifying at trial).

to further the prosecution.¹¹⁸ Among these indicators, one of the strongest signs that a child is a victim of abuse is an exhibition of age-inappropriate sexual behavior.¹¹⁹ In a situation where a child victim is unwilling or unable to testify, the Government will rely upon evidence of a child victim's age-inappropriate sexual behavior to ensure prosecution.¹²⁰

¹¹⁸ See, e.g., Lyon & Koehler, *supra* note 25, at 59 (stating “because gonorrhea is virtually non-existent among nonabused children who have not had sexual contact, it is strong evidence that abuse has occurred”); Yingling, *supra* note 117, at 503–04 (“Although the effects of childhood sexual abuse vary among victims and according to the circumstances surrounding the abuse, researchers have noted common characteristics among victims. During childhood, initial effects of sexual abuse include fear, anxiety, guilt, shame, depression, low self-esteem, and inappropriate sexual behavior”) (citing DAVID FINKELHOR ET AL., A SOURCE BOOK ON CHILD SEXUAL ABUSE 144–52 (1986)). However, some argue that since there are no universal symptoms present in all children that sexual abuse has no clear indicators. See, e.g., Lisa R. Askowitz, Comment, *Restricting the Admissibility of Expert Testimony in Child Sexual Abuse Prosecutions: Pennsylvania Takes It to the Extreme*, 47 U. MIAMI L. REV. 201, 208–09 (1992). Ms. Swan agreed not all children will show effects of abuse, or be defined as symptomatic, but of those that did show the typical symptoms, these were clear indicators that a child has most likely been abused. See Swan Interview, *supra* note 115; see also Lyon & Koehler, *supra* note 25, at 62 (commenting on child sexual abuse symptoms, the authors noted that “many common symptoms are only marginally relevant, and many uncommon symptoms have great probative value.”).

¹¹⁹ Age-inappropriate “other sexual behavior” is the most significant indicator that sexual abuse has occurred. See Swan Interview, *supra* note 115. Ms. Swan noted that age-inappropriate sexual behavior is different from normal childhood sexual experimentation. *Id.* Ms. Swan referred generally to WILLIAM N. FRIEDRICH, PSYCHOTHERAPY OF SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES (1990) as one of many sources that help to distinguish when a child has crossed the boundary between normal sexual experimentation and age-inappropriate behavior. *Id.* Mr. Friedrich conducted a child sex abuse inventory with 880 non-abused children aged two to twelve and 260 sexually abused children aged two to twelve. The sexually abused children were significantly more sexualized and demonstrated sexual behaviors including masturbation, sex acts, penetration, and other acts that differed from the normative sample inventory list. *Id.* When discussing sexual acts, Ms. Swan noted a symptom such as depression may result from numerous other reasons besides sexual abuse (for example genetics); however, inappropriate sexual acts by a child are a strong indicator of abuse since this is extremely rare in children that are not abused. See Swan Interview, *supra* note 115; see also Lyon & Koehler, *supra* note 25, at 59 (stating that “sexual behavior may be one of the most probative symptoms of sexual abuse” and that “certain types of highly sexualized behavior are uncommon among abused children, but are even more uncommon among children who have not been abused. Thus, despite being uncommon among abused children, sexual behavior is quite relevant for proving that abuse occurred.”).

¹²⁰ For example, the mother of a child victim may testify that the child is overtly sexual toward siblings, masturbates obsessively, or has inappropriate sexual contact with other children. “Other sexual behavior” does not include sexual activity with the accused. See *supra* note 24 for a more detailed definition of “other sexual behavior.”

Crucial to child sexual abuse prosecutions, and specifically in a trial in which the Government is relying on evidence of age-inappropriate sexual behavior, is the testimony of an expert.¹²¹ An expert is indispensable in explaining to the fact finder the relevance of the age-inappropriate sexual behavior and whether the behavior is a characteristic that would normally be seen in abused children.¹²² Evidence of the child victim's age-inappropriate sexual behavior combined with the expert analysis of that behavior¹²³ illustrates whether the child has been victimized and assists the fact finder in determining whether the child has been sexually abused.¹²⁴

¹²¹ See Askowitz & Graham, *supra* note 115, at 2034–35 (commenting on the importance of an expert in child sexual abuse trials).

¹²² “M.R.E. 702 provides that a witness qualified as an expert may testify as to scientific, technical, or other specialized knowledge if it will assist the factfinder in understanding the evidence or determining a fact at issue.” *United States v. Hayes*, 62 M.J. 158, 165 (2005). Expert testimony is allowed to explain the relevance of a child’s “other sexual behavior” and how this may indicate sexual abuse. See *United States v. Hadley*, 918 F.2d 848, 852–53 (9th Cir. 1990) (noting that expert testimony is admissible to explain the general behavioral characteristics that are exhibited by sexually abused children); *United States v. Nelson*, 25 M.J. 110, 113 (C.M.A. 1987) (stating that “there is a sufficient body of ‘specialized knowledge’ regarding the typical behavior of sexually abused children and their families, such that the conclusions which an expert draws as to these ‘behavioral patterns’ are admissible”) (quoting *United States v. Snipes*, 18 M.J. 172, 179 (C.M.A. 1984)).

¹²³ Expert testimony concerning the general characteristics of sexually abused children and whether the age-inappropriate sexual behavior of the child victim is consistent with a victimized child is typically considered more probative than prejudicial and will pass an MRE 403 balancing test. See, e.g., *Hadley*, 918 F.2d at 853; *Frenzel v. State*, 849 P.2d 741, 748 (Wyo. 1993) (noting that expert testimony in child sexual abuse cases is “relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault”); see also Lyon & Koehler, *supra* note 25, at 68 n.91 (explaining that age-inappropriate sexual behavior demonstrated by child victims is probative that abuse has occurred).

¹²⁴ Testimony of the child victim’s other sexual behavior coupled with expert testimony may also be used to rebut a defense that the abuse did not occur. See Lyon & Koehler, *supra* note 25, at 55 (“Most courts allow prosecution experts to testify that an alleged victim’s behavior is ‘consistent with’ abuse to rebut defense claims that the behavior proves abuse did not occur.”) (citing JOHN E.B. MEYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 292 (2nd ed. 1992)). Military Rule of Evidence 412, as currently drafted, leaves open the question, could the defense argue that the abuse did not occur and then invoke MRE 412 to prevent the prosecution from offering evidence of the victim’s age-inappropriate sexual behavior with a third party in rebuttal? The proposed fourth exception would resolve this issue and allow the Government to offer the rebuttal evidence. See *infra* notes 144–60 and accompanying text (detailing the proposed fourth exception).

It is clear that in a child sexual abuse trial in which the victim is unable or unwilling to testify, evidence of the child's age-inappropriate sexual behavior that is not with the accused coupled with expert testimony concerning that behavior is a necessity to the Government and essential to ensuring prosecution of these difficult child sexual abuse cases.¹²⁵ However, a defense attorney may exclude all forms of this "other sexual behavior" evidence through an objection to the proffered Government evidence under MRE 412.¹²⁶ Military Rule of Evidence 412 explicitly excludes evidence of the victim's other sexual behavior or sexual predisposition from all proceedings "involving alleged sexual misconduct"¹²⁷ unless a stated exception applies.¹²⁸ The rule is universal in application and does not differentiate between the Government and the defense when expressing this blanket exclusion.¹²⁹ Therefore, introduction of evidence demonstrating other sexual behavior of a victim, or more specifically, a child's age-inappropriate sexual behavior with someone other than the accused, requires the Government to articulate why the evidence fits within a stated exception to MRE 412.¹³⁰

Despite the critical nature of this evidence, the stated exceptions within MRE 412¹³¹ do not provide the Government an avenue to introduce the other sexual behavior of the child victim. The first exception to MRE 412 does not apply to age-inappropriate other sexual behavior by a child victim and is therefore inapplicable.¹³² The second

¹²⁵ In Ms. Swan's extensive experience, she noted that when a child victim cannot or will not testify the case is typically dismissed unless there is some other evidence such as eye witness testimony, physical evidence, or age-inappropriate sexual behavior coupled with expert testimony. See Swan Interview, *supra* note 115.

¹²⁶ See MCM, *supra* note 6, MIL. R. EVID. 412(a)(b).

¹²⁷ *Id.* MIL. R. EVID. 412(b).

¹²⁸ *Id.* MIL. R. EVID. 412(a).

¹²⁹ See generally *id.* Despite Professor Anthony Bocchino's commentary, see *supra* note 112, the rule does not differentiate between the Government and defense when excluding evidence of the victim's other sexual behavior or sexual predisposition.

¹³⁰ See *id.* MIL. R. EVID. 412(a)(b).

¹³¹ See *id.* MIL. R. EVID. 412(b); *supra* note 11 and accompanying text (detailing the three exceptions to MRE 412).

¹³² The first exception allows the defense to rebut allegations that the accused was the source of prosecution offered physical evidence and will admit "evidence of specific instances of sexual behavior by the alleged victim offered to prove that another person other than the accused was the source" of the physical evidence. *Id.* MIL. R. EVID. 412(b)(1)(A). For a more detailed discussion on the first exception, see *infra* notes 193–95, 200–04 and accompanying text.

exception allows the prosecution to admit evidence under MRE 412,¹³³ but the Government is limited to introducing evidence of a sexual relationship between the accused and victim.¹³⁴ This exception is silent concerning the introduction of the victim's sexual activity not with the accused and even liberally interpreted, cannot be construed to allow such evidence.¹³⁵ The rule's third exception explicitly applies only to an accused and clearly does not address or allow for the introduction of the victim's sexual history.¹³⁶ The three exceptions expressed in the rule are not helpful to the Government in rebutting a defense objection based upon MRE 412, and the result is the exclusion of all evidence of a child

¹³³ The second exception will admit the victim's sexual history where the "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 or by the prosecution." See MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(B). This exception focuses on the sexual relationship between the accused and the victim, whether offered by the defense or the Government. See FED. R. EVID. 412 advisory committee's note (1994) (discussing various situations in which the accused and the victim's sexual interaction would allow for the admittance of the victim's sexual history).

¹³⁴ See MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(B). The prosecution would be allowed to use the second exception, for example, in a child sexual abuse case to introduce "evidence of uncharged sexual activity between the accused and the alleged victim . . . pursuant to Rule 404(b) to show a pattern of behavior." FED. R. EVID. 412 advisory committee's note (1994). The inclusion of this language in the second exception to MRE 412 implicitly illustrates congressional concern that the stringent protections provided in the rule would be misused by the accused to exclude damning evidence of sexual misconduct with the victim.

¹³⁵ See MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(B); FED. R. EVID. 412 advisory committee's note (1994) ("Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused."). All examples in the advisory committee notes focus on interaction between the victim and the accused. See *generally id.*

¹³⁶ The third exception admits "evidence the exclusion of which would violate the constitutional rights of the accused." MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(C). This exception expressly applies to the accused, is specifically intended to protect the accused's constitutional right to a fair trial, and will not allow "evidence of specific instances of conduct [to] be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution." FED. R. EVID. 412 advisory committee's note (citing *Olden v. Kentucky*, 488 U.S. 227 (1988)) (noting that the Supreme Court recognizes various circumstances where an accused "may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause"). For a more detailed discussion on the third exception, see *infra* notes 205–19 and accompanying text.

victim's age-inappropriate other sexual behavior in a child sexual abuse trial.¹³⁷

The exclusion of this form of evidence has obvious negative connotations in the prosecution of these types of child sexual abuse trials.¹³⁸ This unforeseen use of MRE 412 as a shield for an accused during a child sexual abuse trial is in violation of the congressional intent behind the rule and contravenes Congress's desire to protect the interests of the victim.¹³⁹ When amending FRE 412 in 1994, and by extension MRE 412, Congress recognized the possible misuse of the rule¹⁴⁰ to exclude evidence of uncharged sexual activity between the accused and the victim and addressed that potential prosecutorial roadblock in the second exception.¹⁴¹ The drafters of the rule, however, did not foresee the use of MRE 412 to exclude evidence of other sexual behavior not with the accused that could be offered by the Government and, contrary to Congress's intent, created an opportunity for defense to use the rule to exclude this form of evidence.¹⁴² The ability of defense counsel to use MRE 412 to impede a child sexual abuse prosecution is a loophole whose existence is unintended and blatantly contradicts the legislative history and vision behind the rule.¹⁴³

¹³⁷ It is possible to envision scenarios outside of a child sexual abuse case where "other sexual behavior" evidence coupled with expert testimony would be relevant and important. Examples might include: a prison sexual assault, male on male rape, or a female rape victim demonstrating rape trauma syndrome.

¹³⁸ See *supra* note 125 (discussing when a child sexual abuse case is typically dismissed). If evidence of a child victim's age-inappropriate other sexual behavior is excluded due to a defense objection under MRE 412 it is also difficult to articulate how an expert's testimony is relevant under MRE 401 or helpful to the fact finder under MRE 702. See generally MCM, *supra* note 6, MIL. R. EVID. 401, 702.

¹³⁹ See generally *supra* notes 66–96 and accompanying text.

¹⁴⁰ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, title IV, subtit. A, ch 4, § 40141(b), 108 Stat. 1796 (1994) (amending FRE 412 to include the language in the second exception allowing the prosecution to use the exception to admit other sexual behavior evidence); see also FED. R. EVID. 412 advisory committee's note (1994) (discussing Government use of the second exception).

¹⁴¹ See *supra* notes 133–35 and accompanying text.

¹⁴² See generally *supra* Section II for a discussion concerning congressional intent behind FRE 412 and MRE 412.

¹⁴³ See generally *id.*

B. The Proposed Fourth Exception

To ensure compliance with congressional intent and to prevent chilling these forms of sexual assault prosecutions, MRE 412 must be amended to include a fourth exception.¹⁴⁴ Currently, MRE 412's general exclusion of the victim's sexual behavior applies to all other sexual behavior of the victim not with the accused, including age-inappropriate sexual behavior of a child victim.¹⁴⁵ The three existing exceptions to MRE 412 do not address this form of evidence and through omission exclude all victim sexual behavior that is not with the accused.¹⁴⁶ This exclusion is inadvertent and can only be corrected by adding a fourth exception to the rule which allows the Government, with the consent of the victim, to introduce evidence of other sexual behavior not with the accused.

To implement this recommendation, MRE 412(b)(1), which states that "the following evidence is admissible"¹⁴⁷ when referring to the existing three exceptions, must add a subsection (D).¹⁴⁸ Military Rule of Evidence 412(b)(1)(D) would make admissible evidence of specific instances of sexual behavior by the alleged victim with respect to other parties offered by the prosecution, with consent of the victim. The military judge would determine whether the other sexual behavior is relevant and whether a victim voluntarily consents to allowing the use of the evidence after conducting a closed hearing similar to the procedure described in MRE 412(c)(2).¹⁴⁹ At the closed hearing, the military judge

¹⁴⁴ Military Rule of Evidence 412 was amended in 1993 and 1998; therefore, an amendment to reflect needed changes has historical precedent. *See* MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-36 (discussing the 1993 and 1998 amendments to MRE 412).

¹⁴⁵ *See supra* notes 125-30 and accompanying text.

¹⁴⁶ *See supra* notes 131-37 and accompanying text for a discussion on why the three existing exceptions to MRE 412 do not allow other sexual behavior evidence offered by the Government.

¹⁴⁷ *See* MCM, *supra* note 6, MIL. R. EVID. 412(b)(1).

¹⁴⁸ A subsection (D) would be cited as MRE 412(b)(1)(D). *See generally id.*

¹⁴⁹ Military Rule of Evidence 412(c)(2) states:

Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article

would conduct a *Reynolds*-type analysis¹⁵⁰ to ensure the other sexual behavior evidence is being offered for the proper purpose by the Government.¹⁵¹ This scrutiny would force the Government to explain how the other sexual behavior is relevant¹⁵² and allow the military judge to screen the proffered evidence for undue prejudice prior to use in trial.¹⁵³

39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Id. MIL. R. EVID. 412(c)(2).

¹⁵⁰ See *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989). *Reynolds* established a three-part test that determines the admissibility of uncharged misconduct evidence under MRE 404(b). See *id.* at 108–09. The first prong of the test mirrors MRE 104(b) and requires that the evidence must reasonably support a finding by the court members that the accused committed “prior crimes, wrongs, or acts.” *Id.* at 109. The second prong requires the evidence to make a fact of consequence more or less probable, thus complying with the definition for relevancy as described in MRE 401. The third and final prong is an MRE 403 balancing test, in which the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *Id.*; see also *United States v. Young*, 55 M.J. 193, 196 (2001) (stating that the *Reynolds* test is the accepted approach when a court determines whether to admit uncharged misconduct); Major David Edward Coombs, *Uncharged Misconduct: The Edge is Never Dull*, ARMY LAW., May 2007, at 19 (explaining the three parts of the *Reynolds* test).

¹⁵¹ Coombs, *supra* note 150, at 19 (“To determine whether the proponent is truly offering the uncharged acts for a proper purpose, military courts use the three-part test announced” in *Reynolds*.)

¹⁵² To find the offered evidence relevant, the military judge must find that the first two parts of the *Reynolds* test are satisfied. To comply with MRE 104(d) is not difficult. See *United States v. Acton*, 38 M.J. 330, 333 (C.M.A. 1993) (referring to the first prong of the *Reynolds* test the court stated that “[t]he threshold for this prong of admissibility is low”) (citing *United States v. Dorsey*, 38 M.J. 244, 246 (C.M.A. 1993)). Under the second prong, the military judge must apply the definition of relevance found in MRE 401 and should consider “inferences and conclusions [that] can be drawn from the evidence.” Coombs, *supra* note 150, at 19. A non-exhaustive list of scenarios in which evidence of a child’s age-inappropriate other sexual behavior could be deemed relevant at the conclusion of the closed hearing include: (1) if the Government is offering the evidence to show that the child is highly sexualized or committing sexual misconduct because of his interaction with the accused and the child’s sexual behavior is intertwined with the accused’s criminal actions; (2) if the court has admitted evidence under MRE 404(b) in a child molestation trial, for example, that the accused possessed child pornography to show intent (see, e.g., *United States v. Mann*, 26 M.J. 1 (C.M.A. 1988)), the accused has a known relationship with the child, and the child is demonstrating age-inappropriate sexual behavior; or (3) if the Government is rebutting the defense that abuse never occurred. See *supra* note 124.

¹⁵³ All evidence offered as an exception under MRE 412 must also pass an MRE 403 balancing test and thus this is not a departure from current practice. See *supra* note 27.

Similarly, the military judge would need to determine if the victim consented to the use of the evidence. The closed hearing would provide full disclosure of the other sexual behavior evidence intended to be offered, thus giving the victim, or his guardian, an opportunity to make an informed, voluntary decision to waive his MRE 412 protections.¹⁵⁴ To ensure complete transparency in this decision, the military judge would, on the record, elicit from the victim, or his guardian, an express waiver of his MRE 412 right to exclude the evidence and voluntary consent to the use of the evidence.¹⁵⁵ By empowering the victim to choose whether this form of other sexual behavior evidence is used at trial, the rule would fully comply with Congress's intent¹⁵⁶ while simultaneously eliminating the defense use of MRE 412 as a shield.¹⁵⁷

At the conclusion of the closed hearing, if the military judge found that the evidence passed the *Reynolds*-type analysis and the victim, or guardian, voluntarily waived the MRE 412 protections, the evidence would be introduced under MRE 412(b)(1)(D).¹⁵⁸ The adoption of the fourth exception would be particularly important in child sexual abuse

¹⁵⁴ One of the original reasons for a closed hearing when discussing an exception under FRE 412 was to ensure the protection of the victim's privacy. See 124 CONG. REC. 34,913 (1978) (statement of Rep. Mann) (noting that a closed hearing allowed the defendant to present arguments for admission of the victim's other sexual behavior evidence while still protecting the victim's privacy). Military Rule of Evidence 412 replaced the in camera hearing with an Article 39(a) hearing, but maintained the same intent of limiting dissemination of the victim's other sexual behavior. See MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-36 ("The closed hearing . . . fully protects an alleged victim against invasion of privacy and potential embarrassment."). The rule is intended to ensure the victim is protected. See *United States v. Banker*, 60 M.J. 216, 220 (2004). By allowing the victim to control the use of this type of other sexual behavior evidence after full disclosure, congressional intent is most likely met. *But see* MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(B) (allowing the prosecution to introduce uncharged sexual activity evidence between the victim and the accused without the consent of the victim).

¹⁵⁵ The military judge would elicit waiver and consent from the victim on the record similar to the manner in which an accused, during a guilty plea, is required to fully waive his right against "self-incrimination, to a trial of facts by a courts-martial, and to be confronted by witnesses." U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-2-8 (15 Sept. 2002).

¹⁵⁶ See *supra* notes 66-96 and accompanying text (discussing congressional intent to protect the victim's interest when disclosing other sexual behavior evidence).

¹⁵⁷ See *supra* notes 138-43 and accompanying text (discussing how the use of MRE 412 by the defense to exclude other sexual behavior not with the accused is an inadvertent oversight and must be corrected).

¹⁵⁸ The evidence offered under this new exception would still need to comport with the procedural requirements outlined in MRE 412(c). *But see infra* Section IV for a discussion on eliminating the unique MRE 412 balancing test detailed in MRE 412(c)(3).

trials where the Government must rely heavily on other sexual behavior evidence coupled with expert testimony.¹⁵⁹ No longer could the defense exclude relevant, probative and voluntary evidence of the victim's other sexual behavior with a third party, or more specifically age-inappropriate sexual behavior of a child, simply by invoking MRE 412.¹⁶⁰

As it is currently drafted, MRE 412 allows the defense to exclude the victim's other sexual behavior with a third party and thus acts as an unintended defense tool to frustrate prosecutions.¹⁶¹ The three existing exceptions to MRE 412 inadequately address this loophole¹⁶² and the result is that the rule acts as a protective shield for the accused.¹⁶³ The Government, unable to rely on evidence of the victim's other sexual behavior, often has no choice but to dismiss charges or not to go forward with prosecution.¹⁶⁴ Prosecution of these forms of sexual offenses are effectively limited, accused sexual offenders are not tried, and victims are left with no recourse. These results are directly in conflict with the congressional intent behind the rule and this opportunity for the accused to be shielded from sexual behavior evidence, and in particular evidence of a child's age-inappropriate sexual behavior, is clearly an unintended, as well as unforeseen, misuse of the rule.¹⁶⁵ Only by amending the rule to include the proposed fourth exception can MRE 412 fully comply with Congress's intent to protect the victim's interest, encourage reporting and cooperation in trial, and hold accountable those that have committed sexual misconduct.¹⁶⁶

¹⁵⁹ See *supra* notes 115–30 and accompanying text (noting the importance of age-inappropriate other sexual behavior evidence coupled with expert testimony in child sexual abuse trials).

¹⁶⁰ See *supra* notes 125–30 and accompanying text (explaining how the current draft of the rule allows for a defense attorney to exclude other sexual behavior evidence through the use of MRE 412).

¹⁶¹ *Id.*

¹⁶² See *supra* notes 131–37 and accompanying text.

¹⁶³ See *supra* notes 138–43 and accompanying text.

¹⁶⁴ See Swan Interview, *supra* note 115. Ms. Swan noted that numerous child molestation trials are dismissed due to lack of evidence. *Id.*

¹⁶⁵ See *supra* notes 89–96 and accompanying text; *supra* notes 105–08 and accompanying text (discussing Congress's desire to craft the rule to incorporate the social policies of encouraging victim reporting, participation in prosecutions, and equity in sexual assault trials).

¹⁶⁶ See *generally supra* 66–96 and accompanying text (discussing congressional intent concerning victim rights when enacting FRE 412 and MRE 412).

IV. Eliminating the MRE 412 Balancing Test

A. Background

Federal Rule of Evidence 412, and by extension MRE 412, attempts to protect victims of nonconsensual sexual offenses while ensuring an accused has a fair and complete trial.¹⁶⁷ Both rules protect the victim's right to privacy by excluding the majority of all evidence concerning her sexual history.¹⁶⁸ This exclusion is not absolute: if a third party was allegedly the source of the physical evidence, if a sexual relationship existed between the victim and the accused, or if there is a constitutional necessity to introduce the victim's sexual history, then in those situations the victim's right to privacy is trumped by the accused's right to admit the evidence in his defense.¹⁶⁹ Prior to the admission of the evidence, the defense is required to demonstrate that the evidence is relevant¹⁷⁰ and that it satisfies the "403 balancing test."¹⁷¹ The victim's and accused's competing interests are balanced through FRE and MRE 412's overarching exclusion of the victim's sexual behavior, except in these three recognized, compelling situations where the proffered evidence remains subject to normal evidentiary requirements.¹⁷²

However, this attempt at an equitable balancing of interests was upset in the original enacted bill by the additional requirement that an accused, presenting evidence under one of the three exceptions, was required to filter his proffered evidence through a unique balancing

¹⁶⁷ See *supra* notes 105–10 and accompanying text; see also *United States v. Sanchez*, 44 M.J. 174, 178 (1996) (discussing MRE 412's goal of balancing the competing interests of the victim and the accused).

¹⁶⁸ See FED. R. EVID. 412(a); MCM, *supra* note 6, MIL. R. EVID. 412(a).

¹⁶⁹ See FED. R. EVID. 412(b); MCM, *supra* note 6, MIL. R. EVID. 412(b).

¹⁷⁰ See FED. R. EVID. 412(b)(1); MCM, *supra* note 6, MIL. R. EVID. 412(c)(3).

¹⁷¹ Federal Rule of Evidence 403 is only applied after FRE 412 is satisfied. See *United States v. One Feather*, 702 F.2d 736, 739 (8th Cir. 1983) (noting that FRE 403 applies to the FRE 412 exceptions). Similarly, MRE 403 is only applied after MRE 412 is satisfied. See *United States v. Banker*, 60 M.J. 216, 223 n.3 (2004) ("the military judge may exclude evidence on MRE 403 grounds even if that evidence would otherwise be admissible under MRE 412."). But see notes 218–19 and accompanying text (discussing the practical irrelevance of MRE 403 concerning the third exception to MRE 412).

¹⁷² See, e.g., 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (noting the need to balance the victim's and accused's interests when drafting FRE 412); *United States v. Dorsey*, 16 M.J. 1, 4 (C.M.A. 1983) ("[T]he legislative history of FRE 412 indicates that Congress intended that evidence of a rape victim's past sexual behavior not be routinely admitted at a criminal trial Yet this new policy of exclusion is couched in terms permitting the admission of such evidence under certain circumstances.").

test.¹⁷³ In contrast to the universal applicability and inclusive nature of the FRE 403 balancing test,¹⁷⁴ the FRE 412 balancing test¹⁷⁵ applied only to the defense and leaned in the direction of excluding evidence offered by the accused.¹⁷⁶ This additional evidentiary requirement meant that in a trial involving sexual misconduct, the defense counsel, after successfully articulating why the proffered evidence was relevant and why the evidence fit within one of the three narrow exceptions carved out of the rule by Congress, still faced the possibility of having the

¹⁷³ See Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046, 2047 (1978) (discussing in FRE 412(c)(3) the unique balancing test required for evidence offered under one of the enumerated exceptions); MCM, *supra* note 6, MIL. R. EVID. 412(c)(3). During the subcommittee hearings prior to the enactment of The Privacy Protection for Rape Victims Act of 1978 the Department of Justice spokesman argued that the unique balancing test created constitutional issues by taking too drastic a departure from the traditional FRE 403 balancing test. See *Privacy Hearings*, *supra* note 3, at 6–7 (statement of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division on behalf of the Department of Justice). In an attempt to compromise, Mr. Pauley recommended removing the word “substantially” from the unique FRE 412 balancing test to ensure that relevant evidence that posed a greater risk to the defendant’s right to a fair trial versus the victim’s right to privacy was not excluded. See *id.*

¹⁷⁴ See FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”); see also MCM, *supra* note 6, MIL. R. EVID. 403. Federal Rule of Evidence 403 is applied to evidence offered by either the Government or the defense and “the policy of the Rule is that if the balance between probative value and countervailing factors is close, the Judge should admit the evidence.” FED. R. EVID. 403 advisory committee’s note (2008); see also *Banker*, 60 M.J. at 222 (noting that MRE 403 is applied to evidence offered by either the Government or the defense).

¹⁷⁵ See Privacy Protection for Rape Victims Act, 92 Stat. at 2047 (outlining the FRE 412 balancing test, the act notes that “evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible . . .”); see also MCM, *supra* note 6, MIL. R. EVID. 412(c)(3) (discussing the MRE 412 balancing test).

¹⁷⁶ See Privacy Protection for Rape Victims Act, 92 Stat. at 2047 (noting that the FRE 412 balancing test only applies to evidence offered by the accused); 124 CONG. REC. 34,912 (1978) (statement of Rep. Mann) (stating that the accused’s offered evidence will only be admitted if the probative value outweighs the danger of unfair prejudice); see also *Banker*, 60 M.J. at 222 (comparing MRE 403 and the balancing test in MRE 412, the court noted that “the two rules lean in different directions: i.e., toward inclusion in the case of M.R.E. 403 and toward exclusion in the case of M.R.E. 412(c)(3)”). The *Banker* court also noted a second difference between the rules; the MRE 412 balancing test only applies to the accused. See *id.*; see also *infra* note 228 for a discussion concerning the differences between the MRE 412 and MRE 403 balancing tests.

evidence excluded under the FRE 412 balancing test.¹⁷⁷ Further, satisfying the evidentiary requirements of FRE 412, including the unique balancing test, did not absolve the defense from the requirement that the proffered evidence also be screened by the FRE 403 balancing test.¹⁷⁸

Recognizing the unlikelihood of a judge excluding evidence deemed to fit within one of the limited enumerated exceptions and the multiple levels of scrutiny placed upon defense proffered evidence, Congress determined that the FRE 412 balancing test was an unnecessary, additional filter.¹⁷⁹ The FRE 412 balancing test simply acted as a redundant and unfair hurdle for the defense due to the limited applicability of the FRE 412 exceptions coupled with the adequate protections already provided to both the victim and the accused through existing evidentiary requirements.¹⁸⁰ For these reasons, Congress

¹⁷⁷ See Privacy Protection for Rape Victims Act, 92 Stat. at 2046–47 (discussing the FRE 412 requirements to introduce evidence under one of the three exceptions).

¹⁷⁸ See *United States v. One Feather*, 702 F.2d 736, 739 (8th Cir. 1983) (excluding evidence that satisfied FRE 412 under FRE 403); FED. R. EVID. 412 advisory committee’s note (1994) (“In a criminal case, evidence may be admitted under subdivision (b)(1) pursuant to three possible exceptions, provided the evidence also satisfies other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403.”); see also *Banker*, 60 M.J. at 223 n.3 (“M.R.E. 412 does not wholly supplant M.R.E. 403 since the military judge may exclude evidence on M.R.E. 403 grounds even if that evidence would otherwise be admissible under M.R.E. 412.”).

¹⁷⁹ See STEPHEN A. SALTZBURG ET AL., COMMENTARY, FED. R. EVID. 412 (LexisNexis 2008). When discussing the elimination of the unique 412 balancing test in a criminal trial, the commentators stated:

[I]n a criminal case, if a specific act is offered for one of the two limited purposes provided, the act is admissible so long as it also satisfies Rule 403. See, e.g., *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (evidence that fits one of the Rule 412 exceptions can nonetheless be excluded if the probative value is substantially outweighed by the prejudicial effect). That is, there is no heightened exclusionary balancing test applied. This makes sense, since if the evidence is narrow enough to fit one of the limited exceptions to subdivision (b)(1), there is little reason to filter it further through a strict exclusionary balancing test.

Id.

¹⁸⁰ The advisory committee to the 1994 amendment noted that “[a]s amended, Rule 412 will be virtually unchanged in criminal cases,” thus recognizing the practical insignificance of eliminating the FRE 412 balancing test. FED. R. EVID. 412 advisory committee’s note (1994). The commentary to the amended rule explained in more detail

amended FRE 412 in 1994 to eliminate the unique balancing test in criminal trials.¹⁸¹

Despite the changes in the federal rule¹⁸² and the similar unlikelihood that a military judge would exclude evidence deemed to fit within an enumerated exception,¹⁸³ MRE 412 retains the unique balancing test.¹⁸⁴ More specifically, in a military proceeding prosecuting a nonconsensual sexual offense, evidence deemed to fit within one of MRE 412's three narrow exceptions must still satisfy this unique balancing test.¹⁸⁵ Just as the balancing test was eliminated in the federal rule, the MRE 412 balancing test should be eliminated. The test is unnecessarily redundant, and contrary to the congressional intent behind the rule, acts as an additional obstacle to an accused presenting a complete defense.¹⁸⁶ Therefore, MRE 412 must be further amended to eliminate the unique balancing test found within the rule.

how the FRE 412 balancing test was redundant and unnecessary. See SALTZBURG ET AL., *supra* note 179.

¹⁸¹ See FED. R. EVID. 412(b)(2). Following 1994, the federal rule only retained a unique balancing test for civil trials:

In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

Id.

¹⁸² See *supra* note 102 (discussing why the JCS retained the MRE 412 balancing test following the Violent Crime Control and Law Enforcement Act of 1994 which eliminated the FRE 412 balancing test in criminal trials).

¹⁸³ See *United States v. Andreozzi*, 60 M.J. 727, 740 n.32 (Army Ct. Crim. App. 2004) (agreeing that the MRE 412 unique balancing test should be eliminated due to the narrowness of the three MRE 412 exceptions and the applicability of MRE 403).

¹⁸⁴ See MCM, *supra* note 6, MIL. R. EVID. 412(c)(3); see also *United States v. Banker*, 60 M.J. 216, 222 (2004) (discussing the applicability of the MRE 412 balancing test when admitting evidence under one of the three enumerated exceptions).

¹⁸⁵ See MCM, *supra* note 6, MIL. R. EVID. 412(c)(3).

¹⁸⁶ See *supra* notes 55–65 and accompanying text (explaining Congress's intent when enacting FRE 412 to fully protect the accused right to a fair trial); *Cal. v. Trombetta*, 467 U.S. 479, 485 (1984) (holding that a criminal defendant has a constitutional right to a "meaningful opportunity to present a complete defense"); *Sandoval v. Acevedo*, 996 F.2d 145, 147 (7th Cir. 1993) (discussing the limitations of a rape shield statute).

B. The Unnecessary MRE 412 Balancing Test

An accused attempting to introduce evidence under one of the three enumerated MRE 412 exceptions has the burden of establishing that the exception applies and explaining how the exception has been satisfied.¹⁸⁷ The first two exceptions are applicable in very limited situations.¹⁸⁸ The third exception requires the defense to explain in detail how the proffered evidence is relevant, material, and vital to the accused's defense.¹⁸⁹ Further, evidence offered under an exception to MRE 412 is scrutinized for relevance and probative value under MRE 403.¹⁹⁰ If the defense-offered evidence is relevant, specific enough to fit within one of the limited exceptions, and satisfies MRE 403, it is extremely unlikely that a military judge could justify excluding the evidence based upon the MRE 412 balancing test.¹⁹¹ A brief description of the narrow types of evidence admitted under each exception and the redundant nature of the MRE 412 balancing test illustrates how "there is little reason to filter [the evidence] further through a strict exclusionary balancing test."¹⁹²

1. *The First Two Exceptions: MRE 412(b)(1)(A) and MRE 412(b)(1)(B)*

The first exception, noted in MRE 412(b)(1)(A), allows for the admission of the victim's sexual behavior where the "evidence of specific instances of sexual behavior by the alleged victim [is] offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence."¹⁹³ This exception is intended to allow the accused an opportunity to "prove that another person was responsible" for the physical evidence where the prosecution has

¹⁸⁷ See *United States v. Moulton*, 47 M.J. 228–29 (1997).

¹⁸⁸ See generally MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(A)(B); see *infra* notes 193–204 and accompanying text.

¹⁸⁹ See *Banker*, 60 M.J. at 222; *United States v. Dohrn*, No. 200301615, 2007 CCA LEXIS 227 (N-M. Ct. Crim. App. June 26, 2007) (unpublished) (explaining how evidence offered under the third exception must be relevant, material, and vital to be admitted). For a more detailed definition of relevant, material, and vital, see *infra* notes 213–19 and accompanying text.

¹⁹⁰ See *supra* notes 169–70 and accompanying text.

¹⁹¹ See SALTZBURG ET AL., *supra* note 179; *Acevedo*, 996 F.2d at 147 (stating that a rape shield statute cannot hinder the introduction of evidence defined as vital). The MRE 403 balancing test is not applied until evidence has satisfied MRE 412. See *supra* note 171.

¹⁹² SALTZBURG ET AL., *supra* note 179.

¹⁹³ MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(A).

“directly or indirectly asserted that the physical evidence originated with the accused.”¹⁹⁴ Thus, evidence is admitted under this first exception in the specific and limited situation where the defense is rebutting an assertion that semen, injury, or physical evidence presented by the Government originated with the accused.¹⁹⁵

“[E]vidence 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 or by the prosecution” is admitted under the second exception to MRE 412.¹⁹⁶ Though this exception seems to admit any evidence that may imply that the victim consented to sexual contact with the accused, the evidence offered is limited to actual sexual contact between the victim and the accused.¹⁹⁷ Further, the sexual contact between the victim and the accused may still be excluded if it is not relevant and probative to showing consent in the charged incident.¹⁹⁸ This exception is therefore narrow in scope and

¹⁹⁴ FED. R. EVID. 412 advisory committee’s note (1994) (citing *United States v. Begay*, 937 F.2d 515, 523 n.10 (10th Cir. 1991)).

¹⁹⁵ *See id.* In addition, “evidence offered for the specific purpose identified in this subdivision may still be excluded if it does not satisfy Rules 401 or 403.” *Id.* (citing *United States v. Azure*, 845 F.2d 1503, 1505–06 (8th Cir. 1988)).

¹⁹⁶ *See MCM, supra* note 6, MIL. R. EVID. 412(b)(1)(B).

¹⁹⁷ *See United States v. Saunders*, 943 F.2d 388, 392 (4th Cir. 1991). The court found that the second exception

permits only evidence of the defendant's past experience with the victim.

The rule manifests the policy that it is unreasonable for a defendant to base his belief of consent on the victim's past sexual experiences with third persons, since it is intolerable to suggest that because the victim is a prostitute, she automatically is assumed to have consented with anyone at any time.

Id.

¹⁹⁸ *See, e.g., United States v. Andreozzi*, 60 M.J. 727, 739 (Army Ct. Crim. App. 2004) (holding that evidence of a prior sexual incident between the victim and the accused should not be admitted under the second exception because the “dissimilar characteristics reduce the relevance to a minimal level” and thus the evidence should be excluded under MRE 403); *United States v. Ramone*, 218 F.3d 1229, 1237 (10th Cir. 2000) (excluding evidence of prior use of inanimate object during sex under FRE 403); *People v. Hastings*, 72 Ill. App. 3d 816, 821 (Ill. App. Ct. 1979) (“[E]ven if the complainant had consented to intercourse with the defendant in the past, that does not mean that the complainant consented to the acts committed on the night in question.”). “Consent” is not relevant if the prosecution is invoking the exception to introduce evidence. *See supra* note 134 (explaining that the Government may use this exception, for example, to introduce MRE 404(b) evidence demonstrating pattern of behavior). The prosecution’s use of the second

will only allow evidence of sexual behavior by the victim to be admitted if there is a prior sexual relationship between the parties and its relevance and probative value is transparent to the military judge.¹⁹⁹

Evidence offered under MRE 412(b)(1)(A) or (B) must be narrow enough to fit within the limited circumstances in which the exceptions apply.²⁰⁰ The first exception will only allow an accused to admit evidence that rebuts the prosecutions offered physical evidence²⁰¹ while the second exception only allows evidence that supports a defense of consent.²⁰² In addition, an accused attempting to introduce evidence under either of these exceptions is further restricted by the relevancy requirements of MRE 401²⁰³ and the balancing test of MRE 403.²⁰⁴ The relatively rare circumstance in which evidence offered fits within the limited applicability of the first two exceptions to MRE 412, combined with the MRE 401 and MRE 403 scrutiny placed upon that proffered evidence, makes the additional MRE 412 balancing test unnecessary.

exception seems to be the drafter's attempt at ensuring that MRE 412 is not misused by the defense to shield the accused. *See supra* notes 140–42 and accompanying text.

¹⁹⁹ *See Ramone*, 218 F.3d at 1237. In *Ramone* the accused attempted to introduce evidence that an inanimate object was used in a previous sexual encounter with the victim under MRE 412(b)(1)(B) to demonstrate consent. *Id.* In its ruling concerning the evidence the court agreed with the lower court's finding that:

[I]t was not relevant to the issue of consent because the victim's response that the object had been used did not indicate consent to its use [E]ven if relevant, the evidence should be excluded under FRE 403 as any probative value was substantially outweighed by unfair prejudice, confusion of the issues, and the potential for misleading the jury.

Id.

²⁰⁰ *See supra* notes 193–99 and accompanying text.

²⁰¹ *See supra* notes 193–95 and accompanying text.

²⁰² *See supra* notes 196–99 and accompanying text.

²⁰³ *See MCM, supra* note 6, MIL. R. EVID. 401 (stating “[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.”).

²⁰⁴ *See generally supra* notes 193–99 and accompanying text.

2. *The Third Exception: MRE 412(b)(1)(C)*

The third exception will admit “evidence the exclusion of which would violate the constitutional rights of the accused.”²⁰⁵ For admission under this exception, the offered evidence must be relevant, material, and favorable to the defense.²⁰⁶ The “relevancy portion of this test is the same as that employed for the other two exceptions of the rule” and thus the offered evidence must comply with MRE 401.²⁰⁷ If deemed relevant, the evidence must be material to the defense.²⁰⁸ In determining the materiality of the evidence “it is necessary to consider the importance of the issue for which the evidence was offered in relation to the other issues in [the] case; the extent to which this issue is in dispute; and the nature of other evidence in the case pertaining to this issue.”²⁰⁹ If the evidence is relevant and material, the evidence must also be favorable to the defense.²¹⁰ Favorable is “synonymous with the term ‘vital’”²¹¹ and refers to evidence that is case dispositive or essential to presenting a complete defense.²¹²

Relevant, material, and vital evidence is a constitutional necessity to the accused’s defense.²¹³ Though the evidence that specifically falls

²⁰⁵ See MCM, *supra* note 6, MIL. R. EVID. 412(b)(1)(C).

²⁰⁶ See *United States v. Banker*, 60 M.J. 216, 222 (2004). As with the first two exceptions, evidence that is otherwise admissible under MRE 412 may be excluded under MRE 403. *Id.* at 223 n.3. But see *infra* notes 213–19 and accompanying text for a discussion on why the MRE 403 balancing test, similar to the MRE 412 balancing test, is arguably irrelevant under the third exception.

²⁰⁷ *Banker*, 60 M.J. at 222.

²⁰⁸ *Id.*

²⁰⁹ *United States v. Dorsey* 16 M.J. 1, 6 (C.M.A. 1983).

²¹⁰ See *id.* at 5 (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982)); *Banker*, 60 M.J. at 222.

²¹¹ *Banker*, 60 M.J. at 222 (citing *Valenzuela-Bernal*, 458 U.S. at 867).

²¹² See *Valenzuela-Bernal*, 458 U.S. at 867 (defining favorable or vital evidence as evidence that will affect the outcome of the trial and is necessary to an adequate defense); see also *United States v. Williams*, 37 M.J. 352, 361 (C.M.A. 1993) (Gierke, J., concurring) (noting that *Valenzuela-Berna* held that the defense must show more than simply a “conceivable benefit” to the defense when compulsory production of a witness was required).

²¹³ See *Banker*, 60 M.J. at 221 (“where evidence is offered pursuant to this exception, it is important for defense counsel to detail an accused’s theory of relevance and constitutional necessity”); see also *Williams*, 37 M.J. at 361 (Gierke, J., concurring) (stating that the “phrase ‘relevant, material, and favorable to the defense’” means that the evidence must be necessary and “[a]ny lower standard of admissibility is not constitutionally mandated . . .”).

within this constitutional necessity category is not concretely defined,²¹⁴ the evidence must clearly have a significant impact on the trial, be of utmost importance to the accused's defense,²¹⁵ and be "of consequence to the determination of" the accused's guilt.²¹⁶ If a military judge determines that the defense evidence offered under the third exception meets this high burden then the evidence is constitutionally required for admission at trial, subject to the MRE 412 balancing test.²¹⁷ However, the constitutional right of the accused to present relevant, material, and vital evidence in his defense is paramount,²¹⁸ thus making it difficult to envision a scenario in which such constitutionally required evidence would be excluded due to the MRE 412 balancing test. The overriding constitutional concerns of admitting evidence deemed relevant, material, and vital to the defense seemingly makes the MRE 412 balancing test irrelevant if the third exception is successfully satisfied.²¹⁹

²¹⁴ See *United States v. Buenaventura*, 45 M.J. 72, 79 (1996) ("Whether evidence is 'constitutionally required to be admitted' is reviewed on a case-by-case basis."); *Dorsey*, 16 M.J. at 4 (noting that the meaning of "constitutionally required" is not stated in the evidentiary rules, but the legislative history "makes clear the drafters' intention that this rule should not be applied in derogation of a criminal accused's constitutional rights.").

²¹⁵ See *Dorsey*, 16 M.J. at 7 (detailing how the constitutional rights of an accused are impeded if excluded evidence "pertains to an important issue in the case," is "intimately connected to the defense evidence," and if there is no alternative form of evidence available) (referencing *Davis v. Alaska*, 415 U.S. 308 (1974)); *Valenzuela-Bernal*, 458 U.S. at 867 (noting that vital evidence will affect the outcome of the trial and is necessary to an adequate defense); *United States v. Carter*, 47 M.J. 395, 396 (1998) (stating that for evidence to be considered constitutionally required "the defense must establish a foundation demonstrating constitutionally required relevance, such as 'testimony proving the existence of a sexual relationship that would have provided significant evidence on an issue of major importance to the case'" (citing *United States v. Moulton*, 47 M.J. 229 (1997))).

²¹⁶ *Dorsey*, 16 M.J. at 6.

²¹⁷ *Id.* at 8.

²¹⁸ *Id.* In reference to the MRE 412 balancing test, the *Dorsey* court stated:

Assuming that this balancing test is appropriate, we again must note that appellant demonstrated that the excluded evidence was relevant, material, and vital to his defense. In such a situation, we believe the holding of the Supreme Court in *Davis v. Alaska*, 415 U.S. at 319–20, dictates that the constitutional right of appellant to present such evidence is paramount.

Id.

²¹⁹ *Id.*

MRE 412(b)(1) states that "evidence of a victim's past sexual behavior is inadmissible unless . . . admitted in accordance with subdivision (c)(1) and (c)(2) and is constitutionally required to be admitted." In view of this language, the balancing test prescribed in

3. *The Redundancy of the MRE 412 Balancing Test*

When attempting to enter evidence under an exception to MRE 412, the defense first must establish that an enumerated exception applies²²⁰ and then offer the narrow and compelling type of evidence that is required to be successfully admitted using an MRE 412 exception.²²¹ If the accused satisfies these stringent requirements, he must further survive the “heightened exclusionary balancing test” of MRE 412.²²² The MRE 412 balancing test is “a rule of exclusion” in which the burden of admissibility “shifts to the proponent of the evidence to demonstrate why the evidence is admissible.”²²³ The proponent of the evidence will always be the defense, because the MRE 412 balancing test only applies to the accused; therefore, only defense-offered evidence is subject to this heightened scrutiny.²²⁴ Upon successful navigation through the MRE 412 balancing test, a military judge will apply MRE 403 to the evidence

MRE 412(c)(3) may not be appropriate to evidence offered under this particular provision.

Id.; see also *United States v. Andreozzi*, 60 M.J. 727, 739 (Army Ct. Crim. App. 2004) (“Ultimately, the Constitution may require admissibility of the evidence.”). Similar to the MRE 412 balancing test, the MRE 403 balancing test may be irrelevant under the third exception due to the constitutional interests of the accused. If the evidence offered under MRE 412(b)(1)(C) is determined constitutionally required, then it is inconceivable that a military judge would exclude this evidence under either balancing test. See *id.* (noting that the Constitution trumps all other admissibility tests).

²²⁰ See *Moulton*, 47 M.J. at 228–29.

²²¹ See *supra* notes 193–219 and accompanying text (discussing the limited applicability of the three MRE 412 exceptions).

²²² See *United States v. Banker*, 60 M.J. 216, 223 (2004); see also SALTZBURG ET AL., *supra* note 179 (explaining why heightened scrutiny of proffered evidence is unnecessary).

²²³ *Banker*, 60 M.J. at 223.

²²⁴ See *id.* In stating that the MRE 412 balancing test only applies to the accused, the court noted:

M.R.E. 412(c)(3) requires the military judge to determine “on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that *the accused seeks to offer* is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice[.]” M.R.E.412(c)(3) (emphasis added). It would be illogical if the judge were to evaluate evidence “offered by the accused” for unfair prejudice to the accused.

Id.

prior to admittance.²²⁵ Unlike the MRE 412 balancing test, when conducting the MRE 403 balancing test, the judge will take into account the interests of both parties.²²⁶

Requiring defense evidence to pass through multiple levels of scrutiny is unnecessary. Prior to the MRE 412 balancing test analysis, extensive judicial scrutiny is required to determine if evidence offered by the defense is the specific type that fits within the limited circumstances in which the three MRE 412 exceptions apply.²²⁷ Additionally, the interests of both the victim and the accused are weighed through the MRE 403 balancing test immediately following the MRE 412 balancing test.²²⁸ The significant burden placed upon the accused to admit evidence under an MRE 412 exception, the limited forms of evidence that will be admitted, and the balancing of the parties interests through MRE 403, make any additional scrutiny placed upon the evidence unnecessary.²²⁹ It makes little sense to require the proffered defense

²²⁵ See *id.* at 223 n.3; *Andreozzi*, 60 M.J. at 738–39 (“Even if admissible under MRE 412, the evidence may still be excluded under the MRE 403 balancing test.”); see also *supra* note 178 for a discussion on the applicability of FRE 403 and MRE 403 to evidence deemed admissible under FRE 412 and MRE 412.

²²⁶ See *Andreozzi*, 60 M.J. at 740; *Banker*, 60 M.J. at 223 (discussing the inclusive nature of MRE 403 and the exclusive nature of MRE 412).

²²⁷ See *supra* notes 193–219.

²²⁸ The MRE 412 and MRE 403 balancing tests are clearly distinct and aimed at different concerns. The MRE 412 balancing test is restrictive and intended to provide protection to victims of nonconsensual sexual offenses. See *Banker*, 60 M.J. at 222. The MRE 403 balancing test is designed to ensure a panel is not determining a case based on unfair evidence. See *generally id.* Congress eliminated the FRE 412 balancing test, not because FRE 403 superseded the FRE 412 balancing test, but rather because the victim was sufficiently protected by the narrowness of the exceptions to FRE 412. See SALTZBURG ET AL., *supra* note 179. Similar to the Federal Rule, the limited type of evidence admissible under a MRE 412 exception ensures that defense proffered evidence is strictly screened and filtered, thus making the scrutiny of the MRE 412 balancing test redundant and unnecessary. See *Andreozzi*, 60 M.J. at 740 n.32 (“[a]s noted in the commentary to Federal Rule of Evidence 412 . . . if the evidence is narrow enough to fit one of the limited exceptions to subdivision (b)(1), there is little reason to filter it through a strict exclusionary balancing test.” (citing SALTZBURG ET AL., *supra* note 179)). In contrast to the redundancy of the MRE 412 balancing test, the MRE 403 balancing test provides a necessary and independent review of proffered sexual behavior evidence prior to admittance. See *Banker*, 60 M.J. at 223 n.3 (discussing the difference in the application of the MRE 403 balancing test versus the MRE 412 balancing test); MCM, *supra* note 6, MIL. R. EVID. 403 analysis, at A22-33 (“The Rule vests the military judge with wide discretion in determining the admissibility of evidence that comes within the Rule.”).

²²⁹ It is questionable how useful the MRE 412 balancing test is to a military judge when screening problematic evidence. The MRE 412 balancing test requires “that the probative value of such evidence outweighs the danger of unfair prejudice” MCM,

evidence to pass through extensive judicial review only to further scrutinize it with the heightened exclusionary balancing test of MRE 412.²³⁰

C. Summary and Proposal

The narrow type of evidence required to successfully fit within one of the limited exceptions to MRE 412 make the additional heightened scrutiny of the rule's balancing test clearly redundant and unnecessary.²³¹ The victim's and accused's interests are properly balanced without the test and an additional filter for defense offered evidence is unfairly prejudicial to the accused.²³² Throughout the legislative history of FRE 412 and MRE 412, congressional intent has consistently focused on providing the accused with a fair trial in which a complete defense is presented.²³³ Recognizing that the redundancy of the FRE 412 balancing test acted contrary to this intent by placing unnecessary scrutiny upon the

supra note 6, MIL. R. EVID. 412(c)(3). The originally proposed, and rejected, balancing test required the "probative value substantially outweigh[] the dangers of unfair prejudice." *Privacy Hearings*, *supra* note 3, at 4 (statement of Roger A. Pauley, Deputy Chief, Legislation and Special Projects Section, Criminal Division on behalf of the Department of Justice); *see also supra* note 173 (discussing the reasons for removing "substantially" from the language of the FRE 412 balancing test). Applying the balancing test enacted in the original FRE 412 and retained in the current MRE 412, the military judge must find that the probative value, however slight, outweighs the danger of unfair prejudice. Evidence determined to fit within an enumerated exception to MRE 412, specifically to rebut the Government's physical evidence, to demonstrate consent, or as a constitutional necessity, most likely has significant probative value. *See generally supra* notes 193–219 and accompanying text; SALTZBURG ET AL., *supra* note 179. Requiring the military judge to apply the MRE 412 balancing test immediately following a finding that one of the narrow MRE 412 exceptions applies is not only redundant, but creates unnecessary work and confusion.

²³⁰ *See* SALTZBURG ET AL., *supra* note 179 ("...if the evidence is narrow enough to fit one of the limited exceptions to subdivision (b)(1), there is little reason to filter it further through a strict exclusionary balancing test."); *Andreozzi*, 60 M.J. at 740 n.32.

²³¹ *See generally supra* notes 187–230 and accompanying text.

²³² *See* SALTZBURG ET AL., *supra* note 179.

²³³ *See, e.g.*, 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden) (discussing the need to protect the accused's constitutional right to a fair trial); *id.* at 34,913 (statement of Rep. Holtzman) (noting the desire to protect the accused's constitutional rights); *California v. Trombetta*, 467 U.S. 479, 485 (1984) (stating that an accused has a right to "a meaningful opportunity to present a complete defense."); SALTZBURG ET AL., *supra* note 179 (discussing the accused's right to present vital evidence); MCM, *supra* note 6, MIL. R. EVID. 412 analysis, at A22-35 ("The Rule recognizes . . . the fundamental right of the defense under the Fifth Amendment of the Constitution of the United States to present relevant defense evidence . . .").

defense proffered evidence, Congress eliminated the test in the 1994 amendment to the federal rule.²³⁴ Similar to a pre-1994 FRE 412, the overlapping and extra level of heightened review created by the MRE 412 balancing test acts contrary to Congress's intent to provide the accused with a fair trial. To comply with congressional intent and to mirror the federal rule, MRE 412 must be amended to eliminate the balancing test.²³⁵

V. Conclusion

Military Rule of Evidence 412 is a delicate balancing act in which a judge is required to walk a fine line between protecting the victim's interests and ensuring an accused has a fair trial.²³⁶ The legislative history of FRE 412 and MRE 412 makes clear that Congress intended these rules to protect victims of nonconsensual sexual crimes while still recognizing the constitutional rights of an accused.²³⁷ The rules exist to encourage victim reporting, promote victim participation, exclude humiliating disclosure of intimate information, and hold accountable those who are involved in sexual misconduct all while not infringing upon the accused's constitutional right to a fair trial.²³⁸ Yet, despite careful consideration of these interests, the current version of MRE 412 acts contrary to Congress's intent.

The unintended use of MRE 412 to hinder a sexual assault trial, and in particular the exclusion of evidence of a child's age-inappropriate sexual behavior with a third party, is clearly contrary to the social policies that are the foundation for the rule.²³⁹ Repeatedly reviewing and

²³⁴ See *supra* note 102; *supra* notes 173–77 and accompanying text.

²³⁵ See *Andreozzi*, 60 M.J. at 740 n.32 (discussing the reasoning behind the elimination of the FRE 412 balancing test, the court agreed with the rule being unnecessary and stated “[w]e recommend elimination of the MRE 412(c)(3) balancing test.”).

²³⁶ See *United States v. Majors*, No. 36304, 2007 CCA LEXIS 264 (A.F. Ct. Crim. App. June 8, 2007) (unpublished) (noting that in a MRE 412 analysis, a judge must “prohibit the defense from embarrassing or humiliating the victim, yet allow the accused all reasonable opportunity to establish his defense.”) (citing *United States v. Saipaia*, 24 M.J. 172, 175 (C.M.A. 1987)); see also *United States v. Dorsey* 16 M.J. 1, 4 (C.M.A. 1983) (discussing the legislative history of FRE 412 and the intent of Congress to equitably balance the victim's and accused's interests).

²³⁷ See generally *supra* Section II.

²³⁸ See *id.*

²³⁹ See FED. R. EVID. 412 advisory committee's note (1994).

scrutinizing defense-proffered evidence is an unnecessary exercise that impedes an accused's right to a complete and fair trial.²⁴⁰ The unforeseen use of MRE 412 as a defense shield and the unnecessary nature of the MRE 412 balancing test contravene Congress's intent.²⁴¹ To ensure compliance with the congressional intent for the rule, MRE 412 must be amended to include a fourth exception and to eliminate the MRE 412 balancing test. By amending the rule and adopting these proposals MRE 412 will be a more just and "constructive addition to the law."²⁴²

²⁴⁰ See generally *supra* Section IV.

²⁴¹ See generally *supra* Section II.

²⁴² 124 CONG. REC. 36,257 (1978) (statement of Sen. Biden).