PROPENSITY EVIDENCE UNDER RULE 413: THE NEED FOR BALANCE

I. INTRODUCTION

On September 13, 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act of 1994 ("Crime Bill") that, among other things, enacted three new Federal Rules of Evidence: 413, 414 and 415 ("New Rules").[1] The original version of the Crime Bill did not contain these New Rules and was narrowly voted down when New York Republican Representative Susan Molinari joined a coalition of Congressmen who chose to block passage of the bill.[2] Representative Molinari voted against the original bill because it excluded her proposal to amend the Federal Rules of Evidence for sex offense cases.[3] In late August the legislation came up for a vote again, and despite the opposition of key Democrats in the House and Senate who feared the New Rules were unconstitutional, the New Rules finally found their way into Title XXXII of the Crime Bill.[4] In exchange for their inclusion, key Republicans (including Representative Molinari) voted to pass the legislation.[5]

These New Rules took effect on July 9, 1995 and relate to the admissibility of sexual misconduct evidence in cases involving charges of sexual assault and child molestation. Their purpose is to make prior sexual misconduct evidence more freely admissible in these cases. Rule 413 admits evidence of similar crimes in sexual assault cases.[6] Rule 414 is similar in structure and content to

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1. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(a), 108 Stat. 1796, 2135-37 (codified at 42 U.S.C. §§ 13,701 et seq.).

2. *See* William Douglas, *Right, Left Oppose Crime Bill*, NEWSDAY, Aug. 10, 1994, at A19.

3. *See* 140 CONG. REC. H8991 (daily ed., Aug. 21, 1994) (statement of Rep. Molinari) (explaining her original refusal to support the bill). The proposal to amend the Federal Rules of Evidence for sex offense cases actually originated with senior counsel David J. Karp of the Office of Policy Development of the Justice Department, but the proposed rules were first introduced in section 231 of the Sexual Assault Prevention Act, which Representative Molinari and Representative Jon Kyl (R-AZ) introduced. *See* H.R. 1149, 102d Cong. § 231 (1991).

4. Ironically, this is the "Miscellaneous" section of the Bill, and these new rules have been anything but miscellaneous. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 320934 at 352.

5. *See* Kenneth Cooper, *House Negotiators Near Crime Bill Accord*, WASH. POST, Aug. 21, 1994, at A1.

6. Rule 413 reads:

Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

Rule 413, but it applies to child molestation cases rather than sexual assault cases.[7] Finally, Rule 415 applies Rules 413 and 414 to civil cases in which a claim rests on a party's alleged sexual assault or child molestation.[8]

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of a sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

FED. R. EVID. 413.

7. Rule 414 reads:

Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

FED. R. EVID. 414.

8. Rule 415 reads:

Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that

These New Rules are a dramatic change to the traditional rules of evidence. Prior to the enactment of the New Rules, a prosecutor could not corroborate a victim's story by asking whether a defendant had engaged in prior sexual misconduct. Indeed, the Federal Rules of Evidence (FRE) codified the traditional common law rule against character evidence in the first sentence of FRE 404(b), which reads: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[9] The new rules purport to lift the Rule 404(b) restriction against character evidence by permitting a court to consider evidence of a certain type of prior act "for its bearing on any matter to which it is relevant."[10] A prosecutor may now offer evidence of such prior acts to show that the defendant is the sort of person who would engage in sexual misconduct.[11] These New Rules seem to conflict with the fundamental principle of Anglo-Saxon jurisprudence that a person "must be tried for what he did, not for who he is."[12]

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party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

FED. R. EVID. 415.

9. FED. R. EVID. 404(b).

10. FED. R. EVID. 413(a); *see, e.g.*, United States v. Cunningham, 103 F.3d 553, 556 (7th Cir. 1996) (explaining that Congress added Rules 413, 414 and 415 to make evidence of similar sexual crimes or acts expressly admissible without regard to Rule 404(b)).

11. Senator Dole's statement on the floor of the Senate is relevant in this regard: "I think if somebody is a repeat offender, if you brought in eight or nine women, for example . . . and he had one offense after another, it would be probative." 139 CONG. REC. S15,020-01, S15,073 (daily ed. Nov. 4, 1993) (statement of Sen. Dole). One commentator offers the following hypothetical closing statement that a prosecuting attorney could make to a jury, arguing that this type of closing argument would dramatically increase the risk of jury misuse of the evidence:

> Ladies and gentlemen, consider the evidence of the three other sexual attacks committed by the accused. That evidence shows you the type of person he is. It proves to you that he is a vicious man. Think back to Ms. Grant's testimony about how—without any provocation—the accused just grabbed her, slammed her against a wall, and then threw her down on the ground. The evidence also demonstrates beyond any doubt that he is a violent man. Think about the testimony by Ms. Martinez and Ms. Barton—the testimony about the serious injuries which the accused inflicted on them. This evidence shows you that that accused is precisely the kind of vicious, violent person who would commit the rape that he's now on trial for. He is disposed to rape. Simply stated, he's a rapist. He's that sort of criminal, and that's exactly what he did in this case.

Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1146-47 (1993).

12. United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980).

Because of problems like this, all three New Rules have been the subject of much criticism and debate.[13] Most commentators oppose the New Rules, arguing that they undermine the integrity and rationality of the Federal Rules of Evidence;[14] that Congress enacted the New Rules solely because of political pressures to "get tough on crime" and are, therefore, poorly drafted and vague;[15] that Congress employed an improper process to enact the New Rules;[16] that the

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13. *See, e.g.*, Dale A. Nance, *Foreword: Do We Really Want to Know the Defendant?*, 70 CHI.-KENT L. REV. 3, 11 (1994) (summarizing arguments against Rules 413-415). For those commentators who support the new rules, see Debra Sherman Tedeschi, *Federal Rule of Evidence 413: Redistributing "The Credibility Quotient,"* 57 U. PITT. L. REV. 107, 123 (1995); Karen M. Fingar, *And Justice For All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501, 510 (1996) (arguing that "[e]very state in the United States should incorporate the recent legislation into its evidence code in order to achieve increased consistency and intellectual honesty in the law regarding the admissibility of uncharged sexual misconduct evidence, and provide greater justice for victims of sex crimes").

14. *See* James S. Liebman, *Proposed Evidence Rules 413 to 415—Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753, 755-57 (1995). Professor Liebman argues that because the new rules permit admission of propensity evidence in sexual assault and child molestation cases, they directly conflict with Rule 404, which generally proscribes using evidence of character traits to prove action in conformity therewith. *See id. See also* James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 111-13 (1994) (asserting that Rules 413-415 will make the Federal Rules of Evidence inconsistent and inexplicable); David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 341 (1995) (stating that the new rules make evidence law more complex and detract from its truth-finding purpose).

15. *See, e.g.*, Joseph A. Aluise, *Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?*, 14 J.L. & POL. 153, 156 (1998) (arguing that these New Rules are poorly drafted because they were quickly pushed through Congress in an effort to respond to the horror stories of "sexual predators" who repeatedly raped and molested but were never convicted for their crimes); Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 962 (1998) (emphasizing "the inappropriate means through which the rules were enacted, the poor manner in which they were drafted, and the weak substantive foundation on which they are based"); *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases* (submitted to Congress in accordance with section 32,0935 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322), *reprinted in* 159 F.R.D. 51, 52 (1995) [hereinafter *Report of the Judicial Conference*] (noting that an overwhelming majority of judges, lawyers, law professors and legal organizations objected to the New Rules because of numerous drafting problems and because the New Rules would allow the admittance of prejudicial evidence); Duane, *supra* note 14, at 115-22 (asserting that the New Rules are ambiguous in scope and improperly override a number of other Federal Rules of Evidence); Liebman, *supra* note 14, at 759-60 (suggesting that the drafters did not intend for the awkward procedure that results from the language used in the New Rules).

16. *See, e.g.*, Myrna S. Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates*, 22 FORDHAM URB. L.J. 343, 343-44 (1995) (recommending that the ABA oppose Rules 413-415, in part because of Congress's bypassing the procedures of the Rules Enabling Act); Duane, *supra* note 14, at 95-97 (discussing the manner in which Congress enacted Rules 413-415); Liebman, *supra* note 14, at 757 (noting that Congress did not subject the rules to appropriate study, Congressional hearings, or consideration by the Supreme Court or its Advisory Committee on Federal Rules).

New Rules violate the Due Process Clause of the Constitution;[17] that the New Rules violate the Equal Protection Clause of the Constitution;[18] and that existing Federal Rules of Evidence (such as Rule 403) may not apply at all to evidence submitted pursuant to Rules 413-15.[19]

Despite overwhelming criticism of these New Rules, the fact remains that Congress has enacted these rules and is unlikely to repeal them. These rules are now a part of the official Federal Rules of Evidence and may be used in any federal court in the United States. Critics should now shift their attention to the fair application of these rules. To this end, commentators must analyze the way courts are using these New Rules and determine how these rules should be balanced against the other Federal Rules of Evidence.

There is no doubt, however, that the proper balance will be very difficult to achieve. Rape, sexual assault and child molestation are all complicated and emotional topics.[20] Any discussion of how these New Rules should be balanced

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17. *See, e.g.*, Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 82 (1995) ("Rule 413 erodes the presumption of innocence in violation of the Fifth Amendment's Due Process Clause"); Margaret C. Livnah, *Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415*, 44 CLEV. ST. L. REV. 169, 181 (1996) ("The risk of due process violation [under Rules 413-415] is increased by the potential that a jury will be prejudiced by explicit reference to prior bad sexual acts"); Louis M. Natali, Jr. & R. Stephen Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 3-4 (1996) (arguing that Rules 413-415 "violate the Due Process Clause because they contravene the prohibition of propensity evidence so deeply embedded in the United States Constitution"); Jason L. McCandless, Note, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL RTS. J. 689 (1997) (asserting that the "use of 'propensity evidence' violates the Due Process Clause because it is 'fundamentally unfair'").

18. Duane, *supra* note 14, at 113-15. Professor Duane argues that Rules 413-415 will have a disproportionate impact on Native Americans because commission of sexual assault or child molestation is a federal offense only if the act occurs on federal property, and all Indian reservations in the United States are located on federal property. *See id.* at 114. Although the racially disparate impact of the rules does not, by itself, amount to a violation of the Equal Protection Clause, Rules 413-415 disproportionately target Native Americans and, therefore, have significant racial implications. *See* Duane, *supra* note 14, at 114-15.

19. *See, e.g.*, Tedeschi, *supra* note 13, at 122 (illustrating the broad language of Rule 413 and the fact that the new rule does not indicate whether or not this broad language trumps the Rule 403 ability of a judge to exclude evidence that is more prejudicial than probative); David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 566 (1994) ("Whether exclusion under Rule 403 would still be available to an accused seeking to challenge the admissibility of this evidence is unclear."); Leonard, *supra* note 14, at 333 n.140 ("There are numerous ambiguities in the [new] rules. This makes it difficult to determine their precise scope.").

20. The number of known rapes committed in 1992 alone was 140,930. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES: 1973-1992 TRENDS 19 (1994). Recent data determined that one out of five women is likely to be raped in her lifetime. See MARY P. KOSS & MARY R. HARVEY, THE RAPE VICTIM: CLINICAL AND COMMUNITY INTERVENTIONS 29 (2d ed. 1991). "[R]ape prevalence of approximately 20% for

against the existing rules of evidence must consider such complicated factors as statistics, empirical data, beliefs, opinions and societal norms.[21] Although achieving such a balance will be difficult, it is nevertheless important to attempt to balance the Congressional intent behind these new rules with the defendant's right to a fair trial.[22]

This Note specifically examines the interplay of Rule 413 and Rule 403,[23] which allows exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.[24] Part II examines the common law history of the character evidence ban (now codified under FRE 404) and the judicial authority to exclude certain evidence under Rule 403 despite its relevance. Part II also examines the history and legislative intent behind Rule 413. Part III looks at how federal courts have attempted to balance Rule 413 with Rule 403. Finally, Part IV proposes that federal courts should not admit evidence under Rule 413 merely because the evidence may have probative value. Instead, courts should

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adult women has been reported by four separate groups of investigators working in different regions of the United States." *Id.*

Data gathered by the FBI indicates that the rate of increase for rape has far outpaced the rate of increase for other crimes. *See* STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., REPORT ON VIOLENCE AGAINST WOMEN: THE INCREASE OF RAPE IN AMERICA 2-4 (Comm. Print 1990). Despite this increase, however, 98% of victims of sex crimes never see their attacker apprehended, tried or imprisoned. *See* 139 CONG. REC. S15,070 (daily ed. Nov. 4, 1993) (statement of Sen. Feinstein).

21. *See infra* notes 76, 78 and 80.

22. Practical considerations also advocate an attempt to balance Rule 413 against the existing Rules of Evidence. These New Rules potentially act as a model for state evidence codes. Currently, thirty-four states and Puerto Rico have adopted evidentiary rules modeled on the Federal Rules of Evidence. *See* Joan L. Larsen, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U.L. REV. 651, 652-53 n.8 (1993). The states adopting and adapting the Federal Rules of Evidence are: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Furthermore, some states have selectively adopted the Federal Rules of Evidence through case law. *See id. See also* L. Kinvin Wroth, *The Federal Rules of Evidence in the States: A Ten-Year Perspective*, 30 VILL. L. REV. 1315 (1985). While the crime addressed by Rule 413, sexual assault, is typically prosecuted in state courts, it is important nevertheless to examine how federal courts balance Rule 413 with Rule 403 and then offer a solution as to how state courts should be balancing these rules. If the federal courts are able to strike the proper balance between Rule 413 and Rule 403, perhaps more states would willingly adopt Rule 413. At this time, only one state has a rule similar to Rule 413. *See* CAL. EVID. CODE § 1108 (West Supp. 1999). Two states have rules similar to Rule 414. *See* MO. ANN. STAT. § 566.025 (West Supp. 1998); IND. CODE ANN. § 35-37-4-15 (West 1998).

23. Rule 403 reads: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

24. This Note concentrates on Rule 413 because Rules 414 and 415 are modeled on Rule 413. In addition, this Note focuses on the proper balance of Rule 413 with Rule 403, the rule governing admissibility of evidence at trial.

limit the prejudicial effect of propensity evidence by using conferences outside the presence of the jurors, in conjunction with Rule 403 and jury instructions. This will balance the Congressional intent behind Rule 413 with the defendant's right to a fair trial, a policy that underlies Rule 403 and the rest of the Federal Rules of Evidence.

II. HISTORY AND BACKGROUND

A. The Traditional Common Law Ban on Character Evidence

A fundamental principle of evidence law is that a person is tried for his specific acts, not for his bad character.[25] This approach to character, or propensity, evidence finds its roots in Anglo-Saxon criminal jurisprudence[26] as early as seventeenth century England.[27] Two of the earliest English cases to address the ban on character evidence were *Hampden's Trial*[28] and *Harrison's Trial*.[29] Both of these cases refused to allow evidence of the defendants' prior bad acts because, as one of the courts stated, "we would not suffer any raking into men's course of life, to pick up evidence that they cannot be prepared to answer to."[30]

Even at common law, however, the ban against character evidence remained incomplete.[31] For example, in order to establish the accused's intent, the law admitted evidence of any overt act that furthered an alleged conspiracy;[32] to establish the author's identity in a prosecution for writing threatening letters to

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25. *See* Mary Katherine Danna, *The New Federal Rules of Evidence 413-415: The Prejudice of Politics or Just Plain Common Sense?*, 41 ST. LOUIS U. L.J. 277 (1996).

26. *See, e.g.*, Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933) (tracing the English history of the character evidence rule and its major exceptions); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938) (explaining in detail the American character evidence rule and similar acts exception).

27. *See* 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2, at 1213 (Tillers ed., rev. ed. 1983); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, 'TRUTH IN CRIMINAL JUSTICE' SERIES, REPORT NO. 4, *The Admission of Criminal Histories at Trial* (1986), *reprinted in* 22 U. MICH. J.L. REFORM 707, 716-17 (1989) [hereinafter OFFICE OF LEGAL POLICY].

28. 9 Cob. St. Tr. 1053 (K.B. 1684).

29. 12 How. St. Tr. 834 (Old Bailey 1692) (Holt, L.C.J.). When the prosecution attempted to offer propensity evidence against the defendant, Justice Holt remarked: "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter." *Id.* at 864.

30. *Hampden's Trial*, 9 Cob. St. Tr. at 1103.

31. *See* Thomas J. Reed, *Trial By Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 718 (1981).

32. *See* Rex v. Horne Tooke, 25 St. Tr. 1, 27, 455 (1794).

extort money it admitted evidence of similar letters written by the defendant;[33] and to prove the absence of mistake in prosecutions for counterfeiting it admitted evidence indicating that the accused had previously passed counterfeit money.[34] Thus, the common law ban against character evidence simply prohibited a certain type of reasoning: an inference that because the defendant committed prior acts, he is therefore a "bad person" and more likely to have committed the crime charged.[35]

Colonial courts in this country later adopted the ban against character evidence. For example, in *Rex v. Doaks*,[36] the defendant was indicted for keeping a brothel.[37] The prosecution sought to introduce evidence of the accused's prior lustful and lewd acts, but the court refused to admit this propensity evidence.[38] Nevertheless, as in England, early American courts continued to make exceptions for the admission of certain kinds of propensity evidence.[39]

Unlike English cases, however, early American cases relied on an additional rationale for excluding propensity evidence: fear that evidence of prior acts might lead a jury to convict the defendant solely for his propensity to commit such a crime or because he had not been punished for his prior acts.[40] Because of this fear, American common law maintained a strong rule prohibiting

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33. *See* 2 E. EAST, A TREATISE OF PLEAS OF THE CROWN 1110 (1803). One author lists a number of other exceptions:

> Similarly, when prosecuting one accused of forgery, the crown's counsel could offer evidence indicating that on prior occasions the accused had passed forged notes in order to establish the defendant's knowledge and intent. . . . The crown's counsel also could offer evidence that one accused of maintaining a disorderly house had kept a similar establishment at another location in order to show the continuing nature of the criminal operation. . . . [T]he crown's counsel could cross-examine the defense's character witnesses by probing the witness' familiarity with the defendant's prior criminal activity.

Reed, *supra* note 31, at 718 (citations omitted).

34. *See* Rex v. Ball, 170 Eng. Rep. 973 (Crown Courts 1808).

35. *See* EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:18, at 2-97 (1996 & Supp. 1998). The concern with this inference lies in the jury's potential to overestimate the relevance of the uncharged misconduct evidence. *See id.* Wigmore explains the rationale for the rule by stating: "It may almost be said that it is because of the indubitable relevancy of specific bad acts showing the character of the accused that such evidence is excluded. It is objectionable not because it has no appreciable probative value but because it has too much." 1A WIGMORE, *supra* note 26, § 58.2 at 1212.

36. Quincy's Mass. Repts. 90 (Mass. Super. Ct. 1763).

37. *See id.* at 91.

38. *See id.*

39. For example, the defendant on trial for passing counterfeit money in *State v. Van Houten* argued that the court could not admit evidence that he had previously passed counterfeit money. The court rejected this argument and admitted the evidence to establish the defendant's knowledge. The court cautioned, however, that the evidence could not be admitted as circumstantial evidence of the accused's conduct. *See* 3 N.J. (2 Penn.) 248 (1810).

40. *See, e.g.*, People v. Stout, 4 Park. Crim. 71 (N.Y. Sup. Ct. 1858).

evidence offered to show action in conformity with character. At the same time, American courts permitted evidence of prior acts offered for non-propensity purposes such as motive, intent, absence of mistake, common scheme or plan, and identity.[41]

The leading case exemplifying American common law is *People v. Molineux*,[42] where the New York Court of Appeals developed a framework for the admissibility of uncharged misconduct evidence. The court prefaced its discussion by noting that "[t]he general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged."[43]

Nevertheless, the court found that if there was a substantial issue of the defendant's motive, a question of the defendant's identity or intent, the possibility of the defendant's participation in a general criminal plan or scheme to commit similar crimes, or a particular modus operandi, the prosecution could offer specific prior acts of the defendant, provided that the prejudicial value of the evidence did not outweigh its probative effect.[44] The court reasoned that these exceptions were permissible because the evidence offered under them was offered not for impermissible character purposes, but rather for other facts at issue in the crime charged.[45]

Courts have employed the *Molineux* rationale to justify the admission of uncharged sex offenses in cases charging the defendant with rape, child molestation, incest or sodomy.[46] Today, those states that have adopted the *Molineux* rule view it as a specialized rule of relevance allowing admission of the defendant's previous misconduct, when relevant, to prove some intermediate issue such as a general plan or scheme to commit sex offenses,[47] intent,[48]

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41. *See* 2 WIGMORE, *supra* note 27, § 357, at 336.

42. 61 N.E. 286 (N.Y. 1901).

43. *Id.* at 293 (citation omitted). The *Molineux* court believed that the character evidence ban was one of the most important characteristics distinguishing the common law from civil law systems. *See id.* at 300.

44. *See id.* at 302.

45. *See id.* at 294.

46. *See, e.g.*, Shelby v. State, 340 So. 2d 847, 848 (Ala. Crim. App. 1976) (admitting evidence of rape of a second victim to show res gestae when the first victim had been raped both before and after the second victim); People v. Oliver, 365 N.E.2d 618, 625 (Ill. App. Ct. 1977) (admitting evidence of defendant's proximity to establish identity, common scheme, and design); Commonwealth v. Helfant, 496 N.E.2d 433, 442 (Mass. 1986) (admitting evidence of a physician's prior use of Valium to sedate patients before assault to establish pattern); State v. Sterling, 516 P.2d 87, 88-89 (Or. Ct. App. 1973) (admitting similar rapes of two teenage girls to show identity).

47. *See, e.g.*, Williams v. State, 110 So. 2d 654, 663 (Fla. 1959) (admitting prior assault to show

motive[49] or the identity of the perpetrator.[50]

In contrast to the states following the *Molineaux* rule, some states created a "lustful disposition" exception where the prosecution may use the defendant's prior acts to show that the defendant had a tendency to act in conformity with a specific lustful character trait.[51] The theory proposed that the defendant has a propensity, evidenced by his prior sexual conduct, for deviant sexual behavior, thus making it more likely that the defendant committed the charged offense.[52]

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plan, scheme, or design); State v. Maylett, 701 P.2d 291, 293 (Idaho Ct. App. 1985) (admitting alleged attacks on other victims to show a common plan if within one year of charged offense); People v. Oliver, 365 N.E.2d 618, 625 (Ill. App. Ct. 1977) (admitting evidence of defendant's proximity to establish common scheme and design); People v. Garland, 393 N.W.2d 896, 898 (Mich. Ct. App. 1986) (admitting evidence to show prior scheme). *But see* Wimberly v. State, 348 S.E.2d 692, 694 (Ga. Ct. App. 1986) (holding twelve year old rape conviction was too remote to show plan or design).

48. *See, e.g.*, United States v. Cuch, 842 F.2d 1173, 1176 (10th Cir. 1988) (admitting prior rapes as evidence of intent); People v. Oliphant, 250 N.W.2d 443, 449 (Mich. 1976) (admitting evidence of other acts when intent at issue); State v. Holden, 414 N.W.2d 516, 520 (Minn. Ct. App. 1987) (admitting evidence of acts committed outside statute of limitation to show prior intent); State v. Means, 363 N.W.2d 565, 569 (S.D. 1985) (admitting prior molestation to show specific intent). *But see* State v. Christensen, 414 N.W.2d 843, 847 (Iowa Ct. App. 1987) (holding evidence of lack of consent of previous victim inadmissible to show intent with respect to later victim).

49. *See, e.g.*, People v. Adrian, 744 P.2d 768, 769 (Colo. Ct. App. 1987) (admitting evidence to show common motive and modus operandi); Burnett v. State, 225 S.E.2d 28, 30 (Ga. 1976) (admitting testimony of four witnesses about similar prior conduct to show motive or scheme); State v. Maylett, 701 P.2d 291, 293 (Idaho Ct. App. 1985) (admitting evidence of prior sexual acts in a child sexual abuse case to show motive or common scheme); State v. Smith, 530 P.2d 1215, 1219 (Kan. 1975) (admitting evidence of prior convictions to show motive); State v. Adams, 513 A.2d 854, 856 (Me. 1986) (admitting prior sexual misconduct to show motive); State v. Whitman, 475 N.E.2d 486, 489 (Ohio. Ct. App. 1984) (admitting evidence of other acts to show motive).

50. *See, e.g.*, People v. Whittington, 141 Cal. Rptr. 742, 747 (Cal. Ct. App. 1977) (admitting evidence of other crimes to prove identity); State v. Lopez, 458 P.2d 851, 853 (N.M. Ct. App. 1969) (admitting evidence of subsequent rape within hour in same vicinity when identity is at issue); Eberhart v. State, 727 P.2d 1374, 1380 (Okla. Crim. App. 1986) (admitting evidence of prior conviction to show identity); White v. State, 533 S.W.2d 735, 743 (Tenn. Crim. App. 1975) (admitting evidence of prior rapes when defendant's identity is at issue).

51. *See* EDWARD W. CLEARY, MCCORMICK ON EVIDENCE, § 190, at 560-61 (3d ed., 1984); 2 WIGMORE, *supra* note 27, §§ 398-402. The name of this exception comes from State v. Ferrand, 27 So. 2d 174, 176 (La. 1946), but is also often referred to as the "depraved sexual instinct" rule and the "lustful inclination" rule. *See* Woods v. State, 235 N.E.2d 479, 486 (Ind. 1968); State v. Schut, 429 P.2d 126, 128 (Wash. 1967).

52. *See, e.g.*, State v. Haston, 166 P.2d 141, 143 (Ariz. 1946) (admitting prior acts of incest as evidence of defendant's lustful disposition); Pounds v. United States, 529 A.2d 791, 794 (D.C. 1987) (allowing exception to show predisposition to seek gratification with a particular victim); Brooks v. State, 242 So. 2d 865, 869 (Miss. 1971) (admitting evidence of prior sexual acts to show defendant's lustful disposition in statutory rape case); State v. Seymour, 57 P.2d 390, 392 (Nev. 1936) (admitting prior sexual act evidence to show defendant's incestuous disposition); State v. Mankiller, 722 P.2d 1183, 1191 (N.M. Ct. App. 1986) (admitting evidence of child molestation to prove lewd and lascivious disposition); Moore v. Commonwealth, 278 S.E.2d 822, 825 (Va. 1981) (admitting evidence to show incestuous disposition); State v. Ray, 806 P.2d 1220, 1229 (Wash. 1991) (admitting collateral sexual misconduct to show defendant's lustful disposition toward victim).

Today, twenty-nine states follow some version of this "lustful disposition" doctrine.[53]

Despite the exceptions to the rule against propensity evidence, the Supreme Court has consistently expressed its approval of the common law rule barring propensity evidence.[54] In 1948 the Supreme Court in *Michelson v. United States*[55] gave its strongest approval yet of the common law rule barring propensity evidence. Justice Jackson, writing for the Court, reasoned that:

> Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt. . . . The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him opportunity to defend against a particular charge.[56]

More recently, *Huddleston v. United States* discussed this ban on propensity evidence.[57]

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53. The states that still recognize the lustful disposition exception to the general bar against character evidence are: Alaska, Arizona, Arkansas, California, District of Columbia, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Mexico, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Note that some commentators argue that the cases espousing the lustful disposition doctrine are arguably no longer good law in the states which have adopted Rule 404(b). *See* Imwinkelried, *supra* note 11, at 1127; Byron N. Miller, Note, *Admissibility of Other Offense Evidence After* State v. Houghton, 25 S.D. L. REV. 166 n.1 (1980); David F. Snively, Note, *Time for Change: Evidentiary Safeguards Needed in Trials for Sexual Offenses*, 11 IND. L. REV. 895, 910 (1978).

54. One of the earliest cases was *Boyd v. United States*, 142 U.S. 450 (1892). The Court reasoned that prior crimes evidence of prior robberies committed by the defendants was inadmissible because it would unduly prejudice the defendants by impressing upon the jurors the notion that the defendants were undeserving of certain prescribed trial protections. *See id.* at 458.

55. 335 U.S. 469 (1948).

56. *Id.* at 475-76.

57. 485 U.S. 681 (1988). The Court noted its "concern" that evidence of prior bad acts and crimes admitted under the present exceptions to Rule 404(b) might carry a risk of "unfair prejudice," but for a number of detailed safeguards contained in the current rules against the possible misuse of such evidence to prove a defendant's bad character. *Id.* at 691. Wigmore states four main rationales for this prohibition against character evidence: such evidence has little probative value; it "diverts the jury's attention from the merits of the case by inducing it to punish or reward a party for being good or bad in general;" adverse character evidence saddles one involved in legal proceedings with disabilities because of previous misconduct; and the use of such evidence "violates a social commitment to the thesis that each person

B. The Federal Rules of Evidence and Rule 404

In 1975, as part of enactment of the Federal Rules of Evidence,[58] Rule 404 codified the common law character evidence ban and its exceptions.[59] Congress intended the original drafting of the Federal Rules of Evidence to adopt common law rules that had developed by the late 1960s.[60] Therefore, Rule 404(a) generally prohibits circumstantial use of character evidence.[61] Rule 404(b)

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remains mentally free and autonomous at every point in his life." 1A WIGMORE, *supra* note 27, § 54.1, at 1150-51.

58. The Federal Rules of Evidence became effective on July 1, 1975. Act of January 2, 1974, Pub. L. No. 93-595, 88 Stat. 1926 (1975), *reprinted in* 1974 U.S.C.C.A.N. 2215.

59. Rule 404 states:

> Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes
>
> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404.

60. For a history of the drafting of the Federal Rules of Evidence, see 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5006 (West 1977). The Uniform Rules of Evidence and the American Law Institute Model Code of Evidence also influenced the drafters of the Federal Rules of Evidence. The language of 404(b), for example, is very similar to the wording of Rule 5 of the Uniform Rules and Rule 311 of the Model Code. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, RULES OF EVIDENCE: A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS 53 (1962), *reprinted in* 1 JAMES F. BAILEY, III & OSCAR M. TRELLES, II, THE FEDERAL RULES OF EVIDENCE: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS, at Doc. 4 (1980).

61. *See* FED. R. EVID. 404(a). The concern, as indicated by the above discussion of the common law precedent, is that the jury will convict the defendant because he or she is a bad person who should be punished for his or her prior bad acts. One author explains:

> [E]vidence that an individual is the kind of person who tends to behave in certain ways almost always has some value as circumstantial evidence as to how he acted (and perhaps with what state of mind) in the matter in question. . . . Yet, evidence of character in any form—reputation, opinion from observation, or specific acts—generally will not be received to prove that a person engaged in certain conduct or did so

prohibits evidence of a defendant's prior uncharged misconduct offered to prove that the defendant acted in conformity with his character, but allows the evidence if it is introduced for a purpose other than showing propensity to commit the alleged offense.[62] Some acceptable purposes include, but are not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[63] Rule 403 governs character evidence admitted for these purposes.[64]

C. Rule 403's Background and Common Law Heritage

The common law recognized that certain circumstances called for the exclusion of relevant evidence.[65] Rule 403 codifies the common law powers of the trial judge and explicitly gives the judge discretion in determining what evidence to admit based on the evidence's probative value and undesirable effect.[66] Where the danger of unfair prejudice, confusion, undue consumption of time, or misleading the jury outweighs the probative value of evidence, the judge may exclude the evidence even though it is relevant.[67] At its core, the rule leaves

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with a particular intent on a specific occasion, so-called circumstantial use of character. The reason is the familiar one of prejudice outweighing probative value.

MCCORMICK, *supra* note 51, § 188, at 554.

62. *See* FED. R. EVID. 404(b). *See also* Waters v. Kassulke, 916 F.2d 329, 336 (6th Cir. 1990) (holding collateral offense evidence inadmissible to prove propensity, but admissible to prove knowledge and intent); United States v. Hadley, 918 F.2d 848, 850 (9th Cir. 1990) (noting that Rule 404(b) is an inclusionary rule permitting prior bad act evidence except to prove propensity).

63. *See* FED. R. EVID. 404(b). The enumerated exceptions listed in Rule 404(b) encompass the common-law exceptions, but courts have held that they are not exclusive. *See, e.g.*, United States v. Powers, 59 F.3d 1460, 1464 (4th Cir. 1995) (noting enumerated list of permissible purposes under Rule 404(b) should be construed broadly and considered inclusive, not exclusive), United States v. Mendez-Ortiz, 810 F.2d 76, 79 (6th Cir. 1986) (recognizing that the list of enumerated permissible uses of prior bad act evidence under Rule 404(b) is "neither exhaustive nor conclusive"); United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979) (reasoning extrinsic act evidence is admissible if relevant to an issue other than the accused's character).

The Federal Rules of Evidence provide for other exceptions as well. Impeachment by a prior conviction is one example. The prosecution can use the prior conviction to show that the witness on the stand has the propensity to lie, but not the propensity to engage in similar conduct. *See* FED. R. EVID. 609(a). A witness may also be impeached by prior bad acts if the acts are probative of truthfulness. *See* FED. R. EVID. 608(b). One also may show character by reputation, opinion, or specific instances of prior conduct where character is a central element of the case. *See* FED. R. EVID. 405. Such cases where character is a central element of the case are, however, rare.

64. *See* FED. R. EVID. 404 advisory committee's note, 56 F.R.D. 219, 221 ("The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.").

65. *See* FED. R. EVID. 404 advisory committee's note, 56 F.R.D. at 218.

66. *See* FED. R. EVID. 403.

67. STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL

the judge with a large discretionary role in controlling the introduction of evidence, so as to generally regulate the course and speed of the trial and prevent jury "misdecision."[68]

There has been some dispute, however, as to the proper standard for balancing probative value against prejudicial effect under Rule 403. Judge Weinstein and Professor Berger argue that courts should "give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value."[69] Professor Dolan, however, recommends that courts "resolve all doubts concerning the balance between probative value and prejudice in favor of prejudice."[70] In the end, most courts faced with the question of the proper standard have chosen not to resolve the issue.[71]

D. The Adoption of Rule 413

Senator Robert Dole and Representative Susan Molinari first proposed the New Rules in 1991 as part of the Women's Equal Opportunity Act.[72] The customary method for passing amendments to federal procedural rules is

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160 (5th ed. 1990).

68. *See, e.g.*, Old Chief v. United States, 117 S. Ct. 644 (1997). The Court described the type of unfair prejudice meant to be weighed by the trial judge under Rule 403 as that which generalizes a defendant's earlier bad act into bad character and takes that as raising the odds that he did the later bad act for which he is now charged (or, worse, as calling for a preventive conviction even if he should happen to be innocent momentarily). The Court went on to say that in accomplishing this weighing, the trial judge must evaluate the offered evidence within the full context of available evidence, evaluating the degrees of probative value and unfair prejudice not only for the item in question but also for any available substitutes. In this way, the offered evidence could be treated as having less probative value than it would have had on its own if it was part of a case that could include other less prejudicial methods of establishing the point for which it has proper relevance. *See also* Cook v. Hoppin, 783 F.2d 684, 689 (7th Cir. 1986) ("Rule 403 was never intended to exclude relevant evidence simply because it is detrimental to one party's case; rather, 'the relevant inquiry is whether any *unfair prejudice* from the evidence substantially outweighs its probative value.'") (emphasis in original); F & S Offshore, Inc. v. K.O. Steel Castings, Inc., 662 F.2d 1104, 1107-08 (5th Cir. 1981) ("Fed. R. Evid. 403 states that relevant evidence is substantially outweighed by the danger of unfair prejudice. Because of its considerable discretion in admission of evidence, reversible error is found only in exceptional circumstances. . . . In reviewing the district court decision, an appellate court should assume the maximum probative force and the minimum prejudice to be reasonably expected.") (citations omitted); United States v. Stirone, 262 F.2d 571, 576-77 (3d Cir. 1958), ("Of course the trial judge may, in the exercise of his sound discretion, exclude evidence which is logically relevant to an issue other than propensity, if he finds that the probative value of such evidence is substantially outweighed by the risk that its admission will create a substantial danger of undue prejudice."), *rev'd on other grounds*, 361 U.S. 212 (1960).

69. 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 403[03] (1999).

70. Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 SO. CAL. L. REV. 220 (1976).

71. *See, e.g.*, United States v. Robinson, 560 F.2d 507, 516 n.14 (2d Cir. 1977) (*en banc*).

72. S. 472, 102d Cong., § 231 (1991), H.R. 1149, 102d Cong., § 231 (1991), 137 CONG. REC. S2197 (daily ed. Feb. 21, 1991).

through the Rules Enabling Act.[73] In developing Rules 413-415, however, Congress took advantage of its power to propose evidentiary rules and bypass the Rules Enabling Act.[74]

After various unsuccessful attempts to enact the reforms, the proposed rules gained new life in 1994 when Representative Molinari announced her intention to block passage of the Crime Bill unless it included the new evidentiary rules.[75] Representative Molinari insisted that "[t]he proposed reform is critical to the protection of the public from rapists and child molesters."[76] The legislative history reveals several reasons why its sponsors believed the legislation served this goal.[77]

First, the sponsors believed that rapists and child molesters have a high recidivism rate.[78] Second, the sponsors believed that the rules would enhance the

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73. *See* Rules Enabling Act, 28 U.S.C. §§ 2071-77 (1994). This Act calls for an Advisory Committee made up of scholars, judges and lawyers in the relevant field to draft a proposal for any amendment or addition to the existing rules. *See id.* The proposal is then subjected to a period of public comment, reviewed by a subcommittee of the United States Judicial Conference (whose members are chosen by the Chief Justice of the Supreme Court), and finally subjected to Congressional review. *See id.*

74. *See* Aluise, *supra* note 15, at 159-60.

75. *See* 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari); 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari). While Representative Molinari led the effort in the House of Representatives, Senator Bob Dole blocked passage of the Crime Bill in the Senate. *See* 140 CONG. REC. at S10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole).

76. 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari). *See also* 140 CONG. REC. H5439 (daily ed. June 29, 1994) (statement of Rep. Kyl) (indicating new rules would result in more convictions). Representative Molinari's remarks no doubt made a strong impression on the average American citizen. In a 1986 poll, 1,000 adults were surveyed and asked to rank various crimes according to their heinousness. *See* Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 297 (1995). While murder was the crime rated most serious, rape, incest and child abuse were the next three highest rated crimes. *See* Imwinkelried, *supra* at 297.

A 1989 study by the Bureau of Justice Statistics, the Department of Justice's research department, confirmed the conclusions of the 1986 study. *See id.* The researchers polled 60,000 adults in an attempt to determine how the public perceives the relative seriousness of different crimes. Once again, homicide received the highest rating and the next two highest ratings went to the offenses of rape and child abuse. *See id.*

77. An address presented to the Evidence Section of the Association of American Law Schools on January 9, 1993 set forth these views. For the full text of this address, see David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994).

78. *See* 140 CONG. REC. S12,263 (daily ed. Aug. 22, 1994) (statement of Sen. Hatch) ("Why should we not let the juries know . . . that these people have a pattern and series of acts that they have done that have amounted to rape or child molestation? . . . [W]hy should it not come in? The fact is, it should."); 140 CONG. REC. S10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole) ("[W]hen someone is out there committing sex crime after sex crime, committing child molestation after child molestation, it is this Senator's view that this [propensity] evidence should be admitted . . ."); 140 CONG. REC. H5438 (daily ed. June 29, 1994) (statement of Rep. Kyl) (explaining that rape and child molestation cases often involve "a clear pattern of conduct by an accused who has been convicted of similar conduct in the past . . ."); 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari) ("The past conduct

credibility of sexual assault and child molestation victims.[79] Third, the sponsors found propensity evidence in sexual assault and child molestation offenses

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of a person with a history of rape or child molestation provides evidence that he or she has the combination of aggressive and sexual impulses that motivates the commission of such crimes and lacks the inhibitions against acting on these impulses."). Recent empirical evidence suggests, however, that the crimes of sexual assault and child molestation are not particularly probative as predictors of future conduct. A comprehensive review of the empirical studies of recidivism rates was published in 1993 and found that these studies report that the recidivism rate for sexual offenses is lower than the rate for other serious crime. *See* Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AMER. J. CRIM. L. 127, 149-50 (1993). These studies also report that the recidivism rate for pedophilia is below the national average for all crimes. *See* Reed, *supra* at 151.

These findings confirm the findings of the Justice Department's 1989 study in which the Bureau of Justice Statistics tracked 100,000 prisoners for three years to determine the extent of their recidivism. *See* ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 (1989). According to the study 31.9% of released burglars were rearrested for burglary, 24.8% of drug offenders were rearrested for a drug offense, and 19.6% of violent robbers were rearrested for robbery. Only 7.7% of rapists were rearrested for rape; only homicide had a lower recidivism rate. *See* BECK, *supra* at 6.

Some commentators have suggested, however, that there are a number of reasons to believe that the recidivism rate for rape is actually higher than these empirical studies suggest. *See, e.g.*, David Finkelhor, *Abusers: Special Topics*, *in* A SOURCEBOOK ON CHILD SEXUAL ABUSE 119, 132 (Finkelhor ed. 1986) (noting that ten studies of child molestation "probably gravely understate the amount of subsequent offending committed by the men who were studied"); Judith V. Becker & John A. Hunter, Jr., *Evaluation of Treatment Outcome for Adult Perpetrators of Child Sexual Abuse*, 19(1) CRIM. JUST. & BEHAV. 74, 82 (1992) (stating that "[u]ndetected crime is quite extensive among sex offenders and . . . official data may reveal only a small percentage of the total sexual offenses committed"); A. Nicholas Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME & DELINQ. 450, 453-54 (1982) (describing an anonymous questionnaire given to convicted and incarcerated rapists and child molesters in which, on average, the subjects indicated they committed two to five times as many sex crimes for which they were not apprehended).

Rape is also a notoriously underreported crime, even among women who acknowledge that they were raped. *See* DIANA E.H. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT 31 (1984) (indicating that only 9.5% of women who are attacked report the crime to the police); Lita Furby, Mark R. Weinrott & Lyn Blackshaw, *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 27 (1989) (finding that fewer than 10% of sexual offenses are reported).

Societal beliefs also may contribute to a high number of unreported rapes because of a belief that certain acts are legal, even though they clearly qualify as sexual assault. *See, e.g.*, HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE 50-51 (1980) (finding that 66% of 1,056 individuals surveyed agreed that "women provoke rape by their appearance or behavior"); Jacqueline D. Goodchilds et al., *Adolescents and Their Perceptions of Sexual Interactions*, *in* 2 RAPE AND SEXUAL ASSAULT 245, 268 (Ann Wolbert Burgess ed., 1988); JOYCE E. WILLIAMS & KAREN A. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 115 (1981) (finding that 30% of whites, 26% of blacks, and 44% of Mexican-Americans questioned in an extensive rape survey in San Antonio defined rape as requiring an unknown man and force or threat of violence).

79. *See* 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (discussing consent and false accusation defenses in sexual assault cases); 140 CONG. REC. S10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole) (indicating defense of attacking credibility of child in child molestation cases); 140 CONG. REC. H5439 (daily ed. June 29, 1994) (statement of Rep. Kyl) ("If the defendant has committed similar acts in the past, the claims of the victim are more likely to be considered truthful if there is substantiation of other assaults.").

highly relevant and probative.[80] Finally, the sponsors claimed that the New Rules would make victims more willing to come forward and confront their attackers.[81] The "Analysis Statement" which accompanied the Crime Bill codified many of these comments and explained the purposes and policy rationales underlying each component of the Act.[82]

However, these proposed rules faced vigorous criticism. Senator Joseph Biden stressed the rules' greatest danger: the potential for unfair prejudice to defendants.[83] Representative William J. Hughes also expressed fear that the

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80. Senator Dole argued that:

> The new rules will supersede in sex offense cases the restrictive aspects of Federal Rule of Evidence 404(b). In contrast to Rule 404(b)'s general prohibition against evidence of character or propensity, the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing 'on any matter to which it is relevant.' This includes the defendant's propensity to commit sexual assault. . . .

140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole). *See also* 140 CONG. REC. 10,276 (daily ed. Aug. 2, 1994) (statement of Sen. Dole) ("Ask any prosecutor; and he or she will tell you how important similar-offense evidence can be.").

Commentators debate, however, whether this sort of propensity evidence truly is relevant and probative in all cases. *See supra* note 78. In addition, empirical studies have found that evidence of sexual misconduct or child molestation by the accused tends to make jurors extremely hostile towards the defendant. The most famous study of the behavioral patterns of American jurors is the Chicago Jury Project. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966). The researchers investigated the potential for prejudice in sex offense prosecutions and found that many jurors consider such conduct offensive, reprehensible and outrageous. *See id.* at 396-97. The research indicated that because jurors found these crimes so reprehensible, they would often find the defendant guilty of a more severe crime than the one with which he had been charged. *See id.* at 397. More importantly, the researchers found that these offenses often cause a jury to be "so outraged by the defendant's conduct that it overrides distinctions of the law and finds him guilty as charged." *Id.* at 396. Thus, it seems clear that knowledge of a defendant's prior acts, especially of sexual assault or child molestation, increases the likelihood that a jury will convict the accused solely on the basis of these prior bad acts.

81. *See* 140 CONG. REC. H5439 (daily ed. June 29, 1994) (statement of Rep. Kyl) ("[V]ictims [who have not fully prosecuted a charge of sexual assault] are often willing to bear the burden of testifying when they know that the person who marred their lives has also victimized others and that these revelations will come out at trial.").

82. *See* 137 CONG. REC. S3214, S3236 (daily ed. Mar. 13, 1991).

83. Senator Biden stated, "This is not a fair thing to do to an individual because it does not speak to the elements of the crime. It does not speak to whether he was there at the place at the time and moment and committed the crime." 139 CONG. REC. S15,072 (daily ed. Nov. 4, 1993) (statement of Sen. Biden). Senator Biden also questioned the idea that prior sexual misconduct is more probative than other prior crimes evidence:

> [T]he truth of the matter is that is not how human nature necessarily functions . . . so there is little probative value. The fact that the defendant may have done something ten years ago . . . may or may not be relevant to whether or not he is at the scene of the crime of which he is being accused. . . . So I suspect we would not allow in evidence, for example, to suggest in a robbery case—this is not what this amendment would do, but to make the point—that you had been convicted of drunk driving. Why would not we allow drunk driving charges to be brought in a robbery case? Well, because it goes to character, it makes you look like you are maybe the kind of guy if you broke that law, you may break this law. It is prejudice without any probative value. The ultimate prejudicial nonprobative kind of evidence to be introduced is to introduce evidence of a similar crime.

New Rules would erect unfair barriers against the defendant.[84] Other critics voiced due process concerns[85] and concerns that the rules' proponents had failed to consider their long-term effects.[86]

Despite the vigorous criticism of the proposed rules, Congress passed the Crime Bill and the New Rules.[87] Although Congress had bypassed the Rules Enabling Act to enact these new rules, Congress also added a provision to the Crime Bill directing the Judicial Conference to report to Congress any recommendations for amending the rule as enacted.[88] Thus, Congress postponed the implementation date for Rules 413-415 for 150 days to allow the Judicial Conference time to comment and propose alternative rules.[89]

The Judicial Conference submitted its report to Congress on February 9, 1995.[90] The Advisory Committee, with the exception of the Department of Justice,[91] opposed the New Rules.[92] The Judicial Conference "urge[d] Congress

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140 CONG. REC. S15,072-73 (daily ed. Nov. 4, 1993) (statement of Sen. Biden). Senator Biden clearly stated that he was in favor of curbing violence against women and children, but not at the price of fairness:

> Now remember, I'm the guy who authored the Violence Against Women Act. It has been my crusade for the past four years to have violence against women taken seriously. . . . I, too, want to see more rapists and child abusers put behind bars. But not at the price of fairness. And not at the expense of what we know in our hearts to be right and just.

140 CONG. REC. S10,966, S10,967 (July 31, 1995) (statement of Sen. Biden).

84. *See* 140 CONG. REC. H8990 (daily ed. Aug. 21, 1994) (statement of Rep. Hughes). *See also* 139 CONG. REC. S15,072 (daily ed. Nov. 4, 1993) (statement of Sen. Biden) (stating that character evidence should not be used "to blind people to looking at the real facts before them and making an independent judgment. . . .").

85. *See* 140 CONG. REC. H8990 (daily ed. Aug. 21, 1994) (statement inserted into the record by Rep. Hughes) (noting that the rules would raise "very serious constitutional questions"); 140 CONG. REC. H5439 (daily ed. June 24, 1994) (statement of Rep. Schumer) ("Make no mistake about it my colleagues, this would say, not just a conviction but any allegation at all would be admissible in a court, not for all crimes but for these crimes. That is turning our system of due process on its head.").

86. *See* 140 CONG. REC. H8968, H8990 (daily ed. Aug. 21, 1994) (statement by Rep. Hughes) ("[The] existing rulemaking process involves a minimum of six levels of scrutiny . . . . This has gone through none of those levels. The rule changes . . . are based on a[n] . . . amendment offered on the floor of the Senate and had . . . twenty minutes of debate. It is procedurally and substantively flawed.").

87. The Crime Bill finally passed after a night of closed negotiations between members of Congress. *See* Jill Zuckman, *Negotiators in House Outline Deal on Crime Bill*, BOSTON GLOBE, Aug. 21, 1994, at 1.

88. *See* Violent Crime Control and Law Enforcement Act of 1994, *supra* note 1, at § 320935(c). *See also* STEPHEN A. SALTZBURG ET AL., 3 FEDERAL RULES OF EVIDENCE MANUAL 575, 580, 583 (6th ed. 1994).

89. *See* Violent Crime Control and Law Enforcement Act of 1994, *supra* note 1, at § 320935(d).

90. *See Report of the Judicial Conference*, *supra* note 15, at 51.

91. The Department of Justice stated, "The new rules are responsive to deficiencies in the existing rules of evidence, and the Department of Justice strongly supports their enactment." Letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, to Sen. Robert Dole, Minority Leader (Apr. 24, 1991), *reprinted in* 137 CONG. REC. S4927 (daily ed. Apr. 24, 1991). The letter continued by arguing the "entirely sound perception that evidence of this type is frequently of critical importance in establishing the guilt of a rapist or child molester, and that concealing it from the jury often carries a grave

to reconsider its decision on the policy questions underlying the new rules," and recommended that Congress abandon the rules completely.[93] The Advisory Committee argued that the New Rules would improperly "permit the admission of unfairly prejudicial evidence," create trial delay by causing "mini-trials within trials" and "diminish significantly the protections that have safeguarded persons accused in criminal cases . . . against undue prejudice."[94] In addition, the Judicial Conference expressed serious reservations about the applicability of Rule 403 to these New Rules.[95]

In its report to Congress, the Judicial Conference suggested an amendment to Rules 404 and 405 to explicitly direct the court to use Rule 403 in evaluating the probative value of evidence.[96] The Judicial Conference enumerated the following factors as relevant to a Rule 403 determination:

(i) proximity in time to the charged or predicate misconduct;

(ii) similarity to the charged or predicate misconduct;

(iii) frequency of the other acts;

(iv) surrounding circumstances;

(v) relevant intervening events; and

(vi) other relevant similarities or differences.[97]

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risk that such a criminal will be turned loose to claim other victims." *Id.*

92. *See Report of the Judicial Conference*, *supra* note 15, at 53. Lawyers, the ABA, judges and scholars soundly criticized the proposed rules. The Administrative Office of the United States Courts solicited comments from these various individuals and found that eighty-eight individuals opposed the rules and only seven supported them. Only three organizations supported the rules, while twelve opposed them. Those opposed to the new rules gave various reasons as to why they were opposed. The reasons included that the rules were unfair (58 responses), were poorly drafted (47 responses), and contained insufficient data on propensity (33 responses). *See Report of the Judicial Conference*, *supra* note 15, at 52.

93. *Id.* The Judicial Conference suggested in the alternative that the provisions of Rules 413-415 should be incorporated as amendments to Rules 404 and 405 in order to clarify any ambiguities. *See id.* at 54.

94. *Id.* at 52, 53.

95. *See id.* at 53.

96. *See Report of the Judicial Conference*, *supra* note 15, at 54.

97. *Id.* at 55. Some scholars have advocated the consideration of other factors, including:

-similarity in type between the alleged events and prior events;

-similarity in relationship between alleged perpetrator and alleged victim in each circumstance;

-similarity in settings in which the events took place;

-proximity in time; and

-frequency of other acts.

Jane Harris Aiken, *Sexual Character Evidence in Civil Actions: Refining the Propensity Rule*, 1997

Despite the Judicial Conference's negative recommendation to Congress concerning the proposed rules, Congress ignored the report and the rules as originally enacted became law on July 9, 1995.[98]

E. Rule 413's expansive coverage and the tension between it and Rule 403

The text of Rule 413 is quite broad. Paragraph (a) states that "evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."[99] To give significant content to Rule 413, one would have to interpret this language as abrogating the language of Rule 404(b) and allowing all kinds of propensity evidence.[100]

The most serious issue involving Rule 413 and the other Federal Rules of

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WIS. L. REV. 1221, 1264.

Other scholars believe the approach should look like this:

> In the first step . . . [t]he judge asks four questions and weighs four factors:
>
> How clearly has the proponent proven that the defendant committed the uncharged act? (factor No. 1)
>
> How probative of the material fact in issue (identity, the actus reus, or mens rea) is the uncharged misconduct? (factor No. 2)
>
> How seriously disputed is that material fact? (factor No. 3)
>
> And does the proponent have other, less prejudicial evidence available to prove the fact in consequence? (factor No. 4)
>
> In the second step, the judge identifies the countervailing probative dangers raised by the uncharged misconduct evidence (factor No. 5). The judge asks three questions: How prejudicial is the evidence? To what extent will the evidence misleadingly distract the jury from the central question whether the defendant committed the charged crime or tort? How time-consuming will the presentation of the proponent's evidence and the defense rebuttal be?

IMWINKELRIED, *supra* note 35, at § 8:03.

Mueller and Kirkpatrick suggest this approach:

> In performing the FRE 403 balancing, courts should consider (1) the length of time since the prior conduct occurred, (2) the extent to which the prior conduct is similar to the charged conduct, (3) number of occurrences of the prior conduct, (4) circumstances surrounding or relating to the prior conduct, (5) intervening events, (6) the inflammatory nature of the prior conduct, and (7) the strength of the evidence that the prior conduct actually occurred, including whether it is admitted or disputed by the defendant.

MUELLER & KIRKPATRICK, FEDERAL EVIDENCE § 162, at 38 (1994 & Supp. 1997).

98. *Amendments by the Violent Crime Control and Law Enforcement Act of 1994*, U.S. Order 95-24, Nov. 15, 1999, *available in* WESTLAW US-Orders Database.

99. FED. R. EVID. 413.

100. In addition, because the rule includes any conduct proscribed under chapter 109A of title 18, United States Code, the range of admissible behavior will be enlarged to include such acts as non-aggravated sexual abuse and abusive sexual contact. For the definition of all conduct encompassed by the New Rules, see 18 U.S.C.A. § 2246(3) (West Supp. 1997). For a discussion of this aspect of the rule, see 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5414 (Supp. 1998).

Evidence is how to reconcile Rule 413 with Rule 403. On its face, Rule 413 seems to force a court to include sexual misconduct evidence even if the court determines that the various factors outlined in Rule 403 substantially outweigh the probative value of the evidence.[101] Rule 413 leaves a court very little discretion in determining admissibility.[102]

Even if Rule 403 applies, two aspects of Rule 413 complicate the application of Rule 403: first, Rule 413's admission of character evidence for any relevant purpose might inflate the probative value of such evidence; and second, a court can no longer balance the possibility that the evidence might be used to show general propensity, one traditional source of unfair prejudice.[103]

The legislative history behind the rules, however, seems to indicate that the sponsors of the legislation recognized the tension between Rule 413 and Rule 403, and that the sponsors intended that the protections of Rule 403 should be available to judges faced with prior sexual misconduct evidence.[104] The problem is that no one informed the federal judiciary of this fact, or explained how federal judges should attempt to balance these two rules. Thus, the federal courts have had to determine whether to apply Rule 403 to sexual misconduct evidence and how to balance Rule 413 against Rule 403.

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101. A minority of commentators argue that Rule 413 requires admission of relevant prior sexual misconduct irrespective of other rules. This argument centers around the rule's use of the phrase "is admissible," which suggests that if the evidence is relevant, it is admissible without regard for other rules of evidence (including Rule 403). *See* Duane, *supra* note 14; Liebman, *supra* note 14. For a general discussion of the problems of language, see 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5411 (Supp. 1997). Other commentators note that such a literal reading opens the door for evidence that is unreliable, inflammatory, confusing, or a waste of time. They argue Rule 413 is subject to Rule 403 balancing, as evidenced by some of the comments in the legislative history. *See* Duane, *supra* note 14.

102. The Justice Department, anticipating that judges might not be willing to allow character evidence, stated, "Entrusting [federal] judges whose attitudes have been formed by the existing, restrictive rules to implement a fundamentally different approach under an essentially discretionary standard would . . . undermine the basic objective [of the new rule]." OFFICE OF LEGAL POLICY, *supra* note 27, at 760.

103. A legitimate Rule 403 argument would assert that the prior act evidence may encourage jurors to punish the accused for past conduct, rather than focus on the currently alleged conduct. Identifying this type of prejudice can be difficult, especially in a sexual assault case. *See* Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1036 (1977).

104. *See* 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994); 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole) ("The presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice."); 140 CONG. REC. H8968, H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) ("In other respects, the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect."); 140 CONG. REC. H5438 (daily ed. June 29, 1994) (statement of Rep. Kyl) ("The trial court retains total discretion to include or exclude this type of evidence.").

III. JUDICIAL RESPONSES

Courts have generally found Rule 403 applicable to sexual misconduct evidence.[105] The Tenth and Eighth Circuits recently considered the issue of balancing Rule 413 with Rule 403, and their decisions provide particular insight into how courts resolve this issue.

A. United States v. Guardia[106]

On September 5, 1996, a federal grand jury indicted Dr. David Guardia with two counts of sexually abusing two female patients who alleged that, during unchaperoned gynecological examinations, he touched them inappropriately.[107] At trial the government offered the testimony of the two victims and then moved to introduce, under Rule 413, the testimony of four women who alleged that Dr. Guardia had abused them in a similar manner.[108] Dr. Guardia moved in limine to exclude the testimony of the four women.[109] The district court granted Dr. Guardia's motion, ruling under Rule 403 that the risk of jury confusion substantially outweighed the probative value of the Rule 413 evidence.[110] The government appealed.

The Tenth Circuit Court of Appeals affirmed the district court's ruling that excluded the evidence under Rule 403.[111] The court reasoned that the 403 balancing test applies to Rule 413 evidence because when the drafters of the

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105. *See, e.g.*, United States v. Eagle, 137 F.3d 1011, 1016 (8th Cir. 1998) (asserting that courts must conduct a Rule 403 balancing test prior to admitting evidence submitted under Rule 413); United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998) (noting that adoption of Rule 413 without any exclusion of or amendment to Rule 403 makes Rule 403 applicable); United States v. Akram, No. 97 CR 78, 1997 WL 392220, at *3 (N.D. Ill. July 8, 1997) (holding that "the developing consensus of judges, lawyers and legal commentators is that Rule 403 applies to evidence otherwise admissible, including evidence otherwise admissible under Rule 413."); United States v. Jackson, CR. No. 95-388-FR, 1996 WL 444968 (D. Or. July 22, 1996) (finding prior bad acts of sexual misconduct not relevant).

106. 135 F.3d 1326 (10th Cir. 1998).

107. *See id.* at 1327. The grand jury found Dr. Guardia in violation of 18 U.S.C. § 2242(2)(A). In addition, the grand jury used the Assimilative Crimes Statute, 18 U.S.C. § 13, to charge the defendant with two counts of criminal sexual penetration in violation of N.M. STAT. ANN. § 30-9-11(E) (Michie Supp. 1997) and two counts of battery in violation of N.M. STAT. ANN. § 30-3-4 (Michie 1978). *See* 135 F.3d at 1327.

108. *See* 135 F.3d at 1327. Two of the four additional witnesses complained of excessive, direct clitoral contact, and one complained of similarly suggestive comments. One of the witnesses complained that Dr. Guardia improperly touched her breasts, and another complained of the defendant's use of a medical instrument. *See id.*

109. *See id.* at 1327. *See* United States v. Guardia, 955 F. Supp. 115 (D.N.M. 1997).

110. *See* 135 F.3d at 1327.

111. *See id.* at 1332.

Federal Rules of Evidence altered the 403 balancing test, they used much more explicit language than that found in Rule 413.[112] In addition, the court reasoned that because it had held that Rule 403 balancing applied to evidence offered under Rule 414, and Rule 414 uses language almost identical to Rule 413, Rule 403 should likewise apply to Rule 413.[113]

The Tenth Circuit stated that to admit evidence under Rule 413, it must pass four barriers:

> 1) the defendant must be on trial for 'an offense of sexual assault;'
>
> 2) the proffered evidence must consist of 'another offense of . . . sexual assault;'
>
> 3) the trial court must find the evidence relevant—that is, the evidence must show both that the defendant had a particular propensity, and that the propensity bears on the charged crime; and
>
> 4) the trial court must make a reasoned, recorded finding that the prejudicial value of the evidence does not substantially outweigh its probative value.[114]

The court indicated that determining the probative value in a given case depends on a number of considerations, including "the similarity of the prior acts to the acts charged, the closeness in time of the prior acts to the charged acts, the frequency of the prior acts, the presence or lack of intervening events, and the need for evidence beyond the testimony of the defendant and alleged victim."[115] Applying all of the above factors to the *Guardia* case, the court held that the testimony from the four witnesses would create a substantial risk of jury confusion because it would transform the trial of two incidents into a trial of six incidents.[116]

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112. *See id.* at 1329. In support of its position, the court pointed to Rule 609(a)(2), which states that convictions involving dishonesty "shall be admitted" for impeachment purposes, and to Rule 609(a)(1), which requires a court to find that the probative value of a prior conviction outweighs its prejudicial effect on the accused. *See* 135 F.3d at 1329.

113. *See* 135 F.3d at 1330. For those cases that have held that Rule 403 applies to Rule 414, see United States v. Castillo, 140 F.3d 874, 882 (10th Cir. 1998); United States v. Mann, 145 F.3d 1347, 1348 (10th Cir. 1998); United States v. Larson, 112 F.3d 600, 604-05 (2d Cir. 1997); United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997); United States v. Sumner, 119 F.3d 658, 661 (8th Cir. 1997); United States v. Meacham, 115 F.3d 1488, 1495 (10th Cir. 1997).

114. 135 F.3d at 1332.

115. *Id.* at 1331 (citations omitted).

116. *See id.* at 1332. The court explained that each incident would require a description by lay witnesses and further explanation by expert witnesses. This additional testimony might be conflicting and overlapping. "The subtle factual distinctions among these incidents would make it difficult for the jury to

This conclusion, however, does not fit within the court's enumerated factors. The court expressed concern about confusion, an aspect of Rule 403 separate from the prejudice concern. Nevertheless, such confusion can cause prejudice. Admission of the other acts could confuse the issues and mislead the jury into convicting the defendant based on his previous actions, even if it had a reasonable doubt as to his commission of the charged crime. The factors enumerated by the Tenth Circuit as limitations on the admissibility of Rule 413 evidence do little to address this form of prejudice.

B. United States v. Mound[117]

In *Mound*, the government charged Alvin Mound with allegedly physically and sexually abusing his daughter.[118] At trial the government sought to introduce evidence of Mound's prior sexual abuse of two girls, ages twelve and sixteen.[119] Mound had pled guilty to the first offense, and the government had dismissed its investigation of the second.[120] The district court admitted the conviction under Rule 413 but excluded evidence of the uncharged offense.[121] The jury convicted Mound of aggravated sexual abuse of a minor, aggravated sexual abuse, assault resulting in serious bodily injury and assault with a dangerous weapon, sentencing him to life imprisonment.[122] On appeal, Mound challenged the admission at trial of the prior conviction of sexual abuse under Rule 413.[123]

The Eighth Circuit Court of Appeals affirmed the district court's findings, holding that the district court's application of Rule 413 and Rule 403 to admit

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separate the evidence of the uncharged conduct from the charged conduct." *Id. See also* WRIGHT & GRAHAM, *supra* note 101, § 5412, at 273 (arguing that the potential for confusion is increased when evidence is admitted under Rule 413).

117. 149 F.3d 799 (8th Cir. 1998).

118. *See id.* at 800. The government alleged that Mound had abused the girl from 1993, when she was ten, through January 1997. *See id.*

119. *See id.*

120. *See id.*

121. *See id.* While Rule 414 specifically addresses sexual offenses against children, the government offered the evidence under Rule 413, and the court admitted the evidence under that rule. Therefore, the appellate court discussed Rule 413, not Rule 414. *See id.* at 800 n.2.

122. *See id.* at 800. The seven total counts included: two counts of aggravated sexual abuse of a minor, in violation of 18 U.S.C. §§ 2241(c), 2246(2); two counts of aggravated sexual abuse, in violation of 18 U.S.C. §§ 2241(c), 2246(2); two counts of assault resulting in serious bodily injury, in violation of 18 U.S.C. § 113(a)(6); and one count of assault with a dangerous weapon, in violation of 18 U.S.C. § 113(a)(3). *See* 149 F.3d at 800.

123. *See* 149 F.3d at 800.

the prior conviction was not an abuse of discretion.[124] The court of appeals agreed with the district court's conclusion that the uncharged offense was inadmissible under Rule 403 because the danger of unfair prejudice and confusion substantially outweighed the probative value of the evidence.[125] The court of appeals also affirmed the lower court's admission of Mound's prior conviction because the prior conviction did not present any danger of unfair prejudice beyond that which "all propensity evidence in such trials presents . . . ."[126]

More importantly, the court of appeals discussed two actions that the district court took in an attempt to guard against unfair prejudice in this case.[127] First, the district court addressed the issue of the prior sexual misconduct evidence by deferring its ruling until it heard the testimony of the alleged victim in closed proceedings.[128] Second, before introducing evidence of the prior conviction, the judge issued a cautionary instruction to the jury reminding them that although the defendant had been found guilty in a prior case, this did not mean that he was guilty in the present case.[129] Both of these actions helped further to guard against unfair prejudice in the case.[130]

The difficulty with this decision, however, lies with the jury instructions. The *Mound* court does very little to prevent the problem underlying the decision in *Guardia*, that is, that juries might focus on the defendant's prior convictions or acts and disregard the lack of evidence in the instant case. Jury instructions are

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124. *See id.* at 801.

125. *See id.* at 801-02.

126. *Id.* at 802 (quoting United States v. LeCompte, 131 F.3d 767, 770 (8th Cir. 1997)).

127. *See id.*

128. *See id.* at 801. After hearing the evidence, the district court held that the evidence of the uncharged offense was inadmissible under Rule 403 but the prior conviction was admissible. *See id.*

129. *See id.* at 802. The instruction to the jury read:

> This defendant was convicted in 1988 of sexual abuse of a minor. This does not mean that he is guilty of any of the charges of aggravated sexual abuse or any other offense as to which he has pled not guilty in this case which you will be deciding. You may give such evidence and the testimony of this witness no weight or such weight as you think it is entitled to receive. . . . [T]his evidence is being received for a limited purpose only.

Id. Numerous scholars have indicated, however, that juries are notorious for ignoring jury instructions. Two main articles summarize the findings from empirical studies. *See* Lisa Eichorn, Note, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS. 341 (1989); J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71 (1990). One author has suggested, however, that juries tend to ignore jury instructions because of a lack of understanding of the policy behind a rule of exclusion and a lack of comprehension of the instruction itself. *See* Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37 (1993). These issues are compounded by the juries' reactions to prior sexual misconduct evidence. *See supra* note 80.

130. *See* 149 F.3d at 802.

notoriously ineffective, and here, despite the supposed disabling instruction, the jury still heard the evidence.[131]

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131. *See supra* note 129.

IV. ANALYSIS AND PROPOSAL

Rape, sexual assault and child molestation remain some of the most troubling problems society faces, and they are certainly among the most serious and heinous of crimes.[132] Solutions to these problems must better protect women and children and bring their attackers to justice.[133] However, these solutions should not include stripping defendants of their due process rights or dismantling evidentiary foundations rooted in the earliest common law. Unquestionably, Congress had good intentions in mind when it enacted Rule 413, but the rule is flawed because it effectively destroys the traditional common law ban against propensity evidence in sexual assault or rape trials. Character evidence is often useful, and a certain level of deference should be given to the legislative intent of Congress, but not at the expense of a defendant's right to a fair trial, which is an underlying basis of our entire judicial system.

A review of the legislative history indicates a number of important premises underlie Rule 413. The major premise must be that courts, left only to discretionary Rule 403-type balancing, tend to exclude too much evidence of a defendant's prior sexual assault history in sexual assault cases.[134] In addition, Congress must have believed that sexual misconduct evidence has relatively high probative value to show action on a particular occasion, and that the prejudicial impact of such evidence is not likely to outweigh its probative value.[135]

However, the empirical data regarding the probative value of prior sexual misconduct evidence offers no clear indication that such evidence is more probative than other types of evidence.[136] In addition, it is unclear that the probative value of such evidence would outweigh its prejudicial impact, given available empirical evidence concerning the average citizen's feelings about sexual misconduct crimes.[137] While no empirical studies exist concerning the over- or under-exclusion of prior sexual misconduct evidence through the use of Rule 403, no convincing reason explains why sex offense cases should be

132. *See supra* notes 20 and 76.
133. There is a concern that, currently, too many of these attackers are going free. *See supra* note 20.
134. *See supra* notes 78-79, 81 and accompanying text.
135. *See supra* note 80.
136. *See supra* note 78.
137. Murder is consistently rated as a more heinous crime than either rape or child molestation. *See supra* note 76.

singled out to allow for a greater use of propensity evidence.[138] While increasing the possibility that the state will prevail, the dangers to the integrity of the judicial system are great. One author sums up this problem by stating:

> Sexual character evidence carries with it a moral condemnation, and one should be wary of rules that make moral condemnation easier. Arguing that the defendant is a bad man and therefore should be found liable in this case might significantly increase the probability that the [state] will prevail, but not without some cost to the integrity of the judicial system.[139]

At its core, this summarizes the main problem with Rule 413: the rule may help increase the possibility that the prosecutor will prevail, but it damages the integrity of the judicial system in the process. In other words, there is a clear policy tension within Rule 413: "[H]ow far do we go in making it easier to convict defendants, some of whom may be innocent, in order to protect victims, some of whom may not be?"[140]

Any attempt to find a workable approach to balancing Rule 413 with Rule 403 must consider the question of what constitutes unfair prejudice. Rule 413(a) clearly states that a court may admit evidence of a prior specific incident of sexual assault by the defendant for "any matter to which it is relevant," including "the defendant's propensity to commit sexual assault or child molestation offenses, and assessment of the probability or improbability that the

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138. At a fundamental level, one's feelings about the probative value of sexual assault evidence depends on one's view of sexual assaults in light of other violent crimes. If one believes sexual assaults largely are analogous to all other violent crimes, character evidence rules need not vary. Alternatively, if one views sexual assaults as one of the physical manifestations of a male-dominated society that tends to discriminate against and oppress women in a variety of ways, then it is reasonable to expect that male prosecutors, judges and fact finders will approach sexual assault cases with biases that are by-products of that societal oppression. Special rules of admissibility to compensate for these biases may be appropriate. *See* Bryden and Park, *supra* note 19, at 583.

Wright and Graham argue, however, that despite the seriousness of rape, allowing a more liberal use of propensity evidence is not the solution:

> Rape is a serious crime and proof is often difficult, particularly in a time in which the law is trying to increase the autonomy of women and decrease the aggressiveness of men. No one wants to return to an era when bruises were the only persuasive evidence of lack of consent. But there are many other serious crimes that are difficult to prove without the use of evidence of propensity—drug offenses, environmental crimes, and official corruption. While some people want to make it easier to convict rapists, others may want to make it easier to convict economic criminals. The reason we make it difficult to convict people is so that the criminal law is an instrument of last resort in our efforts to solve social problems.

WRIGHT & GRAHAM, *supra* note 100, § 5412, at 291.

139. *See* Aiken, *supra* note 97, at 1253.

140. *See* WRIGHT & GRAHAM, *supra* note 100, § 5412, at 292.

defendant has been falsely or mistakenly accused of such an offense."[141] Thus, Rule 413 allows the prosecution to use propensity evidence to argue that the defendant is the kind of person who would commit sex crimes. Rule 413 does not, however, allow the prosecution to offer propensity evidence that would make a jury disregard the lack of evidence in the present case in order to convict the defendant for his past actions.[142] This latter use of propensity evidence is highly prejudicial and courts should focus on this type of use when balancing Rule 413 with Rule 403.

The courts in *Guardia* and *Mound* clearly perceived the needs of both the prosecution and the defendants in attempting to use Rule 403 to ensure fairness. Nevertheless, neither court clearly articulated the reasoning behind its balancing test, and both courts struggled to separate the issue of propensity from the issue of prejudice. Not surprisingly, striking the correct balance between Rule 413 and Rule 403 remains difficult. The factors outlined in the *Guardia* and *Mound* cases,[143] the Report of the Judicial Conference,[144] and various scholarly writings[145] all offer viable approaches, but tend to include so many factors that the analysis becomes confused. Therefore, courts should balance Rule 413 with Rule 403 by considering the following three safeguards:

First, courts should follow the lead of the *Mound* court[146] and the Indiana legislature[147] and require that any hearing regarding the admissibility of prior sexual misconduct evidence be heard outside the presence of the jury.[148] This will allow the court to hear the testimony of the alleged victim, the arguments from both sides, and then make a ruling on the admissibility of the evidence outside the presence of the jury, thereby lessening the prejudicial effects of the evidence.[149]

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141. MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 413.1, at 497-98.

142. One author has phrased the question as: "[W]ill the jury, upon hearing the other acts evidence decide, improperly, to convict the accused because of the allegation that he did the other acts and for that reason alone or primarily?" Norman M. Garland, *Some Thoughts on the Sexual Misconduct Amendments to the Federal Rules of Evidence*, 22 FORDHAM URB. L.J. 355, 359 (1995).

143. *See supra* notes 114, 115, 127-29 and accompanying text.

144. *See supra* note 15.

145. *See supra* note 97.

146. *See supra* note 129.

147. *See supra* note 22. While the Indiana statute covers only child molestation cases, the language of subsection (c), "[t]he court shall hold a hearing out of the presence of the jury regarding the admissibility of the evidence described under subsection (a)," would be very useful in sexual assault cases as well. IND. CODE ANN. § 35-37-4-15(c) (West 1998).

148. *See supra* note 80.

149. While most courts generally use this safeguard already, it is important for all courts to do so every time a Rule 413 issue arises. This first factor does not go so far as to propose that a conference regarding any Rule 413 issue must be heard outside the presence of the jury. Such a proposal would

Second, courts should continue to apply Rule 403 vigorously in such proceedings. A court should look closely at both the relevancy of the proffered evidence and its prejudicial effect. In order to limit undue prejudice, the court should not admit propensity evidence in Rule 413 situations if the prosecution's sole purpose for admitting the evidence of the prior acts is to deflect the jury's attention from the weaknesses of the current case. The prosecution may not use Rule 413 to focus the jury's attention on the defendant's prior bad acts in the hope that the jury will ignore the charges in the current case or disregard the lack of evidence in the present case and convict the defendant because of his previous actions. The court must prevent such undue prejudice through vigorous application of Rule 403.

If the court reasonably ascertains that the prosecution seeks to use the prior acts evidence to prove a defendant's propensity to commit the acts with which he is currently charged, Rule 413 clearly dictates admission of this evidence. This does not mean, however, that Rule 403 no longer applies in such a situation. Instead, courts should use Rule 403 when appropriate and they must examine a number of factors in determining admissibility of the evidence. Courts should consider factors such as the similarity between the acts, similarity in relationship between the perpetrator and the victim, proximity in time, frequency of the other acts, surrounding circumstances and other relevant differences.[150]

Finally, like the court in *Mound*, courts should continue to give limiting instructions that direct the jury to consider the evidence only for its proper use.[151] The proper uses of prior acts evidence include weighing the credibility of the defendant, determining the identity of the perpetrator, or the other factors outlined in Rule 404(b).[152] While there is some concern over the use of limiting instructions,[153] courts generally assume that instructions effectively exclude improper evidence from the jury's consideration.[154] A clearly written and

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change the focus of this Note from a proposal for balancing Rule 413 with Rule 403 to a proposal for the revision of Rule 413, something Congress is unlikely to do.

It should also be noted that the Supreme Court in *Huddleston* indicated a low threshold of proof for uncharged conduct. A court may admit evidence of uncharged offenses if a jury could reasonably conclude by a preponderance of the evidence that the offenses occurred. *See* Huddleston v. United States, 485 U.S. 681, 688-91 (1988).

150. For a list of other factors that may be considered, see *supra* note 97.

151. Like the first safeguard, this proposal is fairly standard, but it is important that all courts give limiting instructions.

152. *See supra* note 59.

153. *See supra* note 129.

154. The Supreme Court has offered this rationale:

effectively timed instruction from the judge to the jury after admission of propensity evidence in a Rule 413 situation will clarify that the jury should not use the evidence for an impermissible purpose, thereby causing undue prejudice to the defendant. An example of such an instruction might be:

> During this trial you have heard evidence that the defendant previously engaged in a sexual offense [on one or more occasions] other than the offense[s] charged in this case. You must decide if the defendant committed the act in question based on the evidence adduced about that event. This evidence may help you weigh the credibility of the defendant or determine if he was the perpetrator of the crime on this occasion. However, the law does not allow you to convict a defendant or to punish him simply because he has done things, even bad things, not specifically charged as crimes in this case.
>
> If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant has a disposition to commit [the same or similar type] sexual offenses. If you find that the defendant has this disposition, you may, but are not required to, infer that he was more likely to commit the crime[s] of which he is accused, but you may not find the defendant guilty solely on the basis of such evidence. Evidence that the defendant committed a prior sexual offense in the past is not evidence that he committed such an act in this case.[155]

This type of instruction allows admission of propensity evidence under Rule 413 and limits its prejudicial effects by explaining that the jury may not convict the defendant solely on the basis of the prior acts evidence.

> The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable, practical accommodation of the interests of the state and the defendant in the criminal justice process.

Richardson, Warden v. Marsh, 481 U.S. 200, 211 (1987).

155. This hypothetical jury instruction was drafted with the help of a number of jury instruction books. *See, e.g.*, CALIFORNIA JURY INSTRUCTIONS, CRIMINAL §§ 2.50, 2.50.01 (Committee on Standard Jury Instructions, Criminal, of the Superior Court of Los Angeles County, California eds., 6th ed. 1996); 1 FEDERAL CRIMINAL JURY INSTRUCTIONS §§ 2.14A, 2.14B (Josephine R. Potuto, et al. eds., 2d ed. 1993 & Supp. 1993); 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS, CIVIL AND CRIMINAL § 17.08 (Edward J. Devitt et al. eds., 4th ed. 1992); MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 2.08 (Committee on Model Criminal Jury Instructions Within the Eighth Circuit eds., 1994); NINTH CIRCUIT MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 2.10 (Committee on Model Criminal Jury Instructions Within the Ninth Circuit eds., 1995); PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 2.05 (Committee on Pattern Criminal Jury Instructions First Circuit eds., 1998).

V. CONCLUSION

By narrowing the scope of Rule 413 with the help of Rule 403, courts can uphold congressional intent while assuring defendants the continued right to a fair trial. The courts must fight to achieve justice for the victims of rape, sexual assault and child molestation, but the fight should not be conducted in such a way as to dismantle hundreds of years of common law precedent, undermine the integrity of the judicial system, and risk the conviction of innocent people.

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