Rape-Shield Laws and Third-Party Defendants: Where Iowa's Laws Fall Short in Protecting Victims

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ABSTRACT: This Note looks at the historical and modern policy of several rape-shield rules at the federal and state level, and analyzes how well these rules protect victims in Iowa who decide to sue potentially liable third-parties, such as school districts. The development and application of the federal rape-shield rules indicates a strong policy of protecting victims from both invasions of privacy and threats to their well-being—while encouraging criminal prosecution and lawsuits against those responsible—by removing factors that might discourage them from seeking justice. An analysis of this dual policy shows that the laws should apply equally to victims who sue their attacker directly and those who sue potentially liable third-parties. Yet, under Iowa law, victims suing third-parties fall into an uncertain loophole in the state's rape-shield rules, which has the potential to harm victims and discourage important lawsuits. This Note proposes a solution that involves modifying the Iowa rape-shield rules as they apply to discovery and adopting the federal rape-shield rules as they apply to admissibility of evidence.

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I. INTRODUCTION

Imagine a new freshman wrestler at the best wrestling high school in the state. His coaches have achieved local-hero status, and his teammates—while known as bullies and troublemakers—rule the school. Practice begins, and every day the team has a 40-minute period of unsupervised time in the gym before the coaches arrive. This seems great at first—the team can bond, stretch, and practice some moves. But some of the freshman's teammates have a different plan. They have a "tradition" to carry out. One day, he sees two of his teammates pin down another freshman, while a third pulls down his own pants and assaults the struggling freshman. He wants to object, but there are no adults around, and he certainly does not want to be next. Where were the

adults? Why were these teenagers alone and unsupervised? What can the freshman wrestler do when his teammates turn to him?

Although this example may seem extreme, it is by no means abnormal.[1] If our freshman wrestler is assaulted by his teammates and wants to use the courts as a means for justice, he has several options. First, he may report the assault to the police and ask that his attackers are punished by the state for their wrongdoing.[2] Second, he may pursue a civil suit against his attackers for assault and battery, and ask that he be compensated for any physical or psychological injuries. Finally, to promote a maximum level of deterrence and prevent this sort of assault from happening to anyone else, the wrestler may want to sue the school for failing to supervise the students entrusted to its care.[3]

Unfortunately, in spite of the net potential benefits of pursuing all three of these legal options,[4] there are many factors that may discourage such a plaintiff from pursuing a lawsuit against the school. The plaintiff will bring this action in state court and state rules of procedure and evidence will apply because a lawsuit for negligent supervision is a common law claim[5] and the parties will likely lack diversity jurisdiction. In Iowa, this means the wrestler is not guaranteed the full protection of the federal rape-shield rules.[6] Under Iowa's rape-shield rules, which offer victims less protection, the wrestler's own sexual history may be subject to discovery, and under state rules of evidence it is unclear whether this evidence can be used against him in court.[7] The cost of keeping such evidence out will fall mostly on the wrestler[8] even though this evidence has little to no value,[9] and its use in trial has great potential to invade the plaintiff's privacy and harm him psychologically.[10] These factors have the

1. *See infra* Part III.B (discussing the incidence of sexual assault at schools and the importance of multifaceted remedies to reduce this problem).

2. Under Iowa Law, the aggressors' conduct would likely fit somewhere within Iowa Code Chapter 709: Sexual Abuse. *See* IOWA CODE § 709.1 (2015).

3. Iowa recognizes a civil suit for "negligent supervision" against school districts and employers. *See, e.g.*, Godar v. Edwards, 588 N.W.2d 701, 709 (Iowa 1999). This Note focuses on a school district as a hypothetical responsible third party; however, there are several common law theories for third-party liability for sexual assault that could be affected by the ambiguities in the Iowa rape-shield rules. *See infra* Part III.B.

4. *See infra* Part III.B (discussing the importance of encouraging suits against responsible third-parties).

5. *See supra* note 3 and accompanying text.

6. *See infra* Part II.B (discussing the application of the Iowa rule to discovery); Part II.C (discussing the application of the Iowa rule to admissibility of evidence).

7. *See infra* Part IV (discussing the application of state and federal rape-shield rules to the freshman wrestler's suit).

8. *See infra* Part II (discussing the burden on the plaintiff to exempt sexual-history evidence from of discovery and keep the same evidence off of the record).

9. *See infra* Part III.B (discussing the low value of sexual-history evidence in civil suits).

10. *See infra* Part III.A (discussing the likelihood of harm to plaintiffs when this sort of evidence is brought onto the record).

potential to discourage important litigation that may both compensate the wrestler for his injuries from a responsible party, and encourage the responsible third party to take steps to prevent injuries to others.[11]

It is important to note at the outset that there are very few reported cases interpreting Iowa's rape-shield rules, and it is virtually impossible to provide qualitative or quantitative data on how the courts treat these rules in claims related to third-party defendants.[12] It is therefore equally difficult to measure the effect that the discrepancy between the federal rules and the Iowa rules has on the final result of these claims. But the fact that these cases are hard to find does not mean they do not exist—rather, it means they are being settled.[13] The period when most cases are settled is also the period when the shortcomings of the Iowa rape-shield rules has the greatest impact on the case: discovery. As discussed in Part IV, the discrepancy between the Iowa rape-shield rules and the federal rules gives defense attorneys the opportunity to engage in aggressive discovery techniques as "a tool to enforce settlement" by strategically increasing the cost of litigation, encouraging plaintiffs to settle based on the cost of maintaining the claim rather than the claim's merits.[14] This Note considers the potential consequences of the discrepancy between Iowa rape-shield rules and Federal rules during trial; although, because claimants are more likely to settle than prosecute an embarrassing and expensive trial, these outcomes are not as likely.[15] The main focus of this Note is on the potential to use this loophole in the Iowa law as a weapon during the early stages of a claim to discourage trial, rather than its effect on the final outcome of a trial that, frankly, rarely happens.[16]

This Note argues that, while Iowa has significant protections in place for victims of sexual assault and abuse directly suing their attacker, these

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11. *See infra* Part III.B (discussing the importance of encouraging these suits against responsible third-parties).

12. Although Iowa dockets are searchable online, the current search engine only allows for searches by party name, offense date, county, and "case type"—which is limited to "civil," "criminal," "juvenile," "small claims," and "traffic." *See Iowa Courts Online Search*, IOWA CTS., https://www.iowacourts.state.ia.us/ESAWebApp/SelectFrame (last visited Nov. 10, 2016). The physical files are distributed through Iowa's 99 counties. Iowa has adopted e-filing; however, the electronic document management system only allows attorneys and parties to access filings related to their case. Finally, a search of the federal docket reveals a few claims, however, this search misses the vast majority of claims because these claims are likely to be filed in state court, and a federal court would apply Federal Rules of Evidence in most cases.

13. *See infra* Part III.B (discussing the incidence of sexual assault in school settings and the importance of third-party liability in these cases).

14. John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549–55 (2010) (discussing the use of discovery as a tactic to force a settlement based on litigation costs rather than the merits of the case).

15. *See infra* Part IV.

16. Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1408 (2002) (noting that in 1999 only 3% of civil cases were decided by trial).

protections fall short when it comes to protecting the interests of victims suing third-party defendants. Under Iowa law, it is often not clear whether the state rape-shield protections extend to plaintiffs suing third-party defendants for damages caused by sexual abuse. This Note aims to address that issue. Part II describes the development and application of rape-shield rules in Iowa and in federal courts, as they apply to pre-trial discovery of evidence and admissibility of evidence during the trial. Part III and Part IV analyze the application of these laws to suits against third-party defendants, and argue that Iowa law fails to offer these plaintiffs protection consistent with the policy goals of compensation and deterrence. Part V proposes amending the Iowa rape-shield rules and adopting the federal rules to better protect victims during discovery and throughout the course of the trial.

II. THE DEVELOPMENT AND APPLICATION OF IOWA AND FEDERAL RAPE-SHIELD RULES TO CASES WITH THIRD-PARTY DEFENDANTS

Although the underlying policies of rape-shield-evidence rules restricting the discovery of a victim's sexual history are the same at federal and state levels, there are several important differences between federal and state law. These differences have a tangible effect on what kind of evidence can be discovered and how it can be discovered—depending on the jurisdiction—and therefore could have an effect on the outcome of the case itself. Typically, the kinds of lawsuits this Note discusses occur in state court because they involve common law principles and lack party diversity. This Part discusses the policy behind the rape-shield evidence rules and describes and compares how the Iowa rules and federal rules affect lawsuits against third-party defendants.

A. THE HISTORY OF AND POLICY BEHIND THE FEDERAL RAPE-SHIELD RULES

Regardless of the source of the rule and whether it aims to prevent discovery or the admission of sexual-history evidence at trial, the overall policy behind both the federal and state rape-shield rules is essentially the same: protect the victim of sexual abuse. The original federal "rape shield law"—Federal Rule of Evidence 412—was enacted by Congress as H.R. 4727, the "Privacy Protection for Rape Victims Act of 1978."[17] The proponents of the act were particularly concerned with preventing defense attorneys from harassing and embarrassing female rape victims on the stand.[18] They

17. H.R. 4727, 95th Cong. (1978) (enacted Oct. 28, 1978 as Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, § 2(a), 92 Stat. 2046).

18. 124 CONG. REC. 34,912 (1978). Representative Mann opened the discussion by describing such defense lawyers:

> [F]or many years in this country, evidentiary rules have permitted the introduction of evidence about a rape victim's prior sexual conduct. Defense lawyers were permitted great latitude in bringing out intimate details about a rape victim's life. 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.

considered sexual-history evidence irrelevant and prejudicial to the plaintiff. They believed that the harassment was also a factor in the under-reporting and under-prosecution of rapes.[19] As enacted, H.R. 4727 only applied to criminal cases where the victim alleged either rape or an attempted rape.[20]

In 1994, Federal Rule of Evidence 412 was amended to include protections for victims in any civil or criminal case which involved sexual misconduct.[21] The Advisory Committee on Rules stated 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."[22] The Committee also clarified and expanded the list of activities that could be considered sexual history for the purposes of Federal Rule of Evidence 412.[23]

The policy justifications for the expanded rule are as long as the list of activities that qualify as sexual history. Justifications include: (1) concern for the embarrassment or humiliation suffered by victims on cross examination; (2) fear that this embarrassment and humiliation would deter the filing of valid complaints; (3) conviction that this testimony would involve time-consuming and distracting collateral issues; and (4) a shift in the public's perception of the morality of sexual behavior, rendering such evidence almost completely irrelevant.[24] As will be discussed in Part II.C below, this policy results in a strong presumption against the admissibility of this evidence in the federal courts.

B. IOWA AND FEDERAL RULES GOVERNING DISCOVERY OF SEXUAL-HISTORY EVIDENCE

Iowa Code section 668.15(1) controls discovery of sexual-history evidence in civil cases in Iowa. The statute states: "a party seeking discovery of information concerning the plaintiff's sexual [history]" must show "good

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Id.

19. *Id.* at 34,913 (statement of Rep. Holtzman) ("Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapes is ever reported.").

20. HR 4727 § 2(a), 92 Stat. at 2046–47.

21. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141, 108 Stat. 1796, 1918–19.

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

23. *Id.* ("Past sexual behavior connotes all activities that involve actual physical conduct . . . or that imply sexual intercourse or sexual contact."). The committee provided examples of typically inadmissible evidence that implied sexual history, including the "use of contraceptives," the "birth of an illegitimate child," and "evidence of venereal disease." *Id.* Further, the committee explicitly included "activities of the mind"—i.e., fantasies—within the definition of "behavior." *Id.*

24. 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE 249–50 (4th ed. 2013); *see also id.* at 251 for an analysis of these policies as applied to the traditional "date rape" cases, where evidence of motive or consent cannot be proved by medical examination.

cause for that discovery."[25] This "is not a prophylactic rule which restricts such discovery in all civil cases," but a burden-shifting rule.[26] Typically, the party opposing discovery bears the burden of proving that the information should be exempted from discovery.[27] Under Iowa Code section 668.15(1), the burden is shifted to the party who seeks discovery in three discrete cases: the plaintiff alleges (1) sexual abuse; (2) sexual assault; or (3) sexual harassment.[28] In order to discover sexual-history evidence in those three cases, the defendant needs to convince the court to order discovery before the plaintiff responds to the discovery request.[29]

This rule protects plaintiffs from invasion of privacy, embarrassment, and sexual stereotyping by imposing additional discovery costs on the defendant and discouraging potentially vindictive and irrelevant discovery; however, in Iowa these protections do not extend very far. The courts construe Iowa Code section 668.15(1) to apply narrowly to only the enumerated cases.[30] The rule has been untested in suits against third-party defendants,[31] increasing the defendant's likelihood of forcing discovery. To force discovery, the defendant must argue to the court that there is "good cause" to receive the information, while the plaintiff resists and requests a protective order to prevent disclosure. The court considers whether the defendant has "good cause" to receive the information, i.e., whether the evidence is potentially useful for establishing a permissible defense against the alleged conduct. "Good cause" is balanced against the plaintiff's right to withhold the evidence pursuant to a protective order. The court considers three factors in deciding whether to grant a protective order: "(1) whether the harm posed by dissemination will be substantial and serious; (2) whether the protective order is precisely and

25. IOWA CODE § 668.15(1) (2015).

26. Weiss v. Amoco Oil Co., 142 F.R.D. 311, 314 (S.D. Iowa 1992).

27. FED. R. CIV. P. 26(c)(1) ("A party . . . may move for a protective order in the court where the action is pending . . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."); *see also* IOWA R. CIV. P. 1.504(1)(a) ("Upon motion by a party . . . from whom discovery is sought . . . and for good cause shown, the court . . . [m]ay make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .").

28. IOWA CODE § 668.15(1).

29. *See generally* IOWA R. CIV. P. 1.504 (governing discovery and protective orders).

30. *See Weiss*, 142 F.R.D. at 314.

31. Three of the five cases citing Iowa Code section 668.15(1) are sexual harassment suits. *See generally* Staples v. Delavan, Inc., No. C 07-3019-MWB, 2008 WL 5215130 (N.D. Iowa Dec. 11, 2008); *Weiss*, 142 F.R.D. 311; Jensen v. Prime Time, Ltd., No. 05-0607, 728 N.W.2d 223 (Table), 2006 WL 3613688 (Iowa Ct. App. Dec. 13, 2006). *Doe v. New London Community School District* involved a lawsuit against a third-party defendant (the school district) under the common law theories of respondeat superior, negligent hiring, negligent retention, negligent supervision, and negligent infliction of emotional distress, but the suit was dismissed as barred by the Iowa Municipal Tort Act's statute of limitations and did not address any issues related to discovery of the plaintiff's sexual history. Doe v. New London Cmty. Sch. Dist., 848 N.W.2d 347, 350, 353–54 (Iowa 2014). *Doe v. Cherwitz* only cites Iowa Code section 668.15 for its value in interpreting other code sections. Doe v. Cherwitz, 518 N.W.2d 362, 363 (Iowa 1994).

narrowly drawn; and (3) whether any alternative means of protecting the public interest is available that would intrude less directly on expression."[32] Any discovery request that asks for relevant information, or information likely to lead to relevant information, is permissible.[33] Courts are therefore cautious about declaring even sexual-history evidence "irrelevant" at the discovery phase, and the bar for relevance is low.[34] Iowa and federal courts have considered sexual-history evidence relevant for a variety of purposes, correctly or otherwise.[35]

In contrast, the federal rule governing discovery does not shift the burden of proving "good cause" in cases involving sexual abuse.[36] The federal rule allows a plaintiff to prevent discovery of his or her sexual history only by seeking a protective order after the defense makes the offending discovery request.[37] As a result, the cost of preventing the discovery is on the plaintiff, and there is nothing else to deter the defendant from making discovery requests related to the plaintiff's sexual history. Compared to the Iowa rule, the federal rule does very little to protect a plaintiff's privacy. However, it is clear that the federal rule applies the same way in all cases—it would protect a plaintiff suing a third-party defendant just as it would protect a plaintiff directly suing his or her abuser.

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32. TOM RILEY & PETER C. RILEY, CIVIL LITIGATION HANDBOOK § 50:7 (2016); *see also* State *ex rel.* Miller v. Nat'l Dietary Research, Inc., 454 N.W.2d 820, 823 (Iowa 1990).

33. FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

34. *See* 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE 528–33, (4th ed. 2013). The definition of relevant evidence "distinctly favors broad admissibility." *Id.* at 529. To meet the bar for relevance, "evidence need only tend to make more or less probable the existence of a fact." *Id.* at 533.

35. *See, e.g.*, Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 69 (1986) (holding that plaintiff's "publicly expressed sexual fantasies" were relevant to "welcomeness"); Wilson v. City of Des Moines, 442 F.3d 637, 643–44 (8th Cir. 2006) (holding that evidence of plaintiff's "sexual comments and behavior" was relevant to, "among other things, why Wilson's coworkers did not socialize with her"); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 964 (8th Cir. 1993) (holding that evidence that the plaintiff posed nude in a magazine was relevant to the "totality of the events that ensued"); *Weiss*, 142 F.R.D. at 315 (holding that a third party's sexual history was relevant to the extent that her conduct indicated that the sexual advances by the "harasser" were "welcomed by her"). For examples of relevant uses of sexual-history evidence in criminal cases, see IOWA R. EVID. 5.412(b)–(c) and FED. R. EVID. 412(b)(1).

36. *Compare* FED. R. CIV. P. 26(c)(1), *with* IOWA CODE § 668.15(1) (2015).

37. FED. R. CIV. P. 26(c).

C. IOWA AND FEDERAL RULES GOVERNING ADMISSIBILITY OF SEXUAL-HISTORY EVIDENCE

Iowa's rules governing the admissibility of sexual-history evidence are located in two places: Iowa Rule of Evidence 5.412 and Iowa Code section 668.15(2).[38] Rule 5.412 is part of Iowa's Rules of Evidence—a subchapter of the Rules of Practice and Procedure.[39] Iowa Code section 668.15 is found in Title XV of the Iowa Code, in the chapter for "Liability in Tort—Comparative Fault."[40] As will be discussed in Part IV, it is possible that the separate locations of these rules contribute to the disparate effects of Iowa rape-shield rules.[41]

Iowa Rule of Evidence 5.412 applies to "criminal case[s] in which a person is accused of sexual abuse."[42] It creates a per se rule of inadmissibility for reputation or opinion evidence of the alleged victim's sexual history[43] and only allows evidence of specific acts to come onto the record under specific circumstances.[44] Iowa Rule of Evidence 5.412 does not contain any provisions governing the admission of sexual-history evidence in civil cases and cannot logically be read on its own to apply to civil cases at all.[45] For civil cases, the appropriate rule is Iowa Code section 668.15.[46] The text of the rule states: "In an action against *a person accused of sexual abuse* . . . evidence concerning the past sexual behavior *of the alleged victim* is not admissible."[47] A logical reading of Iowa Code section 668.15(2) would render sexual-history evidence per se inadmissible in some civil cases,[48] but the plain language of the rule leaves several holes through which some victims' sexual history might be admissible.

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38. IOWA R. EVID. 5.412 (Sexual Abuse Cases; Relevance of Victim's Past Behavior); IOWA CODE § 668.15(2) (Damages Resulting from Sexual Abuse—Evidence).

39. *See generally* IOWA R. EVID.

40. IOWA CODE § 668.15.

41. *See infra* Part IV.

42. IOWA R. EVID. 5.412(a).

43. *Id.* Reputation evidence consists of "what people have heard about the behavior of a party," and opinion evidence consists of "what people know about behavior." MUELLER & KIRKPATRICK, *supra* note 24, at 8.

44. IOWA R. EVID. 5.412(b). Evidence may be admitted either when it is "constitutionally required," IOWA R. EVID. 5.412(b)(1), or when it is relevant "upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury" or "upon the issue of whether the alleged victim consented to the sexual behavior with respect to which sexual abuse is alleged." IOWA R. EVID. 5.412(b)(2)(A)–(B). Additionally, the defendant must provide notice and obtain permission from the court prior to using such evidence, as a protective measure for the victim. IOWA R. EVID. 5.412(c).

45. IOWA R. EVID. 5.412; *see also* Jensen v. Prime Time, Ltd., No. 05-0607, 2006 WL 3613688, at *4–5 (Iowa Ct. App. 2006) (applying Iowa Code section 668.15 in place of Iowa Rule of Evidence 5.412).

46. IOWA CODE § 668.15(1) (2015).

47. *Id.* § 668.15(2) (emphasis added).

48. *See Jensen*, 2006 WL 3613688, at *5 ("Subsection (2), however, refers solely to the introduction of evidence of the alleged victim's past sexual behavior *at trial*, and essentially provides a blanket prohibition against the introduction of such evidence.").

There are two avenues for admitting sexual-history evidence; one has been tested in court and one that has not. In *Weiss v. Amoco Oil Co.*, the court found that the rule did not to apply to a witness who was not the alleged victim of the particular suit.[49] The second option and the main concern of this Note—that the evidence may be admissible against someone who is not "a person accused of sexual abuse"[50]—has not been tested.[51] Thus, it is unclear whether the protections of Iowa Code section 668.15(2) would apply to a plaintiff in a suit against a third-party defendant.[52]

The federal rule governing the admissibility of sexual-history evidence, in contrast, provides greater protections for victims of sexual abuse. Federal Rule of Evidence 412 applies explicitly in both civil and criminal cases.[53] In criminal cases, the application of Iowa Rule of Evidence 5.412 and Federal Rule of Evidence 412 are practically identical.[54] In civil cases, Federal Rule of Evidence 412 varies from Iowa Code section 668.15(2) in three ways. First, Federal Rule of Evidence 412 applies to all victims, regardless of whether they are a party, and regardless of the identity of the defendant.[55] Second, Federal Rule of Evidence 412 introduces a balancing test to determine admissibility.[56] Where Iowa Code section 668.15(2) creates a per se rule of inadmissibility in a narrow range of cases, Federal Rule of Evidence 412 creates a flexible rule that applies to all cases where a sexual abuse victim's sexual history might be brought onto the record—although the rule still favors inadmissibility.[57]

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49. *See* Weiss v. Amoco Oil Co., 142 F.R.D. 311, 314 (S.D. Iowa 1992) (not applying the protections of Iowa Code section 668.15 to anyone other than the alleged victim).

50. Doe v. New London Cmty. Sch. Dist., 848 N.W.2d 347, 361 (Iowa 2014).

51. The two cases which might have tested the applicability of the rule against third-party defendants did not reach the question as they were decided on other grounds. *See id.* at 353–54; Doe v. Cherwitz, 518 N.W.2d 362, 363 (Iowa 1994).

52. In sexual harassment cases in Iowa, Iowa Code section 668.15(2) clearly excludes the victim's sexual-history evidence regardless of who solicits it. *See Jensen*, 2006 WL 3613688, at *5. However, this result is because under the Iowa Civil Rights Act an employer who permits sexual harassment to occur under certain circumstances is statutorily liable. IOWA CODE § 216.6(1)(a); *see also* McElroy v. State, 637 N.W.2d 488, 499 (Iowa 2001) (citing Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)) (adopting hostile work environment as a type of sexual harassment actionable under Iowa law). There is no similar section within the Iowa Code creating liability for sexual harassment or assault of students at high schools—this is largely handled under the common law.

53. FED. R. EVID. 412(a).

54. *Compare* IOWA R. EVID. 5.412 (b)–(c), *with* FED. R. EVID. 412(b)(1), (c).

55. FED. R. EVID. 412 advisory committee's note to 1994 amendment ("The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation.").

56. FED. R. EVID. 412(b)(2) ("In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.").

57. 2 MUELLER & KIRKPATRICK, *supra* note 24, at 257. The test for admitting sexual-history evidence favors inadmissibility and is the opposite of the general test for prejudicial evidence in three ways. First, the burden of proving admissibility rests with the proponent of the evidence rather

Third, as a counterpart to the second difference between the federal and state rule, Federal Rule of Evidence 412 creates a specialized procedure for the courts to determine the admissibility of sexual-history evidence.[58]

III. THE NECESSITY OF APPLYING IOWA'S RAPE-SHIELD RULES TO LAWSUITS AGAINST THIRD-PARTY DEFENDANTS

Normally, "probative" evidence is admissible, even if it is likely to harm a particular witness or a party.[59] If a party wishes to exclude evidence on the basis of harm, they must first establish that the evidence will "prejudice" the jury, and second establish that the risk of prejudice "substantially outweighs" the probative value of the evidence.[60] This is a high burden to meet, and the rule generally favors admissibility of the evidence.[61]

In spite of the strong presumption in favor of admissibility, the common law of evidence has led to the development and codification of several "specialized" rules that govern particular types of evidence particularly likely to be prejudicial.[62] The rape-shield rules are one such type of rule.[63] As discussed in Part II, the rape-shield rules generally operate by shifting the burden of proving admissibility or discoverability to the proponent (rather than the opponent), or by decreasing the opponent's burden of proving prejudice.[64] The justification for switching or lessening the burden is that for

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than the burden of proving inadmissibility with the opponent. Second, the threshold for admission is raised from more probative than prejudicial to substantially more probative than prejudicial. Third, "harm to the victim" is an added factor against admission. *See* 1 MICHAEL H. GRAHAM, WINNING EVIDENCE ARGUMENTS: ADVANCED EVIDENCE FOR THE TRIAL ATTORNEY 611–12 (2006).

58. FED. R. EVID. 412(c)(2) (requiring a motion and an in camera hearing to determine the admissibility of sexual-history evidence, and requiring that the record of such motion and hearing remain sealed if the court determines the evidence is not admissible).

59. *See* FED. R. EVID. 401–03 (setting up the framework for admitting relevant evidence).

60. FED. R. EVID. 403. ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . .").

61. *See* MUELLER & KIRKPATRICK, *supra* note 34, at 621 ("[T]he power to exclude evidence under Rule 403 should be sparingly exercised . . . . since it contemplates admitting rather than excluding evidence . . . ."). The words "may exclude" in Federal Rule of Evidence 403 also make it clear that the rule is to be applied within the judge's discretion. *Id.* at 617; *see also* GRAHAM, *supra* note 57, at 321 ("Exclusion of relevant evidence under Rule 403 is employed sparingly as it is an extraordinary remedy.").

62. *See, e.g.*, FED. R. EVID. 404 (governing the admissibility of evidence relating to character evidence); FED. R. EVID. 405 (governing methods of proving character); FED. R. EVID. 407 (governing the admissibility of evidence relating to subsequent remedial measures); FED. R. EVID. 408 (governing the admissibility of evidence relating to compromise offers and settlement negotiations); FED. R. EVID. 411 (governing the admissibility of evidence relating to liability insurance).

63. *See supra* Part I (describing the various rape-shield rules).

64. *See supra* Part I. Specifically, Federal Rule of Evidence 412 flips the usual burden—the opponent argues that the evidence should be kept out—onto the proponent, who must argue that the evidence should be admitted. In order to make that argument, the proponent must file a motion with the court at least 14 days before trial, after which the court will conduct a hearing to determine whether the evidence is substantially more probative than prejudicial. FED. R. EVID.

almost every case in which the rule could apply, the risk of prejudice is especially high and the value of the evidence is especially low.[65] Further, a history of abusing this sort of evidence has discouraged plaintiffs from bringing lawsuits against their abusers and other responsible parties.[66] The rape-shield rules further the public interest in ensuring justice for victims and deterring future bad acts.

This Part discusses the necessity of applying rape-shield rules to lawsuits against third-party defendants. Part III.A compares the policy interests in protecting victims of sexual abuse in direct suits to the policy interests in protecting victims in suits against third-party defendants, and Part III.B discusses the importance of this policy in encouraging prosecution of civil claims against both sets of defendants. Ultimately, this Note concludes that there is no sufficient justification for *not* extending the policy of protecting victims to suits against third-party defendants.

A. THE POLICY INTERESTS IN PROTECTING VICTIMS IN DIRECT SUITS AND SUITS AGAINST THIRD-PARTY DEFENDANTS ARE IDENTICAL

As discussed in Part II.A, the federal rape-shield rules were established out of concern for the negative effects that such evidence may have on the victim who testifies against her[67] accuser in rape cases.[68] The first federal rape-shield rule was enacted in 1978, during a period of increased attention on the crime of rape and a surge of women's movements to reform rape laws by increasing victim protection.[69] This movement brought special attention to the poor treatment victims received in the courtroom,[70] and raised concern

412(c). This is a more costly and time-consuming procedure than under Federal Rule of Evidence 403.

65. *See supra* Part II.A–B.

66. *See infra* Part III.B.

67. Although modern discussion of victims of sexual abuse attempts to be gender- and sex-neutral, and recognizes that men are also often victimized, the representatives promoting the Privacy Protection for Rape Victims Act and the committee members promoting the later amendments to the statute were primarily concerned about the harms to female victims.

68. *See supra* notes 18–19 and accompanying text.

69. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 2–7 (1977). Of particular importance, rape was beginning to be recognized as a serious law enforcement problem due to perceived severe underreporting. *Id.* at 5. Berger attributes this problem to "[t]he system's perceived hostility to the rape complainant, coupled with the singular shame and trauma of sexual assault." *Id.* (footnote omitted).

70. *See, e.g.*, Huffman v. State, 301 So.2d 815, 816 (Fla. Dist. Ct. App. 1974); Struna v. People, 215 P.2d 905, 907 (Colo. 1950); *see also* Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) (holding that the defendant received ineffective assistance of counsel where counsel "made no investigation of the reputation of the prosecutrix for chastity [and] made no attempt to determine the identity of, or to interview, the prosecutrix's male companion"). In *Huffman*, the victim was asked: "Prior to this incident, ma'am—believe me, I'm not trying to probe. But under the circumstances I have to ask this. Had you had intercourse with any other individual?" *Huffman*, 301 So. 2d at 816. In *Struna*, the victim was asked: "Did Crespin stay in your apartment . . . at Colorado Springs?; Didn't you have another boy friend [sic] besides Crespin Rocha who

that this treatment—now commonly referred to as "victim-blaming"—could actually harm the victims.[71] Further, during this time period there was an increasing realization in the courts that sexual-history evidence has little to no value in trial. This realization, combined with increased concern for victims, was sufficient justification for legislators to exclude sexual-history evidence in federal courts and the state courts that followed the federal lead. This Part argues that the same protection concerns apply to victims suing third-party defendants.

The harm from victim-blaming can be broken into two categories: trauma to the victim on the stand; and societal harm through perpetuating victim-blaming stereotypes. Victims of assault generally are prone to developing certain psychological ailments, such as post-traumatic stress disorder ("PTSD"). Multiple studies have found that perceived negative responses from others towards the victim following an assault can lead to both developing and maintaining PTSD.[72] The Dunmore study concluded that both male and female victims who received negative social responses following their assault believe the "harm to have sprung not only from the assailants, but also from their everyday social world,"[73] and the Ullman study found that negative responses such as treating the victim differently, blaming the victim, or stigmatizing the victim were positively correlated with increased levels of PTSD symptoms.[74] Given the state's interest in protecting victims of assault and the great potential for increasing or prolonging the victim's injuries when sexual-history evidence is used in court, the proponents of rape-shield statutes can hardly be blamed for wanting to prevent unnecessary exposure to blame, except when it is absolutely necessary to protect the defendant's constitutional rights.

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gave you a locket for Christmas?; Do you have any boys in Antonito that you go with to dances, or did you have any there before November 24, 1948?"*Struna*, 215 P.2d at 907.

71. 124 CONG. REC. 34,912 (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.").

72. *See* Bernice Andrews & Chris R. Brewin, *Attributions of Blame for Marital Violence: A Study of Antecedents and Consequences*, 52 J. MARRIAGE & FAM. 757, 765 (1990) (finding a correlation between receiving negative reactions to abuse and self-blame); Rebecca Campbell et al., *Social Reactions to Rape Victims: Healing and Hurtful Effects on Psychological and Physical Health Outcomes*, 16 VIOLENCE & VICTIMS 287, 297 (2001) (finding that negative social reactions were a predictor of post-traumatic stress, depression, and physical health symptoms); Robert C. Davis et al., *Supportive and Unsupportive Responses of Others to Rape Victims: Effects on Concurrent Victim Adjustment*, 19 AM. J. COMMUNITY PSYCHOL. 443, 449 (1991) (finding a correlation between unsupportive behavior and psychological adjustment); Emma Dunmore et al., *Cognitive Factors Involved in the Onset and Maintenance of Posttraumatic Stress Disorder (PTSD) After Physical or Sexual Assault*, 37 BEHAV. RES. & THERAPY 809, 819 (1999) (finding a correlation between post-assault PTSD and perceiving others' reactions as negative); Sarah E. Ullman & Henrietta H. Filipas, *Predictors of PTSD Symptom Severity and Social Reactions in Sexual Assault Victims*, 14 J. TRAUMATIC STRESS 369, 383 (2001) (finding a correlation between PTSD severity and negative reactions from others).

73. Dunmore et al., *supra* note 72, at 825.

74. Ullman & Filipas, *supra* note 72, at 383.

Allowing this sort of victim-blaming on the stand also harms society because it encourages juries to decide cases based on stereotypes that have little to no basis in reality. This kind of decision-making results in criminals going unpunished and hinders victims from receiving justice. Kalven and Zeisel identified this problem as an improper use of the assumption of risk and/or contributory negligence theory in criminal trials in their empirical study analyzing the differences between juries' and judges' behavior.[75] Although contributory negligence is not considered relevant in criminal law unless the victim either consented or created the defendant's right of self-defense through his or her own conduct, the study found that juries were likely to consider such things like past affairs, clothing, and flirting to be "negligent" behavior regardless of any instructions from the judge.[76] In criminal rape cases, the jury was found not to confine itself to the issue of consent: "The jury . . . goes on to weigh the woman's conduct in the prior history of the affair. It closely, and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part."[77] As a result of juries weighing such extraneous factors, a jury acquitted defendants where the judge would have convicted in 12% of "aggravated rape" cases and 60% of "simple rape" cases.[78] The evidence available to the researchers indicated that, "[w]here [the jury] perceives an assumption of risk" and is "given the option of finding the defendant guilty of a lesser crime, [it] will frequently do so."[79] Even as sexual-history evidence has become less common in the courtroom, modern jury manuals still caution prosecutors and plaintiff's lawyers to avoid a scenario where the jury might see the victim as contributing to his or her

75. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 249 (1966). The study analyzed questionnaire responses to 3,576 criminal trials, occurring mainly in 1954, 1955, and 1958. *Id.* at 33.

76. *Id.* at 242–43.

77. *Id.* at 249. Kalven and Zeisel questioned the judge as to what lead the jury to deviate from his or her instructions to consider only the issue of consent and found patterns of jury victim-blaming as observed by the judge: "A group of young people on a beer drinking party. The jury probably figured the girl asked for what she got." *Id.* at 250. "The jury was of the opinion that if it was in a course of conduct which she had accepted, she was in no position to complain of her leading him on." *Id.* "Woman involved went to public dance and was picked up by defendant. Then went to night club and permitted defendant to take her home over unfrequented road . . . woman involved twice married and divorced, age 33." *Id.* In these cases, the jury convicted the defendant of a lesser offense, suggesting that it did not believe "involuntary intercourse under these circumstances is no crime at all, but rather that it does not have the gravity of rape." *Id.*

78. *Id.* at 253. Where the jury did find the defendant guilty, they were almost 100% likely to disagree with the judge on the level of the charge. *Id.* at 253–54. The sample contained 106 rape cases total, 64 of which the researchers classified as aggravated ("includes all cases in which there is evidence of extrinsic violence or in which there are several assailants involved, or in which the defendant and the victim are complete strangers at the time of the event") and 42 of which the researchers classified as simple ("includes all other cases . . . in which none of the aggravating circumstances is present"). *Id.* at 252.

79. *Id.* at 254.

own injury,[80] or instruct defense attorneys on how to convince the jury of the same.[81]

Although comparative fault or contributory negligence is a valid defense in most tort cases, it is not a permissible defense for intentional torts such as assault, battery, or harassment.[82] Sexual-history evidence is almost universally recognized as irrelevant in direct suits against the attacker,[83] and is generally impermissible in federal suits against third-parties, such as sexual harassment suits against an employer.[84] It is also widely considered irrelevant for the purpose of proving the victim's credibility.[85] Even in cases where consent is at

80. CAROL B. ANDERSON, INSIDE JURORS' MINDS: THE HIERARCHY OF JUROR DECISION-MAKING 88 (2012) ("The jurors' strong tendency to engage in defensive attribution leads them to blame the victim to assure themselves that they won't become victims in the future. This is, perhaps, the most difficult obstacle for plaintiff's counsel to overcome at trial." (footnote omitted)).

81. *See, e.g.*, JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 254 (1987) ("For example, Percy Foreman once said that 'the best defense in a murder case is . . . that the deceased should have been killed regardless of how it happened.' This tactic is common in rape trials where attorneys attack the character of the victim." (footnote omitted)).

82. *See* Kelly v. State Farm Mut. Auto. Ins. Co., 764 F. Supp. 1337, 1340–41 (S.D. Iowa 1991) (citing Slager v. HWA Corp., 435 N.W.2d 349 (Iowa 1989) and Tratchel v. Essex Corp., 452 N.W.2d 171 (Iowa 1990)) (recognizing that the Iowa comparative fault statute does not apply to intentional torts); *see also* IOWA CODE § 668.1 (2015).

83. *See* MUELLER & KIRKPATRICK, *supra* note 24, at 250 ("[P]erhaps most important is a change in the public attitude toward conventional sexual behavior. By itself, such behavior is no longer seen as a moral failing, so engaging in it is no longer seen as indicating a character flaw that sheds much light on the likelihood of repeated instances . . . so proving that any particular complaining witness behaves in the manner of many people has little effect in singling her out of the mass of humankind."); *see also* Sandoval v. Acevedo, 966 F.2d 145, 149 (7th Cir. 1993) ("[I]n an age of post-Victorian sexual practice, in which most unmarried young women are sexually active, the fact that a woman has voluntarily engaged in a particular sexual activity on previous occasions does not provide appreciable support for an inference that she *consented* to engage in this activity with the defendant."); United States v. Kasto, 584 F.2d 268, 271 (8th Cir. 1978) (finding that sexual acts involving complainant and persons other than the defendant to hold no probative value).

84. Federal Rule of Evidence 412 and the 1994 amendment advisory committee note indicate that Federal Rule of Evidence 412 does apply in Title VII actions in which the plaintiff has alleged sexual harassment. *See* FED. R. EVID. 412; FED. R. EVID. 412 advisory committee's note to 1994 amendment. *But see* Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 69 (1986) ("While 'voluntariness' in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant."). *Vinson* has never been explicitly overruled or recognized as abrogated by statute, which means that any application of the rape-shield rules to third-party defendants will be bitterly contested by defendants, backed by strong legal support that the sexual-history evidence is relevant. *See* Weiss v. Amoco Oil Co., 142 F.R.D. 311, 315 (S.D. Iowa 1992) (citing *Vinson*, 477 U.S. at 69) (noting that under the standards outlined in *Vinson*, the requested discovery of a witness's sexual history was likely to lead to relevant evidence for the purpose of establishing "welcomeness" of sexual advances).

85. *See Kasto*, 584 F.2d at 272 n.3 ("It is obvious that the mere fact of unchastity of a victim has no relevance whatsoever to her credibility as a witness. Such a proposition would 'necessarily imply the absurd [corollary] that the extramarital sexual history of a female witness would be admissible to impeach her credibility in any case in which she testified.'" (alteration in original)

issue, and the defendant needs circumstantial evidence such as the victim's sexual history with the defendant to prove consent, the courts view requests to use this evidence skeptically.[86] Throughout all such policy discussion there is the additional concern that the evidence of sexual history ought to be excluded because it is "collateral" to the important issues of the case and an overall waste of time.[87]

The jury's use of sexual-history evidence as evidence of comparative fault in either criminal or civil suits against a victim's attacker harms the victim and promotes harmful sexual stereotypes in society at large. The admissibility provisions of Iowa Code section 668.15 and Federal Rule of Evidence 4 12(b)–(c) protect against this risk by keeping the jury from hearing this evidence in most cases where a victim is testifying against her attacker.[88] The Federal Rule also protects victims suing potentially liable third-parties.[89] Even when third-parties have a valid defense based on the victim's actions, it is clear that neither the attacker nor the third party has a valid defense based on the victim's sexual history.[90] But in Iowa, the victim who sues a responsible third party is potentially exposed to all of the harms the rape-shield rules are meant to prevent. The risk of harm to the victim and the irrelevance of the evidence should justify extending the Iowa Rules to victims who are suing third-party defendants.

(citations omitted) (quoting State *ex rel.* Pope v. Superior Court, 545 P.2d 946, 950 (Ariz. 1976))); *see also* Jeffries v. Nix, 912 F.2d 982, 986–87 (citing *Kasto*, 584 F.2d at 271 n.3, and confirming that the "unchastity" of the victim has no value in determining her credibility).

86. *See* 2 MUELLER & KIRKPATRICK, *supra* note 24, at 251 (discussing circumstances under which a defendant might have legitimate need for sexual-history evidence). Federal Rule of Evidence 412(c) establishes a procedure for admitting evidence that involves filing a motion and holding a hearing to determine whether the evidence can be used properly. FED. R. EVID. 412(c). Barring unusual circumstances, the Iowa Rules of Evidence require notice and advance permission from the court before using such evidence. IOWA R. EVID. 5.412(b). Under both rules, the evidence is presumed to be inadmissible until the proponent proves otherwise.

87. *See* 2 MUELLER & KIRKPATRICK, *supra* note 24, at 250 ("[E]vidence of the complainant's prior sexual behavior involves the trier of fact in collateral issues, prolonging the trial and distracting the jury from matters of greater importance.").

88. IOWA CODE § 668.15(2) (2015); FED. R. EVID. 412(b)–(c).

89. *See* FED. R. EVID. 412 advisory committee's note to 1994 amendment ("The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. . . . Rule 412 will . . . apply in a Title VII action in which the plaintiff has alleged sexual harassment.").

90. For example, several courts have recognized an affirmative defense of failure to use "employer-provided preventative or corrective measures by employee." *See* Randy Sutton, Annotation, *When is Supervisor's or Coemployee's Hostile Environment Sexual Harassment Imputable to Employer Under State Law*, 94 A.L.R.5th 1 § 10 (2001). Evidence of the victim's behavior is certainly relevant in determining whether or not they failed to use employer-provided preventative or corrective measures; however, evidence of their sexual behavior is not.

B. THE IMPORTANCE OF HOLDING THIRD-PARTY DEFENDANTS ACCOUNTABLE JUSTIFIES LIMITING THE USE OF SEXUAL-HISTORY EVIDENCE

Beyond concern for the well-being of the victim and the extremely low value of sexual-history evidence, a third reason exists for propagating such a strong bar to its admission: victim blaming—particularly victim blaming in courts of justice—is believed to contribute to the problems of underreporting and under-prosecuting of sexual assault (and later, sexual harassment) cases.[91] Strong rape-shield rules remove the disincentive of victim blaming and encourage victims to come to the court system for justice.[92]

In spite of the increase in civil suits for sexual assault, most victims do not report or prosecute their attackers. The results of the 2014 National Crime Victimization Survey indicated that only 33.6% of incidences of rape or sexual assault were reported to police officers in the year 2014.[93] Incidences of unreported sexual harassment[94] are difficult to measure: a poll conducted by The Huffington Post found that 70% of workplace harassment went unreported,[95] and a 1994 poll by the U.S. Merit Systems Protection Board found that 88% of workplace harassment went unreported.[96]

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91. 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman) ("Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapes is ever reported."); *see also* FED. R. EVID. 412 advisory committee's note to 1994 amendment ("The reason for extending the rule to all criminal cases is . . . . [t]he strong social policy of . . . encouraging victims to come forward to report criminal acts . . . . The reason for extending Rule 412 to civil cases is equally obvious. The . . . wish to encourage victims to come forward when they have been sexually molested do[es] not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim."). Federal Rule of Evidence 412 was initially adopted in 1978. *See supra* note 17.

92. Although it is almost impossible to find data indicating a direct correlation between strong rape-shield rules and an increase in victims coming to the courts for justice, it is notable that there has been over a 1,000% increase in civil suits related to sexual assaults heard at the state supreme court levels between 1970–1975 and 2000–2005. Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 58–59 (2006).

93. JENNIFER L. TRUMAN & LYNN LANGTON, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2014, 7 tbl.6 (2015), http://www.bjs.gov/content/pub/pdf/cv14.pdf. The NCVS survey polls residents age 12 and older on reported and non-reported non-fatal crimes. *Id.* at 2.

94. For the purposes of this Note, this Part focuses on sexual harassment at the workplace and at schools because this is the type of harassment most likely to generate third-party liability.

95. Jillian Berman & Emily Swanson, *Workplace Sexual Harassment Poll Finds Large Share of Workers Suffer, Don't Report*, HUFFINGTON POST (Aug. 27, 2013, 1:13 PM), http://www.huffingtonpost.com/2013/08/27/workplace-sexual-harassment-poll_n_3823671.html (noting that 13% and 19% of respondents reported being harassed by a superior or coworker, respectively).

96. U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE 30 tbl.8 (1995), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948. The report found that 44% of women and 19% of men reported experiencing harassment between 1992 and 1993. *Id.* at 13. This study is slated to be updated by the end of 2018. *See* U.S. MERIT SYS. PROT. BD.,

By shielding victims from the psychological harm and embarrassment of being forced to testify about their sexual history on the stand, rape-shield rules such as Federal Rule of Evidence 412 encourage victims to report sexual assaults and harassment, and to take action against all liable parties. For example, in a Title VII lawsuit for sex discrimination, the plaintiff-victim has the opportunity to sue her direct harassers—usually for assault, battery, and sexual harassment[97]—and her employer if that employers' negligence contributed to the creation of a hostile work environment.[98] Part of the justification for imposing third-party liability on employers is that, in cases brought under Title VII, employers (and employees with supervisory duties) have a duty to prevent sexual harassment by seeing to "the day-to-day supervision of the work environment and with ensuring a safe, productive workplace."[99]

The same logic supports third-party suits against schools where adolescents victimize each other in ways that the school, as a supervisor with substantial control over students, should be able to prevent. Adolescents commonly victimize each other. In one study of 1,086 7th to 12th grade students, over 58% of girls and 40% of boys reported being sexually

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RESEARCH AGENDA 2015–2018, at 7 (2015), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1140540&version=1145045&application=ACROBAT.

97. Iowa recognizes numerous tort actions for assault and battery that are applicable to sexual harassment suits, in addition to civil rights violations, which can be alleged against the harasser directly. *See* Ayers v. Food & Drink, Inc., Nos. 0-023, 99-283, 2000 WL 1298731, at *2 (Iowa Ct. App. 2000). Ayers sued her supervisor, Lynch, in an individual capacity for "sexual harassment (hostile work environment) in violation of Iowa Code Chapter 216, the Iowa Civil Rights Act ('ICRA'); constructive discharge in violation of ICRA; 'retaliation' for complaining about sexual harassment in violation of ICRA; and common law battery." *Id.* The same claims, along with a federal claim for sexual harassment, were alleged against her employers Food & Drink. *Id.*

98. Under Iowa and federal case law, employers are liable for the "hostile work environment" created by harassing co-workers and supervisors if the employer knew of or should have known about the harassment, and failed to take appropriate remedial action. *Ayers*, 2000 WL 1298731, at *3; *see also* Glen Allen Staszewski, Note, *Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment*, 48 VAND. L. REV. 1057, 1078–79 ("Under common-law principles of agency, a principal who conducts an activity through its employees is subject to liability for harm resulting from the employee's conduct if the employer is negligent or reckless. All of the circuit courts have . . . extended their employer liability analysis . . . by imposing liability on employers that knew or should have known of hostile work environment sexual harassment, but nonetheless failed to take appropriate action."). It is important to note that in Iowa an employer can be held liable for assault under the common law theories of negligent hiring, negligent retention, and negligent supervision regardless of whether an employee brings a discrimination claim. *See* Greenland v. Fairtron Corp., 500 N.W.2d 36, 38–39 (Iowa 1993) (finding that the employee could bring claims against employer for assault and battery despite preemption on discrimination claims). The hypothetical freshman wrestler scenario discussed in Part IV is closer to a common law claim against an employer for assault and battery than it is to a statutory claim against an employer for creating a hostile work environment. *See infra* Part IV.

99. Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 76 (1986) (Marshall, J., concurring).

harassed.[100] Within this same sample, "[o]ver half of high school girls reported being sexually assaulted," along with just over one fourth of high school boys.[101] The same study also found that 44% of peer-on-peer sexual assault occurred on school grounds.[102] It is hard to swallow the thought that these assaults are occurring in front of the numerous teachers and staff employed by the schools, which leads to the obvious question: Where are the adults? Iowa law allows suits against school districts where the plaintiff alleges negligent supervision of students or employees. Like Title VII suits against employers, this common law suit recognizes that schools have a duty to protect their charges while they are on school grounds.[103] Given the age and responsibility of the students, the burden on schools is actually much higher than the Title VII burden on employers.[104] However, without adequate protection of rape-shield statutes that would protect students testifying against the school district that has failed them, it is likely that victims would be discouraged from pursuing litigation.

IV. PRESENT FAILURE TO APPLY RAPE-SHIELD RULES TO LAWSUITS AGAINST THIRD-PARTY DEFENDANTS: THE FRESHMAN WRESTLER HYPOTHETICAL

This Part will demonstrate the uncertainty that an alleged victim of sexual abuse—the freshman wrestler described in Part I—will face under the existing Iowa and federal rape-shield rules.[105] Part IV.A discusses the treatment of the victim's sexual history under the Iowa rules through discovery and through trial, and Part IV.B discusses the treatment of the same evidence under the federal rules. Finally, Part IV.C identifies further areas where the loopholes in the existing Iowa rape-shield rules could be strategically exploited to the

100. Amy M. Young et al., *Adolescents' Experience of Sexual Assault by Peers: Prevalence and Nature of Victimization Occurring Within and Outside of School*, 38 J. YOUTH & ADOLESCENCE 1072, 1077 (2008). For the purposes of this study, sexual harassment included; "[s]tared at in a sexual way; [s]exual jokes; [s]exual/obscene phone calls; [and/or] [s]exual/obscene messages." *Id.* at 1076 tbl.1.

101. *Id.* at 1077. For the purposes of this study, sexual assault was defined as: "[k]issed, hugged, touched; [a]ttempted rape; [o]ral sex; [r]ape; [and/or] [s]omething else sexual." *Id.* at 1076 tbl.1.

102. *Id.* at 1078.

103. Iowa recognizes a civil suit for "negligent supervision" against school districts. *See* Godar v. Edwards, 588 N.W.2d 701, 707–09 (Iowa 1999) (recognizing common law suits against a school district for "general negligence, negligent hiring, retention, and supervision").

104. *See id.* (stating that the "school district has statutory duty '[t]o protect the morals and health of the pupils'" (quoting Doe v. Durtschi, 716 P.2d 1238, 1243 (Idaho 1986))); *see also id.* (stating that the "school district has a duty to protect students from physical hazards in the school building or on school grounds, *from the harmful actions of fellow students*, a teacher, or other third persons." (emphasis added) (quoting Peck v. Siau, 827 P.2d 1108, 1112 (Wash. Ct. App. 1992))); Burton v. Des Moines Metro. Transit Auth., 530 N.W.2d 696, 700 (Iowa 1995) ("The law charges school districts with the care and control of children and requires the school district to exercise the same standard of care toward the children that a parent of ordinary prudence would observe in comparable circumstances."); *see also supra* note 98 and accompanying text (discussing the burden of employers to protect employees from harassment).

105. *See supra* Part I.

victim's harm. As discussed in the introduction, most of the harm to the victim occurs during discovery and other pre-trial matters, encouraging the victim to settle the suit based on monetary and emotional considerations rather than the merits of the case.

For the purposes of this hypothetical, it is assumed that the sexual assault occurred as described by the freshman wrestler, and that the school district does not dispute the facts of the assault. The freshman wrestler alleges that the school district knew or should have known that it was leaving wrestlers unsupervised for 40 minutes a day, that this conduct posed an unreasonable risk to students on the wrestling team, and that this conduct caused—at least in part—the wrestler's harm. The school district's only defense is that it did not have knowledge of the lack of supervision, and/or that its methods of supervision were reasonable under the circumstances.[106] The school district also plans to attack the requested damages throughout the trial by alleging that the plaintiff is not as "injured" as he claims. Finally, the freshman wrestler's middle school records from his previous school, which had been made available to the high school when he transferred into the school district, indicate that he had twice been disciplined by the former school during his final year: once for being caught on school grounds engaging in sexual acts with another boy,[107] and once for turning in a school assignment that contained sexually explicit material.[108]

A. THE FRESHMAN WRESTLER'S SEXUAL-HISTORY EVIDENCE UNDER THE IOWA RAPE-SHIELD RULES

The freshman wrestler's suit will almost certainly be filed in state court, as there are no grounds for federal jurisdiction.[109] Therefore, Iowa statutes

106. *See Godar*, 588 N.W.2d at 708 ("A school district cannot be held liable for actions that are not foreseeable when reasonable measures of supervision are employed to insure adequate educational duties are being performed by the teachers, and there is adequate consideration being given for the safety and welfare of all students in the school." (quoting P.L. v. Aubert, 545 N.W.2d 666, 668 (Minn. 1996))).

107. This conduct would qualify as sexual-history evidence under both Federal Rule of Evidence 412 and Iowa Rule of Evidence 5.412. *See* FED. R. EVID. 412(a) advisory committee's note to 1994 amendment ("Past sexual behavior connotes all activities that involve actual physical conduct . . . ."); IOWA R. EVID. 5.412(d) ("[T]he term '*past sexual behavior*' means sexual behavior other than the sexual behavior with respect to which sexual abuse is alleged.").

108. Although this would constitute sexual behavior under Federal Rule of Evidence 412, case law gloss indicates that it might not constitute sexual behavior under Iowa Code section 5.412. *See* FED. R. EVID. 412(a) advisory committee's note to 1994 amendment ("[T]he word 'behavior' should be construed to include activities of the mind, such as fantasies or dreams."); Jeffries v. Nix, 912 F.2d 982, 988 (8th Cir. 1990) (holding that delusions or fantasies about sexual abuse were not "sexual behavior" under Iowa Rule of Evidence 5.412).

109. There are no grounds for federal subject-matter jurisdiction under 28 U.S.C. § 1331 or 1332. *See* 28 U.S.C. §§ 1331–1332 (2012). The parties will lack diversity in the majority of cases as the plaintiff will attend a school within his state, and the suit is based on common law rather than federal law.

governing discovery, evidence, and procedure will determine whether his sexual history will be discovered and whether it will make it onto the record. Part IV.A.1 follows Iowa's treatment of the sexual-history evidence as the case proceeds through the discovery phase, and Part IV.A.2 examines whether the evidence will be admitted to the record under the Iowa rape-shield rules.

1. Discovery

After the freshman wrestler has filed his suit against the school district in state court, both parties will proceed with discovery.[110] In Iowa, all material "which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party" as long as it "appears reasonably calculated to lead to the discovery of admissible evidence" is discoverable.[111] The school district seeks discovery of the freshman wrestler's discipline records, through interrogatories and, potentially, deposition questions about the incidents, ostensibly for the purposes of challenging the requested damages and questioning the plaintiff's credibility. It is probable that the school is also attempting to unnerve the plaintiff and encourage him to back down or accept a settlement favorable to the school.[112]

Using the Iowa Rules of Civil Procedure alone, it would be incredibly difficult (and resource consuming) for the plaintiff to avoid responding to the discovery request. Iowa Rule of Civil Procedure 1.504 is a rule of inclusion,

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110. IOWA R. CIV. P. 1.500–1.600. In Iowa, the general rules governing discovery are contained in Iowa Court Rules, Chapter 1 Rules of Civil Procedure, Division V.

111. IOWA R. CIV. P. 1.503(1).

112. Although debatably unethical, such use of offensive discovery is common and well-documented. The goal is to make your opponent (in this case, the plaintiff) expend more resources than anticipated to prevent unwelcome discovery in the hope that they will "give up" and settle at a value closer to your own client's (in this case, the defendant's) perceived value of the case. *See also* Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in e-Discovery*, 60 MERCER L. REV. 983, 998 (2008) ("Frequently, the requesting party . . . will want the responding party to expend more resources and money to try to [respond to discovery requests] than the responding party thinks is needed or required . . . . This is because parties in litigation, especially at the commencement of a case when discovery plans are formed, rarely agree on the value of a case."); Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1637 (1996) ("In all of these areas, we see a similar pattern. Lawyers, recognizing that they have a certain amount of leeway to engage in questionable litigation practices, try to get away with more extreme and egregious versions of the same conduct."). Faced with the threat of discussing his sexuality on the stand, the freshman wrestler might be inclined to settle on terms more favorable to the school than to himself. *See generally* Beisner, *supra* note 14; Elizabeth Kristen, Gender Equity Program Dir. & Senior Staff Att'y, The Legal Aid Soc'y—Emp't L. Ctr., Panel at the American Bar Association Section of Labor and Employment Law Ethics & Professional Responsibility Committee Eleventh Annual Midwinter Meeting: How to Professionally and Ethically Deal with "Rambo" like Tactics in Discovery (Mar. 25, 2011), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ethics/60_kristen.authcheckdam.pdf (discussing the application of aggressive litigation techniques to vulnerable clients).

not exclusion, and judges are unlikely to limit discovery without the plaintiff showing substantial need.[113] The plaintiff could attempt to seek a protective order under Iowa Rule of Civil Procedure 1.504, but as discussed in Part II.B, these orders are rarely granted.

A savvy attorney who manages to find the discovery provision of Iowa Code section 668.15(1) hidden away in the Judicial Branch and Judicial Procedures section of the Iowa Code (Title XV) might attempt to switch the burden of preventing discovery from the plaintiff to a burden of proving that discovery ought to occur on the defense.[114] The attorney would have ample support to argue that the sexual-history evidence relating to the incident with a boy qualifies for the burden switching rule,[115] although she is less likely to convince the court that the second incident involving a sexually explicit homework assignment is protected.[116] However, in either case the defendant is still likely to prevail, and force discovery of the sexual-history evidence[117] because the school district's attorneys can argue that this discovery request is "likely to lead to relevant evidence" related to the plaintiff's credibility (they hope to learn that he was dishonest in relation to the discipline process). Even if the savvy plaintiff's attorney can convince the court that the discovery provision of Iowa Code section 668.15 applies to the freshman wrestler, since he is not suing the "person accused" the case law indicates that this section of the code may still be inapplicable.[118]

2. Admissibility of Evidence

After the grueling discovery process, and assuming the freshman wrestler has not already settled his claim, the wrestler and his attorneys are now on notice that the defendant might seek to use evidence of the wrestler's sexual history during the trial itself. The freshman wrestler wants to keep the evidence off of the public record for several reasons: (1) it is embarrassing; (2) it feels like a personal attack for something that seems unrelated to what happened with his team; and (3) it seems like the school is blaming him for what happened. Moreover, if the information is made public, the freshman

113. *See supra* Part II.B (discussing the functions of the rules regarding discovery).

114. *See supra* Part II.B (discussing the function of Iowa and Federal Rules governing discovery). *Compare* IOWA R. CIV. P.1.504(1) ("Upon motion by a *party* . . . *from whom discovery is sought* . . . and for good cause shown, the court . . . . [m]ay make any order which justice requires to protect a party . . . .") (emphasis added), *with* IOWA CODE § 668.15(1) (2015) ("[A] *party seeking discovery* of information concerning the plaintiff's sexual conduct . . . must establish specific facts showing good cause for that discovery, and that the information sought is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence." (emphasis added)).

115. The rule applies to "information concerning the plaintiff's sexual conduct with persons other than the person who committed the alleged act." IOWA CODE § 668.15(1).

116. *See supra* note 108 and accompanying text.

117. *See supra* Part II.B (discussing burden switching in discovery, and the low likelihood that the court will prevent discovery).

118. *See supra* note 31 and accompanying text.

wrestler is likely to receive further victimization and bullying at school. The freshman wrestler's attorney has an additional reason for wanting the evidence kept out: when defense counsel asked about the prior incidents during deposition, the freshman wrestler became agitated, frustrated, and aggressive, and had to take some time to cool off—behavior that would not play well in front of the jury. The importance of keeping this evidence out means that the freshman wrestler's attorney must preemptively file a motion in limine asking the court to exclude the evidence prior to trial.[119]

The attorney will need legal authority to back up her argument that the evidence should be excluded. If she starts with the Iowa Rules of Evidence, she will quickly be disappointed when she sees that the Iowa version of Federal Rule of Evidence 412 does not apply to civil suits.[120] Within the rules of evidence, she is left only with two arguments: first, that the sexual-history evidence is not relevant and therefore inadmissible under Iowa Rules of Evidence 5.401 and 5.402;[121] and second, that if the evidence has any relevance, this relevance is substantially outweighed by its prejudicial value and should be excluded under Iowa Rules of Evidence 5.403.[122] Although either of these methods could work with the right court, neither of them will guarantee that the freshman wrestler is protected from the harm he will experience if forced to testify to his sexual history on the stand.[123] The bar for relevant evidence is incredibly low, and courts are very reluctant to apply Iowa Rule of Evidence 5.403.[124]

A lawyer familiar with cases of sexual discrimination or harassment will know to use Iowa Code section 668.15(1)–(2) in spite of the fact that an apparent evidence and procedure rule titled "Damages Resulting from Sexual Abuse—Evidence" is hidden in the comparative fault section of the rules governing judicial procedure.[125] However, this rule also fails to guarantee that the freshman wrestler's sexual history will be excluded.[126] On its face, the admissibility provision of Iowa Code section 668.15 appears to apply only "[i]n an action *against a person accused* of sexual abuse, . . . sexual assault, or sexual harassment," not against potentially liable third-party defendants.[127] There are no suits against third-party defendants that cite this admissibility provision, and in the cases that could have resolved the issue, courts did not

119. *See* IOWA R. CIV. P. 1.431(1)–(3) (allowing interested parties to request an order on a matter other than the hearings).

120. *See supra* Part II (discussing application of IOWA R. EVID. 5.412 to civil cases).

121. *See* IOWA R. EVID. 5.401, 5.402.

122. *See* IOWA R. EVID. 5.403.

123. *See supra* notes 53–58 and accompanying text.

124. *See supra* note 34.

125. IOWA CODE § 668.15(1)–(2) (2015).

126. *See supra* Part II.C (discussing the application of Iowa Code section 668.15 to plaintiffs suing third-party defendants).

127. IOWA CODE § 668.15(2) (emphasis added).

reach the question.[128] Further, if the court were to apply the admissibility provision of Iowa Code section 668.15 to the case, Iowa case law interprets the words "sexual behavior" in a way that indicates that the rule would not prevent admission of the second incident—the sexually explicit homework assignment—onto the record.[129]

The freshman wrestler's attorney may attempt to craft an argument drawing on the policy of Federal Rule of Evidence 412 and the admissibility provision of Iowa Code section 668.15 to demonstrate that this evidence is substantially more prejudicial than probative and ought to be excluded under Iowa Rule of Evidence 5.403—but this argument is thin. An attorney would likely not want to try out a novel legal theory that has not been fully tested in court on a plaintiff who is just interested in being compensated for his injuries. At this point, after a difficult discovery, the prospect of facing similar treatment in court may make the freshman wrestler more willing to settle his case and avoid the embarrassment. Although settlement is a valid option, the problem is that without the public record of a trial, the school district and others similarly situated have little incentive to improve their policies and prevent this kind of injury from happening again.

Settlement is perhaps the best explanation for why there are so few reported cases dealing with the discovery and admissibility provisions of Iowa Code section 668.15. It is well-documented that tort cases are more likely to settle than they are to go to trial: in 1999, only 3% of civil cases were resolved by a trial.[130] Higginbotham explains this phenomenon as the result of the rising popularity and availability of pre-trial settlement, along with an expansive system of rules of procedure and an "army" of magistrate judges assigned to manage pre-trial issues.[131] Beisner attributes the problem to aggressive discovery tactics "to force settlement."[132] The cost of any civil suit alone is apparently enough to encourage settlement;[133] adding in the emotional and psychological costs of presenting sexual-history evidence is likely to further the trend of settling before trial in sexual assault cases against third-party defendants.

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128. *See supra* notes 49–51 and accompanying text (discussing Weiss v. Amoco Oil Co., 142 F.R.D. 311, 314 (S.D. Iowa 1992)); *see also* Doe v. New London Cmty. Sch. Dist., 848 N.W.2d 347, 354–56 (Iowa 2014); Doe v. Cherwitz, 518 N.W.2d 362, 363 (Iowa 1994).

129. *See supra* note 107 and accompanying text.

130. Higginbotham, *supra* note 16, at 1408.

131. *Id.* at 1417–20.

132. Beisner, *supra* note 14, at 551. Beisner argues that the adversarial litigation system "incentivizes abusive discovery tactics that can provide a competitive advantage. Such tactics include coercing a settlement by increasing an opponent's costs through unnecessary information requests and compelling an opponent to produce confidential, proprietary, or embarrassing information." *Id.* at 551–52.

133. *Id.* at 551.

B. THE FRESHMAN WRESTLER'S SEXUAL-HISTORY EVIDENCE UNDER THE FEDERAL RAPE-SHIELD RULES

Although it is unlikely that the freshman wrestler would be able to bring his claim in federal court,[134] it is useful to compare Iowa rules with the federal rules to evaluate how to best comply with the strong policies of protecting victims and promoting justice. Part IV.B.1 discusses the application of the federal rape-shield rules to discovery, and Part IV.B.2 discusses the application of the federal rape-shield rules to admissibility of the evidence in the case of the freshman wrestler.

1. Discovery

Unfortunately for the freshman wrestler, the outcome of discovery in federal court will likely be the same as the outcome in state court under the Iowa Rules—that is, sexual-history evidence will be subject to discovery even after his attorney has exhausted all options for preventing discovery. There is no equivalent to the discovery provision of Iowa Code section 668.15 in the Federal Rules of Civil Procedure;[135] therefore, the most likely outcome is that the court simply applies Federal Rule of Civil Procedure 26(b)–(c). Federal Rule of Civil Procedure 26(b) defines the scope of discovery in a manner almost identical to Iowa Rule of Civil Procedure 1.503(1).[136] Federal Rule of Civil Procedure 26(c) also allows the court to issue a protective order on grounds almost identical to Iowa Rule of Civil Procedure 1.504(1)(a).[137] The freshman wrestler's attorney could attempt to make an argument that Iowa Code section 668.15 is a substantive rule rather than a rule of procedure, and therefore the federal court should apply the state rule in this case; however, the outcome of that argument is far from certain.[138] As in state court, the burden (and cost) will most likely be on the freshman wrestler to prevent discovery of his sexual history.

2. Admissibility of Evidence

Fortunately for our freshman wrestler's attorney, she can reassure her client that he will only have to go through the painful process of sexual history questioning and victim blaming once. The application of the Federal Rules of Evidence to this case will shift the plaintiff's burden of keeping the evidence

134. *See supra* note 109 and accompanying text.

135. *See generally* FED. R. CIV. P. 26.

136. *Compare* FED. R. CIV. P. 26(b), *with* IOWA R. CIV. P. 1.503(1).

137. *Compare* FED. R. CIV. P. 26(c), *with* IOWA R. CIV. P. 1.504(1)(a).

138. *See* 28 U.S.C §§ 1652, 2072 (2012). Federal courts that are exercising diversity jurisdiction over a state law claim must follow state rules of decisions (substantive rules), but not state procedural rules. Iowa Code section 668.15(1) could be either a substantive or a procedural rule. *See* IOWA CODE § 668.15(1) (2015). It is contained within a substantive comparative fault statute, apparently to direct judges on which evidence may be considered for the purpose of establishing comparative fault, but it also creates procedure for discovery and a rule of evidence. *See id.*

out to the defense, who will bear the burden of proving the evidence should come in.[139] The defendant will bear the cost of filing a motion to the court describing the evidence he wishes to admit and the reasons he believes the evidence is admissible at least 14 days before the start of trial.[140] The defendant will bear the cost of serving the motion on all parties, and notifying the victim of his plan to use this evidence.[141] Finally, the defendant will bear the burden of proving at a sealed hearing that the evidence's probative value *substantially outweighs* the danger of harm to the victim.[142]

The freshman wrestler will not avoid all of the burden in this case—an effective attorney should respond to the school district's motion in order to ensure that the court keeps the evidence out. However, unlike the Iowa rules, there is ample support under the federal rules for excluding both incidences of the freshman wrestler's sexual history. First, it is clear that Federal Rule of Evidence 412 considers both instances of prior sexual history to be "sexual behavior."[143] As such, they are presumed to be inadmissible under Federal Rule of Evidence 412 until the proponent of the evidence makes a showing otherwise.[144] Second, it is unlikely that the school district will be able to make the required showing. There are few, if any legitimate reasons for the court to admit the evidence under the existing interpretation of Federal Rule of Evidence 412. Case law indicates that prior sexual behavior or predisposition, on its own, is not probative on the issue of witness credibility.[145] If the freshman wrestler had lied in connection to his punishment for behavior on school grounds—creating a relevant issue of trustworthiness—the underlying behavior itself would still not be relevant as long as he admits to the lie.[146] As far as contesting the issue of damages, this evidence has so little value in relation to damages that it does not "substantially outweigh[] the danger of harm to any victim and of unfair prejudice to any party."[147] The court will most

139. *See supra* Part II.C (discussing application of Federal Rule of Evidence 412).

140. FED. R. EVID. 412(c)(1)(A)–(B).

141. FED. R. EVID. 412(c)(1)(C)–(D).

142. FED. R. EVID. 412(b)(2), (c)(2).

143. *See supra* notes 107–08 (discussing the application of Federal Rule of Evidence 412 and Iowa Rule of Evidence 5.412 to various types of sexual behavior).

144. *See supra* Part II.C (discussing the presumption of inadmissibility established by Federal Rule of Evidence 412).

145. *See supra* note 85 and accompanying text.

146. Federal Rule of Evidence 608(b) permits inquiry into specific instances of conduct in order to attack the witness's credibility "if they are probative of the character for truthfulness or untruthfulness . . . ." FED. R. EVID. 608(b). Under Rule 608(b), the lie or behaviors constituting a lie are relevant, but "[e]xtrinsic evidence with respect to the specific instances of conduct of the witness is not admissible . . . . The cross-examiner thus must take the answer given by the witness." GRAHAM, *supra* note 57, at 986. In most cases, if the freshman wrestler is honest about the lie itself, the court will not permit the cross-examiner to go further.

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

likely rule the evidence inadmissible, and the trial will proceed without further harm to the freshman wrestler.

C. BROADER CONCERNS: PREMISES LIABILITY FOR THIRD-PARTY TORTS

The loopholes in Iowa's rape-shield rules create concerns beyond the freshman wrestler hypothetical. Under the Federal Rules of Evidence, all witnesses are protected from revealing sexual-history evidence.[148] A federal court interpreting the Iowa rape-shield rules in a sexual harassment case held that the protections of the discovery provision of Iowa Code section 668.15 did not apply to a non-party witness who was also harassed by the defendant.[149] Further, Iowa's rape-shield rules can be exploited in cases regarding premises or licensor–licensee liability for intentional torts against third-parties.[150]

In *Morgan v. Perlowski*, for example, the Iowa Supreme Court considered the liability of a homeowner for the intentional assault of a houseguest by a third party—the homeowner had allowed six strangers into an "open beer party" and these strangers subsequently assaulted the plaintiff—the same case law would clearly apply if the houseguest had been sexually assaulted.[151] The Iowa Supreme Court has found liability against a landlord who failed to provide proper security for the tenants in his apartment complex, which arguably contributed to the rape of one of his tenants.[152] A federal court applying Iowa law has considered the potential liability of a university for the rape of a student by an off-duty student security guard.[153] In all of the above cases, it is easy to imagine a combative defense attorney strategically exploiting the above described loopholes to uncover the victim's sexual-history evidence,

148. FED. R. EVID. 412 advisory committee's note to 1994 amendment ("Rule 412 extends to 'pattern' witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible.").

149. Weiss v. Amoco Oil Co., 142 F.R.D. 311, 314 (S.D. Iowa 1992).

150. Although suits based on premises liability or other licensee–licensor theories for the intentional torts of third persons are rare in Iowa, Iowa follows the Restatement (Second) of Torts § 318: "If the actor permits a third person to use land . . . in his possession . . . he is . . . under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others . . . ." RESTATEMENT (SECOND) OF TORTS § 318 (AM. LAW INST. 1965); *see also* Morgan v. Perlowski, 508 N.W.2d 724, 727–28 (Iowa 1993) (applying section 318 where a houseguest was assaulted by a third party). The rule has also been discussed where "social hosts" serving alcohol allow their guests to leave the party intoxicated; however, the rule was limited to cases where the injury occurs on the licensor's property. Brenneman v. Stuelke, 654 N.W.2d 507, 509–10 (Iowa 2002).

151. *Morgan*, 508 N.W.2d at 726. The plaintiff was punched about the face and struck with a pool cue, resulting in permanent injuries. *Id.*

152. Tenney v. Atlantic Assocs., 594 N.W.2d 11, 17 (Iowa 1999). The outcome of the case is unclear as it appears to have settled.

153. Freeman v. Busch, 150 F. Supp. 2d 995, 1001–01 (S.D. Iowa, 2001). The college was ultimately not held liable in this case. *Id.* at 1004.

and coerce them into accepting a settlement that is more favorable to the defendant.[154]

V. THE SOLUTION: AMEND THE RULES

From the above examples, it is evident that the Iowa rape-shield rules governing discovery and admissibility of sexual-history evidence are insufficient to meet the policies of protecting the wellness and privacy of victims suing third-party defendants. This insufficiency discourages valuable lawsuits against potentially liable third-parties, resulting in a lack of motivation for third-parties to develop policies that better protect victims injured on their watch.[155] Although Iowa does have a great number of protections in place for victims who sue their attackers, the gaping hole of uncertainty left for victims such as the freshman wrestler ought to raise concerns.[156] This Part suggests ways in which the current Iowa rape-shield rules can be fixed in order to fulfill the policy goals behind the rules. Part V.A suggests closing the loopholes in the discovery provision of Iowa Code section 668.15 to make it clear that the rule applies in suits against third-party defendants, and suggests moving this discovery provision to a different section of the Iowa Code. Part V.B recommends adopting the federal rule as it relates to the admissibility of evidence in civil suits, or amending the admissibility provision of Iowa Code section 668.15 to make it clear that the rule applies to third-party defendants and moving the rule to the evidence section of the Iowa Code.

A. AMENDING IOWA'S RULES RELATING TO THE DISCOVERY OF SEXUAL-HISTORY EVIDENCE: CLOSE THE LOOPHOLES

Although Iowa's rape-shield rules relating to discovery of sexual-history evidence can sometimes protect victims *more* than the federal rules, there is still risk of victim abuse and harm when vigorous defense lawyers use discovery to attempt to encourage settlement rather than trial.[157] Victims who decide to sue potentially liable third-party defendants are particularly vulnerable, because it is not clear whether the burden-shifting rule in the discovery provision of Iowa Code section 668.15 applies to them.[158] The issue is further

154. Beyond Iowa, "[c]ourts have increasingly recognized third-party duties to use reasonable precaution not only to prevent negligent harms, but also to prevent intentional torts." Bublick, *supra* note 92, at 61 (collecting cases). The trend of delegating societal responsibility for sexual assault is on the rise, and loopholes in evidence rules like Iowa's may have a negative effect on this trend.

155. *See supra* Part III (discussing the policy justifications for encouraging suits against third-party defendants).

156. *See supra* Part IV.A (discussing the treatment of sexual-history evidence under the Iowa rules through discovery and trial).

157. *See supra* note 112 and accompanying text.

158. *See supra* Part II.B (discussing the function of Iowa Code section 668.15(1) in discovery); *see also supra* Part IV.A.1 (discussing the application of Iowa Code section 668.15(1) in a suit against a third-party defendant).

complicated by the rule's location. It appears to govern discovery, but it is located in a chapter on comparative negligence.[159] This ambiguity further encourages abusive discovery tactics, and ought to be resolved.

This problem can be fixed by implementing two simple changes. First, the text of the discovery provision in Iowa Code section 668.15 can be changed to make it clear on its face that it applies to a broader range of cases, like Federal Rule of Evidence 412. The current text of the rule can be modified as follows:

> In a civil action alleging *or involving* conduct which constitutes sexual abuse, . . . sexual assault, or sexual harassment, a party seeking discovery of information concerning the plaintiff's sexual conduct with persons other than the person who committed the alleged act *or seeking discovery of the plaintiff's sexual predisposition* . . . must establish specific facts showing good cause for that discovery, and that the information sought is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence.[160]

By following the format of Federal Rule of Evidence 412 and adding "*or involving* conduct which constitutes sexual abuse," the discovery provision of Iowa Code section 668.15 makes it clear that the action need not be against the person who committed the alleged acts.[161]

Additionally, since the discovery provision of Iowa Code section 668.15 is one which governs discovery rather than "Judicial and Judicial Procedures" or "Liability in Tort—Comparative Fault,"[162] it makes sense to recodify the discovery provision as a rule of civil procedure.[163] This relocation would make the rule easy to find and encourage more frequent use.[164]

B. AMENDING IOWA'S RULES RELATING TO ADMISSIBILITY OF SEXUAL-HISTORY EVIDENCE: AMEND, OR ADOPT THE FEDERAL RULE

Iowa's rape-shield rules relating to the admissibility of sexual-history evidence are probably sufficient for victims who sue their attackers directly, but they are devoid of guidance when it comes to the sexual-history evidence

159. *See* IOWA CODE § 668 (2015).

160. *Id.* Additions to Iowa Code section 668.15(1) are italicized.

161. "The following evidence is not admissible in a civil or criminal proceeding *involving* alleged sexual misconduct." FED. R. EVID. 412(a) (emphasis added); *see also* FED. R. EVID. 412 advisory committee's note to 1994 amendment ("The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation.").

162. *See* IOWA CODE § 668.

163. IOWA R. CIV. P. 1.500–1.600.

164. *See supra* note 31 and accompanying text (indicating the low volume of cases utilizing Iowa Code section 668.15).

of those suing third-party defendants.[165] The current Iowa rule creates an absolute bar to the admission of the evidence only "[i]n an action against a person accused of sexual abuse . . . ."[166] The legislature should amend the admissibility provision of Iowa Code section 668.15 to promote the policy goals behind rape-shield rules and to make it more similar to Federal Rule of Evidence 412:

> In an action ~~against a person accused of~~ *alleging or involving* sexual abuse, . . . sexual assault, or sexual harassment, by an alleged victim of the sexual abuse, sexual assault, or sexual harassment, for damages arising from an injury resulting from the alleged conduct, evidence concerning the past sexual behavior *or sexual predisposition* of the alleged victim is not admissible.[167]

These changes will ensure that the rule applies to the same scope of behavior and the same kinds of victims as Federal Rule of Evidence 412.[168] Additionally, since the admissibility provision of Iowa Code section 668.15 is a rule governing the admissibility of evidence rather than "Judicial Branch and Judicial Procedures" or "Liability in Tort—Comparative Fault,"[169] it makes sense to move the text of the admissibility provision to the chapter of the Iowa Code governing evidence.[170] Doing so would make the rule easier to locate, and facilitate its use.[171]Alternatively, the Iowa Legislature could adopt Federal Rule of Evidence 412 as a replacement to Iowa Rule of Evidence 5.412. The provisions governing criminal cases are practically identical,[172] and although the civil portions of the rule do not absolutely preclude admissibility like the admissibility provision of Iowa Code section 668.15, they create a strong presumption against admissibility that will protect victims in the vast majority of cases.[173]

VI. CONCLUSION

Although Iowa has taken significant steps towards protecting victims' privacy and dignity on the stand, Iowa's victims of sexual assault and abuse

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165. *See supra* Part II.C (discussing the functioning of Iowa Rule of Evidence 5.412); *see also supra* Part IV.A.2 (applying Iowa Rule of Evidence 5.412 to a suit against a third-party defendant).

166. IOWA CODE § 668.15(2).

167. *Id.* Additions are indicated by italics and deletions are indicated by a strike.

168. *See supra* Part II.C (footnotes omitted) (discussing the functions of Federal Rule of Evidence 412); *see also supra* Part IV.B.2 (applying Federal Rule of Evidence 412 to sexual-history evidence in a suit against a third-party defendant).

169. IOWA CODE § 668.

170. IOWA R. EVID. 5.412.

171. *See supra* note 30 and accompanying text (indicating the low volume of cases utilizing Iowa Code section 668.15).

172. *See supra* note 54 and accompanying text.

173. *See supra* Part IV.B.2 (applying Federal Rule of Evidence 412 to a suit against a third-party defendant).

deserve the full protection of the federal rape-shield rules. The shortcomings of the Iowa rules are particularly clear when applied to the scenario such as the freshman wrestler's, where a victim sues a liable third party. Adopting the above-described rules will give Iowan victims the protection they need when they seek justice.